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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS,
AND IN THE
GENERAL COURT
OF
VIRGINIA.

By BENJAMIN WATKINS LEIGH.

VOLUME I.

Eastern District of Virginia, to wit:

BE IT REMEMBERED, That on the first day of July, in the fifty-fourth year of the
{ **L. S.** } Independence of the United States of America, BENJAMIN WATKINS
LEIGH, of the said District, for and on behalf of the Commonwealth of Virginia,
(for the benefit of the said Commonwealth,) as author, in the words following, to wit:

“ Reports of Cases argued and determined in the Court of Appeals, and in the General Court, of Virginia. By Benjamin Watkins Leigh. Volume I.”

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R'D JEFFRIES,
Clerk of the Eastern District of Virginia.

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FLEMING SAUNDERS.	

Attorney General: JOHN ROBERTSON.

* Died 15th October 1829.

† Appointed 22d May 1829.

TABLE OF CASES REPORTED.

Allen & al. v. Smith,	231	Edwards v. Van Bibber,	188	Meze v. Howver,	443
Ambler & al. v. Warwick & Co.,	196	Elwes, Tolson v.,	436	Mitchell v. Commonwealth,	572
Amey & al. v. Dunn,	465	Fouchée & ux., Buck v.,	64	Mencure, Grayson & ux. v.,	449
Anderson v. Leitch & Co.,	462	Fulcher, Hunter v.,	172	Moore's adm'r &c., Todd & ux.	457
Anthony v. Lawhorne,	1	Fulcher v. Baker & al.,	458	v.,	457
Armstrong v. Armstrongs,	491	Garland & al., Clarkson's ad-	147	Newsum v. Newsum,	86
Baker & al. v. Fulcher,	453	ministrator v.,	476	Niel & al. v. Niel & al.,	6
Bartlett & al., Commonw'lth v.,	586	Gibson, Hawkins v.,	470	Norvell, Warwick & ux. & al. v.,	96
Bennett, Carrington v.,	340	Graves v. Graves,	34	Patriotic Bank of Washington,	433
Beverley, Tapp v.,	80	Grayson & ux. v. Moncure,	449	Cookes v.,	306
Billips & al., Lewis & al. v.,	353	Green, Vaughan v.,	287	Patton, Harpers & al. v.,	560
Bradford & al., Rankin v.,	163	Griffith v. Thompson & al.,	140	Pegram, Commonwealth v.,	297
Branson, Harvey & ux. v.,	108	Haleys v. Williams,	306	Pendleton & al., Crews v.,	285
Buck v. Fouchée & ux.,	487	Harpers & al. v. Patton,	108	Peter v. Butler,	483
Buck, Clarke & ux. v.,	285	Harvey & ux. v. Branson,	476	Phillips' ex'ors &c., Raines v.,	443
Butler, Peter v.,	340	Hawkins v. Gibson,	455	Pledge & al., Hughes v.,	481
Carrington v. Bennett,	487	Heiskell, Jackson v.,	442	Raines' ex'or, Sturdivant's ad-	483
Clarke & ux. v. Buck,	147	Howle's adm'r v. Dunn & Co.,	443	ministrator v.,	163
Clarkson's adm'r v. Garland	586	Howver, Meze v.,	173	Raines v. Phillips' ex'or &c.,	581
& al.,	589	Hughes v. Pledge & al.,	257	Rankin v. Bradford & al.,	126
Commonwealth v. Bartlett &	486	Hunter v. Shippard,	486	Rawlings v. Commonwealth,	216
al.,	525	Jackson v. Heiskell,	486	Richards v. Mercer,	42
Commonwealth, Davenport v.,	516	Jackson's ex'or & al., Common-	368	Rowt's adm'r v. Kille's adm'r,	280
Commonwealth v. Jackson's	572	wealth v.,	584	Salling v. M'Kinney,	443
ex'or & al.,	581	Jiggetts & ux. v. Davis,	584	Sehon, Coplin & al. v.,	281
Commonwealth v. Jones,	230	Jones v. Justices of Stafford,	480	Shippard, Hughes v.,	584
Commonwealth v. Lilly's adm'r,	74	Jones, Commonwealth v.,	216	Smith, Allen & al. v.,	73
Commonwealth, Markham's	36	Keith & al., Dunlop & Co. v.,	1	Stafford Justices, Jones v.,	481
adm'r v.,	36	Kille's adm'r, Rowt's adm'r v.,	363	Stevenson v. Singleton,	80
Commonwealth, Mitchell v.,	581	Lawhorne, Anthony v.,	526	Sturdivant's adm'r v. Raines'	331
Commonwealth v. Pegram,	574	Leitch & Co., Anderson v.,	499	ex'or,	457
Commonwealth, Rawlings v.,	433	Lewis & al. v. Billips & al.,	516	Tapp v. Beverley,	188
Commonwealth, Walker v.,	230	Lilly's adm'r, Commonw'lth v.,	499	Thompson & al., Griffith v.,	287
Cookes v. Patriotic Bank &c.,	74	Lindsay's adm'r & al., Martin v.,	499	Todd & ux. v. Moore's adm'r	434
Coplin & al. v. McCalley,	36	Markham's adm'r v. Common-	499	&c.,	457
Coplin & al. v. Sehon,	36	wealth,	499	Tolson v. Elwes,	436
Crews v. Pendleton & al.,	36	Martin v. Lindsay's adm'r &	499	Van Bibber, Edwards v.,	287
Crow v. Crow,	36	al.,	499	Vaughan v. Green,	434
Darlington v. McCoole,	36	McCoole, Darlington v.,	499	Waller, M'Kinney's ex'ors v.,	574
Davenport v. Commonwealth,	36	M'Kinney, Salling v.,	499	Walker v. Commonwealth,	96
Davis, Jiggetts & ux. v.,	36	McCalley, Coplin & Co. v.,	499	Warwick & ux. & al. v. Norvell,	196
Dunlop & Co. v. Keith & al.,	36	M'Kinney's ex'ors v. Waller,	499	Williams, Haleys v.,	140
Dunn & Co., Howle's adm'r v.,	36	Mercer, Richards v.,	499	Wyatt's ex'or v. Woodlief,	473
Dunn v. Amey & al.,	36				

TABLE OF CASES CITED.

Abraham v. Matthews, 6 Munf. 159.	245	Eccleston v. Speke, Carth. 79.	15
Aldrich v. Cooper, 8 Ves. 382.	489	Edmonson v. Popkin, 1 Bos. & Pull. 270.	509
Aldridge v. Giles, 2 Hen. & Munf. 136.	117	Eldridge v. Fisher, 1 Hen. & Munf. 569.	377
Alexander v. Coleman, 6 Munf. 328.	117	Elmendorf v. Taylor, 10 Wheat. 152.	256
Allen v. Belches, 2 Hen. & Munf. 596.	117	England v. Slade, 4 T. R. 682.	190
Allen v. Freeland, 3 Rand. 170.	446	Eppes' adm'r v. Bagley's adm'r &c., 4 Munf. 466.	481
Allesbrook v. Roach, 1 Esp. Ca. 351.	218	Fairfax v. Muse, 2 Hen. & Munf. 567, n. 2.	117
Alleyne and wife v. Grey, 1 Show. 50.	67	Fanning v. Dunham, 5 Johns. Ch. Rep. 122.	510
Anderson &c. v. Fox, 2 Hen. & Munf. 245.	460	Finn's Case, 5 Rand. 710.	578
Appleyard v. Seton, 16 Ves. 228.	106	Fitzroy v. Gwillim, 1 T. R. 153.	508
Arlington v. Merricke, 2 Wms. Saund. 412, note 5.	282	Foster v. Cook, 3 Bro. C. C. 347.	489
Atkinson v. Hutchinson, 3 P. Wms. 268.	424	Freeman v. Parsley, 3 Ves. 421.	77
Attoo v. Commonwealth, 2 Virg. Cas. 382.	570	Gardner v. Vidal, 6 Rand. 106.	218, 481
Attorney General v. Andrew, Hardr. 23.	144	Gardner v. Sheldon, Vaughan 259.	390
Attorney General v. Sutton, 1 P. Wms. 759.	398	Garforth v. Feafon, 1 H. Bl. 327.	45
Avery v. Ray, 1 Mass. Rep. 12.	582	Garland v. Richeson, 4 Rand. 298.	439
Bacon v. Ashby, Finch's Rep. 366.	145	Gibbs v. Ougier, 12 Ves. 413.	489
Bagwell v. Elliott, 2 Rand. 198.	293	Gilliam's adm'r v. Perkinson's adm'r, 4 Rand. 325.	484
Bail v. Payne, 6 Rand. 73.	329, 378	Givens v. Manns, 6 Munf. 191.	470
Bail's Case, 2 Leach 985.	578	Glover v. Strothoff, 2 Bro. C. C. 33.	336
Bamfield v. Popham, 1 P. Wms. 54.	397	Goodrich v. Harding, 3 Rand. 280.	324, 377
Barker v. Harper, Cooper's Ch. Cas. 32.	301	Goodright v. Goodridge, Willes 369.	401
Barlow v. Salter, 17 Ves. 479.	334	Goodwin v. Miller, 2 Munf. 42.	117
Barnesly v. Powell, 1 Ves. sen. 284.	505	Greshams v. Gresham, 6 Munf. 187.	326
Beddingfield v. Ashley, Cro. Eliz. 741.	158	Griffith v. Fanny, Gilm. 143.	175
Bells v. Gillespie, 5 Rand. 373.	329, 378	Hale v. Cove, 1 Stra. 642.	455
Ben v. Peete, 2 Rand. 539.	484	Hammett v. Bullett's ex'ors, 1 Call 567.	493
Bennet's Case, 2 Virg. Cas. 235.	594	Harrington v. Du-Chatel, 1 Bro. C. C. 124.	45
Bennett v. Hardaway, 6 Munf. 125.	295, 341	Harrison v. Sims, 6 Rand. 506.	446
Bickerstaffe and wife v. Percy, 2 Lev. 207.	67	Hassell and others v. Long's ex'ors, 2 Mau. & Selw. 363.	495
Birge v. Bensley, 1 Bro. C. C. 187.	386	Henderson v. Moore, 5 Cranch 11.	236
Blackborn v. Edgley, 1 P. Wms. 605.	398	Henkle v. Royal Exchange Co., 1 Ves. sen. 317.	508
Blackler v. Webb, 2 P. Wms. 388.	77	Herbert v. Binlon, Roll. Rep. 228.	80
Blaine v. Chambers, 1 Serg. & Rawle 109.	456	Higginbotham v. Rucker, 2 Call 318.	335
Blake v. Dodemead and wife, 2 Ld. Raym. 1504.	68	Hill v. Burrow, 3 Call 342.	377
Booth's ex'or v. Armstrong, 2 Wash. 301.	481	Hillary v. Waller, 12 Ves. 239.	190
Booth's Case, 6 Rand. 609.	594	Hindle v. O'Brien, 1 Taunt. 413.	509
Bosanquet v. Dashwood, Cas. Temp. Talb. 37.	201, 300	Hindman v. Taylor, 2 Bro. C. C. 7.	105
Bowyer v. Creigh, 3 Rand. 26.	143	Horrel v. M'Alexander, 5 Rand. 94.	494
Brace v. Marlborough, 3 P. Wms. 498.	486	Howard v. Cobb, 3 Day 310.	456
Branch v. Commonwealth, 2 Call 510.	456	Hudson &c. v. Hudson's ex'or, 3 Rand. 117.	460
Branden v. Grannis, 1 Conn. Rep. 402.	474	Hult v. Cogan, Cro. Eliz. 488.	144
Brewer v. Tarpley, 1 Wash. 363.	378	Humberston v. Humberston, 1 P. Wms. 383.	397
Broadbudd v. Turner, 5 Rand. 308, 329.	10	Hunter v. Haynes, 1 Wash. 71.	383
Broderick v. Broderick, 1 P. Wms. 239.	290	Hunter's adm'r v. Jett, 4 Rand. 104.	435
Brown v. May, 1 Munf. 291.	456	Hunter's ex'ors v. Spotswood, 1 Wash. 145.	459
Brown v. M'Connell, 1 Bibb 265.	509	Idle v. Cook, 1 P. Wms. 73.	397
Brownsword v. Edwards, 2 Ves. sen. 246.	263	Ingram's Case, Co. Lit. 24, a.	45
Bullock v. Irvine, 4 Munf. 450.	612	Irvine &c. v. Eldridge, 1 Wash. 162.	464
Burgess' Case, 2 Virg. Cas. 483.	144	Isam & Paget v. Hitchcock, Cro. Eliz. 202.	67
Burnham v. Bayne, 2 Brownl. 96.	227	Jackson v. M'Gavock, 5 Rand. 509.	362
Hurr v. Harper, 3 Com. Law Rep. 147.	146	James v. M'Williams, 6 Munf. 301.	326
Burroughs v. Elton, 11 Ves. 29.	475	Jeffery v. White, 2 Doug. 476.	496
Bury v. Bishop, 1 Wms. Saund. 318.	509	Johnson v. Brown, 3 Call 267.	363
Bush v. Gower, Ca. Temp. Hardw. 233.	77	Johnstons v. Meriwether, 3 Call 523.	486
Butler v. Stratton, 3 Bro. C. C. 397.	87	Jones' Case, Comb. 473.	68
Carter v. Tyler, 1 Call 165.	10	Jones v. Barkley, 2 Doug. 697.	507
Casson v. Dade, 1 Bro. C. C. 99.	117	Justice v. White, 1 Mod. 239.	67
Chapman v. Armistead, 4 Munf. 382.	71	Keeling v. Brown, 5 Ves. 359.	489
Charleston v. Finney, 1 Sid. 215.	339	Kennedy's Case, 2 Virg. Cas. 510.	616
Chatham v. Tothill, 7 Bro. P. C. 453.	158	Keys v. M'Fatrige, 6 Munf. 18.	341
Chesterfield v. Janssen, 2 Ves. 125.	244	Kightley v. Kightley, 2 Ves. jun. 328.	489
Christy v. Minor, 4 Munf. 431.	334	Lade v. Holford, Bull. N. P. 110.	190
Clare v. Clare, Ca. Temp. Talb. 21.	60	Land v. Jeffries, 5 Rand. 211.	446
Clay v. Sudgrave, 1 Salk. 33.	4	Langley v. Baldwin, 1 P. Wms. 759.	398
Coleman v. Moody, 4 Hen. & Munf. 1.	282	Law v. Law, Ca. Temp. Talb. 140.	45
Commonwealth v. Fairfax, 4 Hen. & Munf. 208.	571	Layng v. Paine, Willes' Rep. 571.	45
Commonwealth v. Wyatt, 6 Rand. 604.	509	Lee v. Tapscott, 2 Wash. 281.	290
Cook v. Jones, 2 Cowp. 727.	390	Lee v. Brace, 1 Ld. Raym. 101.	402
Counden v. Clarke, Hob. 30.	71	Lee v. Woolsey, 19 Johns. Rep. 319.	582
Cowper v. Towers, 1 Lutw. 98.	400	Lester v. Stanley, 3 Day 257.	456
Cozen's Case, Owen 29.	67	Lewis v. Fullerton, 1 Rand. 15.	174, 470
Crosse v. Bilson, 2 Ld. Raym. 1016.	77	Lewis v. Thompson, 2 Hen. & Munf. 104.	484
Davenport v. Hanbury, 3 Ves. 257.	490	Longchamp v. Fish, 5 Bos. & Pull. 415.	10
Davis v. Gardner, 2 Cox's P. Wms. 187.	10	Longford v. Eyre, 1 P. Wms. 740.	136
Davy v. Smith, 3 Salk. 395.	471	Love v. Wyndham, 1 Ventr. 79.	426
Dempsey v. Lawrence, Gilm. 383.	594	M'Call v. Peachy, 3 Munf. 296.	124
Derieux's Case, 2 Virg. Cas. 379.	479	M'Clintic v. Manns, 4 Munf. 328.	377
Desborough v. Copinger, 8 T. R. 77.	326	M'Clung v. Hughes, 5 Rand. 453.	362
Didlake v. Hooper, Gilm. 194.	15	Macchell v. Temple, 2 Show. 288.	68
Doe v. Manifold, 1 Mau. & Selw. 294.	336	Macchell and wife v. Garrett, 3 Salk. 64.	504
Doe v. Lyde, 1 T. R. 593.	443	Macbin v. Delaval, Barnes' Notes 52, 377.	117
Downman v. Chinn, 2 Wash. 189.	375	Mackey v. Bell, 2 Munf. 533.	180
Downman v. Downman, 1 Wash. 27.	232	M'Michen v. Amos, 4 Rand. 142.	499
Dunn v. Bray, 1 Call 388.	105	Macon v. Crump, 1 Call 575.	500
Eagleton v. Kingston, 8 Ves. 488.	60	M'Pherrin v. King, 1 Rand. 172.	493
Earnshaw v. Thornhill, 18 Ves. 485.	77	M'Williams v. Willis, 1 Wash. 199.	493
East India Company v. Skinner, Comb. 342.	47	Malcolm v. Martin, 3 Bro. C. C. 50.	77
Eccard v. Brooke, 2 Cox 213.			

Maria v. Surbaugh, 3 Rand. 230.	177	St. John v. Abbott, Barnes 441.	456
Marine Insurance Company v. Young, 5 Cranch 187.	296	Sawney v. Carter, 6 Rand. 173.	73
Same v. Hodgson, 6 Cranch 206.	296	Scott v. Nesbit, 2 Bro. C. C. 649.	509
Marks v. Morris, 3 Munf. 407.	500	Scott and wife v. Gibbon & Co., 5 Munf. 86.	447
Mathews v. Lewis, 1 Anstr. 7.	509	Scrivener's Case, 3 Ves. & Beame 14.	509
Mercer's Case, 2 Virg. Cas. 144.	596	Selden v. James, 6 Rand. 466.	192
Metcalfe v. Deane, Cro. Eliz. 189.	456	Shallcross v. Finden, 3 Ves. 738.	489
Middleton v. Hill, Cro. Eliz. 588.	509	Sheppard v. Starke, 3 Munf. 29.	116
Minor's Case, 11 Ves. 569.	301	Shires v. Glasscock, 2 Salk. 688.	10
Morret v. Westerne, 2 Vern. 663.	145	Shirley v. Watts, 3 Atk. 300.	146
Motam v. Motam, Roll's Rep. 426.	70	Smith's Case, 2 Virg. Cas. 6.	616
Murray v. M'Carty, 2 Munf. 393.	181	Smith v. Burroughs, 2 Vern. 346.	507
Nadenbousch v. M'Rea, Gilm. 228.	474	Smith and wife v. Chapman, 1 Hen. & Munf. 340.	424
Nalle v. Fenwicke, 4 Rand. 585.	244, 298	Somerset's Case, 20 State Trials 1.	179
Newby v. Blakey, 3 Hen. & Munf. 57.	89	State v. Babcock, 1 Conn. Rep. 401.	456
Newtons v. Barnardines, Mo. 127.	400	Stead v. Course, 4 Cranch 408.	244
Noel v. Fisher, 3 Call 215.	45	Stephens v. Tott, Mo. 665.	70
Noland v. Cromwell, 4 Munf. 156.	356	Stileman v. Ashdown, Amb. 18.	145
Norris v. Crummev, 2 Rand. 328.	436	Stone v. Ware, 6 Munf. 541.	150, 500
Northey v. Strange, 1 P. Wms. 340.	77	Stuart v. Lee, 3 Call 421.	486
Norvell v. Camm &c., 3 Munf. 267.	97	Stuart's heirs v. Coalter, 4 Rand. 74.	201
Norvell v. Camm &c., 6 Munf. 233.	98	Suffolk v. Green, 1 Atk. 450.	504
Norvell v. Camm &c., 2 Rand. 68.	98	Sydnor v. Sydnors, 2 Munf. 263.	377
Nottingham v. Jennings, 1 Ld. Raym. 508.	402	Symmes v. Symonds, 4 Bro. P. C. 328.	142
Parker v. Rule, 9 Cranch 64.	244	Tabb v. Balrd, 3 Call 441.	254
Parsons v. Thompson, 1 H. Bl. 322.	45	Tate v. Talley, 3 Call 354.	377
Partington v. Hobson, 16 Ves. 220.	106	Taylor v. Beck, 3 Rand. 316.	106
Patty v. Collin, 1 Hen. & Munf. 519.	472	Templeman v. Steptoe, 1 Munf. 339.	117
Peel v. Tatlock, 1 Bos. & Pull. 422.	436	Tidball v. Lupton, 1 Rand. 194.	377
Bellis v. Brown, Cro. Jac. 590.	377	Timberlake v. Graves, 6 Munf. 174.	323
Peter v. Cocke, 1 Wash. 257.	493	Tod v. Winchelea, 2 Car. & Payne. 488.	10
Petrie v. Fitzroy, 5 T. R. 152.	474	Tomkins v. Bernet, 1 Salk. 22.	507
Phillips v. Garth, 3 Bro. C. C. 64.	77	Tomlinson v. Dighton, 1 P. Wms. 154.	397
Pierce v. Turner, 5 Cranch 154.	446	Trent v. Trent's ex'x &c., Gilm. 174.	490
Pinbury v. Elkin, 1 P. Wms. 568.	336	Trevor's Case, Cro. Jac. 269.	45
Pit v. Cholmondeley, 2 Ves. sen. 567.	509	Trimmer v. Bayne, 9 Ves. 209.	489
Pleasants v. Pleasants, 2 Call 319.	336	Turner v. Fendall, 1 Cranch 132.	260
Pleasants v. Ross, 1 Wash. 156.	456	Twigg v. Fifield, 18 Ves. 517.	301
Pollard v. Patterson, 3 Hen. & Munf. 67.	206	United States v. Morgan, 3 Wash. Cir. Ct. Rep. 10.	486
Pomeroy's Case, 2 Virg. Cas. 342.	564	Vail v. Nelson, 4 Rand. 478.	133
Poore's Case, 2 Virg. Cas. 474.	616	Wallis v. Savil, Lut. 41.	67
Powell v. Robins, 7 Ves. 209.	490	Walter v. Drew, Com. 372.	378
Prevost v. Gratz, 6 Wheat. 481.	104	Walton v. Spark, Comb. 331.	60
Proctor v. Bishop of Bath & Wells, 2 H. Bl. 368.	336	Waters v. Brown, 3 Marsh. 569.	582
Pullen v. Burbeck, 12 Mod. 357.	144	Weakley v. Rugg, 7 T. R. 323.	375
Purefoy v. Rogers, 2 Saund. 380.	402	Wealthy v. Bosville, Rep. Temp. Hardw. 256.	402
Ralston v. Miller, 3 Rand. 44.	183	Weld v. Bradbury, 2 Vern. 705.	77
Randolph v. Kinney, 3 Rand. 394.	201	Wernick v. M'Murdo, 5 Rand. 51.	58
Randolph v. Randolph, 6 Rand. 194.	446	West v. West, 3 Rand. 373.	268
Redford v. Peggy, 6 Rand. 316.	218	Whiley's Case, 1 New Rep. 94.	578
Redwood v. Ridick, 4 Munf. 222.	459	White v. Steinwacks, 19 Ves. 83.	106
Reeve v. Long, 4 Mod. 259.	408	Whiteford's Case, 6 Rand. 721.	612
Revet v. Braham, 2 Bro. C. C. 639, note a.	106	Whittington v. Christian, 2 Rand. 353.	100
Ricard v. Williams, 7 Wheat. 109.	190	Whitworth v. Adams and others, 5 Rand. 332.	511
Richards v. Brockenbrough's adm'r, 1 Rand. 449.	474	Wicker v. Milford, Harg. Law Tracts, 513.	77
Richardson v. Spragg, 1 P. Wms. 434.	77	Williams v. Brown, 3 Bos. & Pul. 69.	179
Right v. Price, Doug. 241.	10	Williams v. Peyton, 4 Wheat. 77.	244
Robinson v. Fitzherbert, 2 Bro. C. C. 127.	336	Williams v. Chitty, 3 Ves. 551.	489
Robinson v. Robinson, 1 Burr. 38.	390	Wilson v. Rucker, 1 Call 500.	506
Roe v. Rawlings, 7 East 282, note a.	219	Wood v. Griffith, 1 Swanst. 43.	248
Rogers' adm'r v. Chandler's adm'r, 3 Munf. 65.	499	Woodward v. Foxe, 3 Lev. 289.	45
Romilly v. James, 6 Taunt. 263.	379	Wren v. Kirtan, 8 Ves. 502.	301, 312
Ross v. Pynes, 3 Call 568.	506	Wroe v. Washington, 1 Wash. 357.	493
Rowt's adm'r v. Kile's adm'r, Gilm. 302.	276	Wyatt's Case, 6 Rand. 604.	571
Royall v. Johnson, 1 Rand. 421.	116	Wyche v. Macklin, 2 Rand. 426.	474
Royall v. Eppes, 2 Munf. 479.	336	Young v. Scott, 4 Rand. 415.	159, 500

CASES

ARGUED AND DETERMINED IN THE

Supreme Court of Appeals of Virginia.

Anthony and Another v. Lawhorne.

January, 1829.

(Absent COALTER, J.)

Mills*—Application for Right to Build—Trial of Title to Land.—L. owning lands on both sides of a stream, asked leave of court to build a mill upon and dam across it; it was found by inquest, on an ad quod damnum, that lands in the possession of A. of the value of 35 dollars, would be overflowed; the court, on a hearing, being of opinion, that these lands belonged not to A. but to L. himself, granted L. leave to build his dam without paying any damages to A. **HOLD, error;** for the right in the lands could not be thus collaterally tried.

Same—Same—Procedure When Title Doubtful.—In such case, leave should be granted, only on condition, that L. pay A. the damages assessed by the jury; and L. might build his dam, at his peril, without paying them, and then defend A.'s action against him, on the ground that the lands overflowed are his own, and thus put the title directly in issue.

Continuances.†—Under what circumstances, it is error to refuse a continuance.

Lawhorne made application to the county court of Bedford, for leave to erect a water grist mill on Back-Creek in that county, he owning the land on both sides of the stream. The county court awarded him a writ of ad quod damnum. The jury, in their inquest, found, that about three acres of land, in the possession of Anthony and Lancaster, which they purchased jointly of the representatives of William *Leftwich, would be overflowed by raising the dam proposed by Lawhorne nineteen feet high; and assessed the value thereof to 35 dollars. The writ and inquest being returned, the county court summoned Anthony and Lancaster to the next court, to shew cause, if any they had, against Lawhorne's application. The record did not state, that the summons was served on those parties, or, in express terms, that they appeared. At the next term, the court made the following order: "On the motion of Isham Lawhorne, for leave to erect a water grist mill on Back-Creek, on hearing, it is the opinion of the court, that the said mill be established, the dam to be nineteen feet in height, without the payment of any damages by the applicant: it appearing to the satisfaction of the court, that the said Anthony and Lancaster in the report of the jury mentioned, or either of them, have no manner of title to the land, or any part thereof, which will be overflowed by the erection of the said dam, but that the said land belongs to the applicant." From this

order, Anthony and Lancaster appealed to the circuit court of Bedford.

The parties appeared at the first term of the circuit court, and on the first day of the term; and the appellants asked a continuance, upon an affidavit, stating that they had summoned two witnesses whom they deemed material, and who they believed were then in attendance, but that another material witness, one Lee, whom they had not summoned, but who had promised to attend, was absent. The court postponed the hearing till the third day of the term, to give the appellants an opportunity to take Lee's deposition. It was taken accordingly. On the third day, the motion for a continuance was renewed, on the ground of the absence of one of the first mentioned witnesses, named Graves, who had been regularly summoned, and who was material; and it was stated on oath, that, when the motion was made on the first day, Graves was one of the witnesses then alluded to and supposed to be in attendance, but that it was afterwards ascertained that he had been prevented from attending by the *illness of his wife.

3 The circuit court denied the continuance, because on the first motion, Lee's affidavit was agreed to be taken by consent, as removing all objections to a trial during the term, and it was not disclosed by the appellants that they might not be ready after they should obtain the same. To this opinion the appellants filed exceptions, setting forth the facts as above stated.

The circuit court then affirmed the order of the county court; and the appellants appealed to this court.

The cause was argued by Johnson for the appellants, and Leigh for the appellees, upon two points: 1. Whether the motion for a continuance was rightly overruled by the circuit court, or not? 2. Whether it was competent to the county court, in a summary proceeding like this, to try the title of the appellants, to the three acres of land, which the jury in their inquest had found to be in their possession?

GREEN, J., delivered the opinion of the court. The only question upon the merits, is, Whether it was competent to the court, in this collateral way, to decide upon the question of title between the parties, and, in consequence of deciding that the land in question belonged to the applicant, to give him leave to build the mill without paying the damages assessed by the jury?

This, I think, is decided clearly by the terms of the statute (2 Rev. Code, c. 235), which provides, that when one owning the lands on both sides of a stream, wishes to build a mill, he shall, without any previous

***Mills and Milldams.**—The principal case is cited in Pitzer v. Williams, 3 Rob. 252; Upper Appomattox Co. v. Hardings, 11 Gratt. 5; Keystone Bridge Co. v. Summers, 13 W. Va. 492. See monographic note on "Mills and Milldams" appended to Calhoun v. Palmer, 8 Gratt. 88.

†**Continuances.**—See monographic note on "Continuances" appended to Harman v. Howe, 27 Gratt. 676.

notice to the owners of the land above or below, apply for a writ of *ad quod damnum*; upon the execution of which the jury shall be charged, amongst other things, to examine the lands above and below of the property of others, which may be probably overflowed, and say to what damages it will be to the several proprietors; and that, upon the return of such inquest, the proprietors or tenants of the lands so found liable to damage, shall be summoned, &c. And

4 thereupon the court, if certain *specified consequences will not follow the erection of the dam, shall consider, whether, all circumstances weighed, it be reasonable, that the leave to build the mill should be given or not, and shall give or not give it accordingly; and if given, shall lay the party applying under such conditions for preventing the obstruction of fish of passage, and ordinary navigation, or for preventing any impediment to the convenient crossing of the water course, as to them shall seem right. And, thereupon, the applicant, upon paying to the several parties entitled, the damages which the jurors find will be done by the overflowing of the lands above or below, shall be authorised to proceed to erect such mill and dam.

From this summary of the provision of the statute, it appears, that, in cases in which leave is given to build a mill, the court is only authorised to impose conditions to preserve the passage of fish and ordinary navigation, and to prevent obstructions to the passage of the stream; and here its discretion ends. It has no power to vary, by enlarging or abating, the amount of the damages assessed by the jurors, nor to determine whether they are to be paid or not, nor to whom they are payable. The statute, notwithstanding the leave given by the court, imposes upon the applicant, the duty of paying, to the persons entitled, the damages so assessed, as a condition upon which such leave is to be effectual for protecting him against the action of the person actually injured. *Coleman v. Moody*, 4 Hen. & Munf. 1.

If the court had given leave to build the mill, omitting to say any thing as to the damages, the applicant would have had his election to pay them, and thus avoid any question as to his right to erect the dam, or to build it without paying them, in which case, if sued by the appellants, he might have defended himself effectually, by shewing that they were not entitled to the damages assessed, because the freehold was in him. And thus the question of title would have been fairly tried, in a regular way, without any embarrassment. But the court having pronounced a judgment affirm-

5 ing *the title to be in the applicant, and therefore authorising him to build the dam without paying any damages, this judgment might be relied on by him, as a defence to an action by the other parties, either as establishing his right to the land, or as entitling him to build the dam without paying the damages. Whether he or the other parties were entitled, and whether this defence would or would not be available (and I incline to think it would not), it was improper in the court to give this judgment upon a

point not within the scope of their authority, and thus to interpose an obstacle to the assertion of the appellant's rights against the appellee, in an action for the nuisance done to the lands in their possession, and to which they claim title.

Upon this ground, I think, that the judgments both of the circuit and county courts should be reversed. And if there were nothing more in the case, this court now giving such judgment as the circuit court ought to have given, would give judgment that the appellee should have leave to build this mill, with a dam nineteen feet high, leaving him to pay the assessed damages or not, as he shall be advised. But we have not the evidence upon the merits, which the appellants alleged they had in their power, and which they were prevented from offering to the circuit court, in consequence of the refusal to continue the cause: in which, I think, the circuit court erred, the affidavit being sufficient to entitle the appellants to a continuance.

Both orders should therefore be reversed, and the cause remanded to the circuit court, to be there heard upon such evidence as the parties may adduce, and to be disposed of as may thereupon appear proper.

6 *Lewis Neil and Others v. Abram Neil and Others.

February, 1829.

Wills—Attestation—Presence of Testator*—Case at Bar.—An attestation of a will of lands made in the same room with testator, is *prima facie* an attestation in his presence, according to the statute of wills: an attestation not made in the same room, is *prima facie* not an attestation in his presence; but as, in the one case, the attestation is good, if shewn to have been made within the scope of testator's view from his actual position; so, in the other, it is not good, if it appear, that, in the actual relative situation of testator and witnesses, he could not possibly have seen the act of attestation, nor have so changed situation as to have enabled him to see it, without aid from others, which was at hand, but was neither asked nor given.

The appellants, claiming as heirs of Thomas Neil deceased, exhibited their bill in the superior court of chancery of Winchester, against the appellees, who claimed as his devisees, contesting the validity of an instrument purporting to be the will of that decedent, whereby real estate was devised, which had been proved and recorded in the county court of Frederick, upon the ground, that the instrument had not been duly published, declared and attested, according to the statute of wills. The chancellor directed an issue of *devisavit vel non*, to be tried before the circuit court of Frederick. At the trial of this issue, the appellants filed a bill of exceptions to an instruction given by the court to the jury, stating:

That upon the trial of the issue, it was proved, that the testator, who was very weak and not able to rise from his bed or turn

***Wills—Attestation—Presence of Testator.**—On the question as to what is or what is not an attestation in the presence of the testator within the meaning of the statute, see full discussion in *foot-note* to *Sturdivant v. Birchett*, 10 Gratt. 69. The principal case is also cited on this question in *Moore v. Moore*, 8 Gratt. 314, 328, 331; *Nock v. Nock*, 10 Gratt. 118, 123, 126, 133, 134, 135; *Green v. Crain*, 12 Gratt. 267; *Sturdivant v. Birchett*, 10 Gratt. 73, 84; *Young v. Barner*, 27 Gratt. 105; *Baldwin v. Baldwin*, 81 Va. 410, 411, 413. See monographic note on "Wills."

himself in it without assistance, was raised up and placed upon the side of his bed, and a small table set by, and the paper before the jury (the will in question) placed on it; and that the testator, supported there, signed his name to it; after which the table was removed, and he placed in his bed. Some of the witnesses said, that he was laid with his back to the table on which the said paper was laid, when two of the attesting witnesses subscribed their names, and that he could not see said witnesses attest the same, or the paper itself, being unable to turn his face towards them. One witness said, he

7 thought his face was *turned toward the table; other witnesses did not remember how that matter was. It was also proved, that, by reason of his weakness, the testator's sight was very dim, and that the transaction was after night; and there was not more light than one candle in the room, and a good fire. The third witness came into the room some time after this, and put his signature, as he said, in a situation where the testator could have seen him: other witnesses said they thought differently. It was also proved, that before any of the witnesses subscribed their names, the testator was asked if he acknowledged the said paper to be his last will and testament, and if he desired that the witnesses should respectively attest it; to which questions he answered in the affirmative. Upon this testimony, it was contended for the plaintiffs, that this was not an attestation in the presence of the testator. And the court, being called upon by the counsel on both sides, instructed the jury, that signing in the presence of the testator, was intended to enable him to see that the persons he confided in were those who attested the paper, and to prevent a false paper being imposed upon them; and that, if from the evidence they believed, that the testator's mind was sufficiently sound to know the necessity of these precautions, and he could have had himself turned in his bed, so as to see the paper and witnesses at the time of the attestation, or have had them placed in such situation, that he could have seen them, and did not do either, still it was in law an attestation in the presence of the testator.

The jury found a verdict in favor of the will; which being certified to the court of chancery, the plaintiffs moved that court to set it aside, and direct a new trial, on the ground, that the instruction given by the circuit court to the jury, was a misdirection; but the chancellor overruled this motion, and on the hearing dismissed the bill. The plaintiffs appealed to this court.

Johnson and Leigh, for the appellants, admitted it to be well settled, that it is not necessary the testator should actually

8 *see the witnesses attest, and that it suffices if he and they be so situated that he may see them if he will: but the direction given by the circuit court to the jury, in this case, amounted in effect to this, That it is a sufficient compliance with the requisition of the statute of wills, in this particular, if the testator be in such a situation in relation to the attesting witnesses, that though in his actual situation, he cannot, if he will, by his own power without the

aid of others, see them attest the will, yet he may, if he will, have himself or the witnesses placed in another situation, in which, if such change of place were made, he might see them attest. This, they said, was going a great deal too far: it was always in the power of a testator in his perfect senses, so to place himself or have himself placed, as to be present at the act of attestation, or to command the witnesses into his presence; but this power surely was not presence. They examined the reason, policy and object of the statute, in requiring the attestation to be made in the testator's presence, and the adjudications upon it: and they contended, that the attestation in the presence of the testator, intended and required by the statute, was an attestation within his view; an attestation, which the testator, in the actual situation of himself and the witnesses, has the capacity of seeing, if he will; an attestation, which it requires not the agency or the aid of others, so to change his position in respect to the witnesses, or theirs in respect to him, as to enable him to see them in the act of attestation. Thus, an attestation by the witnesses, though in a different room from that in which the testator is, if made where he has the capacity to see it, if he will, is a good attestation in his presence: but an attestation, though in the same room with the testator, if made when he and the witnesses are so situated with respect to each other, that he cannot see them attest, without change of place and the agency of others so to change it, is not an attestation in his presence, within the meaning of the statute. The execution of a will by a blind man, must of necessity be an exception to the general rule, resting on reasons peculiar to the case.

9 *Stanard and Wickham, for the appellees, insisted, that an attestation of a will by the witnesses, at the testator's request, in the same room with him, not made clandestinely, and exempt from all imputation or suspicion of fraud or imposition, is necessarily an attestation in the testator's presence within the true meaning of the statute. Under such circumstances, the testator and the witnesses are mutually present to each other: and he has all the power of supervision and control over the act of attestation, which the statute intended to provide, in order to secure him from imposition; all the faculty of supervision, indeed, which it is possible to give him. Under such circumstances, too, the witnesses must feel a consciousness, in the act of attestation, that the exercise of the testator's faculty of supervision depends on his own will. He cannot be compelled to exercise it. Accordingly, they said, no case had ever occurred, in which (nothing clandestine or fraudulent being imputable) an attestation in the same room with the testator, was contested as not being an attestation in his presence. They urged the inconvenience and ill consequences of a contrary doctrine: the extreme nicety it would require in every probat; the doubts and danger in which it would involve the fairest wills; the frequent and troublesome litigation it would engender. They denied, that attestation in the testator's presence, was synonymous with attestation within his view, or within the range of his

vision. And they argued, that the cases, in which attestations by the witnesses, in a different room from that where the testator was, but still within his view, have been upheld as good attestations in the testator's presence, all proceed upon the admission, that attestation in the same room with the testator, is unquestionably an attestation in his presence; and that those adjudications, in effect, only enlarge the sense of the statute beyond the common import of its words, by holding attestation in another place, if within the testator's view or range of vision, equivalent to attestation in his presence, or in other words, in the same place with him. If the propositions

10 *contended for by the appellants' counsel, were admitted, a blind man cannot make a will at all.

The following authorities were cited and examined, in the argument: *Shires v. Glasscock*, 2 Salk. 688, Carth. 81; *Davy v. Smith*, 3 Salk. 395; *Casson v. Dade*, 1 Bro. C. C. 99; *Broderick v. Broderick*, 1 P. Wms. 239; *Longford v. Eyre*, Id. 740; *Doe v. Manifold*, 1 Mau. & Selw. 294; *Tod v. Winchelsea*, 2 Car. & Payne, 488, 12 Com. Law Rep. 227; *Right v. Price*, Doug. 241; *Pow. on Dev.* 90-97; *Rob. on Wills*, 163-7; *Longchamp v. Fish*, 5 Bos. & Pul. 415.

CARR, J. To understand correctly the instruction given by the circuit court to the jury which tried the issue of *devisavit vel non*, we must not take it as an abstract proposition, but (as it was given) in connection with and as applicable to the case proved in evidence. Thus it was proved, (as is clear to me from the bill of exceptions), that the whole transaction of signing and attesting the will, took place in the testator's bed-room; and that the testator, before the witnesses subscribed, being asked if he acknowledged the will, and wished them to attest it, answered affirmatively. These facts enter into the instruction of the court: as if it had been said to the jury, in such a case as this, where the whole transaction took place in one room, and the testator acknowledged the will, and desired the witnesses to attest it, if you believe that his mind was sufficiently sound to know the necessity of the precautions prescribed by the act, and he could have had himself turned in bed so as to see the witnesses, or have had them move so that he could have seen them, and he did neither, still it was an attestation in his presence. And this instruction, I strongly incline to think was correct.

Our statute (taken from 29 Car. 2. c. 3) requires, that the attestation of the witnesses shall be in the presence of the testator. The object of this law, (as the cases shew, and the counsel admitted), was correctly expounded by the judge, when he told the jury, that "signing in the presence of

11 the *testator, was to enable him to see that the persons he confided in, were those who attested, and to prevent a false paper being imposed upon them." The phrase employed is one in common use: in presence of the testator. What is presence? The opposite of absence. It may be said (I suppose) of every attestation, that it was either in the presence, or the absence of the testator. Presence seems to mean, in company with—within the view of—in the same

room with. Thus, if you ask a man, were you present when such a thing happened? He will answer, "Yes; I was in the same room." If a man be in one room, and a transaction take place in another room, of the house, it would certainly, *prima facie*, be considered as out of his presence. In all the cases, therefore, where an attestation out of the room of the testator has been supported, the court has extended the construction, to take in cases within the meaning, though not the strict words, of the statute. This, courts are always inclined to do; and on no subject have they gone farther than in support of the last wills of the dead, where the objection is technical, and the meaning of the statute has been substantially complied with. Thus, in *Right v. Price*, Doug. 243, lord Mansfield says, "the court would lean in support of a fair will, and not defeat it for a slip in form, where the meaning of the statute had been complied with: it was upon that principle (he adds) that *Shires v. Glasscock*, and other cases of that sort, were decided." These are the cases where the attestation was out of the room. Again, in *Longchamp v. Fish*, 5 Bos. & Pull. 420, the question was, whether a will executed by a blind man should have been read over to him in the presence of the witnesses; *Rooke, J.*, says, "there is not the least imputation of fraud in this case, but the application made to us to set aside the will, is founded on mere technical reasoning. Now, unless compelled so to do by the provisions of the statute, I never would set aside a will on mere technical reasoning."

Let us now examine, more particularly, the cases which have been decided on this subject.

12 *The first is the case of *Shires v. Glasscock*, 2 Salk. 688, Carth. 81, 1 Eq. Ca. Abr. 403. Sir George Shires, being sick in bed, made his will, and signed it, in the presence of three witnesses; but he being very ill, the witnesses withdrew into a gallery, seven yards distant, between which and the chamber where the testator lay, there was a lobby with glass doors, and the glass broken in some places. Here the witnesses subscribed the will. It was proved that the testator, from the bed where he lay, might have seen the table in the gallery, on which the witnesses subscribed, through the lobby and the broken glass window. Per Curiam, "the statute required attesting in his presence, to prevent obtruding another will in place of the true one: it is enough if the testator might see; it is not necessary that he should actually see them signing: for, at that rate, if a man should but turn his back, or look off, it would vitiate the will. Here the signing was in the view of the testator; he might have seen it, and that was enough. So if the testator being sick should be in bed, and the curtain drawn." This case was decided in 3 Jac. 2, about eleven years after the making of the statute; and it is the first we have on the subject. It has ever since been considered a leading case, and is constantly referred to. In *Right v. Price*, Buller, J., says, "*Shires v. Glasscock* was decided soon after the statute passed, when the reason and meaning of the clause in question, were exactly known."

Let us then, for a moment, examine this case, and compare it with the one before us. The statute requires attestation in the presence of the testator: yet it must strike every one, that the witnesses, (in another room, seven yards distant from that of the testator, and separated by a lobby) were not, strictly speaking, in his presence. If then the court had inclined to construe the statute literally, this will could not have been supported: but they say, the meaning of the statute was to prevent obtruding another will in place of the true one; and it is enough if the testator might see them signing: thus substituting the possibility of seeing the subscription in the separate room,

13 *for the presence required by the statute. It is upon this ground, that lord Mansfield, in the passage before cited, quotes this case as decided upon the principle, that courts lean in favour of fair wills, and will not defeat them for a slip in form, where the meaning of the statute has been complied with. In the case before us, the subscribing was in the bed-room of the testator, perhaps within a few feet of the bed, and at his request; and the judge told the jury, that if they believed he could have had himself turned in bed, so as to see the witnesses, or have had them moved into his sight, the meaning of the law was complied with. Now, to my understanding, a subscribing in the same room with the testator, and at his request, is a literal compliance with the statute; a signing in his presence. But, suppose we admit, that it was not a compliance with the very letter, as the testator's back was to the table, and he could not turn without help; yet, surely, it was a situation far better calculated to prevent or detect imposition, than that of Sir George Shires. At any moment during the transaction, he might have said to the witnesses, stop; and to his attendants, turn me over: and, in an instant, the witnesses and the will would have been in full view, and so near as to give him some chance to distinguish a false will if such had been actually substituted: and the knowledge that he could do this, united with the fear which guilt always feels, would give to any party meditating such fraud, a consciousness so strong of the presence and power of detection, of the testator, as to furnish substantially those guards intended by the statute. But how was it with Sir George Shires? He lay in his bed, as we may suppose, in a position nearly horizontal; the witnesses went with the will, out of his room, through a lobby, and into another room seven yards distant: where was the difficulty of changing the will, while taking it to this room? and if changed, where was his chance of detecting the imposition? Can it be supposed, that from his reclining position, looking through the broken pane of the glass door, he could, at the distance of seven yards, distinguish a false will *from the true one?

14 He must be lynx-eyed indeed, if he could. Yet this is a leading case, never since questioned or departed from.

The next case is *Davy v. Smith*, 3 Salk. 395. Upon a trial at bar, the question was, whether the witnesses to a will had pursued the statute of frauds, in subscribing their names; and it was resolved, that where the

testator lay in a bed in one room, and the witnesses went through a small passage into another room, and there set their names, at a table in the middle of the room, and opposite to the door, and both that and the door of the room where the testator lay, were open, so that he might see them subscribe their names if he would, though there was no positive proof, that he did see them subscribe, yet that was a sufficient subscribing within the meaning of the statute; because it was possible, that the testator might see them subscribe; and, therefore, per curiam, if the witnesses subscribe their names in the same room where the testator lies, though the curtains of the bed are drawn close, 'tis a good subscribing within this statute; because, if 'tis in his power to see them and what is done, it shall be construed to be in his presence. This case is liable to all the remarks made on the last; the attestation was in another room, separated from the testator's by a passage; the circumstances furnished the same facility of substituting a false will; and the situation and distance of the testator, the same difficulty of detection. Yet, because he might by possibility have seen the witnesses, the will was supported. Of the court's remark, with respect to a subscription in the same room with the curtains drawn close, I shall speak more particularly when I come to that class of cases.

In *Casson v. Dade*, 1 Bro. C. C. 99, the court decides, that it is not necessary for the testator to be even in the same house with the witnesses; for there, a lady sat in her carriage in the street, and signed her will, and the witnesses took it into an attorney's office and subscribed; and the will

15 was supported, because it was proved, by a person in the *carriage, that through the window of the office, the testatrix might see what passed within. Now, it can hardly be said, that because a person in the street may see what is passing in the room, those in the room are therefore in her presence. Yet the court leaning strongly in support of the will, substituted sight for presence, though that sight did not furnish half the means to avoid or detect imposition, which our case affords.

The next attempt was to prevail on the courts to support wills attested out of the room of the testator, and also out of his sight; but this attempt failed; and it was decided, in many cases, that though the signing was in a room contiguous, yet the devise would be void, unless the testator were in a position, from which he might, if he chose, see the witnesses subscribe, without changing his situation. Of this class, were the cases of *Ecclleston v. Speke*, Carth. 79, *Broderick v. Broderick*, 1 P. Wms. 239, *Machell v. Temple*, 2 Show. 288, and *Doe v. Manifold*, 1 Mau. & Selw. 294. This last case was much relied on by the counsel for the appellants; and lord Ellenborough was considered as having pronounced the law to be, that no matter how near the parties might be together, in the same room, yet if the testator could not from his situation see the attestation, it was not in his presence. If I understood lord Ellenborough thus, I should be compelled to say, that it was an obiter dictum, not only unsupported, but contradicted, by the whole current of authority:

an obiter dictum, because the case before him was not of a subscription in the same, but in a different room: unsupported, because there is no case, or even dictum, that I have met with, which takes the position, that where the signing is in the same room, it must also be in the sight of the testator, to constitute presence. But I do not understand lord Ellenborough as the counsel did. The case before him was one in which the testator executed the will in his bed, and there being no table in that room, the witnesses went into another, divided from it by

a passage, into which the doors of both rooms opened, and they subscribed the will at a table before the fire-place of that other room, and both doors were open. The jury found, *ad nisi prius*, 1. that the testator did not see the witnesses attest the will; 2. that a person in the bed room might, by inclining his body and advancing his head into the passage, have seen the witnesses attest the will; 3. that the testator was not in such a situation in the room, that he might, by so inclining his body and advancing his head into the passage, have seen the witnesses attest the will. Upon this, the judge who tried the cause, told the jury, that he was of opinion, that the will was not duly attested; and the jury found accordingly. There was a motion to set aside the verdict, on the ground of misdirection. Lord Ellenborough's remarks must be taken with reference to the case before him; a case, in which the attestation was out of the room, was not seen by the testator, nor was he in a situation from which he could see it. After speaking of the case of *Casson v. Dade*, which, he says, he was old enough to remember, and had gone to see the office through the window of which the lady who sat in her carriage could (as was proved) see what passed within; lord Ellenborough says, "in favour of attestation, it is presumed that if the testator might see, he did see. But I am afraid, that if we get beyond the rule which requires that the witnesses should be actually within the reach of the organs of sight, we shall be giving effect to an attestation out of the devisor's presence; as to which the rule is, that where the devisor cannot by possibility see the act doing, that is out of his presence." Now, all this is entirely correct, as applied to the case before the court, a subscribing in another room; and to this case alone, the chief justice meant to apply it. The case he cites, and the language he uses, shew, that a signing in the same room was not in his mind at all.

Let us now see, what the judges have said of the effect of a subscription, where the testator and the witnesses are together in the same room. And here it is worthy of remark, that in the lapse of one hundred and fifty years, since the making of the statute, I can find (in all the books I have searched) but two cases, in which a dispute has arisen about the due attestation of a will, where the signing was in the same room: indeed, I may say but one case, for in *Tod v. The Earl of Winchelsea*, (which I shall presently cite more particularly), the weight of evidence was, that the attestation was in another room. I apprehend, that, in the making of wills, it happens, in nine cases out of ten, that the

witnesses attest in the same room with the testator: how shall we account, then, for the fact, that we find upon record, so few cases in which it has been questioned whether such attestation was sufficient? I answer, upon the ground of the general opinion, that a signing in the same room was a signing in the presence of the testator; and cut off all inquiry about vision, or the relative position of the parties.

In *Longford v. Eyre*, 1 P. Wms. 740, the lady Clutterbuck having a power to devise certain lands during coverture, made her will, to which there were four witnesses: one was beyond sea; two swore, that they saw the will executed, and subscribed the same in the presence of the testatrix; the third swore, that he subscribed the will, as a witness, in the same room with, and at the request of the testatrix. Lord Cowper doubted as to the execution of the will, but would declare no opinion till farther application. It came on again before lord Macclesfield; and it was pressed upon him, that this third witness signing in the same room, was necessarily a signing in the presence of the testatrix. To this argument he replied, "that the bare subscribing the will by the witnesses in the same room, did not necessarily imply it to be in the testator's presence: for it might be in a corner of the room, in a clandestine, fraudulent way; and then it would not be a subscribing by the witness, in the testator's presence, merely because in the same room; but (he adds) here, it being sworn by the witness, that he subscribed the will at the request of the testatrix, and in the same room, this could not be fraudulent, and was therefore well enough."

*From this opinion, I think we may fairly draw two conclusions. The first is, that a signing in the same room, is (as a general proposition) a signing in the presence, but ceases to be so, if it be clandestinely and fraudulently done. Powell in his treatise on Devises (p. 168,) shews, that he so understands the case: Speaking of the conclusions to be drawn from it, he says, "And a devise, even if it be executed in the room where the testator is, and may see it if he please, will, if the subscribing be done in a clandestine and secret manner, be void notwithstanding." Roberts also in his treatise on Wills, (p. 129) from this same case, and the case of *Right v. Price*, where the testator was insensible, draws this conclusion: "the mere corporal presence, however, of the testator, unless his mind and faculties also are present, will not satisfy the statute on this point; for there must be a mental knowledge of the fact; so that, as a subscription clandestinely made in a corner of the same room with the testator, was not, on this account, a sufficient attestation, so neither would such subscription in the same room suffice, if the percipience and intelligence of the testator were gone, so as to constitute it an act done without his knowledge." The second conclusion from the opinion of lord Macclesfield, is, that where the signing is at "the request of the testator, and in the same room, it could not be fraudulent, and therefore is good." Now, in our case, the witnesses signed at the request of the testator, and in the same room; and the instruction of the judge is predicated upon these facts.

In the cases of *Shires v. Glasscock*, and *Davy v. Smith*, (the two earliest) the court laid it down, that if the witnesses subscribe their names in the same room where the testator is in bed, though the curtains of the bed be drawn close, it is a good subscribing; because, if it is in his power to see them and what is done, it shall be construed to be in his presence. The point to be sure, was not directly before the court; but yet it shews their opinion, and has been constantly quoted since as law. The proposition is laid down broadly, *that

19 a signing in the room, is a signing in the presence, though the testator be in bed and the curtains closely drawn. Why? because it is taken for granted, that it is in his power to see what passes in the room. We are not told, whether the testator had the strength to raise himself in the bed, or to put by the curtain with his own hand: this makes no term in the proposition. Whether he could raise the curtain, without aid, or with the aid of others, it was equally in his power to get it out of the way, and see what was doing; and if, having this power, he lay still, the signing was in his presence. So, in our case, the witnesses being with the will in the testator's bed-room, and there at his request signing, signed in his presence; because he had the power of seeing them, either by being turned over, or removing them into his sight; and if, having this power, he did not choose to exercise it, the signing was not the less in his presence.

The last case I shall cite, is *Tod v. The Earl of Winchelsea, Car. & Payne*, 488, decided in 1826. The question was, whether the will of the duke of Roxburgh was duly attested under the statute of frauds. One of the subscribing witnesses was dead. Another stated, that after the duke had signed the will, as far as he recollected, he took leave of him, and himself with the other witnesses, and the writer, went into an adjoining room called the writing-room, the door between the rooms remaining open; and that the witnesses signed their names on a table; but what sort of a table, or where it stood, he did not remember, nor could he say whether the duke could see them when they signed. The deposition of the other subscribing witness stated, that he believed the will was attested in the room where the duke was, but that he was not positive. It, however, appeared, that when the witness had given a former deposition on this subject, he then thought the will was attested in the adjoining room. It was proved, that as the duke lay in bed, he could only see one end of the writing-room; and that there were three tables in it, one in the middle of the room which as he lay in bed he could not see, another which he could

20 *see, and a third which was moveable, running on castors, and which might be wheeled into a part of the room, from whence he might see it in bed. Chief justice Abbot told the jury, "By the statute of King Charles II. it is required, that the witnesses who attest a will of lands, shall do so in the presence of the testator; and you have to consider, whether they did so in this case. As to what shall be held to be in the presence of the party; it cannot be necessary, that it should be in his sight, as

the testator might have lost his sight, and in such cases other circumstances have been held to be sufficient. The rule to be drawn from all the decisions, which I mean to leave to you as the law, is this: was or was not the will attested by the witnesses in such a place, that the duke of Roxburgh might have seen what they were doing? I don't say, that it is necessary that you should be satisfied, that he did see them. If it were attested in the room in which he was, it is clear, upon the cases, that that is sufficient; if a table was brought to the door, he might have seen; but if it was done on the table in the middle of the room, he could not. As to the supposition that he got out of bed, I think there is no foundation for that, because he was assisted to rise in his bed, and was exhausted by the writing his name the first time. One witness says the will was attested in the room; but Sir Coutts Trotter thinks otherwise; and the former, on another examination, said he thought the will was attested in the next room. But it does not follow that the duke could not see the attestation, because it was in the adjoining room. If it was executed at the pier table, he might have seen it; or, if the moveable table was placed in one part of the room, he might also have seen it. You will, therefore, have to say, whether the will was attested in the bed-room; if so, there is no doubt; but if you think it was attested in the other room, whether it was attested in such part of that room, that the testator might have seen the witnesses attest it: in either of those cases, the plaintiffs are entitled to a verdict. But if you think otherwise, I am of opinion that in point of law, you ought to find for the defendants."

21 *If this case be authority it completely settles the question. The case brought directly before the court, the distinction between an attestation, in the same room, and in an adjoining room: and the judge treats it clearly, telling the jury that if they found the signing in the same room, it was clear upon the cases, that that was sufficient; and again, if the will was attested in the bed-chamber, there could be no doubt; but if not, then you must enquire, whether the testator could see the attestation. By this case, the instruction of the judge, in the case before us, is amply justified. And this, I think, is the true rule, both upon reason and authority. When no fraud is imputed, a signing in the room gives all the safety which the statute intended; and the question of fraud is wholly for the jury; where that intervenes it will vitiate, even though the will be executed, under the very eye of the testator. In the case before us, the objection is technical merely; and the courts have always leaned against such, in favour of fair wills. If we, departing from this course, require a strict and literal compliance with the statute, and say that every attestation not in the range of vision as the testator lay, shall be out of his presence, we shall give rise to a thousand perplexing questions, and much oftener disappoint fair wills, than we shall guard the testator from imposition. I think the decree should be affirmed.

GREEN, J. The proposition involved in the instruction given by the circuit court in

this case, is, that if a testator, lying sick in bed, and so feeble as not to be able to turn his body or head without assistance, be raised up, and sitting on his bed-side, signs his will upon a table at the side of the bed; and, after requesting the attesting witnesses to subscribe it as witnesses, be laid down in the bed, with his back to the table, so that, without turning his body or head he cannot see the witnesses at, or the will upon, the table; and the witnesses, under these circumstances subscribe the will on the table; the will is duly attested and subscribed by the witnesses in the presence of the testator, provided he was in

22 *a state of mind to know the necessity of the precautions required by the statute in the attestation of wills, and could have had himself turned in his bed, or had the witnesses brought within his view, so as to have seen the act of subscribing.

Courts of justice have always, and very properly, leaned strongly in favour of the validity of wills fairly made, and when there is no imputation of fraud. But there is a limit prescribed by positive law, beyond which we cannot go. The witnesses must subscribe in the presence of the testator, in some sense.

The cases upon this subject (most of which have been noticed by judge Carr) have, accordingly, gone to this extent, that where the testator and the witnesses are together, for the purpose, as they usually are, of transacting the business of attesting the will, and so their attention specially called to that object; if they be in such a situation, that the testator may, if he pleases, by the exertion of his own volition and physical powers, without materially changing his position with respect to place, and without the assistance of others, see the witnesses subscribe; that is a subscribing in his presence. And, perhaps, the cases justify us in saying, that this is, under such circumstances, a presumption or conclusion of law, against which no evidence will be received. When they are in the same room, the prima facie presumption is, that the testator might see the attestation and subscription, without extraneous assistance; and, without evidence to the contrary, this would be taken for granted. But this is not necessarily so. In the case of *Tod v. Winchelsea*, in which chief justice Abbott instructed the jury, that if the will was subscribed by the witnesses in the room, where the testator was, there was no doubt of its due execution, there was no evidence to repel the presumption. In that case, too, the testator might have had the moveable table in the room adjoining that in which he was, the door being open, moved with the witnesses within his view, and the will there subscribed by them. And in the case

23 of *Doe v. Manifold*, *the testator might have caused himself to be removed to the door of the room in which he was, and then bending forward his body, and advancing his head into the passage, he could have seen the witnesses subscribing in the adjoining room. Yet this capacity (like the capacity of the testator relied on in our case) to have the table and witnesses removed into the view of the testator, and the testator himself brought into such a situation, with-

out leaving the room in which he was, as that he might see the witnesses subscribing in another room, were not held to bring these cases within the statute. Nor is there any case which intimates, that, where the testator is in such a situation, that he cannot see the subscription by the witnesses, by means of his own power and volition, as above mentioned, it is sufficient to satisfy the requisition of the statute, that he might cause himself, or the witnesses, to be placed in such a situation as that he might see their attestation.

As to the case of a blind man: whilst vision and a reasonable degree of proximity constitute presence, in the case of one who has the faculty of vision, some other criterion must be adopted in the case of a blind man, one circumstance of which must be proximity; but what other circumstances must concur with that, is not settled by authority, and must be left to be decided when the case occurred.

I think the decree should be reversed, and the cause remanded, to have a new trial of the issue of *deviasit vel non*, upon which no such instruction is to be again given.

COALTER, J. The object of the law, in requiring a will to be attested in the presence of the testator, is to prevent a surreptitious will being substituted and imposed on him for the will he intends to publish. To effect this object, the witnesses and the will must both be in the presence of the testator; he ought to see, or at least be able to see, both. He may, it is true, turn away his eyes, so as not to see what is doing, or he may look on, the whole time. It will rarely happen, that

24 the witnesses engaged in the attestation, are at *the same time watching the testator, to see whether he is looking at them, so as to establish the fact that he saw them attest; and therefore the most that they can be required to prove, is, that he was so present to them, and they to him, as that he might, and therefore probably did, see the attestation. Nothing less than this, it seems to me, can satisfy the words and intention of the statute.

Suppose the witnesses retire to a table standing behind a desk in the testator's chamber, where he lying sick in his bed, makes his will; and over which desk he can even see the heads of the witnesses, but neither the table, the will, nor the act of attestation; is this a good will within the act? and will it be considered as duly attested, unless it can be shewn, that they retired there for fraudulent purposes? Is the power to require the witnesses to come from behind the desk and expose their acts to view, though no such requisition be made, equivalent to the power of actually seeing them if he chose to cast his eyes on the scene of action?

Suppose there is a folding screen, impervious to the sight, round the foot or side of the bed, and the witnesses retire behind that out of his view; is the power to direct it to be folded or shut up, so as to expose the table and witnesses to view, to be substituted for that power to supervise the transaction, which the simple act of casting his eyes on the spot affords? must it be proved, that they retired behind the screen, in order to be out of view and for fraudulent purposes?

Suppose the table at which the witnesses subscribe, be just within the door of an adjoining room, a few feet from the testator's bed, who has his face to it, and when open, can as plainly see the table, as if it were in his chamber, or more so, there being more light there than is agreeable or proper in the bed-room of the sick; but in order to exclude this disagreeable light from the sick bed, the door is usually kept shut; and, without any real or apparent intention of fraud, it is actually shut at the time of attestation: is the power to require it to be opened, to be substituted for the power to see if the party had chosen to cast his eye that way?

25 *Could it be said of either of these cases, that as he might have seen, it is fairly to be presumed that he did see, and that consequently no imposition was practised?

The object of the law being to prevent frauds, it prescribes the forms which are to be pursued, and which *prima facie* are sufficient to guard against fraud. All attestations not coming up to these requisites, may be fraudulent, and are in fact so considered in law, without proof of actual fraud; and no proof of actual fairness can avail or supply the requisites of the law. The most credible witnesses who ever lived may prove that they saw the will subscribed, heard it read to the testator and approved of by him; that he requested them to attest; that they all took hold of the will, carried it into another room, having received it from the hands of the testator; that they all continued to hold it, until each attested it; and all returned with it and delivered it to the testator again: yet it is no will of lands unless he could see them attest. Say, that they attested it in the door-way, where their acts could have been seen, had not the door been closed to shut out offensive light from the sick bed; it is no will. According to all the cases, to make it an attestation in the presence, the door must be open: no case goes so far as to affirm, that if the testator had had his suspicions awakened, and could have commanded the door to be opened, it is the same thing as if it had been opened.

It is not to be supposed, that testators, especially in their last illness, are suspicious of those around them, or that they are in a frame of mind, if they are of body, to guard, by any unusual effort, against frauds. The law undertakes to guard them. They may still be defrauded. But, if the attestation be according to law, the fraud must be proved; if not, the law avoids the will, as though actual fraud were proved, and no proof of fairness can make it good.

The opinion of the judge below, in this case, makes this a good will, although the jury might believe, not only that the testator did not actually see the attestation, but that

26 he could not see it, any more than if it had been in another *room with the door shut. Had his suspicions been aroused, and had he been turned, it is true he might have seen; and so he might, on being turned over, had the attestation been in an adjoining room, and in a part of it which would have been visible to him when he was so turned over. If the attestation had been in an adjoining room, at a table visible from the bed, had the testator been turned

over, but not visible to him as he lay unable to turn; this (as, I think, all the cases shew) would not have been a good attestation. The power to have himself turned, and the power to see, if turned, is the same in both cases. Yet, in the one case, it is said to be a will, in the other, not so. A testator, not too ill to get up, acknowledges his will, lying on his bed: he continues to lie there, and his will is attested in an adjoining room: he can, by getting up, and sitting on his bed side, and leaning forward, see what is done and is fully able to do so, without assistance, or much bodily pain: but he omits to do it, and the law protects him against any will made in such a situation. But the man who is laid with his back to the table, when his will is attested, and can no more see it, or what is doing, than if he was held there by superior force, unless he calls for assistance, is not protected by the law!

It is true the cases say, that proof of actual seeing is not necessary, the presence being such that he can see if he will; but where is the case which says, that it is a good attestation notwithstanding proof on the other side, that he not only did not see, but could not without assistance, any more than he could see through a panel door what was doing behind it, and which he was unable to open without assistance?

If the doctrine contended for be tenable, why shall not a will, executed in an adjoining room, be good, where the testator could direct the table to be set out within his view whereat to attest it? Why not, if attested in an obscure corner in the same room, because he might have ordered it to be done in a part of the room where he could see what was doing?

27 The law is not that it shall be attested in his *presence, if he thinks it proper to superintend the act himself, otherwise he may trust to the honesty of his friends and the witnesses, to see for him that no fraud is done: No; the law requires him to be present himself, body and mind. If he can, by turning his eye, see what is doing, he will be presumed to have seen it, and no farther proof that he did see is necessary; but if interposing walls or other obstructions, render it doubtful whether he could see or not, the power to see must be proved and made apparent; as, that a door or window was open, (not that it might have been opened, if requested,) and that his position in bed was such, (not might have been such had he desired to be raised or turned,) as that he had it in his power, by simply looking on, to see. This is enough, and you need not prove that he actually did see.

I can see no magic in the four walls of the testator's bed chamber, which shall make him more present at an act of attestation, which in reality he cannot see without calling for assistance, than he is at a similar act performed a few feet from him, which he can see, even without assistance, by a slight change in his position. Neither the law nor the decisions under it, it seems to me, contemplate any such fictitious presence. If the act be done in the same room, *prima facie* he is really present; that is, he can really see; and, nothing further being shewn, he is presumed to have supervised the act. But if it is in a remote corner, though within the four walls, it must be shewn that he was

so situated, in point of position and light, as that he could see, or it is deemed in law fraudulent and void, without proof of actual intended fraud. This, I think, is the sum and substance of the law, and all the decisions; and that to go beyond it, is dangerous.

I think the instruction given to the jury was wrong.

CABELL, J. The statute makes it essential to the validity of a will of lands, that it shall be attested by two or more witnesses, in the presence of the testator. The object

of this requisition, is to enable the testator to see, that those *who attest the will are the persons in whom he confides, and to prevent a false paper from being surreptitiously imposed on the witnesses. Presence is not defined in the statute; but a due attention to the object of the law in requiring it, will lead us to its true meaning. It cannot be synonymous with being in the same room with the testator: for a man may be so situated, as to see what is passing in another room as accurately as if it were in the same room; and he may be so situated, as to be as incapable of seeing what is transacting in the same room, as if it were in a different room. The object of the law will be completely effected, and can only be effected, by the testator's being in such a situation in relation to the will and the witnesses, that he may, if he will, see, from that situation, both the will and the witnesses in the act of attestation. This capacity in the testator is, unquestionably, the test of presence, in all cases of attestation out of the room in which the testator may be: for all the cases shew, that an attestation out of the room of the testator, is held to be in his presence, if he might see it, and not in his presence, if he could not see it. Now, as the reason of the law in requiring an attestation to be in the presence of the testator, is precisely the same, whether that attestation be in the same room, or in a different room, the law will apply the same test of presence to both cases. An attestation, therefore, in the same room with the testator, will, as in the case of an attestation in a different room, be held to be in his presence or not in his presence, according to the capacity or want of capacity in the testator to supervise the transaction. There is, however, one important difference between an attestation in the same room, and one not in the same room with the testator: in the absence of all proof, a man is presumed to be able to see what is done in the same room with him, and to be unable to see what is done in a different room. An attestation, therefore, in the same room, is *prima facie* good; an attestation in a different room, is *prima facie* bad. But this presumption must yield to positive proof. An attestation, therefore, out of the room

29 of the *testator, but proved to be within the scope of his vision, becomes good, as being in his presence; and an attestation in the same room, but proved to be out of the scope of his vision, becomes bad, as not being in his presence. And this is, as I take it, the substance of all the authorities.

I am, therefore, of opinion, that the instruction of the circuit court to the jury, was improper; for, according to the case, as stated, the testator is supposed to have been in such

a situation, that he could not see the attestation, since he lay in his bed, with his face turned from the witnesses, and was so weak as to be unable to turn his face towards them. The fact, that the testator might have caused himself to be turned over in his bed by his attendants, or that he might have caused the witnesses to take a position in the room where he might have seen them, (without, however, doing either,) is not entitled to any weight. A power of that sort exists in every case: in every case, the testator may cause his own situation, or that of the witnesses, to be so changed as that he may see the attestation. Such a power was expressly held to be insufficient in the cases cited at the bar, of *Doe v. Manifold*, and *Tod v. The Earl of Winchelsea*. A contrary decision would have the effect of substituting the confidence of the testator in his attendants and the witnesses, for that presence of the testator which the law requires. It is going far enough to say, that the law may be satisfied, by the testator being in such a situation, that he may, from that situation, and without the aid of others, supervise the attestation.

BROOKE, President. To arrive at a correct decision in this case, the first object is to ascertain the true construction of our statute, taken from the british statute of 29 Car. 2, and to have a correct understanding of the cases decided on that statute by the english judges. The terms of both statutes require, that the attestation should be in the presence of the testator. What constitutes presence, I think, is correctly settled by the adjudicated cases. Where the witnesses

30 *are called upon by the testator to witness his will, and are in the same room with him for that purpose, they are mutually in the presence of each other, according to the terms of the statute. In such case, he has all the control over the attestation, intended by the statute; and to invalidate the will, fraud or a clandestine attestation of it, must be proved; as, (in one of the cases,) a secret attestation in another corner of the room. The statute protects both the testator and the witnesses from imposition: he generally selects those that he most confides in, to witness his will: and if the terms of the statute be complied with, fraud, on the one or the other, must be proved, to invalidate it. Under such circumstances, in the absence of any charge of fraud, a blind man's will may be well attested. And hence it is said, that it is not necessary to prove, that the testator did actually see the attestation of his will, if he might see it. How might he see it? not by his own individual powers, (for that is not said, either in the statute, or in the cases where the attestation is in the actual presence of the testator,) but by the aid of others, if necessary. The witnesses being in his actual presence, he possesses all the other powers of controlling the attestation; and if his confidence in them be such, he may turn his back upon them, and dispense with the controlling power of sight, if he choose. The terms of the statute being complied with, the witnesses being actually in his presence, that circumstance is a sufficient control over them, or the statute in words would have required more. It might, in terms, have re-

quired, that he should actually see them, or of himself have the power to see them; but this would have rendered it impossible for a blind man to make a will.

It is admitted, that it need not be proved, that the testator actually saw the attestation of the will, if he had the power to see it; and that he may dispense with this portion of his controlling influence, and turn his back upon the witnesses when they attest the will. This admission must be on the principle, that his actual presence and confidence in the witnesses

supply the place of actual vision, in a case in which *the terms of the statute are complied with; it cannot depend on his own physical power to see the witnesses attest the will. Such a position would open a field of controversy, in which there would be no sure means of ascertaining the fact. If his vision were defective, as in age or extreme sickness is often the case, and he obliged to resort to artificial means to aid his sight, it could not be said, that he had the power within himself to see the attestation. Such a requirement would lead to endless controversy: it would be necessary to ascertain, with precision, the distance to which his vision extended, and the degree of light requisite; and, if he might have used glasses, and did not use them, it might be said, that he had not the power to see without the aid of others. In the case before us, if the testator had lost his confidence in the witnesses, and was not satisfied with the control of his presence, he might have been turned over by the aid of others, though without it he could not turn himself; as, in the case in which a testator could not see without glasses, he might with the aid of others get them, though physically unable himself to obtain them.

All the cases in which the attestation is in the same room, in the presence of the testator, and in which no fraud is charged, proceed, if I understand them, on this course of reasoning. The terms of the statute being complied with, in every particular, to invalidate the will, fraud must be charged and proved. In the last case that I have seen, *Tod v. The Earl of Winchelsea*, chief justice Abbott said, in charging the jury, "as to what shall be held to be in the presence of the party, it cannot be necessary that it should be in his sight, as the testator might have lost his sight, and in such cases other circumstances have been held to be sufficient." The circumstances, that the blind man had dictated the will, and when it was read to him, directed attestation to be made; it being attested in the same room, in his presence, and the terms of the statute being complied with, though he had lost the controlling power of sight; and no fraud being alleged; have been held sufficient.

Nor is there any thing, *in the cases in which the attestation of the witnesses was in another room: in those cases, the controlling power of actual vision of the attestation by the testator, is considered as equivalent to the influence of his actual presence in the other cases. In the cases, in which the attestation is in another room, not in the actual presence of the testator, he is considered as constructively present, because he exercises a control equivalent to

that of actual presence, by actually seeing the attestation, as far as that can be presumed, or having the power within himself to see it without the aid of others. And a blind man, in such case, cannot make a will, whatever may be done to inform him of what is going on.

In the first cases, the presence of the witnesses for the purpose of attesting the will, in the same room, and their actual attestation there, is sufficient, unless fraud be charged. In the second, where the attestation is in another room, the testator must have actual vision, or the power to have it, without the aid of others, or the spirit of the statute is not complied with. In such case, it is important, that he should have the power to see within himself, because otherwise his control over the attestation would be wanted; to go farther, and to admit, that the power to see the attestation of the witnesses made in another room by the aid of others, would be sufficient, (as in the case of actual presence in the same room,) would open as wide a field for controversy, as the requisition of a power in the testator himself without aid from others, to see the attestation, where it is made in his actual presence in the same room; which has been before remarked on. If, in the case of attestation in another room, the power of the testator by the aid of others, to see it, was admitted; the witnesses not being in his actual presence, could not know, that he could have aid; nor could others, in another room, intending to palm a false will upon him, know that such aid was within his power. His control over the attestation would be gone, and the statute defeated in its letter and spirit. The letter of the statute is complied with, by the control, which actual presence and the power to see by the aid

*of others known to the witnesses, gives to the testator; its spirit is complied with, when the testator, though in another room, and not in the presence of the witnesses, is known to have the power within himself to overlook the attestation, without the aid of others, the extent of which the witnesses and others, in another room, cannot be accurately apprised of.

But it may be said, that, in the case before us, the fraud comes out in the fact, that the testator, though he could not turn himself in his bed, so as to see the attestation of the will, neither required or was assisted by others to turn him. Unless he was incompetent, from mental infirmity, to ask for aid, if he wished it, (which is not pretended,) it is nothing more than the case in which the testator turned his back upon the attestation, which was said to be of no importance. If he had asked to be turned over, or that the witnesses should change their position, that he might see the attestation, and either had been refused, and the will attested behind his back, it would have been a clandestine attestation, and the will invalid. But nothing of the sort is pretended. He possessed a mind competent to make a will, in all respects, and exercised every control over the attestation of it, except the controlling power of actual sight of it, which is not required by the statute, either in its terms or in its spirit.

For authority for the distinction I take, between the cases in which the attestation is

in the actual presence of the testator, and those in which the attestation is by construction in his presence, I refer to the cases already cited by judge Carr. Nor will I repeat the instruction of the circuit court to the jury: it must be taken in relation to the facts stated in the bill of exceptions; and if so, it was wrong on the principle contended for; it ought to have gone further; it ought to have informed the jury, that though they might find upon the evidence, that the testator had the power of himself to turn him towards the witnesses, yet as his sight was dim, and the light bad, it ought to be proved,

34 of his own accord, have seen *the attestation: which would not have been more, than what seems to be required by a majority of the court. Upon a sound construction of the statute, and also upon the adjudged cases, I think the instruction of the circuit court was correct, and that the decree ought to be affirmed.

By the majority of the court, Decree reversed.

Graves v. Graves.

February, 1829.

Appeals*—Interlocutory Decree—Suspension—Statute.
—Appeal from an interlocutory decree in chancery denied, because the party asking it might and more properly ought to apply to the chancellor, to suspend the effect of the decree, under the act of 1827-8, c. 25, § 4.

Maria L. Graves exhibited her bill, in the superiour court of chancery of Fredericksburg, against Simeon Graves, her husband; charging the husband with adultery, and other grievous misconduct towards and ill treatment of her; and praying a divorce a mensa et thoro, that all the property he had acquired in her right by the marriage might be restored to her, that the care and education of the children of the marriage should be confided to her, and that alimony, and a suitable allowance for the children, should be decreed to her. The husband, in his answer, controverted the facts of misconduct imputed to him by the bill. And many depositions touching the facts in issue, were taken and filed by both parties.

The cause, coming on for hearing in May, 1828, the chancellor pronounced an interlocutory decree. That the plaintiff should be divorced from the bed and board of the defendant, her husband; perpetually separated from him; and intirely discharged from his authority and control: that her person and property, as well that which should be allotted to her by the court, as that she might afterwards acquire, should be protected from the dominion or interference

35 *of her husband: that the defendant should deliver to the plaintiff, all the slaves and their increase, which he had acquired by his marriage with her, and which were then in his possession, or under his control: that a commissioner of the court should take an account of the value of all the other estate, real and personal, possessed or owned by the defendant, and the annual value thereof, and of all the debts due and owing to or from him: that the defendant should submit to be examined by

the commissioner, on oath, touching the said account: and that the commissioner should also inquire and report, what sum would be necessary for the maintenance and education of the children of the marriage, and whether any of them were of a proper age to be bound apprentice. And the court also appointed Layton Yancey guardian of the children; and ordered, that the parties, or such of them as had the custody of the children, should surrender them to the said guardian. But the effect of so much of the decree as directed the slaves aforesaid to be delivered up to the plaintiff, was suspended, until some responsible person should enter into bond with sufficient surety, in the penalty of six thousand dollars, payable to the defendant, with condition to comply with the future order of the court in relation to the slaves.

This bond was accordingly executed and filed.

Patton presented a petition on behalf the defendant, praying an appeal from the decree, and complaining of errors, in the proceedings and decree, in fact and in law.

BROOKE, President. Without giving any opinion on the merits, the court denies the appeal, on the ground, that the case more aptly comes under the 4th section of the act of 1827-8, c. 25, (Sess. Acts, p. 20,) amending the laws in relation to the jurisdiction of the court of appeals: whereby it is provided, that no appeal shall be granted from any interlocutory decree of a superiour court of chancery, except by the court of

36 appeals; but that the courts of chancery, or *the judges thereof in vacation, may suspend the execution of any interlocutory decree, requiring the payment of money, or changing the possession and title of property, provided the party, desirous of appealing, shall enter into bond with sufficient surety, in the manner now prescribed by law, with condition reciting the interlocutory decree and the intention of the party to take an appeal so soon as a final decree shall be made, and binding such party to pay all costs and damages, and the profits of the property recovered, in case the decree be affirmed, or the party fail to take or prosecute the appeal.

Appeal denied.

Darlington v. M'Coole.

February, 1829.

(Absent CARR, J.)*

Specific Performance—Parol Agreement That Father Will Give Son-in-Law Tract of Land.—A parol agreement between father-in-law and son-in-law, that the former will give the latter a piece of land,

*He did not sit in the cause, because he had decided it in the court of chancery.

†**Specific Performance—Verbal Promise to Convey Land—Consideration.**—The principal case holds that a parol agreement between a father-in-law and his son-in-law, that he will give his son-in-law a tract of land, supported by no substantial value or meritorious consideration will not be specifically executed, at the suit of the son-in-law, after the death of his wife, against the father's devisee of the land. Neither would such an agreement be specifically executed, under such circumstances, even if it had been in writing; nor would equity have aided a defective conveyance had such a one been made.

Upon the authority of the principal case it was

*See monographic note on "Appeal and Error" appended to Hill v. Salem, etc., Turnpike Co., 1 Rob. 263.

supported by no substantially valuable or meritorious consideration, will not be specifically executed, at the suit of the son-in-law, after the death of his wife, against the father's devisee of the land; neither would such an agreement be specifically executed, under such circumstances, even if it had been in writing; nor would equity have aided a defective conveyance had such a one been made.

Darlington exhibited his bill against John M'Coole the younger, in the superior court of chancery of Winchester, setting forth, that in May 1802, he married Catharine a daughter of John M'Coole the elder, of Frederick county. That, before the marriage, and in contemplation thereof, M'Coole the father wrote him a letter, wherein he promised him a place called The Falling Waters, being a piece of land parcel of the tract on which M'Coole lived, and though
37 *this letter was lost, its contents could be proved; and that, upon his mentioning, at breakfast, the second morning after the marriage, in the presence of his father-in-law and of the family and of the defendant among the rest, that he had to go to Front Royal (in another part of the same county),

held in Reed v. Vannorsdale, 2 Leigh 570, that where a wealthy brother verbally agrees with his brother, who is poor, that if he will forego his intention to move to the West, and move and settle on a tract of land near the residence of such wealthy brother, he will convey the land to him in fee; the agreement was executed on the part of the poor brother but without incurring any expense or loss in so doing: there being neither meritorious nor a valuable consideration to support the agreement equity will not decree specific execution against the heirs of the wealthy brother.

In Jones v. Obenchain, 10 Gratt. 266, it is said, the case of *Darlington v. M'Coole* is no authority on the question involved in the one now under consideration; but it serves to show the impression on the minds of the judges of this court, that where there was a meritorious consideration, meaning thereby a provision for the wife or child, equity will enforce a defective conveyance. To the same effect see the principal case cited in Sayers v. Wall, 26 Gratt. 579.

In Burkholder v. Ludlam, 30 Gratt. 262, it is said, in *Darlington v. M'Coole*, 1 Leigh 36, Reed v. Vannorsdale, 2 Leigh 569, Pigg v. Corder, 12 Leigh 69, Cox v. Cox, 26 Gratt. 306, specific execution was denied; but there is nothing to be found in any of these cases in conflict or at all inconsistent with the decision in *Shobe v. Carr*, 3 Munf. 10. On the contrary the reasoning of the judges in some of these cases would rather seem to confirm the principles of that case. And in the case of *Shobe v. Carr*, 3 Munf. 10, it is held that where a testator having put his son-in-law into possession of a leasehold tract of land and delivered to him the lease, and permanent improvements having been made by his son-in-law with the assistance of the family, and parol declarations by the testator that he had given him the land in consideration of his having married his daughter and to prevent his moving to Kentucky; the son-in-law had an equitable title to the land for the time the lease had to run, and to a release of the legal title upon the heirs or executors, according as the interest conveyed by lease might be greater or less.

Also in *Fram v. Frame*, 32 W. Va. 476, 9 S. E. Rep. 906, it is said: "It may be regarded as settled law in this state and in Virginia that a verbal donee of land—a child—who, under the verbal gift, has taken possession of the land and improved it—has a right to demand in a court of equity a specific performance of the contract by the execution of a deed by the father, thereby consummating his verbal gift. This was so held in *Shobe's Exrs v. Carr*, 3 Munf. 10, decided as long ago as 1811, and this case has been repeatedly followed or recognized as law by numerous Virginia decisions ever since. See *Darlington v. M'Coole*, 1 Leigh 36; Reed's Heirs v. Vannorsdale, 2 Leigh 569; Pigg v. Corder, 12 Leigh 69; Cox v. Cox, 26 Gratt. 306." To the same effect, see, citing the principal case, *Marling v. Marling*, 9 W. Va. 79; *Miller v. Lorentz*, 39 W. Va. 172, 19 S. E. Rep. 395; *Goodwin v. Bartlett*, 43 W. Va. 534, 27 S. E. Rep. 326. See the principal case cited in *foot-note* to *Farrill v. McKinley*, 9 Gratt. 1; *Griffin v. Cunningham*, 19 Gratt. 571. See generally, monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 3 Gratt. 243.

to confirm a contract he had begun with one Vanmeter for a tannery, in which business he intended to engage with prospect of great advantage, the father-in-law said, he need not do that, for he would give him the piece of land called The Falling Waters, to be his property (describing the boundaries), and moreover, that he and his son John would help him to improve it. That M'Coole's declared motive was, to prevent his daughter from removing to a distant residence. That, in consequence of these promises, Darlington relinquished his beneficial contract with Vanmeter, for the Front Royal tannery; was shortly afterwards put by his father-in-law in possession of The Falling Waters, being a piece of land, designated by metes and bounds, containing about thirty-five acres; built dwelling houses on it, sunk vats for a tannery, and improved, held and enjoyed it as his own, until M'Coole, his father-in-law, died in 1815, having by his will devised it to his son, the defendant. And that, though M'Coole, the father-in-law, had never made him any conveyance of the land according to his promise and agreement; yet he had laid off the boundary lines, in the presence of the defendant, his son and now his devisee; and had often declared his willingness to make such conveyance. The bill prayed a specific execution of the alleged promise and agreement of M'Coole, the father, to give and convey the land to Darlington; and that M'Coole, the son and devisee, might be compelled to convey it accordingly.

The defendant, in his answer, denied all the allegations of the bill, both as to the promise of M'Coole, the father, before Darlington's marriage, and the agreement after the marriage, to give him The Falling Waters. He said, that his father, shortly after Darlington's marriage, told him he might have the land in question, as a temporary accommodation *for his family, assisted him in building on and improving it, and suffered him to enjoy it, during his own life; but neither made him any gift of it, nor ever intended to do so.

It was also alleged in the answer, and proved, that, upon Darlington's marriage with M'Coole's daughter, his father-in-law gave him such personal property as he advanced to his other daughters on their marriage: that he afterwards contributed the greater part of the labour and expense of the buildings (which were log-houses) and the other improvements, put on The Falling Waters: that Darlington's first wife, the daughter of M'Coole, died in 1805, leaving one daughter, who was immediately taken into her grandfather's family, and treated and brought up as one of his own children, and was provided for by her grandfather's will, equally with his own daughters: and that Darlington had married a second wife, by whom he had several children.

Of the letter, alleged in the bill to have been written, before Darlington's marriage, by M'Coole, the father, to him, promising to give him The Falling Waters, there was no proof whatever. Neither was there any positive proof of the agreement alleged in the bill, to have been made, at breakfast, the second morning after the marriage; and the members of the family, being examined as witnesses, declared they had heard nothing

of the kind. But several witnesses deposed, that M'Coole, the father, had pointed out the boundaries of the land, and frequently said he had given it to Darlington; and that Darlington had held and enjoyed it as his own, during M'Coole's life. Vanmeter deposed, that, having a valuable tannery at Front Royal, with a large stock on hand, he had entered into a contract with Darlington, before his marriage, to carry on the business in partnership, each to contribute equal stock, and to carry on the business at joint expense and for joint and equal benefit; that he thought, at the time, it would be a very profitable business; that Darlington had a tract of land, by the sale of which he could have

39 contributed his *share of in-put stock, by the time it would have been wanted, because of the large stock Vanmeter had on hand; but before Darlington's marriage, he (Vanneter) received a letter, purporting to be written by John M'Coole the elder, though he did not know that it was in fact written by him, being unacquainted with his handwriting, in which he stated, that he had himself made Darlington an advantageous offer, and urged Vanmeter, to release him from the contract concerning the Front Royal tannery; which Vanmeter, in consequence of that letter, agreed to do, though very reluctantly. And Lewis M'Coole, a son of the elder M'Coole, deposed, that Darlington, shortly after his marriage went to Front Royal; and the witness was told by his father, that Darlington had made a contract with Vanmeter, provided he could furnish a sufficient sum of money to pay for half the stock of the tannery on hand; his father said, he had not the money to furnish him; he hated to part with his child to go that distance; and he thought it would be better to give them a piece of land on The Falling Waters. His father, after the death of Darlington's wife, said he had never made him a deed, and never intended it; but he would probably give the land, or the value of it, to his child.

The chancellor dismissed the bill: and Darlington appealed to this court.

Johnson, for the appellant, insisted, That the agreement between the elder M'Coole and Darlington, that the former would give him the land in question, if he would relinquish his contract with Vanmeter, was proved, by the fact, that Darlington had made a beneficial contract with Vanmeter, and gave it up; by M'Coole's declaration to his son Lewis, that it would be best to give him this land; by his frequent declarations to others, that he had given it to him; and by the fact, that, even after his daughter's death, and after Darlington's second marriage, he had permitted him to enjoy the property without the least disturbance. And,

40 he said, the relinquishment by Darlington, of his beneficial contract *with Vanmeter, was a valuable consideration performed on his part, which made the agreement obligatory on M'Coole; and this performance of the agreement by Darlington on his part, and the possession of the land, given him by M'Coole immediately, and enjoyed for so many years, took the case out of the statute of frauds.

Nicholas and Leigh, for the appellees, submitted, that there was no agreement proved; that, taking the plaintiff's own evidence,

waving all criticisms to which it was obnoxious, and disregarding the evidence adduced on the other side, the most that could be pretended, was that M'Coole had promised, or rather had intended, to give the land, as an advancement to his daughter, with the view of having her settled in his neighbourhood. But, if there was an agreement, there was no consideration, no such act performed by Darlington, no such loss incurred by him, as made it obligatory on M'Coole, in law or in equity, to fulfil the promise, under any circumstances; much more, to convey to Darlington, after his wife's death, property, which he could only have intended to give, if at all, as an advancement and provision for her. According to his own shewing in the bill, he had made no contract with Vanmeter: he was only engaged in a treaty with him: and the evidence, narrowly examined, proves there was nothing more.

BROOKE, President, delivered the opinion of the court. The appellant, in his bill, without noticing the death of his first wife, or the existence of his daughter by her, or his second marriage and his issue by that marriage, claims for himself, a conveyance in fee of the land on which he had settled, on two distinct grounds; first, a promise made him by his father-in-law, by letter before the marriage; and, secondly, an agreement after the marriage, to give the land to him, in consideration of his relinquishing a valuable contract he had made with Vanmeter.

Of the letter before the marriage, there is no proof.

41 *As to the agreement after the marriage, the evidence, taking it most favourably for the appellant, is, that M'Coole gave him the property in question, as far as he could give it to him by parol, and by putting him in possession of it; but there was no consideration for this gift, beyond the parental motive to advance his daughter, and to have her settled in his neighbourhood. There was, in fact, no concluded contract between the appellant and Vanmeter. The bill itself states, that the contract with Vanmeter was inchoate only; and although an attempt was made to prove by Vanmeter, that it was concluded, and that he reluctantly absolved the appellant from it, in consequence of a letter from M'Coole, soliciting him to do so; yet he did not know, that the letter was from M'Coole, and it is lost. It seems clear, from the evidence of Vanmeter and Lewis M'Coole, taken on the part of the appellant, that, according to the statement in the bill, Darlington's contract with Vanmeter was inchoate only, and depended on the appellant's advancing money to the value of half the stock in Vanmeter's tan-yard, and for the employment of half the hands, and the payment of half of all other expenses; which would have required a large sum of money, such as the appellant could have by no means commanded, but by selling a tract of land which he held. So that, if he gave up any thing in consequence of M'Coole's promise, it was an uncertain speculation. The improvements on The Falling Waters, were of a character to induce no pecuniary expenditure; and, such as they were, M'Coole is proved to have contributed two-thirds the labour of making them; and the appellant's portion of the labour of making them, was more than

compensated by the use of the property for thirteen years, or more, free of rent.

In such a case, when the donor has received nothing, and the donee lost nothing; when the chief motive of the gift, a provision for the donor's daughter, is annihilated by her death; and when the father has discharged the moral obligation to provide for her issue; there is nothing to call into action the powers of a court of equity. There is neither a valuable nor a meritorious consideration; without one of which, a court of equity will not aid a defective conveyance, much less enforce a bare agreement, even if it were in writing.

The decree is affirmed.

Salling v. M'Kinney.

February, 1820.

[19 Am. Dec. 722.]

Sheriff—Buying and Selling Office.*—What Contract Now in Violation of Statute.—M'K. sheriff of Scott, farmed his shrievalty to G. whom he appointed his deputy, for a sum in gross, to be paid him by G. who, by the same contract, was to discharge all duties and to take all emoluments of the office: held that such contract is not prohibited by the statute of Virginia against buying and selling offices, and is lawful.

This was a motion made in the circuit court of Scott county, by M'Kinney, late high sheriff of that county, against Salling, his deputy, for the amount of a judgment, which the commonwealth had recovered against M'Kinney in the general court, on account of taxes collected by Salling, which he had failed to pay into the treasury. Salling pleaded several pleas in bar, on which issues were joined, and these issues were tried by a jury; but the jury not agreeing, were discharged, and the cause continued to another term; when the court, dispensing with a jury,† heard the whole case and gave judgment against Salling for 541 dollars 20 cents, with interest from November 12th, 1822, till paid, and costs; spreading all facts proved in the case, upon the record. From this judgment Salling appealed to this court.

The facts in the case were these: M'Kinney was duly recommended and commissioned sheriff of Scott, for the year 1819; but the county court recommended another for the shrievalty for the year 1820, whom the executive refused to commission; and the county court, on its part, refused to recommend M'Kinney; yet it permitted him to qualify, by giving an official bond and taking the oaths of office, and to act as sheriff for the year 1820. In March, 1819, M'Kinney appointed one Gillingwaters his deputy, who being approved of by the county court, executed a bond to his principal, with condition, reciting that he was appointed deputy for the year 1819, and the next year also; and stipulating, that the deputy should perform all the duties of the office, and save his principal harmless. The con-

tract between M'Kinney and Gillingwaters was, that the latter (the deputy) should do all the business and receive all the emoluments of the office, and in consideration thereof, should pay M'Kinney a gross sum of 400 dollars; and he gave him his notes for that sum, and paid him part of it. On the 9th June, 1819, Gillingwaters made a contract with Salling, whereby he farmed to Salling the office of deputy sheriff for both years of M'Kinney's shrievalty, in a particular bailiwick of the county, for the sum of one hundred and twenty dollars, to be paid him by Salling, and Salling was to be accountable to Gillingwaters: he was the sub-deputy of Gillingwaters. There was no evidence, that M'Kinney knew of this agreement between Gillingwaters and Salling, till after the term of office had expired; but on the 10th June, 1819, M'Kinney appointed Salling his deputy, who being approved of by the court, executed his bond to M'Kinney for the due performance of the office; the consideration of which recited, generally, that M'Kinney had appointed Salling his deputy, and stipulated, that Salling should "well and truly execute his duty in his office of deputy sheriff, during his continuance in office, and should well and truly pay M'Kinney all damages which he might sustain, in consequence of the acts of Salling in his office aforesaid." After this, Gillingwaters and Salling executed the duties of the shrievalty for the

year 1819. On the 15th June, 1820, Salling was reappointed deputy, and gave a new bond to the same effect as the former. And on the 11th July, 1820, Gillingwaters was also continued in his office of deputy, and gave a new bond. Salling collected part of the public dues of 1820, and paid it over to Gillingwaters, without M'Kinney's consent or privity, which Gillingwaters failed to pay into the treasury; and the commonwealth recovered judgment against M'Kinney for the whole amount of the defalcation. The motion was grounded on Salling's last bond for the due discharge of his office of deputy.

The case was twice argued, at a former term, first by Leigh for the appellant, and Stanard for the appellee, and again by the same counsel, and by Johnson also for the appellant; but no note of the argument was preserved.

CARR, J. This case presents the question, Whether a contract is legal, by which a sheriff contracts, that another shall exercise the duties of his office, and have all the fees, privileges and emoluments of it, and, in consideration thereof, shall pay to the sheriff a gross sum, unconnected in any manner with the fees of the office? This question depends on our statute, which prohibits the sale of any office, or deputation of office, &c. touching the administration or execution of justice, or the receipt or payment of the public revenue, or any clerkship in a court of record; subjects the persons offending to penalties and disabilities; and pronounces all such bargains and sales, bonds, covenants, &c. utterly void, &c. provided, that nothing in the act shall be so construed as to prohibit the appointment, qualification and acting of any deputy clerk or deputy sheriff, who shall be employed to assist their principals in the execution of

***Sheriff—Buying and Selling Office.**—The principal case is cited in *Foot-note* to Noel v. Fisher, 3 Call 215; Com. v. Tate, 3 Leigh 807, 808; O'Rear v. Kiger, 10 Leigh 627; Holland v. Helm, 7 Gratt. 256; Cecil v. Early, 10 Gratt. 204. The principal case is reported in 19 Am. Dec. 722. See monographic note on "Sheriffs and Constables."

†See Burke v. Levy, 1 Rand. 1.—Note in Original Edition.

their respective offices. 1 Rev. Code, ch. 145, p. 559. This act is taken from 5 and 6 Ed. 6, c. 16, with some difference as to the extent of the law, and also with the exception, that the english statute has no such proviso as ours.

That the enacting part of this law extends to the office of sheriff, is most clear, both from its words and the exception

45 *in the proviso. This was acknowledged on all hands in the argument.

It is settled by many cases, that where an office is within this statute, and the salary is certain, if the principal make a deputation, reserving a less sum out of the salary, it is good; so, if the profits be uncertain, arising from fees, if the principal make a deputation, reserving a certain sum out of the fees and profits of the office, it is good; for in these cases, the deputy is not to pay, unless the profits arise to so much; and, though a deputy, by his constitution, is in place of his principal, yet he has no right to his fees; they still continue to be the principal's; so that, as to him, it is only reserving a part of his own, and giving away the rest to another. But, where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, which must be paid at all events, this is a sale of the office; and a bond for the performance of such an agreement is void by the statute. This construction of the law, settled by numerous english cases (Sir Arthur Ingram's case, Co. Litt. 234, a.; Doct. Trevor's case, Cro. Jac. 269; 12 Co. Rep. 78; Woodward v. Foxe, 3 Lev. 289; 2 Vent. 187; 3 Inst. 148; Layng v. Paine, Willes's Rep. 571; Parsons v. Thompson, 1 H. Bl. 322; Garforth v. Fearon, 1 H. Bl. 327; Law v. Law, Ca. Temp. Talb. 140; 3 P. Wms. 391; S. C. Harrington v. Du-Chatel, 1 Bro. C. C. 124), has also been adopted by this court in Noel v. Fisher, 3 Call, 215, a case which arose before our law, and was decided under 5 and 6 Ed. 6, c. 16, then in force here. It being thus settled, that the office of sheriff is within the enacting part of this law, and that a deputation for a sum in gross is a sale of the office, and void; the case at bar must be clearly within the statute, unless the proviso can receive such a construction, as to repeal the enacting clause wholly, so far as relates to the deputation of the offices of sheriff and clerk. It is contended, that this construction must be given to it; and the tenor of the reasoning on which this idea rests is (if I understand it) the following: The proviso must be intended to have

46 some effect, to withdraw from the operation of *the law, some case or class of cases, which would otherwise be within it. Literally, it imports that nothing in the act shall be taken to prohibit the appointment of a deputy clerk and sheriff, to assist their principals in the execution of their offices; but there was nothing in the act which did prohibit this; and, therefore, there is no function for the proviso taken in the limited sense. We must then enlarge its meaning, till it reach some enactment of the law; as it stands, taken literally, it would make the act read thus: No sheriff shall sell the deputation of his office, provided, however, that this shall not be so construed, as to prohibit a deputation made without a sale.

To avoid this absurdity, where the proviso says, that nothing in the act shall prohibit the appointment, qualification and acting of a deputy clerk or sheriff, we must construe it to mean, that nothing in the act shall prohibit the sale of the deputation of clerk or sheriff.

To this reasoning, I cannot assent. There seem to me several insurmountable objections to it. In the construction of statutes we are told from high authority, that "when the words are doubtful and uncertain, it is proper to inquire what was the intent of the legislature; but where they have expressed themselves in plain and clear words, it is very dangerous for judges to launch out too far in searching into their intent." In the enacting clause, the statute prohibits, in the strongest and clearest terms, the sale of certain offices, and deputations of offices: among these, the office of clerk is expressly named, and that of sheriff so described, that the law embraces it just as clearly as if it had been named. The proviso says, that nothing in the act shall prohibit the appointment, qualification and acting of any deputy clerk or deputy sheriff. How can we understand the appointment, qualification and acting of deputy clerks and sheriffs, to mean the sale of the deputation of these offices? does appointment mean sale? can there be no appointment but by a sale? When the law uses words of known and settled meaning, we must give them that meaning. The word appointment is one

47 of frequent use and determinate *meaning, in the law: many statutes regulate the appointment of deputies (sheriffs, clerks, surveyors and others); and I fancy it would puzzle the research of the most indefatigable, to produce a single instance in which the word is used to signify a sale. When the act meant to forbid the sale of offices, it used plain terms, "no person shall bargain or sell any office, &c." If it had intended in the proviso to except from the operation of the act, the sale of the deputations of clerk and sheriff, was it not natural to have used the same terms, and to have said, "nothing in this act shall be construed to prohibit the bargain or sale of the deputations of clerk or sheriff?"

This construction not only violates the plain language of the law, but the nature of a proviso also; the office of which is not to repeal the enacting clause, but to modify it. The legislature is not to be supposed to intend to contradict, in the latter clause of a law, what they had enacted in a former; but to limit and explain the general words of the enactment. And this explanation is often out of abundant caution, excepting from the operation of the law, expressly, cases which by fair construction would not have come within its range. But here you make the law say, "no sheriff or clerk shall sell the deputation of his office; provided, nevertheless, that nothing in this act shall be so construed as to prohibit a sheriff or clerk, from selling the deputation of his office. If the legislature had used these words, the courts could not have helped it: but is it right to make them speak thus, by a construction which violates the palpable meaning of the words it has used? and this, on the ground solely, that the proviso, will be inefficient, unless you give it this extent?

But if we must look for the intent of the legislature, what was the general object of this law? It is entitled, "an act against the buying and selling of offices." The preamble to the english statute, from which ours is taken, states the objects to be, to avoid corruption &c. and to the intent, that persons worthy and meet to be advanced to the place where justice is to be administered, or
 48 any service of trust executed, *shall hereafter be preferred to the same, and no other &c. In *Layng v. Paine*, chief justice Willes, in delivering the opinion of the court, says, there were two principal reasons for making that statute; 1. that offices might be exercised by persons of skill and integrity; and 2. that they might take only the legal fees; for (he adds) "those who buy their offices, will be apt to make more than their legal fees, according to what is said 3 Inst. 148, they that buy will sell." Now are not the offices of clerk and sheriff within the mischief and the reason of this statute, as well as the letter? Is it not important to the community, that these offices should be exercised by persons of skill and integrity? Do they not furnish the greatest facilities, and the strongest temptations, to imposition and extortion? What officer is there, so closely and intimately connected with the people, in all their civil relations, as the sheriff? In the collection of taxes, the service of process, the levying of executions, the sale of property, and in various other ways, he has it in his power to harass and oppress them, by means so easy of practice, so difficult of detection, as to offer the strongest possible temptations; so strong indeed, that none but the firmest and most upright minds can be expected to resist them. For the judicious selection of this officer, the law has shewn itself very solicitous, however its provisions may have been neglected or perverted in practice. The justices of the peace, we know, are appointed for their good character, and form a most respectable class of the community: out of this body, the court of every county is directed, annually, to nominate to the governor three persons, one of whom, being approved by the governor with the advice of the privy council, shall be commissioned to execute the office of sheriff. What greater caution could the legislature have observed, to ensure the filling this office by men of skill and honesty? And can we suppose, that this same legislature intended, that so soon as the sheriff was appointed, he should set up his office for sale to the highest bidder? That when passing
 49 a law, prohibiting, under severe penalties, the sale of offices, which *in any wise touch the administration or execution of justice, or the receipt or payment of the public revenue, they should, by a proviso, mean to say, nothing in this act shall prevent a sheriff from selling his office to a deputy? and that, too, when the law only says, nothing shall prevent his appointing a deputy to assist him? What is the natural effect of this license to sell? The sheriff considers the office as a source of profit merely; as something given him to make money by: and the more he can make by it, the better. He sets it up for sale: When a bidder offers, what are the considerations which influence him? Does he ask, which among all these will administer the office with most skill and

integrity, with least oppression, extortion, and vexation to the people? By no means: but, which will give me the highest price, and best secure me against the consequences of his misdeeds, should they be discovered? Having secured these points, he makes over his office, and divests himself, so far as he can, of all its duties and its cares. What is the view of the buyer? Not, assuredly, to benefit the people, but to better his own condition; to make money. He has probably been screwed up, by competition, to a high price, and is turned loose upon the people, not merely to indemnify himself (for no man will work for nothing), but to make the most of his bargain; and, having bought for gain, an office presenting so many tempting opportunities for extortion and speculation, who can wonder, that he should seek to improve them to the utmost? And thus would be violated the second great object of the statute against buying and selling of offices, which chief justice Willes states to be, that the legal fees only should be taken; for those who buy their offices will be apt to make more than their legal fees, according to what is said in 3 Inst. "those that buy will sell." Thus, whether we consult the plain language of the law, or the intention of the legislature, it is equally clear to me, that the sale of the deputation of the offices of clerk and sheriff, so far from being sanctioned and legalized, is expressly prohibited.

50 *It was said, that while the enacting clause prohibits the sale of the offices of clerk and sheriff, the proviso only permits the sale of the deputation of those offices, and therefore modifies, rather than contradicts, the clause. But does not the clause forbid the sale of the deputation, as well as of the office itself? If you permit a sheriff to sell out his office, to any one, whom he shall make his deputy, I should like to know, what kind of a sale of his office it is, that you prohibit? or of what practical use such prohibition can be?

It was also contended, that the history of sheriffs, traced from the earliest annals of the state, adds strength to the opinion, that the proviso intended to legalize a sale of the deputation of the office; by shewing, that this office was intended to pass in rotation through the magistracy of the counties, as a reward for their various services; which would be frustrated, unless they could farm their offices out, as it was well known, that both from their age, when the office usually came to them, and from their personal unfitness in many cases, they could neither execute the office themselves, nor superintend its execution. And for these positions, the laws of the colonial government and of the state, and the practice under them, were referred to.

Let us first look to the laws. I deny that, by them, the office was either directed to pass in rotation, except for a short time, or given as a reward. There is in 1 Hen. Stat. at large, p. 224, an extract, taken from a manuscript book, stating, that in 1634, the country was divided into eight shires, &c. And it is added, "And, as in England, sheriffs shall be elected to have the same power as there." This is the first notice of sheriffs in our laws. In the same volume, p. 392 (anno 1655) it is enacted, "that the commissioners (justices) of every county, shall recommend

three or more to the governor and council, who shall elect such sheriffs, out of those so recommended, as they &c. shall think most meet and fit for the place." The first act I can find, confining the office of sheriff to justices (then called commissioners) is in 1660-1, 2 Hen. Stat. at large, p. 21, 51

*and the second is 1661-2, Id. p. 78. And the reason assigned for it in the last act, is worthy of notice: "Forasmuch as the commissioners of county courts are, by the laws of this country, answerable for the levies and entreatments of each county, of which the sheriff is usually collector, be it therefore enacted, that none but one of the commissioners of each county shall be sheriff of the county; and further, that the commissioners shall exercise the said office, successively, as they hold their places in commission, every one a whole year and no longer." Here two things are remarkable: 1. the office was not confined to the magistracy by way of reward; 2. they were to take it in succession. This act seems to have remained in force, till 1705 (3 Hen. Stat. at large, p. 246) when a law passed, enacting (among other things) that the court of every county shall yearly present to the governor, a list or recommendation of three such persons (being justices) in the same county court, respectively, as they shall think most fit and able to execute the office of sheriff &c. Here, we find, the principle of the office passing in rotation among the justices expressly repealed, and the courts directed to recommend to the governor three such persons, being justices, as they shall think most fit and able to execute the office of sheriff. And this principle of rotation, thus expressly repealed, has not been revived, nor has it received the least countenance from any succeeding law. On the contrary, from the passage of the above law to the year 1748, upwards of forty years, the principle of selecting persons for their fitness and ability, remained express law, and has, in my opinion, given the rule which ought to have governed ever since. For, though the law of 1748 (which has been followed in all the subsequent revisions) says, the justices shall annually present to the governor a list of three persons of their body (omitting the words, "such persons as they shall think most fit and able"); yet, as the principle of rotation had been expressly repealed, I cannot see what rule ought to have guided their selection, but the superior fitness

52 and ability of the persons *chosen; and this, more especially, if it should appear that the office of sheriff was not given to the justices for their benefit or as a reward for their services. This, I think, does appear; 1. from the law before quoted, which assigns a different reason for confining the office to the justices; and 2. from the consideration, that in that early day, when the counties were thinly inhabited and poor, the office was rather a burthen than a benefit: a conclusion greatly strengthened by the fact, that in 1710, the legislature found itself obliged to compel the acceptance of the office, by inflicting the heavy penalty of five thousand pounds of tobacco, on any person commissioned, who should refuse to act; unless such person should make oath, before the court of the county, that he hath

used his best endeavour, truly and bona fide, without any covin or collusion, to get security for his performance thereof, and that he could not obtain such security. It is further provided by the act, who hath served as sheriff of a county, shall be liable to the forfeitures of the act, for refusing to serve a second time, unless every person named in the commission of the peace, hath actually after him served in the office of sheriff, or paid the fine for refusal. This act continued in force, I believe, till the revival of 1792, the penalty being reduced from time to time. Now, I ask, can better evidence be wanting, to show, that at the passage of this law, the office was a burthen rather than a benefit? Do we find it necessary to compel by penalties the acceptance of favours, benefits or rewards? To make a man purge himself, by oath in open court, of the suspicion of attempting to evade the acceptance and enjoyment of these rewards, by covin and collusion? If the office had been profitable, would we have seen a proviso exempting a man who had served once, from forfeiture for refusing a second service, unless every other justice had also borne the burthen since his service? These considerations satisfy me, that when the law passed confining the office to the justices, it was a thing rather to be avoided than sought after, and not given to them as a reward for services,

53 *but imposed upon them as a burthen.

That in the lapse of years, and the progress of society, the office has become valuable, can certainly have no effect upon the original intention of the legislature. That the practice (since my day at least) has been to appoint the justices to the office in rotation, I admit; how far back it commenced, I know not. As a commentary on the law, it would have weight in a doubtful case, but where the law is clear it must speak for itself.

It was also contended, that though the sale of the sheriff's office be not permitted by law, yet it has been the general idea, that it was so, and the universal practice to farm it out; and that this common error makes it lawful. I cannot assent to this position. The sale of the deputation of this office is expressly forbidden by the statute, unless the proviso excepts it. I have shewn it does not. Here, then, we have the statute law prohibiting the sale under a severe penalty, and declaring the bond given as the price of it void: and we have the law of common error, holding the sale and the bond good. Which shall we follow? We cannot serve two masters. To me it seems, that we can know no law but that derived from the law-making power; and that, in opposition to such laws, error, however common, however hoary, can impose on us no obligation. We ought, in such cases, to examine the law thoroughly, and see clearly, that the common opinion is erroneous, before we decide: but, having done this, and finding that we must either violate the law or correct the error, I cannot conceive how we should hesitate in our course. And this, I think, has been the opinion of this court. No error could be more prevalent, than that one bond would answer for the two years of the sheriff's office; but this court did not, therefore, shrink from correcting it. It was equally

the general opinion, that you might fine a sheriff, toties quoties, for failing to return an execution; and this was the constant practice: the question, however, at length came before this court, and the error was corrected. It was said, in the argument of

54 the case of Wernick and M'Murdo, also, that the opinion and *practice were old and general, that an administrator de bonis non could sue the representative of a former executor, for assets wasted or converted by him: this court, however, took up the question upon the law, not of public opinion, but of the land; and decided, that he could not. Other cases, I have no doubt, might be mentioned.

It was also said, that if we decide, that a deputation of the office of sheriff for a sum in gross, is a sale, it will have no other effect than to add four words to the bargain, and make the price payable out of the profits. What consequences may follow our decision, is not, as I conceive, the exact question before us. That question is, whether by such deputation for a gross sum, the law is violated which forbids a sale? If it be, we must say so, though the heavens should fall. That such deputation is a sale, was admitted as settled law; and the cases proving it are too numerous to cite. The law, then, pronounces the contract void, and all bonds given under it. If this law may be easily evaded, that can be no reason for our refusing to execute it, though a proper ground for amendment by the legislature.

Upon the whole, I think both bonds, that of the deputy and of the sub-deputy void; and that the motion being on them, cannot be sustained; and, therefore, that the judgment of the court below should be reversed.

GREEN, J. This case presents the question, Whether the respective contracts between M'Kinney and Gillingwaters, and the latter and Salling, were void under our statute prohibiting the buying and selling of offices?

That statute relates to all such offices, or the deputations of them, or of any part of them, as in any wise touch or concern the administration of the executive government, or the administration or execution of justice, or the receipt or payment of the public revenue, or any clerkship in a court of record; and prohibits all persons to bargain or sell

55 the same, or to receive or take any thing directly or indirectly *for the same, or for a vote in appointing thereto, or to take any promise, agreement &c. for the payment of any thing for the same, or for a vote in appointing thereto, under the penalty of being incapable of appointing, or voting for the appointment, to any such office or deputation thereof, or of any part thereof, and of being disabled to hold the office, in virtue of which they hold the right to appoint, or to vote in the appointment to the same, and of being amerced and imprisoned, and if a member of the assembly, of being expelled, and incapable of being afterwards elected. And every person giving or paying, or making a promise, agreement &c. to give or pay, anything for the appointment, or for a vote in the appointment, to any such office or deputation thereof, or of any part thereof, is declared incapable of serving in any such office. It moreover

declares, that every such bargain, sale, promise, agreement &c. shall be void: with two provisos: 1. that nothing therein contained shall be so construed as to prohibit the appointment, qualification and acting of any deputy clerk or deputy sheriff, who shall be employed to assist their principals in the execution of their respective offices; 2. that all acts done by any person so offending, by authority or colour of the office or deputation thereof which ought to be forfeited, before he be removed from the office or deputation, shall be valid in such like manner as if the act had never been made.

This statute was taken literally from that of the 5 and 6 Ed. 6, c. 16, with the exception of the proviso in our act in respect to deputy clerks and sheriffs, and of offices touching the administration of the executive government, which are not in the english statute, and of many offices embraced in that which are not touched by our act, none such existing here. The settled construction of the english statute, is, that whenever the agreement is that the deputy shall do all the duties, and receive all the emoluments, of an office, the profits of which are uncertain, and depending upon fees, and shall in consideration thereof pay, or agree to pay, a gross

sum to the principal, it is a sale 56 prohibited by the statute. *But if he only engages to pay a stipulated sum out of the fees, it does not fall within it. And this was the construction adopted by this court in the case of a sale of the deputation of the office of sheriff, in *Noel v. Fisher*, 3 Call 215, a case which arose upon a transaction before our statute was enacted, and when the english statute was in force here.

There can be no doubt but that the enacting part of the statute extends to the office of sheriff, which emphatically touches and concerns the execution of justice, and the receipt and payment of the public revenue. The only question is, Whether the deputation of that office is wholly excepted out of the enacting clauses by the proviso?

The literal terms of the proviso import, that only the case of a deputy employed to assist the principal in the execution of his office, and not one employed to do the whole of its duties, is intended to be excepted from the operation of the enacting clauses. Yet, if the proviso was expunged from the act, the employment of a deputy to do the whole of the duties, would not be prohibited. And it is contrary to the nature of a proviso to enlarge the operation of the enacting clauses. To employ a deputy to do the whole business of the office, paying him a fixed sum, or giving him all its emoluments (except a given sum to be paid by him out of them), as a compensation for his services, would, therefore, be the employment of a deputy to assist his principal, within the meaning of the proviso. But there was no occasion for any proviso, to except such a case from the enacting clauses, since without the proviso, the case would not fall within the prohibitions of the statute. The only case in which a deputation of the office could come within the enacting clause, is that where the deputy paid or agreed to pay for it, a gross sum, at all events, and independently of the amount of the fees: and if the proviso does not except such a case, it has no effect what-

ever. For, in that case, the statute would, in respect to the deputation of the office of sheriff, read in effect thus: No sheriff shall sell the deputation of his office, provided
57 however, that this shall not be *so construed as to prohibit a deputation made without a sale; which would be absurd, unless there were some doubt, whether the office could be deputed or not, and the proviso was inserted for greater caution, and to sanction deputations which were not contrary to the enacting clause. But there was no shadow of doubt upon that point; for the office of deputy sheriff had been recognized by our statutes, and regulated from the earliest periods of our legislation; and so the office of deputy clerk was also recognized, and only a few years before an oath prescribed to be taken by him, before he could be permitted to act as such.

It was argued, that the offices of clerk and sheriff, and deputations of them, being embraced within the enacting clause, especially that of the former, which is mentioned by name, a construction which would exempt the deputations of them from the operation of the statute, would give to the proviso, not the effect of modifying the general provisions of the enacting clause, but of taking from its operation entirely, one of the cases at least which was embraced by it in express terms, that of the office of clerk of a court of record. A particular attention to the frame of the act, which follows literally that of the english statute, in which there is a proviso excepting certain offices, will shew, that such would not be the effect of that construction. It begins with prohibiting the sale of any office or offices, or the deputation of any office or offices, or any part or parcel of any of them, or the receiving money &c. for any office or offices, or the deputation of any office or offices, or of any part or parcel of any of them, or for a vote in appointing to any office or offices, or the deputation of any office or offices, or any part or parcel of them; and then describes the offices, as being those only which shall in any wise touch &c. The general object of the act being to prohibit the sale not only of offices of a particular description, but the deputation thereof, or of any part thereof, with only two exceptions, not of the offices, but of their deputations only, the most simple method was to announce, in the first instance, a general prohibition, *and then the particular exceptions, not of any office particularly designated in the several prohibitions, but of its deputation only. Thus, notwithstanding the proviso, the offices of clerk and sheriff may be sold contrary to the statute, or at least a vote in the appointment to them may be so sold; as if any justice of the peace should receive a reward for giving his vote in the appointment of a clerk, or the nomination of a sheriff; or any judge for the appointment, or a vote in the appointment, of any clerk; or a member of the executive, for a vote in the appointment of a sheriff. These cases would fall clearly within the denunciations of the statute.

These considerations would incline me strongly to the opinion, if we were not to look beyond the terms of the statute itself, that the sale of the deputation of the offices of clerk and sheriff, was not embraced by the

statute. Other circumstances lead to the same conclusion.

One of these is to be found in the history of the office of sheriffs in Virginia. Until 1655, sheriffs were elected. An act was then passed, directing that the justice of the peace in each county (then called commissioners), should nominate three or more, out of which the governor and council should commission one as sheriff. In 1660, it was enacted, that the office should be conferred upon the commissioners in succession. And so the case remained until 1705; when it was enacted, that no person but a justice of the peace should be appointed sheriff, and that the county courts should annually nominate three justices, one of whom should be commissioned, and that a sheriff might be continued for two years and no longer, the former laws, from 1657 downwards, having prohibited any sheriff, or under-sheriff, to serve for more than one year. In 1710, a heavy penalty was imposed upon any one, who was commissioned, and refused to act. This penalty was, from time to time, gradually moderated and finally dropped at the revival of 1792.

Although the laws subsequent to 1705, imposed upon the county court and executive, no obligation to nominate and
59 *appoint the justices in succession to the office of sheriff; yet the invariable practice has always been, and still is, to pursue that course (which is considered as a matter of right), unless there be some very serious objection to the propriety of appointing the senior justice who has not already held the office. The office, although formerly burthensome, and imposed upon the justices under a heavy penalty, has long since been of some value, and considered as a reward and the only one given to them for their important public services. These justices have been uniformly selected from the most valuable and respectable classes of our community, have borne the chief burthen of the administration of justice, and the whole of that of the internal police of the country. They have, in a great degree, composed our legislative bodies. The office of sheriff, devolving on them in succession, generally comes to them at an advanced age, and when they are unfitted, from that cause, as well as from their previous course of life, and other occupations, to discharge in detail the duties of the office, or even to superintend personally the discharge of those duties by others: and they have, as was to be expected, almost invariably, so far as I am informed, and as indeed is perfectly notorious, formed their offices to others, without being conscious of violating any law, either municipal or moral. This practice must have been well known to the legislature, which enacted the law in question. And this induces a belief, that the proviso was intended to except the deputation of this office from the general terms of the statute. In a doubtful case, the state of things, to which the provisions of a statute were intended to be applied, may properly be resorted to, as a means of ascertaining its true construction.

Another circumstance entitled to some weight, is, that the statutes of 4 Hen. 4, c. 5, and 26 Hen. 6, c. 10, which expressly prohibited a sheriff to farm (that is to sell the dep-

utation of his office), were in force here, when the legislature were engaged in the business of re-enacting such of the british statutes, as it was thought fit to adopt into our *code, as preparatory to the abolition of all the english statutes. And though the statute of Ed. 6, was in substance enacted here, and all our own statutes, respecting the office and duties of sheriff, were also revised and brought into one; yet it was not thought fit to adopt the prohibition of the statutes of Hen. 4, and Hen. 6, of farming the office of sheriff. On the contrary, in re-enacting the statute of Ed. 6, which, whilst it would have prohibited the farming, but not the deputation without sale, of the office, if the proviso in question had not been inserted, they inserted that proviso, for no purpose that I can perceive, but to prevent the operation, which the statute would otherwise have had, in prohibiting the farming of the office.

If, however, these circumstances are not sufficient to justify the conclusion, that, upon the literal construction of the statute the sale of the deputation of the office of sheriff, is excepted from its provisions; still the construction is so doubtful, and the practice in question has so long prevailed, and is so extensive, and the consequences of holding it illegal so extensively ruinous, that if there be any case, to which the maxim communis error facit jus can apply, this is surely one. That maxim has been held in England to sanction practices even expressly against the statutes: *Clay v. Sudgrave*, 1 Salk. 33; *Walton v. Spark*, Comb. 321; *Herbert v. Binion*, Roll. Rep. 223; *East Ind. Company v. Skinner*, Comb. 342.

If this practice were held to be illegal, and the original contract of deputation held to be void, all collateral contracts of indemnity, or otherwise founded on it, as their consideration, would also be void, and the parties subjected to the high penalties imposed by the law; and, in both respects, very great numbers of persons would be involved: while such a decision would have no effect whatever in preventing the future mischief, which might arise from the practice; since it would only serve to admonish the parties of the necessity of adding to the terms of their contracts, four words *(out of the profits), which would not vary the substance of the contract, while it would make it unquestionably valid.

If I am right in these views, the argument, that the sale of public offices is malum in se, and against the principles of the common law, and amount to bribery and extortion, is sufficiently answered.

Upon the whole, I think the contract between M'Kinney and Gillingwaters was valid; and that between the latter and Salling, whether valid or void, can in no way affect M'Kinney, since he was not privy to it. All that we can infer from the facts in the record, is, that M'Kinney having sold the deputation of his whole office to Gillingwaters, the latter substituted Salling to a part of it, and M'Kinney at his instance admitted the latter as his deputy; he giving surety to M'Kinney, to indemnify him against any loss arising from his acts as deputy, and not to Gillingwaters

to indemnify him. Salling was therefore bound to see that the revenue collected by him was paid into the treasury, so as to indemnify the high sheriff, and paid it over to Gillingwaters at his own peril. The judgment should be affirmed.

COALTER, J., and CABELL, J., concurred.

BROOKE, President. I do not think it of any importance, to inquire into the history of the shrievalty in Virginia, or to ascertain from it, when and whether it was a valuable office, or in what degree it was intended as compensation to the magistrates of the counties; as very little if any light is to be borrowed from those topics, to illustrate the construction of our statute against buying and selling offices, passed in 1792, and which (with the exception of the 4th section) is a copy of the 5 and 6 Ed. 6, then in force here. That it was the practice to sell the deputation of the office of sheriff, either for a gross sum, or a sum to be paid out of the fees of the office, at the time the act of 1792 was passed, there can be no doubt. The first section of that act disables the persons holding the offices therein described, from holding them, *who shall bargain or sell any office or offices, or receive or take any money, fee or reward, or any profit, directly or indirectly, or take any promise, agreement, covenant, bond or assurance, for any office or offices, or the deputation of any office or offices, or any part or parcel of those which shall in any wise touch or concern the administration of the executive government, or the administration or execution of justice, or the receipt or payment of the public revenue, by declaring, in the latter part of the section, that every person, so offending, shall be incapable of appointing or voting for the appointment to such office, and shall be adjudged a disabled person in law &c. plainly, and in terms, including and interdicting the deputation of, or appointment to, the office of deputy sheriff, among others, for any fee or reward &c. The second section, corresponding with the first, disqualifies the person, receiving the deputation or appointment of such offices, on the terms interdicted in the first section, from holding or serving in such offices. And the third section declares, that such bargain, sale, promise, bond, covenant, agreement or assurance, (referring to all those interdicted in the first section,) shall be utterly void and of no effect. And then comes the proviso in the fourth section, on the construction of which the case before us depends: it is, that nothing in the act contained, shall be so construed as to prohibit the appointment, qualification and acting of any deputy clerk or deputy sheriff, who shall be employed to assist their principals, in the execution of their respective offices. To give to this section no effect at all, would be a monstrous construction of the act. Though it is admitted, that examples may be found in some of our statutes, in which the legislature, for greater caution, have, by a proviso, excepted a case not before in the act; yet no example can be found, in which a case plainly within the terms of the statute, has been held to be unaffected

by a proviso, obviously (as in this instance) intended to take it out of the act, upon any construction of the act founded on its policy, and not on the terms of the proviso.

63 Such an example would justify the *court, in almost any case, in departing from the plain letter of a statute, and giving to it a construction, drawn from what it might suppose a wiser and better policy.

The first section of the act plainly interdicts the buying and selling a large description of offices, including that of deputy sheriff; an office which, it must be admitted, it was the practice to sell, under the existing restrictions upon the abuse of the power, not altogether applicable to other offices, viz. the control of the law, which requires an oath to be taken by the deputy sheriff in open court, and of the court also, which might for good reasons object to his qualification. And to except this office from its operation, and also that of deputy clerk, was not so violent an outrage on the whole policy of the first section as seems to be supposed. To insist, that the proviso means only to except the sale of such office for a sum to be paid out of its fees, would be to give it no effect; as such sale was not within the first section of the act. It was known to the legislature, when the act was passed, to have been so decided by the english judges, on the statute 5 and 6 Ed. 6, from which it copied the section. But the proviso, in its terms, is not susceptible of such an ineffectual construction of its meaning: in it is employed the very language of the first section. It is not to be so construed, as to except the naked appointment &c. of an deputy clerk or deputy sheriff, no appointment of either being prohibited by the first section (but on the contrary indirectly provided for) unless made for fee, reward &c. In terms, too, the proviso applies to the third section, which makes void all bargains, sales &c. Its terms are, that nothing in this act contained (including all its sections) shall be so construed &c. plainly, I think, excepting from the act, the operation of the third section also on bargains, sales &c. entered into for the office of deputy sheriff.

The decision in the case of Noel v. Fisher, in this court, if it can have any influence, is favourable to this construction of our act. That decision was on the english statute, from which the first three sections in our statute are substantially

64 *copied. It was in a case arising before the passage of our act of 1792. It pronounced a bond, taken for the office of deputy sheriff, for a gross sum (not to be paid out of the fees of office), to be void, as the english courts had before done, on the statute of Ed. 6. And it can hardly be doubted, that, though that decision was after our statute upon a case arising before it, the law of it was well known to the legislature from the english decisions long before; and it is not conceivable, that in the fourth section of our act (the proviso), it meant to take a case out of the operation of it, which had never been considered as within the act of Ed. 6, but the contrary, by the english judges. I think such a con-

struction inadmissible on every ground, and that the case before us is within the proviso; and that, therefore, the judgment must be affirmed.

Judgment affirmed.

Buck v. Fouchee and Wife.*

February, 1829.

Pleading—Plea of Actio Non—Conclusion—Case at Bar.—Sci. fa. by husband and wife, upon a judgment recovered by wife *bum sola*, suggesting that since rendition of the judgment, the wife had intermarried with the husband. Plea, *actio non*, because at the date of the emanation of the sci. fa. the wife was not married to the husband as suggested in the writ: concluding to the country. And plea held naught, upon general demurrer: 1. because the matter of it is properly pleadable in abatement only, not in bar; 2. because it neither distinctly negatives the fact suggested in the writ, nor affirms any matter to avoid the action; and 3. because, instead of concluding with a verification, it concludes to the country.

William Fouchee and Mildred his wife sued out of the circuit court of Frederick, a scire facias against Thomas Buck and Anne his wife, dated the 14th November 1822, and returnable at the rules, the first Monday in

December following; which, reciting 65 that the said Mildred had, in *October 1821, recovered by the judgment of the said court, 1500 dollars damages for slander uttered by the said Anne, and 133 dollars for costs of suit, and "that since the rendering of the said judgment, the said Mildred had intermarried with the said Fouchee," and that execution of the judgment yet remained to be made, required the said Thomas Buck and Anne his wife to appear at the rule day aforesaid, and shew cause, if any they could, why Fouchee and wife should not have execution of the said judgment &c.

The scire facias was duly executed and returned; and, at December rules 1822, a conditional judgment was entered in the office against the defendants, for the debt in the writ mentioned.

At May term 1823, the death of the defendant Anne was suggested on the record, and the writ abated as to her: And on the motion of the defendant Thomas Buck, the conditional judgment entered at the rules, was set aside; And thereupon,

He filed a special demurrer to the scire facias (wherein it was called a declaration) shewing for cause, that the plaintiffs alleged in the scire facias, a marriage between themselves, without stating when or where it was solemnized. This demurrer was overruled by the court.

And he pleaded, 1. *nul tiel record*; to which the plaintiffs replied generally; and the court, on inspection, found that there was such a record.

2. He pleaded a special plea, in these words, viz: "And the said defendant, by leave of the court &c. for further plea &c. says, that the said plaintiffs ought not to have or maintain their action aforesaid thereof against him; because he says, that at the date of the emanation of the said scire facias, the said William Fouchee was not married to the said Mildred, as is al-

*The principal case is cited in *Carthrae v. Clark*, 5 Leigh 275, 278, 280.

leged in their declaration; and of this he puts himself upon the country."

To this second plea, the plaintiffs replied, by way of estoppel, that the plaintiff Mildred recovered the judgment
66 *against Thomas Buck and Anne his wife, at October term 1821; that, on the 11th May 1822, the plaintiff Mildred sued out a *capias ad satisfaciendum* against Buck and wife, upon which Buck being taken in execution, he surrendered property in discharge of his body, and gave a forthcoming bond for the property, with one Blakemore his surety; and, that a motion being made, at October term 1822, for an award of execution on this forthcoming bond, Buck and Blakemore, his surety, resisted the motion, and moved the court to quash the bond; and the court did accordingly quash the bond, and the execution in consequence of which it had been taken, "it appearing to the satisfaction of the court, as had been insisted by the counsel for Buck, that the plaintiff Mildred, soon after the rendition of the judgment upon which the execution was issued, intermarried with William Fouchée, and was at the time the execution issued, and at the time the forthcoming bond was taken, a feme covert, and that a *scire facias* ought to have been awarded against the said Thomas Buck and Anne his wife, before execution on the said judgment could regularly be issued." The replication sets forth all these proceedings, at large in *hæc verba*, and prays judgment, if Buck be not thereby estopped from pleading the matter of his second plea.

To this replication, Buck demurred generally: the plaintiffs joined in the demurrer: and the court held that the law was for the plaintiffs, and gave judgment for the debt in the *sci. fa.* mentioned. And Buck appealed to this court.

The cause was argued at a former term, when only three judges were present, by Johnson for the appellant, and Stanard for the appellee; and the judges, then sitting, were of opinion, that the judgment ought to be affirmed; but, at Johnson's instance, they directed that the cause should be argued again before a full court. It was argued again, by the same counsel at the present term. Both arguments preceded the appointment of the reporter, and no note of them was preserved.

67 *GREEN, J. The real questions in this cause arise out of the second plea, alleging that the plaintiff was not married at the time of the emanation of the *scire facias*, the replication thereto, and the general demurrer to the replication, which leads us up to the first fault in the pleadings.

There was, indeed, a special demurrer to the *scire facias*, for the want of an allegation of the time and place of the suggested marriage of the plaintiffs, which will be noticed, incidentally, in considering the first objection to the plea; which is, that it pleads in bar matter which goes only in abatement. This, if true, is an error of substance, and fatal upon a general demurrer. To notice a few of the many adjudged cases to that effect: *Isam & Paget v. Hitchcock*, Cro. Eliz. 202; *Justice v. White*, 1 Mod. 239; *Wallis v. Savil*, Lut.

41; *Crosse v. Bilson*, 2 Ld. Raym. 1016. In these cases, matters going only in abatement, being pleaded in bar, and the pleadings terminating in general demurrers, judgments were given against the defendants for that cause only, and for the reason assigned by chief justice Holt, in the last mentioned case, that a plea in bar, admitting that the suit is well brought, and opposing nothing but matter in abatement to the plaintiff's demand, judgment final should be given for the plaintiff, as in case of *nil dicit*, or any other plea containing no matter of defence.

All the elementary writers and reported cases which I have seen, treat the matter of this plea, when pleaded to an action by husband and wife, as going in abatement only; and I have met with no suggestion, any where, to the contrary, which is entitled to the least respect. 1 Chitt. plead. 441; Tidd's prac. (old edi.) 179; Com. Dig. Abatement, E. 6; 3 Instruct. Cler. 69; Theloall's Dig. lib. II. c. 2, § 8, (referred to in Comyns *ubi supra*, and in 4 Vin. Abr. Baron and Feme, C. b. pl. 9, p. 184, and citing 11 Ed. 3, Brief, 476,) year book 39 Ed. 3, 32 (cited by Comyns); Alleyne and wife v. Grey, 1 Show. 50; 2 Salk. 437; Comb. 131, in which the matter was pleaded in abatement, as appears by Comberback's report of the case; as it was in *Bickerstaffe and wife v. Percy*, 2 Lev. 207; 3 Keb. 810, as appears by Keble's report. In Theloall's Dig. lib. II. c. 2, § 12, (citing 7 H. 6, 13, and 50 Ed. 3, 15,) it is said, "so in assize by baron and feme, or debt, or trespass, not his feme is a good plea to the writ: but in dower, or appeal of the death of her husband, it ought to be ne unques accouple in lawful matrimony with the deceased;" and *Ibid.* § 13, (citing truly 11 H. 4, 13). "In appeal by baron of the ravishment of his feme, it was pleaded ne unques accouple &c. and the plea was accepted." 4 Vin. Abr. Baron & Feme, C. b. pl. 23, 24, p. 186.

These are all the reported cases that I have met with, in which this matter has been pleaded to an action by husband and wife, except those of *Machell and wife v. Garrett*, 3 Salk. 64; 12 Mod. 276, and *Jones's case*, Comb. 473, the reports of which do not inform us, whether the pleas were in abatement or in bar. The case, however, of *Blake v. Dodemead and wife*, 2 Ld. Raym. 1504, in the decision of which the courts of common pleas and king's bench concurred, is decisive of this question. There, to a *scire facias* by husband and wife, upon a judgment obtained by the wife *dum sola*, and which suggested the intermarriage of the plaintiffs after the judgment, without stating the time or place of marriage, the defendants demurred specially for that cause; and judgment was given for the plaintiffs; the court holding, that although all material facts, which go to the point of the action, must be pleaded with a venue, yet that such as go only to the person of the plaintiff, or to the point of the writ, need not be so stated, they being only in abatement; and that the question, whether married or not, was matter of the latter character.

Upon this mass of uncontroverted evi-

dence of the uniform opinions of the profession upon this subject, from the time of Ed. 3, downwards we may safely conclude, that the plea of never married, to an action by husband and wife, in personal actions at least is only proper in abatement without going into the large field of inquiry as to

69 the grounds of distinction, *upon principle, between matter in abatement and matter in bar. I shall only add, that it is a settled rule, that the question, whether one suing in autre droit (as an executor or administrator) be entitled to the character he assumes, is a matter in abatement only. And a husband, suing with his wife for her choses in action, sues in her right only; for if he die before recovery, the right and action survive to her; or if she die, he can neither claim the subject, nor prosecute the action, as husband. And this distinguishes the case of a husband and wife suing for her property, from those of a widow suing for her dower, or a wife appealing another of the death of her husband, or a husband appealing another of the ravishment of his wife, in which they sue in their own right, and the marriage, and that a lawful marriage, is an indispensable ingredient in their title, the want of which goes in bar of their suit; while, in the other case, a marriage in fact, whether lawful or not, is sufficient; as was decided in several of the cases before cited, Alleyne and wife v. Grey, Jones's case, and Machell and wife v. Garrett.

But suppose this matter might be properly pleaded in bar, the plea is liable to several other objections, which are fatal upon general demurrer. The scire facias suggests a marriage after the judgment and before the emanation of the writ. The plea is, that the plaintiffs were not married at the time of the emanation of the writ. These allegations are not inconsistent with each other, and the last does not negative the first; for there might have been a marriage after the judgment, as suggested in scire facias, which might have been dissolved by a divorce before the emanation of the scire facias, and so the plaintiffs not married at the date of the scire facias, as alleged in the plea. And this must be considered as the effect of the plea; for if it was intended to deny the fact of the marriage, the plea should have averred that the plaintiffs were never married and might then have properly concluded to the country, since then there would have been a direct affirmative and negative, in respect to the same fact. When a plea is

70 equivocal, it is to be taken *most strongly against the pleader, 1 Chitt. plead. 521. The scire facias did not suggest a continuance of the marriage at the time of suing it out, nor was it necessary that it should: that was an intendment of law, which presumes an existing state of things to continue until the contrary is shewn. And no issue can be taken on a legal inference, nor can it be denied in pleading, but the facts which avoid it must be stated, so as to enable the court to judge of their legal effect. Every material fact averred by one party, and not denied by the other, in pleading, is admitted: And the averment that the plaintiffs were not mar-

ried at the date of the scire facias, admitted that they were married before, as alleged on the other side; as, in Alleyne and wife v. Grey, the plea that the plaintiff were not lawfully married, was held to be an admission that they had (as they alleged) been married in fact, and only to put the lawfulness of the marriage in issue. The legal inference, that the marriage, once existing, continued, could only be repelled, by shewing the fact by which it was dissolved, or ceased to continue. That could only be by a divorce from the bonds of matrimony. A divorce from bed and board does not dissolve the marriage, nor affect the marital rights of the husband in respect to his wife's choses in action. Stephens v. Tott, Mo. 665; Motam v. Motam, Roll's Rep. 426, cited 18 Vin. Abr. prohibition Q. pl. 10, 11, p. 3. And a divorce could only be the consequence of a legislative act, or a judicial sentence. The plea in question, therefore, proposed to refer to the jury, all these questions of law, and the effect of the act dissolving the marriage; all of which should have been referred to the court, by a plea distinctly stating the matter by which it was insisted the marriage had been dissolved; as was done in the case before cited 39 Ed. 3, 33, when the plea stated a divorce by an ecclesiastical court specified, and that from the bonds of matrimony, on account of the marriage being before the age of assent, and a subsequent dissent. Upon the ground, then, that the plea neither denied

71 directly any facts suggested in the scire *facias, nor alleged any fact directly to avoid their effect, it was fatally defective, even if it had concluded, as it ought to have done, with a verification.

If, however, it were admitted, that the matter of the plea was pleadable in bar, and well pleaded in other respects, the conclusion to the country was an error of substance and fatal on a general demurrer. This was the only ground of the former judgment of the court given in this case; which, after the fullest consideration, I still think was right. After a conclusion to the country, all pleading is closed except to demur, or join issue by a similitur; and as no issue can be made up, without an express averment on the one side, and a direct negative on the other, of the same fact, it is error to conclude a plea to the country, which does not directly deny some matter directly averred on the other side. The plea in this case denied nothing which had been alleged on the other side, but sought to avoid the matter alleged on the part of the plaintiffs, by the allegation of a distinct fact, that the parties were not married at the date of the scire facias, to which they ought to have had an opportunity of replying. That such an improper conclusion is fatal on general demurrer, is uniformly affirmed, by the adjudged cases; of which those of Cowper v. Towers, 1 Lutw. 98, and Charleston v. Finney, 1 Sid. 215, are strongly in point.

Without considering the effect of the estoppel relied on, I think the judgment should be affirmed upon the manifold defects of the plea in matters of substance.

The other judges concurred, and the judgment was affirmed.

***Stevenson v. Singleton.**

February, 1820.

Contracts—Between Master and Slave—Validity.—

Contract between master and slave, whereby the master agreed to emancipate the slave, for \$1000 to be paid by the slave to him, of which the slave paid \$566. HELD, that the chancellor cannot, on a bill by the slave against the master, enforce such contract so partly performed.

Same—Same.—Held, generally, that the chancellor cannot enforce any contract between master and slave, though it be fully performed on the slave's part.

Robert Gibbon, on the 11th December 1818, agreed with his slave Richard Singleton, the appellee, that he would sell him to himself, or in other words, that he would emancipate him, in consideration of the sum of a thousand dollars to be paid to him by the slave. Of this sum, 400 dollars were to be paid in cash, 300 were to be secured to be paid on the 1st January 1820, and the other 300 on the 1st January 1821. The 400 dollars were paid accordingly, in cash, by the appellee; and William Foushee and Andrew Stevenson, as his friends, executed their joint notes or bonds to Gibbon, for the two sums of 300 dollars each, payable as aforesaid. But no deed of emancipation was executed by Gibbon. On the contrary, Foushee and Stevenson required, as a security for their indemnification, that Gibbon should convey the slave to them, by bill of sale in due form; which was done accordingly. The intention of the parties, however, was that the slave should be emancipated whenever he should pay to his former master, or to his sureties, the amount of the notes. He was thereupon permitted by Foushee and Stevenson to go at large and act as a freeman, for the purpose of raising the funds necessary for the completion of his right to freedom. It appears, that he paid to Gibbon at different times, in part of the first note, the sum of 166 dollars, which with the 400 paid at the commencement of the transaction, amounted to 566 dollars. He contended, that he also paid to William Foushee other sums, in the confidence that he would pay them over to his former master: but this was denied by Foushee. In January 1821, after both notes

73 had become due, Gibbon insisted on immediate *payment; and as the appellee was unable to pay the money, and Foushee and Stevenson were unwilling to advance it for him, an arrangement was made with Gibbon, by which they re-conveyed the slave to him, in consideration of his delivering up their notes. Gibbon appears to have been still very willing to give freedom to the appellee, provided he could have got the balance of the money. The appellee commenced this suit, in forma pauperis, in the superior court of chancery of Richmond against Foushee, Stevenson

and Gibbon: and that court decreed, that the appellee was free, and entitled to all the immunities of a free man of colour; and that Foushee and Stevenson should pay to the administrators of Gibbon (who had died pending the suit) the money due on their notes, with interest thereon. From this decree Stevenson appealed to this court.

Leigh for the appellant, and Nicholas assigned counsel for the appellee, submitted the case, without argument.

CABELL, J., delivered the opinion of the court. In the case of Sawney v. Carter, 6 Rand. 173, this court refused, on great consideration, to enforce a promise by a master to emancipate his slave, where the conditions of the promise had been partly complied with by the slave. It is impossible to distinguish that case from this. The court proceeded on the principle, that it is not competent to a court of chancery to enforce a contract between master and slave, even although the contract should be fully complied with on the part of the slave. The decree of the chancellor must be reversed and the bill dismissed.

74 ***William Crow and Others, Children of William Crow, v. Thomas Crow and Others.**

February, 1820.

Wills—Constructions—Per Stirpes—Per Capita*—Case

at Bar.—John Crow bequeathed, that the balance of his slaves should be divided equally between his children, to wit, the heirs of W. C. [a deceased son of testator], naming them, seven in number, T. C., M. C. and J. C. [sons of testator], and the children of his deceased daughters, M. J. and S. C. but the children of his daughters M. J. and S. C. should take, respectively, only such part as their mothers respectively would take if still alive, that is to say, a child's part. HELD, that the seven children of the deceased son took equally per capita with the testator's three living sons, and the children of his two deceased daughters took per stirpes, each, their mother's part.

This case originated in the county court of Essex, whence it was carried by appeal to the superior court of chancery of Fredericksburg, and brought thence by appeal to this court.

John Crow, by his last will and testament, after having by previous provisions, disposed of his land and some slaves and other property, bequeathed as follows: "I devise and direct, that the balance of my slaves shall be equally divided between my children, to wit, the heirs of William Crow, namely, William, Robert, Patsey, Nancy, Henry, Ennis, and John, (heirs of William Crow deceased,) Thomas, Moses, John Crow, and the children of my deceased daughter Massey Jones, and the children of my deceased daughter Sarah Crane, to them and their heirs; but the children of my daughter Massey Jones are to take only such part as their mother would take if she was still alive, that is to say, a child's part; and in like manner, the children of my daughter Sarah Crane are to take only such part as their mother would take, if

***Contracts—Between Master and Slave—Validity.—**

It is well settled that a contract between a master and his slave, for the future emancipation of the slave cannot be enforced against the master, although it may have been fully performed on the part of the slave. *Shue v. Turk*, 15 Gratt. 265, 276, citing *Sawney v. Carter*, 6 Rand. 173; *Stevenson v. Singleton*, 1 Leigh 72. To the same effect the principal case is cited in *Bailey v. Polindexter*, 14 Gratt. 193, and note; *Williamson v. Coalter*, 14 Gratt. 397; *Woodland v. Newhall*, 31 Fed. Rep. 438; *Wood v. Ward*, 30 Fed. Cas. 432. See monographic note on "Contracts," appended to *Enders v. Board of Public Works*, 1 Gratt. 364.

***Wills—Construction—Per Capita—Per Stirpes.**—On this question the principal case is cited in *Foot-note* to *Brewer v. Ople*, 1 Call 212; *Hamletts v. Hamletts*, 12 Leigh 399, and *Foot-note*; *Foot-note* to *McMaster v. McMaster*, 10 Gratt. 276; *Hoxton v. Grifith*, 18 Gratt. 578; *Senger v. Senger*, 81 Va. 697, 699; *Walker v. Webster*, 96 Va. 382, 28 S. E. Rep. 570. See monographic note on "Wills."

she was still alive, that is to say, a child's part."

William Crow deceased, and Thomas, Moses and John Crow, were sons of the testator. It appears from the will, that the testator had one child, Mrs. Whooston, who was living at the date of his will, and
75 that he had had another *child who was then dead, neither of whom is mentioned in the bequest above quoted. He made a distinct provision for Mrs. Whooston; and as to the property given her, he provided, that "if she should die without a living heir, it should return to his estate."

The county court and the chancellor both held, that the residue of the testator's slaves should be divided into six parts, or shares, and one share allotted to the seven children of William Crow deceased, among them, one to each of the testator's sons, Thomas, Moses and John Crow, one to the children of Mrs. Jones, and one to the children of Mrs. Crane. The children of William Crow appealed to this court.

Johnson, for the appellants, said, that under the first part of the bequest, to the seven children of William Crow by name, to the three sons of the testator by name, and to the children of Mrs. Jones and to those of Mrs. Crane by description, had it not been qualified by subsequent words, all the persons named and all the persons described, would have taken equal shares per capita; and the subsequent words, providing that the children of Mrs. Jones and those of Mrs. Crane should take per stirpes, leave the seven children of William Crow, who are particularly named, to take per capita; nay, manifest a clear intent that they should so take. The testator, in directing the subject to be equally divided between his children, to wit, the heirs of William Crow, namely, William, &c. (children of his son William), Thomas, &c. (his own sons) and the children of his daughters, Mrs. Jones and Mrs. Crane, in effect, describes and adopts his grand-children by his son William as his children, while his grand-children by his two daughters are described not as his but as their children. And when the testator said, that the children of Mrs. Jones and Mrs. Crane, respectively, should take only such part as their mothers would have taken if alive, that is to say, a child's part, he meant that part
76 which would be a child's part according to the rule *of division prescribed in the clause itself, not a child's part in the general sense of the phrase; for he left a living child not mentioned in the bequest.

Stanard, for the appellees, observed, that if Johnson's construction prevailed, the children of the testator's son William would take more than half the whole subject, namely, seven-twelfths, and the other five branches of his family only one-twelfth, each; a construction so contrary to the natural bounty which dictated the provision, that it ought not to be allowed, unless it was unavoidable. The words of the will import no such extraordinary and unreasonable disposition. The declared design was, that the subject should be equally divided among the testator's children; and this design would be defeated, if his grand-children by

his son William take per capita with the testator's own sons, and his grand-children by his daughters take per stirpes. The children of William, though named, are yet described as his heirs; which is nomen collectivum. The provision with respect to the children of the two deceased daughters, that they shall each take the share which their mothers if alive would take, that is, a child's part, evinced an intent, that the shares should be ascertained by reference to the testator's own children named in the clause.

CARR, J. The sole question presented to the court, is, Whether, under the words of the will, the children of William Crow deceased, will take per capita, equal shares with Thomas, Moses and John, the children of the testator, or per stirpes, the share of their father, as the children of Mrs. Jones and Mrs. Crane take?

In the construction of wills, I think it very often happens, that we, in the first place, make up an opinion as to what the testator ought in justice to have done; that is, what we would in such a case have done; and then endeavour to find out reasons shewing that what he ought to have done, he has done. It was by this process
77 (I rather think) that, on *the argument of this case, I took up a pretty strong impression against the appellants. It seemed to me not right, that the grand-children by one son, should receive more than the other grand-children, and equal shares with the children of the testator; and, therefore, I concluded, that such was not the meaning of the will. But this is surely a very erroneous process; for the testator having a perfect right to the property, his will is the sole law: we are to inquire what that will is: and in this inquiry, what we think it ought to be, should not have the least influence. The reasons, the calculations, the feelings, the whims even, which may have influenced the testator are inscrutable to us: his words are the only safe guides to conduct us to his meaning.

In the case before us, it seems to me, that the plain natural meaning of the words, and the rules drawn from the cases, lead us to the same conclusion. The cases all lay it down, that where a legacy is to several, whatever may be their relations to each other, or however the statute of distributions might operate upon such relations, equality shall be the rule, unless the testator has established a different one. Thus, to A. and B. and the children of C. all take per capita: to A. B. and C. and their children; all living at the testator's death take equally. So, to the descendants of A. and B., all their descendants, children, grand-children &c. take per capita. *Richardson v. Spraag*, 1 P. Wms. 434; *Blackler v. Webb*, 2 P. Wms. 383; *Eccard v. Brooke*, 2 Cox, 213; *Butler v. Stratton*, 3 Bro. C. C. 367; *Weld v. Bradbury*, 2 Vern. 705; *Northey v. Strange*, 1 P. Wms. 340; *Wicker v. Wilford*, Harg. law tracts, 513; *Malcolm v. Martin*, 3 Bro. C. C. 50; *Phillips v. Garth*, Id. 64; *Davenport v. Hanbury*, 3 Vez. 257; *Freeman v. Parsley*, Id. 421.

Look now at the words of the will: "the balance of slaves to be equally divided between my children, to wit, the heirs of Wil-

William Crow, namely (enumerating his son W. C.'s children), Thomas, Moses, John Crow (children of testator), and the children of my deceased daughter Massey Jones, and the children of my deceased daughter Sarah Crane." *Now, suppose the testator had stopped here: could there be any doubt, that each of his children and grand-children, named or described, would take equally, per capita? He first establishes equality as the rule of partition; and then enumerates, as the takers, ten persons by name, seven of whom he calls the heirs of William Crow, three his own children; and then he describes, as takers, the children of his two deceased daughters. It does not seem possible to raise a doubt, that if the testator had stopped here, all the children and grand-children, who were the objects of his bounty, must have taken equally. And of this he himself was well aware; for he adds, "but the children of my daughter Massey Jones, are to take only such part as their mother would take, if she were still alive, that is to say, a child's part; and in like manner, the children of my daughter Sarah Crane, are to take only such part as their mother would take, if she were still alive, that is to say, a child's part." Now, this is a clear and distinct exception: and it shews two things: 1. that the testator knew, that under the former part of the clause, all the objects it would take per capita: 2. that he did not intend, that all should so take. He, therefore, excepts from its operation, those who were to take by a different rule, namely, per stirpes; and these were the children of his two daughters. This seems to me to give tenfold strength to the claim of William Crow's children to take in their own right, per capita. However clearly in favour of that claim the first part of that clause may be, it might, (but for the exception) have been doubted, whether the testator so understood it: but that is impossible now: he has given his own explanation. Knowing, then, that by the operation of the first words, his daughters' children (whom he had only described generally as children) would take equally, and a fortiori, that William Crow's children, (each of whom he had individually named) would so take; when he excepts the children of his daughters, and leaves the children of William to the unrestrained operation of the clause, the conclusion, that these last were intended to take

79 *equally, is precisely as strong as that the others were to take by a different rule.

Nor is this conclusion at all weakened, in my mind, by the testator's calling them William Crow's heirs. He knew nothing of the technical distinction between children and heirs. He shews that he uses them in the same sense: for he says, "the heirs of William Crow namely, William &c. meaning his children." And in another part of the will, speaking of his daughter Whooston, he says, that what he has given to her shall return to his estate &c. if she shall die without a living heir.

But it was said, the words "a child's part," used in this clause, are strong to shew, that the testator meant, that this residuum should be divided into six parts,

and consequently, that William's children should come in per stirpes only. I cannot see it in that light. By "a child's part," did the testator mean a part to be ascertained, by taking the whole number of his children, living and dead, as the divisor? This would seem the natural sense. But this would give eight as the divisor; for he had had four sons and four daughters: but this is not contended for. Did he mean all his living children? No! for one of them is confessedly excluded from this legacy, and the children of three deceased children included. The truth is, that by child's part, he did not mean at all to designate the number of portions, or the manner of taking: for the general purpose of the clause, he had already done this; and the whole purpose of this part of the clause, was to except the children of his daughters, and establish for them a mode of taking, different from that of his three sons and the children of William. In doing this, he says, they are to take only such part, as their mother would take, if she was still alive, that is to say, a child's part; meaning, simply, to place them in the shoes of their mother, that they should take whatever part she as a child would have taken, without intending to designate either the amount of that part, or its proportion to the whole.

80 *I am of opinion, that the appellants take per capita; that the personality subject to this clause, should be divided into twelve parts, of which the appellants should take seven, one each; the three sons, one each; the children of Mrs. Jones one, and the children of Mrs. Crane one.

GREEN, J., said, that he inclined very strongly to the opinion, that the decree of the courts below was right, but the opinion of the other judges to the contrary was so clear and decided, that he surrendered his own.

The other judges, concurring with CARR, J., the decree was reversed.

Tapp v. Beverley.

February, 1829.

(Absent COALTER and GREEN, J.)

Injunctions*—Against Judgments—Payment of Part of Debt—Effect.—If, pending an injunction to a judgment at law, plaintiff in equity pay part of the debt due by the judgment enjoined, the injunction should be perpetuated as to the sum so paid.

Equity Practice—Discounts against a Judgment—Costs.†—If a party resort to equity to obtain discounts against a judgment at law, to which he is not justly entitled, claiming also other discounts, to which he is justly entitled, but which his creditors were willing to allow him, the costs should be decreed against him.

Vendors of Land—Execution and Acknowledgment of Deed—Recordation.—Vendors of land, bound to make a conveyance thereof, are bound so to execute it in presence of witnesses, or so to acknowledge it before magistrates, that the vendee may have it recorded according to law.

In March 1804, Munford Beverley contracted with William Tapp, to sell him a tract of land in the county of Culpeper, at forty shillings per acre; £1000 of the pur-

*Injunctions.—See monographic note on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.
†Costs.—See monographic note on "Costs" appended to Jones v. Tatum, 19 Gratt. 720.

chase money to be paid on the 1st January 1805, and the residue in twelve months thereafter: a title free from all incumbrances, was to be made on the day appointed for the first payment. It being ascertained before the 1st January 1805, *that Beverley, in consequence of some leases which he had made, would be unable to comply with this contract, the parties consented to modify it, by an agreement that Tapp should receive the rents for the year 1804, and take a conveyance subject to the leases; and that he should have a credit of four years, instead of one year, for the excess of the purchase money beyond £1000. provided this sum should be paid on the 1st January 1805. In the latter part of the year 1804, Beverley contracted with Ross, Grinnan, Mundel and Carter, to sell them his patrimonial estate in the county of Culpeper, which included the land he had previously sold to Tapp; and on the 1st January 1805, he conveyed the whole estate to them, and took back a mortgage upon it, to secure the purchase money. He communicated to them, on the same day, by a memorandum in writing, that he had before sold to Tapp, a part of the land, not then surveyed, but supposed to contain 700 acres, at forty shillings per acre. On the 12th January 1805, the land having been surveyed, and found to contain 797½ acres, Beverley conveyed it to Tapp, and received from him £1000, and took his bond for £575. the residue of the purchase money, payable on the 1st January 1809, according to the modification of their contract. On the 19th March 1805, he paid to Ross, Grinnan, Mundel and Carter, the £1000. he had received from Tapp, and took their obligation to convey the land to Tapp and to take an assignment of Tapp's bond for the balance of the purchase money. It would seem, from the terms of this obligation, that they were not then informed of the change that had been made in the contract between Beverley and Tapp, as to the time of the last payment; and Beverley swears that he did not communicate it to them. This obligation was soon afterwards delivered to Tapp, and Beverley tendered to Ross and his associates, an assignment of Tapp's bond for £575. payable on the 1st January 1809, as above mentioned; but they refused to receive it, on the ground that it ought to have been made payable on the 1st January 1806, according to the original contract *between Beverley and Tapp, which was the only one that had been made known to them, and on the basis of which they had consented to convey the land. Shortly after the 1st January 1806, they instituted a suit in chancery against Tapp and Beverley, for the purpose of compelling an immediate payment of the balance of the purchase money; but they were cast in that suit. They thereupon took from Beverley an assignment of Tapp's bond, brought suit upon it, and prosecuted it to a judgment.

Tapp then exhibited a bill, in the superior court of chancery of Fredericksburg, against Beverley and against Ross and his associates, claiming credit for the rents of 1804, and two discounts for debts contracted to him by Beverley, subsequent to the date

of his bond to Beverley, and (as he alleged) before Beverley's assignment thereof to Ross and others; insisting on a specific execution by Ross and others, of their contract to convey to him the land he had bought of Beverley, before he should be held to pay them the purchase money; and praying an injunction to proceedings on the judgment at law, till these matters could be heard and adjusted in equity. The injunction was awarded.

Ross and his associates, in their answers, contest the two discounts claimed by Tapp, for the debts due him by Beverley, on the ground, that when those debts were contracted, Tapp had notice that Beverley had assigned to them the whole of the debt which Tapp owed for the land. And they filed with their answers, a deed conveying all their right in the land to Tapp, which they said they would deliver to him, when he paid the money. This instrument was executed by them all; but as to some of them, there were no subscribing witnesses; nor was it acknowledged or certified for record, in any of the modes prescribed by the statute.

Upon the coming in of the answers, the chancellor referred the accounts to a commissioner; who made a report, in which, rejecting the discounts claimed by Tapp for the debts due by Beverley to him, he gave him credit for 86 dollars, as of the 1st

January 1809, for the rents of 1804, 83 and for *1160 dollars paid by Tapp on the 1st January 1813, pending the suit in chancery; and stated a balance due from Tapp of 1192 dollars 65 cents with interest from 1st January 1813. And the commissioner reported, that this was the state of the account, which the defendants, Ross and others, admitted to be right.

The chancellor, upon the coming in of the report, perpetuated the injunction as to seventy-four dollars only (on account of the rents of 1804) to be credited as of the 1st January 1809, and dissolved the injunction as to all the residue. He made no provision in the decree, for perfecting and delivering the conveyance from Ross and others to Tapp. And he decreed that Tapp should pay the costs. Tapp appealed to this court.

The case was argued here, by Leigh for the appellant, and Stanard for the appellees.

The question, whether Tapp was entitled to the two discounts he claimed, for debts contracted to him by Beverley, as against Ross and others, the assignees of Beverley, was a question of fact, depending intirely on the proofs; and on this point, this court concurred with the chancellor, and decided against the claim of the appellant.

Leigh objected to the decree, 1. that it dissolved the injunction as the 1160 dollars, paid by Tapp, in part satisfaction of the debt, pending the suit in chancery, though the defendants themselves admitted that credit before the commissioner: and 2. that the court should have decreed the defendants, Ross and others, to make and deliver a conveyance of the land to Tapp, so perfected as to be admissible to record, before or at the time he should be called on to pay the balance of the purchase money.

Standard answered, 1. that the payment made pending the suit in chancery, not being a subject of controversy (as it could not possibly have been) nor presented by the pleadings, could not properly have been noticed in the decree: "2. that the conveyance by Ross and others, having been executed by those parties, and filed as a deed which they proffered to deliver, whenever Tapp should entitle himself to it by paying the purchase money, would be at Tapp's command the moment he paid the purchase money, and the chancellor might at any time direct that it should be delivered to him; and besides, Ross and others had only an equitable title, the legal title having been re-vested in Beverley and he having conveyed to Tapp.

CABELL, J. I am of opinion, that the commissioner rightly rejected the set-offs claimed by Tapp, as they were for transactions with Beverley, long subsequent to the time when Tapp knew, that whatever was due from him for the purchase of the land, was justly payable, not to Beverley, but to Ross, Grinnan, Mundel and Carter; and I approve of the statement of the commissioner in all respects. The chancellor approved of it also, and ought, consequently, to have made it the basis of his decree. But he has not done so; for he perpetuated the injunction for 74 dollars only, as of the 1st January 1809, and dissolved it as to the residue; thus letting loose the execution for the difference between 74 and 86 dollars, and also for the sum of 1160 dollars, paid pending the suit. This was clearly wrong as to the first mentioned sum, viz. the difference between 74 and 86 dollars, because the commissioner's report clearly shews, that Tapp was entitled to the 86 dollars. And I think the decree was equally wrong in not giving credit for the 1160 dollars. The fact of the money not having been paid, until after the institution of this suit and the granting the injunction, might affect the question as to who should pay the costs of the suit, but it surely could not authorise the dissolution of the injunction as to money actually paid and no longer due. The injunction should have been perpetuated for all but 1192 dollars 65 cents with interest thereon, according to the statement of the commissioner.

85 "I am also of opinion, that the decree is erroneous in another respect. Ross and his associates did not stand in the situation of persons holding a mere equity, which may be released by parol or by act in pais. They had expressly bound themselves, by their written obligation of the 19th March 1805, to convey the land to Tapp. They must, under the circumstances of this case, be regarded as vendors of the land; and they shew, that they considered themselves bound to convey it with general warranty; for they exhibit with their answers, a deed conveying the land with general warranty, which appears to have been executed by all the parties. As to some of the grantors, however, there were no witnesses; nor was the deed acknowledged, in any of the modes prescribed by the laws regulating the recording of conveyances. A person bound to make a conveyance of lands, is bound to execute it in the pres-

ence of witnesses, or to acknowledge it in such manner, that the person to whom it is made, may have it recorded according to law. It was error in the court of chancery, not to provide for this, contemporarily with the dissolution of the injunction.

The decree should be reversed with costs, the injunction reinstated, and the cause remanded to be further proceeded in, according to the principles now declared.

As to the costs in the court of chancery; the appellees voluntarily allowed all just credits; and were willing, at all times, (after they took the assignment,) to make the conveyance, provided the appellant would pay the balance justly due. He forced them into the court of equity, to defend themselves against his unjust claims of set-off, and he should therefore pay the costs incurred in that court.

The other judges concurring, the decree was reversed with costs.

86

***Newsom v. Newsom.**

February, 1829.

[19 Am. Dec. 937.]

Administrator—Sale of Chattel Not Belonging to His Testator—Liability to Owner.—If an adm'r sell a chattel, whereof his intestate died possessed, but which in truth belonged of right to another, and apply the proceeds to payment of his intestate's debts in due course of administration, without any notice of the right or claim of the true owner, he is personally liable to the true owner for the value, in trover brought by the owner against him.

Trover—Amount of Recovery by Trustee of Chattel.—It seems, that a naked trustee of a chattel is entitled to recover, in trover, not nominal damages only, but the full value.

Same—When Proof of Demand and Refusal Unnecessary.—Proof of demand and refusal is never necessary in trover, where there is proof of actual conversion.

Appellate Practice—Bills of Exception—Point Not Presented to Court Below.—Where exceptions are taken to opinions of a court given at the trial of a cause on specific points, the appellate court will examine no points but such as were presented to and decided by the court below, though from the matters stated in the bill of exceptions, there be apparently other points that might have been made.

Trover, in the circuit court of Norfolk, by William Newsom against Henry Newsom (in his own right) for a slave claimed by the plaintiff as his property, and charged to have been converted by the defendant to

***Executors and Administrators—Liability to Owner for Detention or Sale of His Property.**—With regard to the owner of the property, the executor's (or administrator's) detention (or sale) is a wrong of his own, which subjects him personally, to a judgment for them, or their alternative value. Catlett v. Russell, 6 Leigh 361, citing *Newsom v. Newsom*, 1 Leigh 86. On the question of the liability of an agent for the conversion of the property of a third person, see note in 2 Va. Law Reg. 552; 5 Va. Law Reg. 51. See also, monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6; monographic note on "Agencies" appended to Silliman v. Fredericksburg, etc., R. Co., 27 Gratt. 119.

†Trover and Conversion—Necessity for Demand and Refusal Dispensed with.—Demand and refusal, being only evidence of conversion, need not be shown when there is sufficient proof of actual conversion. Haines v. Cochran, 28 Va. 724, citing *Newsom v. Newsom*, 1 Leigh 86. See monographic note on "Trover and Conversion" appended to Eastern Lunatic Asylum v. Garrett, 27 Gratt. 168.

‡Appellate Practice—Point Not Presented to Court Below—Effect.—For proposition that, a point not raised in the court below cannot be passed upon in the appellate court, the principal case and Barrett v. Willis, 4 Leigh 114, are cited in Rose v. Burgess, 10 Leigh 198.

his own use. Plea, the general issue. Verdict and judgment for the plaintiff, for 684 dollars damages. The defendant filed a bill of exceptions to opinions of the circuit court given at the trial; which stated,

1. That the plaintiff, having first proved that the slave in question was, on the — day of March 1808, the property of R. R. Keeling, gave in evidence a deed of that date, executed by Keeling, and duly recorded, whereby Keeling, in consideration of his wife Amey having joined him in the sale and conveyance of lands of her own inheritance, conveyed the slave in question (among others) to the plaintiff, in trust, that he should permit Amey, the wife, to hold possession of the property, and enjoy the profits, to her separate use, during her life; and after her death, in trust to the use of the children of the marriage, then born or afterwards to be born, during their minority; and after the youngest should attain to full age, in trust for such of the children as the wife should appoint, and in default of such appointment, to be equally divided among them. The plaintiff then

87 proved, *that Mrs. Amey Keeling during her lifetime, sold the slave in question to one Pendred, and died within five years next before the institution of this suit: Pendred died in possession of the slave: administration of Pendred's estate was granted to his widow: and she married Henry Newsum the defendant; who having thus acquired the possession of the slave, sold him in his representative character, before the institution of this suit, to one Bonney for 450 dollars, who afterwards sold him to one Adams. But the plaintiff adduced no proof, either of a demand of the slave of the defendant, or any notice to him of the plaintiff's title, prior to the institution of the suit. Whereupon, the defendant's counsel prayed the court to instruct the jury, that unless such demand and refusal were proved, they should find for the defendant, because as he acquired possession of the slave lawfully, and had parted with it prior to any demand of the property, and without notice of any defect in his intestate's title, the evidence did not shew a tortious conversion of the slave to the defendant's own use, and the action did not lie against him. But, the court refused to give the instruction; and instructed the jury, that, if from the evidence, they believed there had been an actual conversion of the slave to the defendant's use, proof of demand and refusal was not necessary.

2. The defendant's counsel then moved the court to instruct the jury, that the action could not be maintained against the defendant, he having acquired possession of the slave in his representative character, as above mentioned, and parted with it before the institution of this suit; but the court refused to give such instruction.

3. The defendant then offered in evidence the inventory and appraisement of Pendred's estate, and the account of his administration thereof, regularly settled; in order to shew, that the price he had obtained for the slave had been credited to Pendred's estate, in his account of administration, and paid

to the creditors of that estate; and that there was a large balance due on the account, to the defendant, as the administrator. *But the plaintiff objected to the introduction of this evidence; and the court (the facts first above stated as to the plaintiff's title being admitted), sustained the objection and excluded the evidence; because the facts it was offered to prove, if proved, would not exonerate the defendant from the plaintiff's action, or affect his right to recover.

To all these opinions the defendant filed exceptions, and applied to this court for a supersedeas to the judgment, which was allowed.

Stanard, for plaintiff in error. This case presents the question, Whether an administrator, acquiring in that character a chattel of which his intestate died possessed, and selling it in the regular course of his duty, without notice of any adverse right, or of any defect in his intestate's title, be personally liable as for a wrongful conversion to his own use, at the suit of a person claiming title adverse to that of the intestate? There is no adjudged case exactly in point. In the analogous case of an agent receiving property or money for his principal, and paying or transferring it to his principal, or devoting it to his use, if it afterwards appear, that the principal had no right, the principal and not the agent is liable. The possession of the slave, in this case, was cast upon the administrator by act of law: he was a mere fiduciary, and bound by the law to appropriate it to the use of his intestate's estate: and in selling it, without notice of doubt or defect in his intestate's title, and applying the proceeds in due course of administration, he was only discharging his bounden duty. The performance of his legal duty, was a just defence, and he ought to have been allowed to prove the truth of it. If he had disposed of the subject, after notice of the adverse claim, such notice as a demand made would have given him, then he would have acted at his own peril, and been personally responsible for the conversion. But as no demand was made, and he had no notice of the adverse claim, his sale and application of the proceeds, was a conversion, not to his own use,

89 but to *the use of his intestate's estate. It was the intestate that made the wrongful conversion: and the action lay against the administrator in his representative character, so as to charge his intestate's estate, not against him, in his own right, to charge him personally. The equity of the statute (1 Rev. Code, c. 104, § 64), gives trover against an executor or administrator for a conversion by the testator or intestate in his lifetime: And this was the proper remedy in the present case.

The evidence of the plaintiff having been adduced, as set out in the bill of exceptions, and the court, being asked to instruct the jury, "that the evidence did not shew a tortious conversion of the slave to the defendant's own use, and that the action did not lie against him," refused the instruction. The title shewn by the plaintiff is therefore properly examinable. He

shewed no title. For 1st, the act of limitations began to run, from the date of Mrs. Keeling's sale to Pendred, instead of the date of her death; Pendred's possession was, from the time of his purchase, adverse to the title of the trustee; and, if he held the slave five years, counting from the time of his purchase, such possession gave him title. *Newby v. Blakey*, 3 Hen. & Munf. 57. 2ndly, The plaintiff was a mere trustee, without power, in any manner or for any purpose, to alien the trust subject; but if he may maintain trover for this slave, and recover his value, he may thereby in effect alien him; for it is settled, that a recovery in trover, vests the title of the subject in the defendant of whom the value is recovered. The trustee, if he could maintain the action on his naked legal title, could only sue and recover damages pro interesse suo; but here he has recovered obviously the whole value. The cestuis que trust may also sue and recover damages pro interesse suo; and they too may recover the whole value again.

Conway Robinson, for defendant in error. The questions raised by Mr. Stanard, as to the sufficiency of the plaintiff's title to recover, and as to the just measure of damages, *are not presented by the record. This is not a demurrer to evidence, or a special verdict, but a bill of exceptions to opinions of the circuit court on specific points; and as there was no occasion, so there was no attempt, to state more of the evidence, than what would suffice to shew the relevancy of the points moved, and the decisions given, at the trial. There was no general objection to the plaintiff's title, in the circuit court: the objection was only, that his evidence did not shew a conversion to the defendant's own use, and that the action did not lie against him, without proof of a demand and refusal.

The opinion first excepted to, was, that proof of demand and refusal was not necessary to maintain the action; no more. And, clearly, proof of demand and refusal, being only presumptive evidence of conversion, cannot be necessary, where direct proof of actual conversion is adduced. 3 Starkie on ev. 1492, 1496.*

The other opinions of the court, stated and excepted to, amount in effect to this, that the facts, of the defendant's acquisition of the slave in his representative character, of his having parted with him in the same character, and of his having disbursed the proceeds of sale in due course of administration, before the institution of the suit, all combined, constituted no good defence to the action. The circumstance of the possession of the property having been parted with by the defendant, is surely of no avail: nay, that was the very act of conversion. The manner in which he acquired the possession, cannot be material to the only inquiries proper to the case; namely, had the plaintiff just right to the property? And had the defendant converted it to his own use? There is no instance, in which the manner of the defendant's acquisition of property

belonging to another, has been allowed to justify or excuse a conversion of it. With regard to the application which the defendant made of the proceeds of sale, the right owner cannot be affected by that: *to him the evil is just as great, whether the defendant gave the proceeds of his property to others, or retained them to himself. Neither can the defendant's want of notice of the defect of his intestate's title, avail him. It is the duty of every man, who sells property, no matter in what character or under what pretence, to see that it belongs to himself, and not to his neighbour. And if it be granted, that the administrator's conduct in this case was dictated by a sense of duty, and his motives and purposes fair, the personal loss he has incurred must yet be laid to his own fault or at least his misfortune, certainly not to any fault of plaintiff.

CARR, J. The exceptions taken to the opinions of the court given at the trial, present the only points for the consideration of this court. The ingenuity of counsel, indeed, suggested several others; but we are compelled by the settled law of the court to say, that they do not arise upon this record. The distinction between a bill of exceptions and a demurrer to evidence, has been so often taken by this court, that it would be a waste of time to repeat it, and most mischievous to depart from it. This distinction clearly excludes from our view, the question made upon the act of limitations. Whether the five years of possession ought to run from the sale of the slave by Mrs. Keeling, or from her death? It is not upon the record, and non constat what was the evidence. Neither can we, sitting in a court of law, take cognizance of the equitable rights of the children of Mrs. Keeling: that consideration is for another forum. Nor, as it seems to me, does it come fairly before us, on this record; to decide, whether a trustee can bring trover for a slave? Or, whether his damages should be for the full value, or nominal merely? The plaintiff sues, not as trustee, but as owner of the slave; the jury has found a general verdict; and the evidence is not before us. True, in a bill of exceptions, taken by the defendant, to a refusal of the court to instruct the jury (not that a trustee could not maintain trover for a slave, but "that unless a demand, and refusal *was proved, the verdict must be for the defendant,") there is a statement of some evidence, and among other things, a deed of trust, which, it is said, conveyed the slave to the plaintiff; but what other evidence might have been before the jury, it is impossible to say.

If, however, these questions were properly raised, I should feel no hesitation in saying, that a court of law looks only to the legal title, and that being in the trustee, he may assert it, by any action which is given to the legal owner of property: nor can a court of law limit his recovery to nominal damages.

As to the instructions of the court, they seem to me intirely correct. Demand and refusal, is only evidence of conversion, and therefore not necessary under the facts of

*The edition referred to is Ingraham's, Boston, 1822.—Note in Original Edition.

this case, where a conversion is proved by other evidence. In like manner, the defendant was liable to the action, though he received the slave as administrator, sold him as administrator, and disbursed the money as administrator, without the least notice of the defect of his intestate's title. The right of the owner to sue for his slave, can never depend on such circumstances as these. The administrator, when he sells property as belonging to his intestate, acts at his peril. If he sells my property, he must answer to me for it, however he may have thought himself bound by law to sell, and however fairly he may have applied the proceeds to the debts of his intestate.

The court was also right in rejecting the evidence offered by the defendant. What had the inventory, appraisement and settlement of his administration account, to do with the claim of the plaintiff? They were wholly irrelevant to the question, whether the slave was the property of the plaintiff or not.

I think the judgment must be affirmed.

GREEN and CABELL, J., and BROOKE, president, declared their intire concurrence with the opinion of JUDGE CARR; but

93 *COALTER, J., said he was not prepared to say, as a general proposition, that, where a testator or intestate has fairly purchased property, a horse for instance, from one who turns out afterwards not to be the true owner, and dies possessed of such property, having for a considerable time used it as his own, and it comes to the possession of his executor or administrator after his death, and he, without any notice or demand from the true owner, sells the horse, with the other perishable estate, and fully administers the whole personal fund, if in such case, trover be brought against the representative, for a conversion by him as an individual, the action can be sustained, so as to throw the loss on him.

He added: I understand the law to be, that if a defendant come to possession of a chattel by finding, or in other lawful way, it is necessary for the plaintiff to prove a refusal to deliver, unless the defendant shall have unlawfully intermeddled with the goods. If they be lost or taken from him, he is not guilty of a conversion, because he has not disposed of them as if they were his own.

Does the executor or administrator, as an individual, unlawfully intermeddle with the goods, in the case put? Can he be said to have converted them to his own use? Is it an answer to this to say, that he has converted them to the use of the estate? It will, no doubt, be a conversion in the testator or intestate, in the case put, for which, under the act of assembly, trover will lie against the executor or administrator, and may be a conversion by him as executor or administrator, and for which trover may lie against him as such, so as to charge the estate for the value; or an action for money had and received by the executor or administrator as such, so as to charge the estate; but the question is, whether, under our system of laws, in relation to executors and administrators, and especially since the party is not without his just remedy under

the act giving trover against executors or administrators as well as for them, he can be charged individually, as for a conversion to his own use, unless demand and refusal, before he has sold, be proved?

94 When the *goods come to the hands of the executor or administrator, the regular remedy is replevin or detinue for them. 1 Wm's. Saund. 216, a., note 1. The law makes it his duty to sell: he cannot resist the claims of creditors: he cannot demand, as to them, that the personal estate shall remain five years in his possession, so as to put to rest all demands of this kind: he cannot resort back to creditors, since he cannot shew who has received the money arising from any particular chattel. Suppose he departs from the directions of the law as to selling, leaves the property to answer executions, and points out to the sheriff what has come to his hands, and he levies and amongst other things takes the horse in dispute and sells him, no notice being given; is this a conversion by him individually? Yet this would be a conversion in the finder of goods, for they would go to his use; he would have disposed of them as his own.

If A. deliver goods, which afterwards turn out to be the property of B. to C. to deliver to D. and C. does so deliver them, having no notice that they are the property of B. is he guilty of a conversion of them to his own use?

The most analogous case which I can find to the supposed one now under consideration, is that in which I understand it to have been settled, that if a sheriff levy an execution on the goods of a bankrupt, and sell them after the act of bankruptcy, but before commission and assignment, he is not liable in trover, though the goods ceased to be the goods of the bankrupt, from the moment of the act of bankruptcy. But the plaintiff, at whose suit they were seized, is liable to the action? for though equally ignorant, they came thus to his use. Before assignment, the sheriff is presumed to be ignorant of the act of bankruptcy, and is acting in obedience to the writ, (how it would be if express knowledge of it was proved, is another question): but after commission and assignment, which is public and notorious to all the country, he can no longer plead ignorance, and acts at his own peril.

Our legislature, by various statutes, has shewn a disposition to protect executors and administrators, who are honestly

95 *doing their duty, against individual loss. If a party does not know his own rights, why shall an executor or administrator of the adverse claimant, be presumed to know them? If from any cause, he be unable to make his rights known, even by a demand in pais, why shall his misfortune, if he lose his property, be visited on one equally innocent with himself?

But the present case is not considered as presenting the broad proposition laid down in the case above supposed. It presents the case of a slave conveyed in trust by a deed duly recorded (there being no objection to the deed, as not being duly recorded) and there is consequently implied notice, at

least, that the title was not in the intestate. This is not a case of demurrer to evidence; and we know not what was proved.

All I mean to say in this case, is, that, as I am at present advised, I am not prepared to affirm the broad doctrines, which have been contended for; nor am I intirely prepared to disaffirm them. I wish the point, as it really is not involved in this case, not to be considered as settled by it.

96 *Warwick and Wife and Another v. Norvell.

February, 1829.

(Absent CABELL and COALTER, J.)

Equity Practice*—Application to Stay Proceedings at Law—Confession of Judgment Necessary to Granting Injunction.—Where a party defendant in a suit at law, before judgment, resorts as plaintiff to equity, praying relief against the claim asserted at law on equitable grounds, and an injunction to stay proceedings at law, the injunction should be granted only on condition that he confess judgment at law, though he may have grounds of defence at law, distinct from the grounds of relief preferred to the court of equity.

Same—Same—Same—Appeal.—Where an injunction has been granted in such a case, and the chancellor dissolves the injunction, unless the plaintiff in equity will confess judgment at law, on appeal from such an order, this court will not examine the merits, though, at the time the order was made, the cause stood for hearing.

This controversy had been already before this court, several times, in various forms; and a recapitulation of the former adjudications concerning it, formed an essential part of the state of the case, in the shape in which it was now presented to the court.

In ejectment, brought by John Camm and wife and John Warwick and wife against Reuben Norvell, for a piece of land in Amherst, the jury found, in a special verdict, that the land in controversy was parcel of a tract of 3926 acres, which had been granted, in September 1755, to James Christian, John Christian and William Brown. No division was made among them. After the death of the grantees James and John Christian, (whereby the whole land survived to Brown) Charles and John Christian, sons of the grantee John, presented a petition to the governor, for the whole tract, as lapsed and forfeited for non-payment of quit rents. The general court, in April '74, gave judgment for the petitioners, that the lands were forfeited and re-vested in the crown, and ordered it to be certified to the governor. In October '77, the petitioners Charles and John Christian, conveyed and delivered possession of 933 acres of the land to James Gresham. Gresham, in August '87, conveyed and delivered possession of 433 acres, parcel of the

97 933 *acres, to Thomas Powell; he died in '88, intestate; and Mrs. Camm and Mrs. Warwick were his daughters and heirs. The tract of 433 acres was the land claimed in the ejectment. Camm and wife and Warwick and wife, and those they claimed under, had been in possession of it from '74 till 1800, when Norvell entered and ousted them. Norvell had obtained a grant for land, including about 330 of the 433

acres, founded on a and office treasury warrant, entered in September '94, surveyed in November '95, and granted by patent dated November '97. Upon this state of facts, the district court gave judgment for the heirs of Powell, Mrs. Camm and Mrs. Warwick; and, on an appeal taken by Norvell to this court, the judgment was affirmed, in May 1811, on the single ground, that the long possession, which had been held by the heirs of Powell, and those they claimed under, gave them title to recover, in ejectment. Norvell v. Camm, &c., 2 Munf. 257.

Norvell then brought a writ of right for the tract of 433 acres of land, against Camm and wife and Warwick and wife; upon the trial of which, the titles under which both parties claimed being exhibited, the circuit court instructed the jury, that, as the land had been once granted by patent in '55, though it had been adjudged forfeited and lapsed, by the general court in '74, and though no new patent had been granted to the petitioners, at whose suit it was so forfeited, yet it was not waste and unappropriated land, subject to be taken up by a treasury warrant; and, therefore, the patent granted to Norvell in November '97, was void. The jury, under this instruction, found a verdict for the tenants, and the court gave them judgment. Norvell appealed. And a special court of appeals, in December 1818, held, that Norvell's patent, being on its face fair and regular, could not be thus impugned, collaterally and by extrinsic evidence, but only by suit in equity to set it aside, or some other proceeding having that for its direct object; and that patent must prevail, except
98 against an elder one: therefore, *the judgment was reversed, and a new trial directed. Norvell v. Camm, &c., 6 Munf. 233.

Upon the second trial in the circuit court, the tenants forbore to exhibit their title: they merely offered evidence of long and continued possession, in themselves and those under whom they claimed, payment of quit-rents &c. to lead to the presumption of a patent prior to that under which Norvell claimed. And Norvell, first, to establish his own title, exhibited his patent of November '97, and another patent dated June 1813, with parol evidence to shew that those patents included all the land in controversy; and, then, for the purpose of repelling the presumption of a prior grant to those under whom the tenants claimed, or any of them, he gave in evidence the record of the ejectment first above mentioned, wherein the special verdict set forth the true state of the title under which the tenants claimed, and excluded all presumption of any patent prior to his own. And he set forth all the evidence, that adduced by the tenants as well as that adduced by himself, in a demurrer to evidence, which he tendered; but the tenants refused, and the court would not compel them, to join in it. To this Norvell filed exceptions. Upon the evidence set forth in the demurrer to evidence, several questions of fact arose: Whether Norvell's entries were made on the land held by the tenants? Whether the patents under which he claimed, covered it?

*Injunctions.—The principal case is cited in Lawrence v. Bowman, 15 Fed. Cas. 24, which case holds contra. See monographic note on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.

&c. There was a general verdict and judgment for the tenants. Norvell again appealed. And another special court of appeals, in December 1823, declaring that the judgment of the former special court, 6 Munf. 233, was the law of, and no longer questionable in, this case, held that the circuit court ought to have compelled the tenants to join in Norvell's demurrer to evidence; and, therefore, reversed the judgment, and remanded the cause, with directions that the verdict should be set aside, and the tenants compelled to join in the demurrer. *Norvell v. Camm, &c.*, 2 Rand. 68.

In February 1824, the case of *Whittington v. Christian*, (Id. 353,) was decided by the regular court of appeals; *wherein the heirs of John Christian, in ejectment brought against Whittington, claimed 1000 acres of the 3926 acres of land, granted by the patent of September '55, to James Christian, John Christian and William Brown: they claimed under John Christian, the son of John the original patentee, and one of the petitioners, at whose suit the general court, in '74, had declared the patent of '55 forfeited. Whittington claimed under Norvell, who claimed this tract of 1000 acres, under three patents, dated in '97, upon surveys made in '95 and '96, and who, and those claiming under him, had held the land ever since. In this case, then, the same questions arose, which were presented in the case of *Norvell v. Camm*, 6 Munf. 233, and which were then decided in favour of Norvell: Whether the land in question, having been granted in '55, and having been afterwards, in '74, adjudged forfeited and re-vested in the crown, was waste and unappropriated land subject to location on a treasury warrant? if not, Whether, nevertheless, the commonwealth's legal title therein passed to Norvell, by virtue of the patents granted to him in '97? And the court upon the fullest consideration, decided both points against Norvell: it held, moreover, that the petitioners, at whose suit, in '74, the lands were adjudged forfeited by the original patentees of '55, and their heirs or assignees, were even now entitled, by right of preemption, to claim grants for the lands so forfeited, and that such grants, when issued, would relate back to the date of the original patents of '55.

Immediately, after the first decision of the special court of appeals in *Norvell v. Camm*, 6 Munf. 233, Warwick and wife and Mrs. Camm (her husband was now dead) preferred their petition to the superior court of chancery of Lynchburg, setting forth the rights under which they claimed; charging, that Norvell's grant of November '97, embracing the tract of 433 acres (or part of it) claimed and held by him, was fraudulently, surreptitiously and illegally obtained, upon the false suggestion, that the land thereby granted was waste and unappropriated land, subject to
100 location *and grant upon treasury warrant; and praying a scire facias and certiorari, to have the patent certified to the court, examined, and repealed. And, in May 1824, after the second decision of the special court of appeals in *Norvell v.*

Camm, 2 Rand. 68, remanding that case to the circuit court, and after the contrary decision in *Whittington v. Christian*, Id. 353, they exhibited their bill in the same court of chancery, setting forth a full history of the controversies at law between them and Norvell, and all the facts which had been developed in the progress of them; the pendency of Norvell's writ of right in the circuit court, then standing on his demurrer to evidence; the points presented by the demurrer; the principle settled by the judgments of the two special courts of appeals, in *Norvell v. Camm*, as the law of that particular case, no longer to be questioned, that Norvell's patents cannot be impugned at law, but are only voidable in equity; and the direct opposite principle settled by the regular court of appeals in *Whittington v. Christian*, as the law of the land, that those patents are not only voidable in equity, but void at law: charging, that Norvell's patents of November '97 and June 1813 were obtained fraudulently, surreptitiously, illegally, and upon false suggestion: and praying, that the patent of November '97 might be examined and repealed by the chancellor; that, meanwhile, Norvell might be enjoined from farther proceedings on his writ of right in the circuit court, till the subject could be examined and determined in equity; and that the court might order a new trial of the mise joined in the writ of right, wherein Norvell should be inhibited from using that patent in support of his claim.

The injunction was awarded, the 21st May 1824.

Norvell, in his answer, denied, that his patents had been obtained fraudulently, surreptitiously, illegally, and upon false suggestion. He stated some matters of fact, which (he said) had not been heretofore adduced, in the trials of the suits at law, and which evinced his innocence of any actual fraud; and he referred to the records of three other controversies
101 *he had had (besides those that had been brought by appeal to the court of appeals) concerning the validity and regularity of the patents he had obtained, for the lands included in the patent of '55 to the two Christians and Brown, all of which were determined in his favour; and, alleging that the plaintiffs here were privies to the parties there, he insisted that those decisions concluded the main question, whether the lands thereby granted to him, were in point of law subject to location and grant upon treasury warrants. But, if this question were still open, he insisted, that the lands granted by the patent of '55, adjudged by the general court in '74 to be lapsed, forfeited, and re-vested in the crown, but not re-granted to the petitioners at whose suit the forfeiture was declared, were lands subject to location and grant upon treasury warrant, under the land laws, at the time the grants thereof to him emanated: in short, he controverted the opinion of the court of appeals, on this point, in *Whittington v. Christian*.

This answer was filed the 9th May 1825, and on the 21st of the same month, Norvell moved the court to dissolve the injunction;

on which the chancellor took time to advise till the next term.

A general replication to the answer, was put in at the rules, 25th May 1825; and commissions for taking depositions were awarded to both parties.

No depositions were filed by either.

The plaintiffs exhibited the record of Norvell's writ of right against them, which contained the record of their previous ejectment against him. The defendant exhibited the record of a suit in the superior court of chancery of Richmond, in which John and Charles Christian were plaintiffs and Norvell defendant, and in which some of the grants obtained by Norvell for parcels of the 3926 acres granted by the patent of '55, were impeached, and the lands claimed by John and Charles Christian, as in justice their property; and their bill was dismissed in September 1807. And

that record contained two other records; the one of a caveat *prosecuted by Charles Christian against Norvell, in the district court of Charlottesville, to prevent the issuing of a grant to him of the very parcel of land (it appeared) for which he afterwards obtained the patent of November '97, the validity of which was now controverted by Warwick and wife and Camm, which caveat was dismissed in September '97; the other, the record of a caveat prosecuted by Norvell against John Christian, in the same district court, to prevent the issuing of a grant to him of the 1000 acres of land (it appeared) that was in controversy in Whittington v. Christian, on which caveat judgment was given for Norvell in April '99.

At the rules in September 1825, this cause was regularly set for hearing.

And, at the ensuing October term, the chancellor made the following interlocutory order: "This day came the parties by their counsel, and the court having maturely considered the premises and the arguments of counsel, doth order, that the injunction awarded the plaintiffs in this cause (Warwick and wife and Camm) on the 21st May 1824, to restrain the defendant (Norvell) his agents &c. from further proceeding in the action instituted by him against them, in the circuit court of Amherst and by the judge of that court removed to the circuit court of Lynchburg, stand dissolved, as an act of this day, unless the plaintiffs shall at the next term of the circuit court of Lynchburg, confess a judgment for the 433 acres of land in the bill mentioned, as claimed by them, or so much thereof as may be comprised in the defendant's grant sought by the present bill to be repealed." From this order Warwick and wife and Camm appealed to this court.

The cause was argued by Johnson, for the appellants, and Stanard, for the appellee.

I. Johnson pressed the court, very earnestly, to enter into a consideration of the merits of the cause, and put an end to this long protracted controversy. All the materials for *forming a judgment upon the merits, were in the record, and were before the chancellor at the time he made the interlocutory order: the parties had filed no depositions in the long

interval allowed them for the purpose; it was obvious, neither had any parole evidence to adduce; all their evidence was documentary, and contained in their exhibits. And though a motion to dissolve the injunction, was made at May term 1825, which the chancellor took time to consider till the next term, yet before the next terms the cause had been set for hearing, and stood then for hearing: therefore, the chancellor ought to have taken it up as upon a hearing, instead of taking it up on the motion to dissolve the injunction. But, even if he was right in taking it up, on the motion, the motion itself presented the merits to him for decision; for Norvell had moved for a dissolution of the injunction, generally, not for a conditional dissolution unless judgment should be confessed in his action at law. If the chancellor might and ought to have decided the merits, this court may and ought to do so. Besides, this court has often, in cases where the merits of a controversy were really open to full view, though not in point of form regularly before it, availed itself of the opportunity to express its opinion upon them, and thus to put an end to further expensive and vexatious litigation; and if this were ever proper in any case, it was proper in this. He, therefore, proceeded to examine, succinctly, the main point in controversy, the regularity and validity of Norvell's patent of '97; and shewed, that the decision of Norvell v. Camm, 6 Munf. 233, determined that it was examinable, and might be annulled, in equity; and that the solemn decision of Whittington v. Christian, 2 Rand. 353, condemned it as void.

Stanard, for the appellees, did not wholly decline the discussion of the merits; but he said, it was improper to discuss them; for they were not now before the court. The chancellor had not considered them, or made any decree touching them. His order only settled a point of practice. The sole province of this court was to revise that order; its jurisdiction *was altogether appellate; and if, instead of revising the order the chancellor made, the order appealed from, this court should decide upon matters, on which the chancellor did not decide, but on the contrary carefully avoided the decision of, it would exercise original, not appellate, jurisdiction.

II. As to the conditional order dissolving the injunction, Johnson insisted, that the chancellor ought not, in such a case as this, to have imposed upon the plaintiffs in equity, the condition that they should confess judgment in the action at law. Warwick and Camm had a right to have the validity of Norvell's patent, upon which alone he could sustain his claim at law, examined in equity, where only it was examinable, without relinquishing any grounds of defence, wholly distinct from the merits of the patent, which might avail them at law. The bill in equity impeached Norvell's title: but the chancellor would not entertain them there, for that purpose, unless they would surrender their own: thus giving to a holder of a patent, impugned as surreptitiously and illegally obtained, the advantage of avoiding every other diffi-

culty, and every objection to his claim, save only the objection to the regularity of the patent, and of avoiding too, the merits of his adversary's independent claim of title; and laying a party seeking, upon equitable grounds, to prevent his opponent from using a wrongful patent against him at law, under the necessity of foregoing any and every rightful defence he might have, available to him at law, triable only at law, and wholly distinct from the matters preferred to the court of equity as grounds for relief. This was, in effect, to deny the plaintiffs their remedy in equity, not upon condition that they should waive their legal remedy for the same right, but that they should waive other rights.

If the matters preferred to equity for relief against proceedings at law, be the sole ground on which the party praying such relief, claims right, the chancellor ought to require him to abandon his defence at law, by a confession of judgment; but if, besides the grounds for relief in equity, he *have distinct and substantive grounds of defence at law, not cognizable in equity, he ought not to be required to confess judgment at law. Suppose one action of debt brought on several bonds, and the defendant to have complete defence at law as to all but one of the bonds, and, as to that, to prefer his bill in equity, alleging that it was obtained of him by fraud, and praying a discovery of the fraud, an inhibition to make use of the fraudulent bond at law, and a stay of proceedings at law till this matter can be heard in equity: must he, in order to entitle himself to this equity, confess judgment for all the debts claimed of him in the action at law?

In the practice of the english chancery, where relief is asked against a claim asserted at law, and no defence available at law is pretended, the chancellor does not enjoin the proceeding in the action to judgment: his injunction inhibits execution on the judgment when obtained. But when it is the object of the bill in equity, to obtain matter of defence to be used at law, the court stays the proceedings in the action at law. 1 Madd. Chan. 130-134; 2 Id. 218-19; 1 Newland's prac. in Chan. 217-223; 2 Harr. Chan. prac. 171-8; Partington v. Hobson, 16 Ves. 220; Appleyard v. Seton, Id. 223; Earnshaw v. Thornhill, 18 Ves. 485; White v. Steinwacks, 19 Ves. 83; Hindman v. Taylor, 2 Bro. C. C. 7; Revet v. Braham, Id. 639, note (a).

Norvell claimed in his writ of right a tract of 433 acres of land; one unascertained part, under his patent of November '97; another, under his patent of June 1813. The chancellor's order of dissolution required Warwick and wife and Camm to confess judgment for that part of the land covered by the first patent: for the part of the land claimed under the last patent, Norvell was left to get judgment if and when he can. So, if this order be complied with, two judgments must be rendered at law; one for one parcel on the tenants' confession, and another for the other parcel, for the demandant or for the tenants, according to the judgment of the court as

to the right; which would be irregular and anomalous.

106 *Stanard said, that as to the difficulty of rendering two judgments in the same action at law, there would be the same difficulty in suing out two executions on the same judgment, one immediately for the part as to which no relief was asked in equity, the other after the decree in equity, for the part as to which relief was sought there, if the decree should deny the relief. [Green, J., said, a question of this kind was considered in *Taylor v. Beck*, 3 Rand. 316, and his opinion then was, that, upon a partial cognovit actionem, no judgment ought to be rendered till the whole should be tried, and then one judgment given as to the whole.] Stanard said, the chancellor had, in truth, done more for the plaintiffs than he ought, in allowing them to confess judgment in part: he ought to have required them to confess judgment for the whole.

The bill in this case was not a bill for the discovery of matters to be used as a defence in the action at law; it was a bill for substantive relief in equity, upon equitable grounds, with a view to use, not facts discovered, but the relief obtained upon them in equity, as a defence at law. On bills for discovery of matter to be used on a trial at law, the proceedings at law may be stayed, till the discovery be obtained in equity; but in such bills, there should be no prayer for substantive relief; if there be, the bill is demurrable for that cause. On a bill for relief in equity against a claim asserted at law, there was no instance of an injunction awarded to prevent the plaintiff at law from proceeding to trial and judgment. And the authorities cited for the appellants, all shewed, that whenever a party resorts to a court of equity, for substantive relief against a claim asserted at law, he must submit himself to the jurisdiction of the chancellor, intirely and without reserve: if he ask relief in equity, after judgment at law, the chancellor invariably requires, as the condition of his interference, a release of errors at law; if before judgment, a confession of judgment, which is a release of errors.

107 *He denied the propriety, in this case, of granting any injunction to prevent the plaintiffs at law from proceeding to trial and judgment, or, indeed, that there was any reason or occasion for one.

PER CURIAM. Although the cause was set for hearing after the motion to dissolve the injunction, and before the conditional order dissolving it (which is the order appealed from), the cause has not been heard in the court of chancery on its merits; and either party has yet the right to produce new evidence. To pronounce any decree here, on the merits, would be to take original and not appellate jurisdiction.

As regards the order dissolving the injunction on the condition stated, the general rule is, that when a party comes into a court of equity to be relieved against proceedings at law, he must confess judgment at law, and rely solely on the court of

equity for relief. Anon. 1 Vern. 120, 1 Madd. Chan. 132. Nor is there any thing in the peculiar circumstances of this case, to take it out of the rule. Indeed, it does not appear, that there was any cause for an injunction, except to restrain the defendant in equity, after judgment obtained by him at law, from turning the tenants out of possession, before the validity of the patent on which his legal title depended, shall be examined and decided on, in the court of chancery; and the relief, after the confession to judgment, will be as ample as in ordinary cases. If Norvell's patent be vacated, the injunction will be perpetuated as to the land covered by it, or he may be decreed to convey his title under it, to the plaintiffs in equity.

Decree affirmed.

108 *Harvey and Wife v. Branson.

February, 1829.

(Absent CABELL and COALTER, *J.)

Chancery Practice—Decrees—When Final—Case at Bar.—A decree in chancery disposing of the whole subject, deciding all questions in controversy, ascertaining the rights of all parties, and awarding the costs, though it appoint a commissioner to sell part of the subject, and account for and pay the proceeds to the parties, with liberty to them to apply to the court to add other or substitute new commissioners, or for a partition of the subject directed to be sold, in kind, is a final decree.

Levi Branson filed his bill against Harvey and wife and Peck, setting forth that his grand-father, Benjamin Borden the elder, by his will in 1742, among other things, directed that all his lands on the waters of James river should be sold, excepting 5000 acres of land, all good, which he gave to five of his daughters, Abigail Worthington, Rebecca Branson, Deborah Borden, Lydia Borden, and Elizabeth Borden, that is, 1000 acres of good land a-piece to every one of the said five daughters above mentioned, to them and their heirs and assigns forever: that his widow and eldest son and heir Benjamin Borden, the younger, were executors of this will: that the 1000 acres were never allotted to Rebecca Branson: that she was dead, and the plaintiff was her heir at law: that Benjamin Borden, the younger, as executor and heir, took possession of all the lands of his father: that he died leaving a daughter Martha, his heir, with whom the defendant

Harvey intermarried: that all the lands unsold have passed into their hands: and, after some farther details, the bill prayed a decree against Harvey and wife and Peck (who was stated to have some of the lands in possession) for the 1000 acres of land. The answer of the defendants, acknowledged most of the facts in the bill, but stated, that Rebecca Branson and her husband, in 1745, conveyed the land by deed to Benjamin Borden, the younger, with general warranty; and, though it should appear that the right of Rebecca was not divested by that conveyance, yet
109 *the defendants had a right to resort to the warranty of the plaintiff's father, which descended upon him &c.

Soon after answering this bill, Harvey and wife filed a cross-bill against Branson, stating his claim for the 1000 acres, and the deed of his father and mother; that it was made for a valuable consideration, but the privy examination of the wife was not taken: charging, that Branson was bound by the warranty and covenants of his father, and that he has received or claims considerable estate from him, which they seek to have decreed them, if the plaintiff should recover the land: especially, a claim made by Branson for his father's portion of a part of the estate of Benjamin Borden the elder, which that testator directed should be sold, and divided among his children. This bill was answered.

On a hearing of the original and cross-suits, in December 1813, the chancellor decided, that Branson was entitled to the 1000 acres of land devised to his mother: that the warranty in his father's deed did not bind him, because no assets had descended to him: that this case, however, was not ready for a final decree, because it appeared, that the particular land claimed in the bill had been already appropriated in satisfaction of the claim of another daughter: And it being suggested to the court, that there were other persons possessed of land subject to the claim, leave was given to amend the bill, and make them parties. And, with respect to the cross-bill, the chancellor said, that though the warranty of his father did not bind Branson, yet that the covenants in the deed would bind the personal estate of the father, to answer any damages sustained by the breach of them: that Branson denied that he had received any personal assets from his father, and there was no evidence to prove that he had: that he was seeking, however, in another suit depending in this court (Borden's representatives v. Bowyer & al.) to recover a sum of money on account of the devise in the will of Benjamin Borden the elder, of certain lands to be sold, and the monies arising therefrom to be divided between his daughter
110 ter Rebecca Branson and others: *that the court held Mrs. Branson's share of this last mentioned subject, a chattel interest, to which her husband and his personal representatives were entitled: and that the court would, therefore, provide, that whatever of that legacy the personal representatives of Branson, the father, would have been entitled to receive, should be held liable to the indemnification of Harvey.

*COALTER, J. did not sit, because he had been formerly counsel in the cause.

Decrees—When Final.—On this question, the principal case is cited in *foot-note* to *Vanmeter v. Vanmeters*, 3 Gratt. 148; *foot-note* to *Fleming v. Bollinger*, 8 Gratt. 292; *foot-note* to *Rogers v. Strother*, 27 Gratt. 417; *Thorntons v. Fitzhugh*, 4 Leigh 213, 218, 219, 220; *Tennent v. Pattons*, 6 Leigh 208; *Cocke v. Gilpin*, 1 Rob. 34, 43, 46, 52 (see *note*); *Ambrose v. Keller*, 23 Gratt. 774; *Smith v. Blackwell*, 31 Gratt. 200; *Ryan v. McLeod*, 32 Gratt. 376 (see *note*); *Rawlings v. Rawlings*, 75 Va. 83, 87; *Wayland v. Crank*, 70 Va. 605; *Parker v. Logan*, 82 Va. 379, 4 S. E. Rep. 615; *Roanoke Nat. Bk. v. Farmers' Nat. Bank*, 84 Va. 610, 5 S. E. Rep. 682; *Barker v. Jenkins*, 84 Va. 890, 6 S. E. Rep. 459; *Jameson v. Jameson*, 86 Va. 51, 9 S. E. Rep. 480; *Series v. Cromer*, 88 Va. 428, 13 S. E. Rep. 850; *Sexton v. Patterson*, 1 Va. Dec. 564; *Manion v. Faby*, 11 W. Va. 493; *Ruhl v. Ruhl*, 24 W. Va. 283; *Core v. Strickler*, 24 W. Va. 693, 695; *State v. Hays*, 30 W. Va. 120, 3 S. E. Rep. 185; *Williamson v. Jones*, 39 W. Va. 282, 19 S. E. Rep. 444. See monographic *note* on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

Under the leave given, Branson amended his bill, and made several new defendants, in whose possession, it was stated, there were lands subject to his claim. These defendants answered, and much evidence was taken.

The two causes were again heard, together with the case of Borden's representatives v. Bowyer, in July 1818; when the chancellor made an interlocutory decree, touching all the three causes, wherein he declared, that the great difficulty of selecting, at this day, lands to answer the devise of Benjamin Borden the elder, of 1000 acres of land to each of his daughters, and the injury which would result from it to persons, who, or those under whom they claimed, had been long in possession, rendered it proper, that the claim of Mrs. Branson's heir (the only claim not yet satisfied) should be ascertained in money, and paid out of the shares of Robert Harvey and John Bowyer, of the monies received, or to be received, for the proceeds of the lands directed by a former decree of the court to be sold; and, if that should prove insufficient, then out of their own estates, in proportion to the amounts which they or their ancestors had received for lands (of B. B. the elder) sold by them. He further decided, that the claims of all the testator B. B.'s daughters, for shares of the proceeds of the lands devised to be sold, had been extinguished, except that of Mrs. Branson; and that the claims of two of his sons Joseph and John Borden, as well as that of Mrs. Branson, remained yet unextinguished. And he appointed commissioners to ascertain the compensation to which the heir of Mrs. Branson was entitled for the 1000 acres of land, specifically devised to her,

but never assigned to her, with directions to *report &c. And other directions were given, and reports ordered, in relation to the case of Borden v. Bowyer, not material to be particularly stated here.

It appeared, that the former decree, directing lands to be sold, referred to in the above mentioned decree of July 1818, was an interlocutory decree made in the case of Borden v. Bowyer; that the lands thereby decreed to be sold, were such of the lands devised by the will of Benjamin Borden the elder, to be sold, and the proceeds divided among all his children, as then remained unsold; that sales had been made; and that the proceeds thereof were then at the disposal of the court, or in a train of collection by Samuel Clarke, the commissioner who made them: so that the subject, which was afterwards to be disposed of, appertained to the case of Borden v. Bowyer.

The commissioners appointed to ascertain the compensation due to Mrs. Branson's heir, for the tract of 1000 acres devised to her, reported it to be 20,000 dollars; and to this report there was no exception.

The other reports, relating to the case of Borden v. Bowyer, required by the decree of July 1818, were also returned; and exceptions thereto were filed by the parties.

And, in August 1820, the three causes, Branson v. Harvey and wife and others, Harvey and wife v. Branson, and Borden's

representatives &c. v. Bowyer &c. were heard together; when the following decree was pronounced as to them all:

"These causes came on, together, this 5th day of August 1820, to be finally heard, on the decrees herein before rendered, and on the report of the commissioners and the exceptions thereto, and were argued by counsel: Whereupon the court doth overrule all the exceptions, taken by Bowyer and Harvey and wife, to the report of commissioner Samuel Clarke made in the case of Borden's representatives against Bowyer et al. and doth also overrule the third exception taken to said report by the plaintiff's counsel; but doth sustain the first

exception of the plaintiffs, so far as 112 to require *that the £48. 8. 8. therein mentioned, with the interest allowed thereon, should be debited to the defendant Bowyer; and doth sustain the plaintiff's second exception, requiring that the value of the 260 acres of land therein mentioned, should be brought into the account, at the price of £176. according to the estimate of the commissioners in 1804, on which sum of £176. interest should be calculated at the rate of six per centum per annum from the 1st November 1804 to the 1st November 1818, and the amount added to the purchase money received by Hawkins and wife, with which the defendants Harvey and wife are chargeable. The report aforesaid, when reformed on these principles, will shew the following results: that the whole fund, proceeding from the sale of lands distributable under the will of Benjamin Borden the elder, calculated up to 1st November 1818, is 75,524 dollars 73 cents; of which the plaintiffs, the representatives of Joseph Borden, are entitled to one ninth, equal to 8,391 dollars 63 cents, and the defendant John Borden to one other ninth; and of which the defendants Harvey and wife are entitled to three ninths, and a moiety of the ninth which would have belonged to the representatives of Branson, equal to 29,370 dollars 72 cents, and the defendant Bowyer to the like amount; that, deducting from the sum aforesaid, to which the said Harvey and wife were entitled, the amount which has been received by them and the said Hawkins and wife, to wit, 8,140 dollars 80 cents, stated on the 23d page of the commissioner's report, and 996 dollars on account of the aforesaid 260 acres of land, equal in the whole to 9,136 dollars 83 cents, there would remain due to the said Harvey and wife, of the fund aforesaid, a balance of 20,233 dollars 92 cents; and that deducting from the said Bowyer's portion of the fund aforesaid, what has been received thereof by his testator, that is to say, 17,759 dollars 57 cents, stated on the said 23d page of the commissioner's report, and 352 dollars, the principal and interest of the aforesaid £48. 8. 8. equal in the whole to 18,111 dollars 94 cents, there

would remain due of the fund aforesaid, 113 said, to said Bowyer 11,258 *dollars 78 cents. The said report, thus reformed, the court approves and confirms. The court, having heretofore decided, in the case of Branson v. Harvey and others, that the plaintiff must be compensated for the 1000 acres of land to which he was

entitled, by the value thereof in money, to be paid out of that portion of the fund aforesaid to which the defendants Harvey and wife and Bowyer were entitled, and commissioners appointed for that purpose having ascertained and reported to this court, in the year 1818, that the value of said land was 20,000 dollars, which report is approved and confirmed, there must be now appropriated to the said Branson, out of the balances above stated to be due to the said Harvey and wife and Bowyer, the said sum of 20,000 dollars; which being deducted in moieties, from the said balances, will leave due to the said Harvey and wife the sum of 10,233 dollars 92 cents, and to the said Bowyer the sum of 1,258 dollars 78 cents. (The several results herein stated will appear more distinctly by reference to a statement made and signed by the plaintiff's counsel, marked A. B. filed among the papers, and approved by the court.) The court doth, therefore, adjudge, order and decree, that commissioner Samuel Clarke, to whom hath been entrusted the management of the fund aforesaid, under the direction of the court, do proceed, without delay, to collect the same with such additions as shall have been made thereto since the 1st November 1818, as the respective sums loaned out, or payable for the original purchase money, shall fall due, after retaining his commissions thereon, and paying therefrom the costs yet unpaid which have been expended, as well by the plaintiffs and the defendants Harvey and wife and Bowyer, in the original suit of Borden v. Bowyer, as by the plaintiffs and defendants in the original and cross-suits of Branson v. Harvey and wife, and Harvey and wife v. Branson and others: that he do pay unto the plaintiffs the representatives of Joseph Borden deceased, their agent or attorney, the aforesaid sum of 8,391 dollars 63 cents, with six per centum per annum interest thereon from the 114 1st November *1818 till paid: that he pay unto the defendant John Borden, his agent or attorney, a like sum with like interest: that he pay unto the representatives of Rebecca Branson deceased, their agent or attorney, the sum of 20,000 dollars, with like interest from the same period till paid: that he pay unto the aforesaid Robert Harvey and wife, the aforesaid sum of 10,233 dollars 92 cents, with like interest from the same period till paid: and that he do pay unto the aforesaid John Bowyer, the said sum of 1,258 dollars 78 cents, with like interest from the same period till paid. If the fund aforesaid should be inadequate to the payment of the said several sums, then the sums decreed to the said Joseph Borden's representatives, John Borden, Harvey and wife and John Bowyer are to abate in the following manner; one-ninth of the deficiency is to be deducted from each of the sums decreed to said Joseph Borden's representatives and said John Borden, and the residue of the deficiency is to be deducted in equal moieties from the sums decreed to said Harvey and wife and Bowyer. If the said fund should be more than adequate to pay the said several sums, then the surplus shall be paid as followeth, one-ninth to said Joseph Borden's representatives, one-ninth

to John Borden, and the residue in equal moieties to said Harvey and wife and Bowyer. It is further adjudged, ordered and decreed, that the agency of said Samuel Clarke in the sale of lands yet remaining unsold, continue as heretofore, and that he proceed to make sales thereof, in such manner as he may judge most conducive to the interest of the parties; and after retaining his commission, and the proper costs and charges of the sales, that he distribute the proceeds thereof, in the same manner as the surplus of the fund aforesaid is directed by this decree to be distributed. Leave is, however, reserved to the parties aforesaid, at any time whatever, to apply to this court, to supersede the appointment of said Clarke as commissioner to make sales as aforesaid, or to appoint any commissioner or commissioners to act with or to succeed him, or to have the said unsold lands divided amongst the parties aforesaid 115 *in the foregoing proportions. If it should so turn out that one-ninth part of the unsold lands aforesaid, should be more than sufficient to remunerate the said Harvey and wife and Bowyer, for the balance of the 20,000 dollars with interest decreed to the representatives of Branson, after deducting therefrom the said Branson's one-ninth of the fund aforesaid which has been assigned by this decree to the said Harvey and wife and Bowyer, then the surplus of the said one-ninth of the unsold lands shall go and be paid to the said representatives of Branson. It is further adjudged, ordered and decreed, that the bill of the plaintiffs be dismissed (but without cost) as to the defendants whose lands were surveyed and laid off, on the supposition that they were subject to the devise of a thousand acres in the will of Benjamin Borden the elder."

In April 1824, Harvey and wife presented a petition to the chancellor praying an appeal from the above decree of December 1820, as to the two suits between them and Branson, which he denied; and, in July 1824, they presented a petition for an appeal to a judge of this court, by whom it was allowed. And the cause being now called for hearing,

Johnson, for the appellee, moved to dismiss the appeal, as having been improvidently allowed.

Whether it was so or no, depended on the character of the decree: if the decree was interlocutory, the cause was pending in the court of chancery when the appeal was allowed, and then the appeal might be allowed; if the decree was final, the appeal from it was barred by the statute, 1 Rev. Code, ch. 66, § 53, whereby the right to the appeal is limited to three years from the date of the decree.

He maintained, that the decree was final; final as to all the causes; final, at least, as to the two causes between Branson and Harvey, as to which only the appeal from the decree had been taken.

116 *If the decree were interlocutory as to Borden v. Bowyer, it was not therefore the less final as to Branson and Harvey. It disposed of every point and subject in controversy between them; it determined the suits pending between them; it was

final then as to them, even if the suit of *Borden v. Bowyer* were still left pending as to the parties thereto. *Royall v. Johnson*, 1 Rand. 421.

But the decree was final, as to the case of *Borden v. Bowyer* too. The chancellor certainly intended it should be so; for the decree expressly stated, that the causes came on to be finally heard. In the decree of July 1818, it was determined, that all the claims to the subject to be disposed of in *Borden v. Bowyer*, were extinguished, except the claims of the parties remaining in the court, in the three causes, when they were heard in December 1820. The claims of these parties, claims to the subject collected and at the disposal of the court in *Borden v. Bowyer*, alone remained to be adjusted. The decree of December 1820 decided every question in dispute; ascertained the rights of all the parties, in all the causes, to the whole subject in controversy; awarded the costs; and in short, left nothing to be done by the court, but to carry the decree into execution. The reservations made in the decree, had respect only to the future execution of it: liberty was not reserved to any party, ever afterwards, to contest the rights declared by it, but only to resort to the chancellor, for his aid in carrying it into effect, for the benefit of all parties. Reservations of this kind do not make a decree interlocutory. *Sheppard v. Starke*, 3 Munf. 29. If such reservations made a decree interlocutory, no decree could be final. For, in case of final, as well as interlocutory decrees, the parties have always a right to the aid of the court (whether liberty to apply for it be reserved or not) to execute the decrees they have obtained: indeed, they must resort to the court for the purpose, if the decree be not voluntarily and regularly fulfilled in all its provisions.

117 *Stanard, for the appellants, contended, that the decree was interlocutory. He said, every decree which leaves any thing to be done in the cause, by the court, was interlocutory, as between the parties remaining in court, though it might be final, as to the other parties then or previously dismissed from the cause. *Fairfax v. Muse*, 2 Hen. & Munf. 557-8, n. 2; *Allen v. Belches*, Id. 595; *Aldridge v. Giles*, 3 Hen. & Munf. 136; *Templeman v. Steptoe*, 1 Munf. 339; *Goodwin v. Miller*, 2 Munf. 42; *Mackey v. Bell*, Id. 523; *Chapman v. Armistead*, 4 Munf. 382, 398; *Alexander v. Coleman*, 6 Munf. 328. In *Mackey v. Bell*, the rights of the parties were completely adjusted, and the costs were awarded; yet this court held the decree interlocutory, because commissioners were appointed to carry the decree into effect: here, not only was a commissioner appointed to carry the decree into effect, but provisions were made for adding other or substituting new commissioners, or for dispensing with the sales, and making partition of the lands, by subsequent orders in the causes. The stating in the preamble of the decree, that the causes came on to be finally heard, could not determine the character of the decree: it could only shew, at the most, that the chancellor intended to make, or supposed he was making a

final decree: but such a design (if it could fairly be inferred) could not make the decree final, if it was in truth interlocutory. The decree, which this court held to be interlocutory in *Chapman v. Armistead*, was manifestly intended to be a final one, by the court that pronounced it. The decree in question here, was a single decree in the three cases of *Branson v. Harvey*, *Harvey v. Branson*, and *Borden v. Bowyer*; in the scheme of the decree, the first two cases were indissolubly blended with the last; indeed, the whole of the subject, disposed of by the decree as between *Branson* and *Harvey*, grew out of, had been collected in, and appertained to, the case of *Borden v. Bowyer*: if, then, the decree was interlocutory as to *Borden* and *Bowyer*, it was so as to *Branson* and *Harvey*. Now, he said, the decree, as to *Borden v.*

118 **Bowyer*, was clearly interlocutory: part of the lands remained to be sold by the commissioner; he was ordered to sell them; and those sales were of course to be reported to the court, and might be confirmed or set aside: accounts of subsequent collections of the proceeds of former as well as of subsequent sales, were to be rendered, were liable to exception, and were subject to the examination of the court. Otherwise, the chancellor's decree, in effect, constituted his commissioner a vice-chancellor. And, in those subsequent proceedings, all the parties in all the causes were interested, *Branson* as well as the others: for, by those proceedings, it was to be ascertained, whether the ninth part of the proceeds of the lands yet to be sold, will be more than sufficient to remunerate *Harvey* and *Bowyer*, for the balance of the 20,000 dollars and interest decreed to *Branson*, after deducting his ninth part of the fund in hand assigned by the decree to *Harvey* and *Bowyer*; in which case, the decree provided, that the surplus of the ninth part of the proceeds of the unsold lands shall be paid to *Branson*. The rights of the parties were not completely adjusted. The reservations contained in the decree, were therefore proper; and they were such as were proper only in an interlocutory decree, being reservations intended to be made effectual by subsequent orders or decrees in the same causes. If the decree were final, those reservations could only lay the foundation of new suits.

CARR, J. All decrees are either interlocutory or final: there is no middle class. In the progress of a cause, it often becomes necessary to make orders of different kinds, in order to enable the court to come at the whole case, or to settle the details, after the principles of the cause are decided: all these are interlocutory orders or decrees. But when a decree makes an end of a case, and decides the whole matter in contest, costs and all, leaving nothing further for the court to do, it is certainly a final decree. Let us try the case before us by this test.

119 **Branson* filed his bill to recover 100 acres of land: this was the sole object of it. The defendants *Harvey* and wife filed their cross-bill, claiming that if *Branson* should recover the land, they might be indemnified out of the assets of

his father descended to him. To Branson the chancellor said, he could not give him land, but he would give him the value of it in money; and he decreed his receiver to pay him 20,000 dollars. To Harvey and wife he said, that no lands had descended to Branson from his father, in respect of which he was liable on his father's warranty; but that there was a fund in the power of the court, which he was seeking, and which the court held liable to their indemnity; and that fund they should have, so far as it would go: accordingly he directed his receiver to pay this fund, so far as it was in hand, and to continue to apply it in the same way, as it shall accrue. The costs are given in both cases; and the bill dismissed as to some of the defendants, against whom no decree could be made. Now, did not this make an end of the business? What remained to be acted upon? What more did the court mean to do, or could it do? I cannot conceive. It is said, that the land was not all sold, from which the fund was to arise: but that, in my judgment, has no effect on the character of the decree. The court had done all it meant to do, or could do; and, in the suit of Borden v. Bowyer, the rights and interests in this land, and in the proceeds of it, had been settled, and also the mode of sale and distribution. Branson's share both of the money raised and of the land to be sold, was settled at a ninth: all his share of the money in hand, the court had decreed to Harvey and Bowyer, and all the proceeds of future sales, till they should be paid. To say that this was not a final decree, would be saying that no final decree could be made in such a case. How many decrees do we see, directing money to be paid at stated times, thereafter; decreeing an annuity for instance: but it never was doubted, that such decrees were final, if intended to be so.

120 *But it is said, that this case is so blended with that of Borden v. Bowyer, as to have become a part of the same cause, and that the decree being, as to Borden v. Bowyer, clearly interlocutory, this must be so as to Branson v. Harvey too. But how are these blended? there has been no order of consolidation, and I do not understand how without that, two distinct causes can become one. A consolidation of them, would seem to me very improper; their objects are different, and so are the parties in interest. The suit of Borden v. Bowyer is not before us; we have no copy of the record; I can speak of it, therefore, only from extracts from it, introduced into this case. Its general object seems to have been, a call upon the representatives of Benjamin Borden the younger, to account for and distribute the proceeds of all the lands, which Benjamin Borden the elder directed should be sold, and the proceeds divided among his children. To this suit all the children or their representatives must have been parties. But the bill of Branson, was for a specific devise of 1000 acres of land to his mother; and no child was made a party to this; nobody but Harvey and wife. How then could the suits have been consolidated? Would it have been right to have clogged

Branson, who had a specific object in view, by forcing him into the general contest, and affecting him by all the costs and all the delays, arising from such a number of parties, and such numerous subjects and points of litigation? The causes were connected in this way only: the chancellor declining to give Branson land, threw him upon Harvey and Bowyer's portion of the general fund, collected in Borden v. Bowyer; and also gave Harvey and Bowyer indemnity out of Branson's share of that same fund: but this could not make the two suits one.

It is said the chancellor heard them together, and pronounced one decree in them all. It is true the chancellor found it more convenient to have one hearing, and to pronounce one decree, than two; but 121 it was never in his *thought, that by this proceeding he was consolidating them: for throughout both his decrees, he treats them as distinct and separate suits; and it may be seen at a glance, what part of the decree is referable to the one, and what to the other.

I cannot think then, that this case is, in any respect, made a part of Borden v. Bowyer. But if it were, and if the decree in Borden v. Bowyer, was clearly interlocutory, it would not follow, that the decree here must of necessity be so too. The claim of Branson was certainly a distinct one: none of the parties to the other suit, none of the heirs of Borden, participated in that claim: he claimed for himself alone, the share of his mother; her 1000 acres. Even, then, if he had carried this separate claim into the general suit, there might have been a final decree as to him, without any decree on the other parts of the cause. For, I think, this court clearly right in Royal's adm'r. v. Johnson, where it decided that where a decree is made as to one of several defendants, the interests of that one being wholly unconnected with the others, and he being directed to receive or pay costs, such decree is final as to him, though the cause may be still pending in court as to the rest. Now, I have shewn, that the decree makes a complete disposition of the subjects of the bill and cross-bill of Branson v. Harvey, with the costs; and these subjects are so entirely unconnected with the objects of Borden v. Bowyer, that it would be difficult to imagine, how any thing subsequently done in this last, could affect the right or interest of Branson.

But I am strongly inclined to think this decree is final as to Borden v. Bowyer itself. I can only judge from the extracts from the record of that case, before mentioned, and the decree itself. The objection taken at the bar, I understood to be, not that the court had left any part of the case undecided, but that the decision was not final, because the commissioner of the court was still to go on and sell the lands, and because liberty was reserved to the parties to apply to the court to supersede 122 him, or to appoint one or *more commissioners to act with him, or to succeed him, or to have the unsold lands divided among the parties in the proportions settled by the decree. But this does not seem to me, to make the decree interlocutory. The

commissioner was not to report his proceedings: the court did not mean to pass upon them, in order to their validity. The power to sell, included the power to convey: and he was to distribute the money in settled proportions, as it came to hand. The liberty reserved to the parties to apply to the court, was merely to enable it to stop the commissioner, if he should be found abusing his trust; or to stop him, if all the parties should agree to divide the unsold lands, in the proportions settled by the decree. No leave was given to apply to the court to change any part of the decree in principle. We know, that in all cases where lands are to be sold, and the money applied to the use of particular persons, if all interested be *sui juris* and agree upon it, they may apply to equity, and elect to have the land. The leave given here, was nothing more: they could have done it of themselves in pais. But does not the very circumstance of leave being given to the parties, shew that the decree is final, and they out of court? If the case was still pending, and the parties in court, what need could there be of leave to apply to the court? In England, I find it every day's practice to appeal from decrees, where leave is granted to apply to the court for its assistance. It seems never to have been thought of there, that such leave makes the decree interlocutory.

It seems to me, that such a doctrine in this case, would be calculated to do much mischief. How long will you keep the decree open? The parties may apply or not: it is perfectly optional with them. The decree may be for years in a course of execution. There seem to be various scraps and slipes of land, the remnants of a large body, scattered here and there, through two or three counties. The commissioner is not to sell at once, or at auction: this would involve a sacrifice, which the parties did not wish. Years may
123 *pass away, before he closes the agency. And would it not be productive of fearful mischief, to decide, that during all that time, there shall be a lis pendens? that every thing done in the cause, may be undone? that all the titles, (perhaps, two or three hundred) suppose to have been settled by the decree, are still liable to be disturbed? and that every one who has purchased since the decree, resting (as he thought) on the firm foundation of a final decree not appealed from, is to be taken as a *lite pendente purchaser*? Such a doctrine promulgated, would shake many titles to their foundation.

I have met with but one case in our reports, which may seem to apply to this point; the case of *Sheppard v. Starke*. That was a bill brought against an executor by a distributee, for an account, and division of the residuum: a certain sum was decreed against the executor, to be paid to the children on their executing bonds &c.: "and liberty was reserved to the parties, or either of them, to resort to the court for its further interposition, if it should be found necessary." To this decree, the executor filed a bill of review, upon which proceedings and a decree were had; and the cause came up by appeal. On the argu-

ment here, not a word was said about the character of the decree, or the regularity of the bill of review. This court prefaced its opinion on the merits, by saying, "the court is of opinion, that though either of the parties to the original decree pronounced in this cause, might, in a summary way, have resorted to the court of chancery, for its further interposition, if deemed necessary, (under the special reservation in the decree contained,) they might also proceed by bill, as was done in the present instance; that mode being equally justified by the reservation aforesaid, and beneficial to the parties." It is clear to me, that the court had no intention, there, of expressing an opinion, that the decree was interlocutory: if so, it could not have sustained the bill of review, which, we know, can only be filed after a final decree; for not even the consent of parties can make a decree
124 final, which in its nature and terms *is interlocutory, as the court had decided in *M'Call v. Peachy*, 3 Munf. 296.

Upon the whole, I am of opinion, that the decree in the two suits of *Branson v. Harvey*, was final, and not being appealed from in time, the appeal must be dismissed.

GREEN, J. I am of the same opinion. In my judgment, every decree which leaves nothing more to be done in the cause, no subject to be acted upon or disposed of, no question to be decided by the court, is in its nature final; and that, therefore, this decree, in respect both to the case of *Borden v. Bowyer* and the cases of *Branson* and *Harvey*, is final. But I have some doubts, whether this opinion be quite conformable with former adjudications of the court, on questions touching the character of decrees, whether interlocutory or final.

BROOKE, President. I concur in the opinion, that the decree is final and conclusive, as to all the cases; and this, as well upon the former decisions of the court on like questions, as upon principle. I consider the case of *Sheppard v. Starke*, as in point: the court there, must have regarded the decree as final, else it could not have entertained the bill of review as regular and proper. As to the reservations in this decree, those and all similar reservations, are, in my view, simply provisions for the execution of the decree, as one final and conclusive, not reservations of any points for future consideration and decision.

The appeal was dismissed.

125

**Richards v. Mercer.*

March, 1829.

(Absent BROOKE, P.)

Conveyance of Land—Proviso—When Not Executory—Case at Bar.—M. agrees to sell R. a tract of land, parcel of a larger tract held by him, to consist of equal quantities of bottom and hill land, the boundaries of the bottom being fixed, but its quantity unknown: M. by deed, conveys R. a tract of land within specified bounds supposed to contain equal quantities of bottom and hill, with a proviso, inserted after the conveying part of the deed, that if the specified bounds contain less, or contain more, hill than bottom, in the one case, one of the lines described in the deed shall be drawn in so as to exclude the excess of hill land, and in the other case, that the same line should be thrown out so as to include as much of hill as bottom: and it is found, by survey, that the lines described in

the deed, contain 76 acres less of hill than bottom, so that the line specified in the proviso is thrown farther out to include this 76 acres of hill. HELD, that the proviso is not a mere executory contract to convey the additional 76 acres of hill land, but this 76 acres is conveyed by the deed, and that with sufficient certainty.

Same—Mortgage to Secure Purchase Price—When Not an Encumbrance on Title Although There is No Release—General Warranty*—Case at Bar.—M. agrees to sell R. 822 acres of land, for 5,754 dollars, and the parties covenant, that as the sufficiency of M.'s title is not certain, M. shall procure his brother to join him in the conveyance with general warranty to R. which is done accordingly: the 822 acres is parcel of a large tract of 12,500 acres, which was purchased of P. in London, in 1803, and then mortgaged to secure the purchase money £3,375 sterling: this mortgage has never been recorded in Virginia, and there is strong reason to believe the debt thereby secured fully paid: but no release of it has been obtained. HELD, this mortgage is no valid objection to a decree for M. against R. for a balance of the purchase money of the 822 acres of land.

Charles Fenton Mercer, by deed of bargain and sale, dated January 13th 1804, and duly recorded in the county court of Mason in July following; reciting that he had purchased of William Philip Perrin of London, a large tract lying on the Ohio, of near 14,000 acres, which Perrin had purchased of George Mercer deceased, for £3,375 sterling, payable in four instalments; that this purchase had been made for the mutual benefit of himself, John Fenton Mercer and James Mercer Garnett, though the land had been conveyed by Perrin to him alone; and that he had mortgaged the land to Perrin to secure the purchase money; in consideration, that John Fenton Mercer and
126 James Mercer Garnett *agreed to pay, each, one third of the purchase money to Perrin, conveyed to each of them, one equal undivided third part of the land, in fee simple.

Partition of this land was soon afterwards made between the two Mercers and Garnett.

By articles, dated August 31st 1809, between John F. Mercer and James Richards, Mercer covenanted to sell and convey to Richards 1300 acres of land on Sixteen Mile creek in Mason county (parcel of a lot which had been assigned to him in the partition) for a price to be ascertained by arbitrament, and to be satisfied and paid by Richards, partly by a conveyance to Mercer of other designated lands then held by Richards, and partly in money. And the articles contained a covenant in these words: "As the sufficiency of the titles, by which the lands aforesaid are respectively held by the parties, is not known to them, for the further assurance of the sufficiency, the said Mercer covenants and agrees, that he will procure Charles F. Mercer to join him in the conveyance of the said 1300 acres of land, and in a general warranty thereof, to the said Richards, or he will convey the lands he may receive from the said Rich-

ards, in trust, to such persons as may be nominated by the said Richards, for his benefit, and liable to be sold in the event of the failure of the said Mercer's title to the land he may convey to the said Richards or any part thereof, for as much money as may be lost by the insufficiency of the said Mercer's title." And Richards, on his part, entered into a similar covenant, for securing to Mercer, the title of the lands he contracted to convey him in exchange.

This contract was afterwards modified, by agreement between the parties, so as that John F. Mercer, instead of the 1300 acres of land on Sixteen Mile creek, mentioned in the original articles, was to sell and convey to Richards another piece of land on Crab creek and the Ohio, parcel of another designated lot that had also been assigned to Mercer in the partition above mentioned; which substituted tract was to consist of equal quantities of hill land 127 and river bottom, the *former at two dollars, and the latter at twelve dollars, averaging for the whole seven dollars per acre. The boundaries of the bottom land intended to be sold, were ascertained and known at the time; but the quantity of bottom was not known; and (of course) it was not known, how the lines were to be run, so as to include an equal quantity of hill land.

In pursuance of the contract, thus modified, John F. Mercer and Charles F. Mercer, by deed, dated November 8th 1809, conveyed to Richards, a parcel of land lying on the Ohio, in Mason, "bounded as follows; beginning at or near the mouth of Crab creek, at the corner of the said John F. Mercer and James Mercer Garnett; thence, with the line of Mercer and Garnett, to the back line of the original military survey called Mercer's bottom, to another corner of Mercer and Garnett in the said back line; thence northwardly as far along the same (the back line), as to the common point of intersection of the said back line with a line running from the lower corner of Caroline Maret's lot, at the foot of the hills, parallel with the said Mercer and Garnett's line; thence (that is, from the point of intersection of the said back and parallel lines) with the parallel line, to the corner of Caroline Maret's lower line (this is the course called the short parallel), to the river Ohio; and thence with the meanders thereof to the beginning, containing by supposition 700 acres of hill and bottom land." Habendum, "the said tract or parcel of land" with the appurtenances &c. to the said Richards, his heirs and assigns: "Provided that should the hill land within the said boundaries, exceed in number of acres the river bottom therein contained, then the said hill land shall be reduced to the same extent with the bottom, by running the short parallel above mentioned, as much nearer to the line of Mercer and Garnett aforesaid, as may be necessary for that purpose; and should the hill land, on the other hand, be less in quantity than the bottom within the said boundaries, then the quantity of hill land shall be extended, by running the said short parallel as much farther from the said Mercer and
128 Garnett's line, *as may be necessary

*Conveyance of Land—Defect in Title—General Warranty.—A vendee in possession of land under a conveyance of general warranty has no claim to relief in equity against the payment of the purchase money on the grounds of a defect in title where there has been no actual eviction or suit depending or threatened. *Beale v. Seiveley*, 8 Leigh 675, citing *Ralston v. Miller*, 8 Rand. 44; *Yancey v. Lewis*, 4 Hen. & M. 390; *Grantland v. Wight*, 5 Munf. 296; *Richards v. Mercer*, 1 Leigh 125; *Koger v. Kane*, 5 Leigh 606. See a discussion of this subject in foot-note appended to the last-named case. See also, citing the principal case on this subject, *Miller v. Argyle*, 5 Leigh 405; *Wamsley v. Stalnaker*, 24 W. Va. 232.

for that purpose, and thus having equalized the number of acres of bottom and hill, provided the whole quantity shall fall short of 700 acres, there shall be a reduction from the purchase money, of seven dollars per acre for every acre it may so fall short; on the other hand, should the said tract of land exceed in quantity 700 acres, then for every acre of such excess, seven dollars per acre shall be added to the price," to be paid by Richards, as provided by the articles of August 31st 1809, in respect to the money thereby contracted to be by him paid. This deed contains a covenant of general warranty of both John F. and Charles F. Mercer.

Richards, in May 1810, procured a survey of the land he had thus bought, to be made by the surveyor of Mason, wherein the bottom was represented to contain 373 acres, and the short parallel was so run as to include 373 acres of hill land; in all 746 acres.

Richards made several payments on account of the purchase money; but before the transaction was closed, John F. Mercer died, and by his will devised his estate to Charles F. Mercer, and appointed him executor: who, in July 1819, exhibited his bill against Richards, in the superior court of chancery of Fredericksburg, setting forth the facts above stated; complaining, that in the survey which had been made at Richards's instance, in May 1810, there were in truth 441 instead of 373 acres of bottom, and only 305 instead of 373 acres of hill land; insisting that, consequently, according to the terms of the proviso contained in the deed of November 8th 1809, Richards was bound to take 136 acres more of hill land at the price of seven dollars per acre; and praying, that the land might be laid off to Richards conformably with the true intent of the covenants and of the deed, and that he might be decreed to settle and to pay the balance of the purchase money.

Richards, in his answer, insisted on the survey of May 1810, as fair in itself, and one in which the Mercers had acquiesced.

129 *In the progress of the cause, the chancellor ordered a survey, which was made and returned by the surveyor of Mason. It appeared by this survey, that the quantity of bottom land was 411 acres; and the line, called the short parallel, was thrown out, so as to include the equal quantity of hill land; making in all 822 acres; that is to say, 76 acres more than Richards's survey had made it.

The chancellor also ordered an account, to ascertain the balance of the purchase money due from Richards. The commissioner reported that both parties acquiesced in the last survey, and stated the balance to be 1,774 dollars, with interest &c. With this report both parties were content.

But Richards, in the mean time, by leave of the court, filed a supplemental answer; wherein he stated, that since filing his former answer, he had discovered, that the whole tract of 14,000 acres, whereof the land he had bought of John F. Mercer was parcel, had been mortgaged by Charles F. Mercer to William Philip Perrin of London, to se-

cure £3,375. sterling, payable in four equal annual instalments, with interest from October 1803; and that this mortgage (for aught he knew) was still a subsisting security and incumbrance on the land.

Upon this, all the deeds affecting the title, were exhibited. The land was originally granted to George Mercer, by the colonial government, by patent dated in December 1772, wherein the quantity is stated to be 13,532 acres. George Mercer, by deed of lease and release, dated in November 1773, conveyed the whole tract to William Philip Perrin (described as being of the parish of St. George, Bloomsbury, in the county of Middlesex). By deed of lease and release, dated October 1803, W. P. Perrin (described in this deed, as being of Dorset street, in the parish of St. Mary Le Bone in the county of Middlesex) conveyed the whole tract to Charles F. Mercer, for the consideration of £3,375. sterling, payable in four instalments: And C. F. Mercer immediately mortgaged it to Perrin (described here also as of Dorset street &c.) as a security for the purchase

130 money. *He also gave his bonds for the debt, in which Mr. Monroe, then American Minister at London, and a Mr. Rennolds of London, were his sureties. And, in July 1809, Perrin conveyed the land and assigned the mortgage and the debt to Rennolds. The conveyance from Perrin to C. F. Mercer, was recorded in the general court; but neither Mercer's mortgage to Perrin, nor Perrin's assignment thereof to Rennolds, was ever recorded in Virginia.

Mercer averred, that the whole of the debt due to Perrin, had long since been paid; and he adduced evidence, which rendered it highly probable, though not certain, that it was paid. But no release of the mortgage, either by the heirs of Perrin or of Rennolds (they were both dead) was produced; and it seems, that for the want of knowledge who or where they were, such release could not be procured. It appeared, indeed, that Mercer had forgotten the execution of the mortgage, till he was reminded of it by the supplemental answer of Richards.

The chancellor was of opinion, that the mortgage to Perrin was no obstacle to the relief prayed by Mercer; and he decreed, that Richards should pay Mercer the balance of 1,774 dollars, with interest &c. and the costs of suit: but the decree did not require, that Mercer should convey to Richards, the surplus 76 acres of hill land, included in the lines of the survey made under the order of court, which the decree compelled Richards to take, and the price of which constituted part of the balance of purchase money decreed.

Richards appealed to this court.

Stanard, for the appellant, made two objections to the decree. 1st. The deed of November 1809 conveys the land lying within certain defined metes and bounds, and no more; and the survey made under the order of the chancellor having departed from those metes and bounds, and thrown out the short parallel, so as to include 76 acres of hill land lying without the metes and bounds specified in the deed, that deed did not pass this additional 76 acres.

131 The *proviso in the deed is an executory contract for the conveyance of such additional quantity; but it is not itself a conveyance, nor can it enlarge the actual conveyance that precedes it. It is apparent, that the deed was not intended to convey, by its own force, more than the quantity contained within the bounds therein specified. The chancellor, therefore, ought not to have decreed the unconditional payment of the whole purchase money, including the price of the additional 76 acres, without providing that Mercer should make a conveyance thereof to Richards.

2d. The proof of the payment of the debt due to Perrin and secured by the mortgage, is insufficient to establish the fact; and if the debt be paid, yet the mortgage has not been released, and therefore the legal estate is still outstanding in the heir at law of Perrin or of Rennolds; neither has the heir at law of Perrin or of Rennolds been made a party, so that the court could decree a release of the mortgage. John F. Mercer, at the time of his sale to Richards, and Charles F. Mercer, at the time of the decree, held only an equitable estate. And the court ought not to have made the decree until the legal title was got in; or at least it ought to have made the payment of the balance of the purchase money by Richards, dependent on the consummation of his title.

Harrison and Johnson, for the appellee. As to the 1st point: To understand the description of the land contained in the deed, and especially the effect of the proviso, it must be remarked, that, at the time the deed was made, the river boundary in front, the western line (Mercer and Garnett's line), the back line of the military survey, the eastern line running out from the river quite through the bottom to the very foot of the river hills but no farther (Maret's lower line), and the back line of Maret's land, were all fixed and known to the parties; and the river hills gave the line which divided the bottom from the hill land; so that the boundaries of the bottom land were fixed; but the quantity to the bottom land had not been ascertained; conse-

132 quently, it was not known *where the short parallel, or the line which was to be run parallel to Mercer and Garnett's line, and which was to be run from the back line to Maret's land, ought to be located, so as to include as much of hill as there was of bottom land; and consequently, too, the number of acres intended to be sold was not ascertained. Therefore, it was not intended to fix the location of the short parallel by the deed, but to prescribe a certain method of locating it: the quantity of bottom land within the known boundaries of it, was first to be ascertained; and then the short parallel was to be drawn in, or thrown out, so as to give an equal quantity of hill land. The function of the proviso is to explain the previous description of the land conveyed; it is part of the description. The deed leaves the short parallel ambulatory; but it prescribes a plain and simple mathematical process for the location of it; and wherever it should by that process be located, it was the effect as well as the intent of the deed, to convey all the land

within it, and no more. Greater precision and certainty cannot be required. Accordingly, Richards made no complaint in the court of chancery, as to the sufficiency of the deed to convey all the land included in the last survey, which fixed the location of the short parallel; and the amount of the purchase money, by his express assent before the commissioner, was computed with reference to the quantity shewn by that survey.

As to the 2d objection, there are many considerations any one of which would furnish a sufficient answer, much more all combined. 1. The mortgage to Perrin was never recorded in Virginia; and it was a conveyance of real estate to an alien, for Perrin is therein described as of Dorset street, in the parish of St. Mary Le Bone in the county of Middlesex; and though the instrument might have been available as a security in equity, yet as there can be little doubt that the mortgaged debt has been satisfied, it could never avail him to recover the naked legal title. 2. There was certainly no fraudulent concealment of this incumbrance practised by John F. Mercer upon Richards: On the contrary,

133 *the probable defect of the title is noticed in the original articles of August 31st 1809. Richards, in all probability, had actual notice of this mortgage, when he purchased: and if he had not, he might with the exercise of the slightest diligence have had notice of it: if he looked at all into the title of his vendor (as all purchasers ought, and almost all do) he would have seen a recital of this mortgage in the deed under which his vendor immediately claimed, then of record in Mason county court open to his inspection; namely, Charles F. Mercer's deed to his brother and Mr. Garnett, of January 13th 1804. He took, and he has hitherto held, possession, undisturbed. No suit has been prosecuted; none is threatened. He cannot now object this technical and patent, if not known, defect in the title. Sugd. law of Vend. 2, 8; Id. ch. 9, § vi. 345, 6, 7; (a) *Ralston v. Miller*, 3 Rand. 44; *Vail v. Nelson*, 4 Rand. 478. And 3. Richards knew there were doubts concerning the title, and stipulated for a particular security; a covenant of general warranty, wherein Charles F. Mercer should join with the vendor. This security he has got. He can ask no more. Sugd. ch. 9, § iv. 331; *Harg. Co. Litt.* 384, a. note 1.

Stanard, in reply. The reasoning, by which the appellee's counsel endeavour to obviate the first objection to the decree, conflicts with the principle on which the bill is framed, its prayer and its object. The argument concludes, that the deed of November 1809, was an executed contract in all its parts, and that this is a suit only to recover the purchase money: whereas the bill treats the proviso contained in the deed as an executory covenant, and prays a specific execution of it. And the bill takes the right ground. There is not a single word of grant or conveyance in the deed, that applies to a foot of land lying without

(a) The edition of Sugden's treatise, to which these references are made, is Ingham's Philadelphia edition of 1820.—Note in Original Edition.

the lines therein specified: the proviso, surely contains no words of grant; it is, in its terms, an executory contract; there
 134 is "nothing in the context, to give it a meaning variant from that which its words import; and no principle of equity or even of convenience requires, that the construction should be strained in the least. The short parallel is defined by the deed as precisely as any other line: the deed gives its course, its terminus a quo and terminus ad quem; calls for a straight line, parallel to Mercer and Garnett's line, from Maret's corner to the back line of the military survey; and conveys all the hill land included within that line, and neither more nor less. The proviso is a covenant providing for a future change of this line. Its language is prospective throughout; providing what should be done afterwards, and not even professing to declare what was done, or intended to be done, in this particular, by the deed. If the short parallel as located by the deed, should be found to include more of hill than of bottom land, the proviso bound Mercer to take a re-conveyance of the excess, and to make a proportional abatement from the price; if found to include less of hill than of bottom, Richards was bound to accept a conveyance of, and to pay for, an additional quantity of hill land. This is the effect of the proviso. According to the construction of the appellee's counsel, the deed does not, proprio vigore, pass the additional hill land; it operates to convey it, only by force of the future survey: in effect, the survey, not the deed, is the operative conveyance of the additional 76 acres of hill land: and whether a survey can be a conveyance of land, let the court judge.

Then, as to the incumbrance of Perrin's mortgage. That this mortgage was not recorded, can no wise help Richards, seeing that he has notice of it, before payment of the purchase money. Supposing Perrin an alien, and admitting that therefore he cannot claim to take and hold under the mortgage, as a conveyance, at law, it is nevertheless effectual as a security for the debt in equity; and I submit, that the evidence does not suffice to establish the payment of the debt. But, there is no proof that Perrin was an alien, unless it be im-

possible that an American citizen can be domiciled *in London. And if the
 135 description of Perrin's domicile in the mortgage, prove him an alien, it proves too, that he was a British subject; so that he was competent to take and hold under George Mercer's conveyance of November 1773; and, under that conveyance, as the land was never confiscated, he continued to hold it, till the 6th article of the treaty of 1783 prevented any future confiscation, and till the 9th article of the treaty of 1794 secured his title, and provided, that with respect to this subject, and the legal remedies incident thereto, he should not be regarded as an alien, but might grant, sell or devise it, in like manner as if he was an American citizen. (1 Bior. Laws U. S. 205, 212.) That Perrin was competent to sell and convey the subject in 1803, the appellee himself must maintain; else Richards has no title at all. Can it be doubted, that the

treaty of 1794 enabled him to take an immediate mortgage of the same subject, to secure the purchase money? The argument deduced from the supposition, that Richards had actual notice of Perrin's mortgage, or at least that that incumbrance was a patent defect in the title, of which he might without gross negligence have acquired knowledge is refuted by the fact, clearly appearing on the record, that this mortgage was so little known, or had made so little impression on the Mercers themselves, that Charles F. Mercer, who executed the instrument, had forgotten that it ever existed. With what reason can it be contended that Richards was conscious of that of which the Mercers were ignorant? There is as little reason to impute knowledge of the defect to him, as concealment of it to them. The proposition, that the parties have stipulated, and Richards has obtained a particular security against defects of title, namely, a general warranty of the land, in which both the Mercers joined, is quite destitute of foundation, unless the appellee be at liberty to tear a covenant out of the contract of August 1809, for the sale of 1300 acres of land on Sixteen Mile creek, though that contract was completely abandoned, and to insert it

in the new contract, evidenced by the
 136 *deed of November 1809, for the sale of another parcel of land on Crab creek. Let it be remembered, that this is not a case of a purchaser coming into equity, asking relief on account of defect of title, after having accepted a conveyance, and paid the purchase money, but of a vendor, claiming specific execution and payment of the purchase money, and a defect of title discovered, before the purchase money is all paid, and before specific execution decreed. In such a case, the very authorities cited for the appellee, prove that the vendor is bound to clear the title. Sugd. ch. 9, § vi. p. 345. The objection to the title is not merely technical: the legal estate is outstanding: and this is so serious an objection, that it has become a settled and invariable rule, that a purchaser shall not be compelled to accept a doubtful title, nor be forced to take an equitable one. Sugd. ch. 7, § III. 242.

COALTER, J., compared the price at which John F. Mercer sold Richards the tracts of 822 acres, with that at which Charles F. Mercer bought of Perrin the whole military tract of 13,582 acres; and shewed, that the purchase money of the small parcel bought by Richards, containing not a sixteenth of the whole tract, amounted to about a third of the purchase money for which the whole tract had been bought of Perrin: whence, he said, it might be fairly inferred, that if the whole debt secured by the mortgage to Perrin, were yet unsatisfied, there would be land enough, and much more than enough, to satisfy the whole debt, without touching the parcel held by Richards. But he remarked there were many circumstances (which he stated and commented on) to raise a belief that the debt to Perrin had been fully paid.

And (he proceeded) though these circumstances do not amount to absolute proof of the payment of the debt secured by the

mortgage to Perrin, yet they go so strongly to establish a belief that this must be the fact, as to authorise us (as it seems to me), especially connected with the other circumstances of the case, to leave the party 137 to his remedy on *the covenants in his deed. Those other circumstances are, that first stated, namely, the improbability that the parcel of land bought by Richards, could in any event be touched by Perrin's mortgage, and the further fact, that the parties, being ignorant as to the goodness of the title to the lands given in exchange under the contract, or being apprised that difficulties of some kind or other did exist, agreed mutually to procure others to join them in the deeds and covenants of warranty, so as to secure them against such defects. This, therefore, is stronger than the ordinary case of covenants by a vendor alone; a particular security was required, and that very security given: and if, in an ordinary case, a court (under such circumstances as this case presents) might turn the party over to his covenants, a fortiori may it be done where security was required and given.

It is said, the legal title is still outstanding, and the party has a right to have it in. If, however, the debt has been paid, as there is every reason to believe, can actual notice of an unrecorded mortgage, after payment, affect the party at law? Is it not void for want of registry, unless notice is given before the debt is discharged? I incline to think there can be no danger to the party on this ground. The deed to Richards does not lead him, by reference, to the deed of Charles F. Mercer, to his brother and Mr. Garnett, in which alone the mortgage is mentioned; and he swears he had no actual notice of the mortgage until May 1822. At most, then, he had before that time, such implied notice as might affect him in equity in relation to the creditor, had the mortgage been undischarged. It seems to me, it could not have been the intention of the legislature, that notice of an unrecorded satisfied mortgage should affect the party at law.

I should be sorry to be obliged to say, that a mortgage executed in a foreign country, held up for so long a time, and when it must be so difficult to get releases &c. shall be a sufficient ground, on which to hold up the purchase money, especially under the circumstances attending this case. How long is it to be held up?

138 *The mere possibility that the legal title conveyed by the mortgage may prove a disturbance to Richards's title, resting on the intire improbability that the debt has not been paid, or that it cannot be paid out of the remaining lands, is surely too slight a ground, on which either to vacate the contract, if that was asked, or to tie up the purchase money to an indefinite period of time. The covenants and security given in the deed ought to be enough to cover this surmise of a want of clear title. How could Perrin disturb the title, either at law or in equity, if the money has been paid, or can be satisfied out of the remaining lands, or can be made out of Mercer?

But it is further said, that the deed does

not convey that small portion of the hill land, which is now embraced by the moveable line, as now established by the decree in this case.

This seems to be an objection thought of, for the first time, in this court. It is not taken in the answer; and it is not to be supposed, that, if any doubt had been suggested in the court below, there could have been any hesitation in that court to decree a conveyance thereof, either by the party, or by a commissioner. If there were any doubt on this subject, however, and if the decree were to be reversed on such ground, the costs ought to be paid by the appellant, the appellee having substantially prevailed. But can there be any doubt as to this matter?

The bottom land was bounded by the river on one side, and by established lines on two of the other sides, running out from the river to the hills; and was bounded on the other side by the hill land. The whole bottom land is conveyed, but the quantity was not precisely known. Had the parties established the lines along the foot of the hill, and stated them in the deed, leaving the quantity unascertained, and then made the same provisions as are now contained in the deed; it is believed, all would agree that the deed would convey one equal quantity of hill land. The parties intended a conveyance, and not an executory contract, as to the hill land; and

the question is, whether, as the mar- 139 gin of the hill *land was not ascertained in the deed, but as that must now be a matter resting on opinion only, the deed can operate a conveyance? This objection, if well founded, might (it seems to me) go further than in the argument it was thought fit to push it: it might go to shew that the contract itself, considering it executory, could not be executed for uncertainty. Who is to form this opinion, if the parties, themselves, have left it vague? But if others can ascertain the line of division between the hill and bottom land, then so soon as that is done, it is as certain, as if the parties themselves had done it in the first instance, and the residue follows by mathematical certainty. That is certain which can be rendered so. Suppose the parties themselves, or a surveyor for them, had run this border line, so as to ascertain the quantity of bottom land, and they had thus been satisfied as to that, and the surveyor had proceeded, with like consent, to close and mark the open line, and Mercer had afterwards brought his ejectment for the land, thus embraced in the survey, is it possible, that any court of law, these facts appearing, could hesitate in deciding that the deed covered this land?

But here is a decree settling the boundary, in a suit brought by Mercer, claiming to settle it precisely as it has been; and it is, in fact, by the assent of both parties to the survey, settled to their mutual satisfaction. Who can disturb this? not Mercer surely; and if he cannot, no one under him can; no one can, except one having title paramount to both. No mere intruder could prevail against this title, thus confirmed by a decree founded on assent as to the boundaries. Hence, no one in the court

below dreamed of the necessity of a farther conveyance. The strong reasons urged in the argument in favor of this position also furnish additional ground to shew, that no doubt ought to exist on this point.

On the whole, therefore, I think the decree ought to be affirmed.

The other judges concurred, and the decree was affirmed.

140

*Haleys v. Williams.

March, 1829.

[19 Am. Dec. 743.]

(Absent BROOKE, P., and COALTER, J.)

Judgments—Order of Satisfaction.*—If several creditors by judgments of different dates, resort to a court of equity, for satisfaction out of an equitable interest of their debtor in real estate, they are to have satisfaction out of the fund, according to the order of their judgments in point of time, the elder being entitled to priority over the younger.

Same—On What a Lien.—In equity, judgments are liens on the whole of the debtor's equitable estate in lands; so that not a moiety only but the whole fund is first to be applied to satisfy the elder judgment, and not a moiety only but the whole of the residue is then to be applied to satisfy the younger judgment.

Same—Elegit—How Lands Extended—Quere.—Whether if there be two judgments of different dates, and elegits on each, and a moiety of the debtor's lands be extended on the elder, the whole instead of half only of the other moiety, be not properly extendible on the younger judgment.

By deed dated June 10, 1823, Mereday Haley conveyed to his sons Philip and William Haley, in fee, a mill and sixty-five acres of land thereto adjoining, and another tract of sixty acres, lying in Caroline county. The consideration expressed in the deed was 1500 dollars, and a receipt for the money of the same date with the deed, was subjoined to it.

The same Mereday Haley, by deed dated June 18, 1823, conveyed to Samuel Chiles and Timothy Chandler, trustees, a tract of 340 acres of land in Caroline, and the same mill and lands comprised in the deed of June 10, 1823, ten slaves, sundry stock of horses, cows &c. plantation utensils, and household and kitchen furniture, in trust, to secure a debt of 1099 dollars due by M. Haley to F. James & Co. and another debt of 935 dollars due to his son Joseph C. Haley.

And, by deed dated October 1, 1823, Mere-

***Judgments—Order of Satisfaction.**—Amongst incumbrancers, where all having nothing but equities, and none the legal title, their equities being equal, they are entitled to satisfaction according to the priority of their incumbrances in point of time, upon the maxim *qui prior est in tempore, potior est in jure*. Couits v. Walker, 2 Leigh 280, citing *Haleys v. Williams*, 1 Leigh 140. To the same effect the principal case is cited in *Michaux v. Brown*, 10 Gratt. 619; *Hale v. Horne*, 21 Gratt. 123; *Findlay v. Toncray*, 2 Rob. 377.

+Decrees—On What a Lien.—A decree creates a lien on the debtor's equity of redemption under his deed of trust; for though the equity of redemption could not be sold under a *fi. fa.* and was not extendible, yet the decree constituted an equitable lien thereon, entitled to priority over subsequent liens by judgment or otherwise. *Findlay v. Toncray*, 2 Rob. 377, citing *Haleys v. Williams*, 1 Leigh 140; *Couits v. Walker*, 2 Leigh 280. The principal case is also cited in *Nickell v. Handly*, 10 Gratt. 399, and in *McClung v. Belrne*, 10 Leigh 406, citing the principal case. It is said, the equity of redemption in land conveyed in trust should have been first sold out and out,—not a moiety only, but the whole.

But where a creditor, standing on the lien of his judgment alone, comes into a court of equity to

day Haley conveyed to George Martin, 176 acres of land, apparently parcel of the largest tract comprised in the deed of trust of June 18, 1823, for the sum of 1200 dollars, whereof Martin paid 50 dollars, and gave his bond for 1150 dollars, which bond M. Haley transferred to his son Joseph C. Haley.

F. James & Co. shortly after the deed of trust of June 18, 1823, was executed, assigned the debt thereby secured, 141 *and the security, to Philip, William and Joseph C. Haley, sons of Mereday, for a full and fair consideration. And on the 29th September 1823, the assignees had a sale made under the deed of trust; at which Philip Haley purchased three of the trust slaves, and sundry articles of furniture, at the price of 239 dollars; William Haley purchased four slaves, a horse and some furniture, for 337 dollars; and Joseph C. Haley purchased three slaves, for 105 dollars. These sales were so conducted as to prevent competition, and the prices shew that there was none.

After all these transactions, James Williams and Richard Williams, recovered judgments against Mereday Haley, for debts contracted before any of the deeds above mentioned had been executed; and sued out executions, which were unavailing. James's judgment was the eldest.

And then they exhibited their bill, in the superior court of chancery of Fredericksburg, against Mereday Haley, Philip, William and Joseph C. Haley, Martin and F. James & Co. charging that the deed of June 10, 1823, was altogether voluntary and fraudulent; that the deed of trust of June 18, 1823, though fair so far as it secured the debt to F. James & Co. was fraudulent so far as it secured the debt of 935 dollars to Joseph C. Haley, no such debt having been

remove an obstruction interposed by a fraudulent conveyance in the way of his remedy at law against the legal estate of his debtor, a court of equity cannot enlarge his rights so as to reach property not liable at law; the most it has done in such cases, is to expedite his remedy by decreeing a sale of the moiety. *McNew v. Smith*, 5 Gratt. 88, citing principal case. See also, citing principal case, *foot-note* to *McClung v. Belrne*, 10 Leigh 394. To the same effect the principal case is cited in *Buchanan v. Clark*, 10 Gratt. 177.

In *Cronie v. Hart*, 18 Gratt. 745. It is said, in respect to the third and last inquiry suggested, it will be seen that the language of the Code is very clear. After declaring, that "the lien of a judgment may always be enforced in the court of equity," it does not authorize such court to decree a sale of real estate, or any part thereof, unless "it appear to such court that the rents and profits of the real estate, subject to the lien, will not satisfy the judgment in five years." This enactment was doubtless designed to clear up the difficulties arising under the decisions of *Haleys v. Williams*, 1 Leigh 140. *Blow v. Maynard*, 2 Leigh 29. *Tennent v. Pattons*, 6 Leigh 196. *McClung v. Belrne*, 10 Leigh 394, and *McNew v. Smith*, 5 Gratt. 84, cited by counsel for defendants in error; and to fix the grounds and extent of equitable jurisdiction in the enforcement of judgment liens. These cases left in doubt as to what was the precise limit of the discretion to be exercised in decreeing satisfaction of the rents and profits; so that it was peculiarly fit for the assembly to regulate the matter by positive enactment. This is done in language clear enough to comprehend all cases; nor does it seem that there is any ground to suppose from the report of the revisors as was ingeniously contended for, that the case of original equitable jurisdiction to set aside a fraudulent conveyance was not designed to be embraced by these terms. See monographic notes on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 423, and "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

due; that the sales under the deed of trust of September 29, 1823, were fraudulent; and that though the sale of October 1, 1823, of 176 acres of land to Martin, was fair so far as he was concerned, the transfer of his bond for 1150 dollars of the purchase money, by M. Haley, the father, to Joseph C. Haley, the son, was fraudulent: And praying, that all the transactions, thus impeached as fraudulent might be set aside, and the property subjected to their judgments. The defendants filed their answers; and a volume of depositions in relation to the frauds charged in the bill, were taken and filed by both parties. The chancellor held that the charges of fraud were fully proved, and pronounced an interlocutory decree according with the prayer of the bill. The Haleys appealed to this court.

142 *The cause was argued by Stanard for the appellants, and Johnson for the appellees. The argument turned chiefly on the questions of fact touching the imputed frauds; but in the course of it, two points of law were suggested. 1. The chancellor's decree directed, that R. Williams, the junior judgment creditor, should participate equally with J. Williams, who had the elder judgment, in the distribution of the funds held liable to the judgments, whether those funds should be sufficient to satisfy both judgments or not; and the question was whether the elder judgment was not entitled to priority of satisfaction to its full amount? 2. Whether the whole of the real subject was bound by the judgments, or only three-fourths thereof, that is, a moiety by the elder, and a moiety of the other moiety by the junior?

GREEN, J. The transactions impeached in this case, are so palpably fraudulent, that it would be a waste of time to discuss the proofs in detail. The decree subjecting the property in question to the satisfaction of the plaintiffs' judgments, is, therefore, right in principle, but it is erroneous in its details in several particulars. (Here the judge pointed out several errors in the details of the decree, and indicated the proper corrections thereof: they involved no principle.)

The decree directs, that Richard Williams shall participate equally with James Williams, in the distribution of the funds held liable to their demands, whether they be sufficient to pay them in full or not; whereas the latter having obtained the first judgment and placed the first execution in the sheriff's hands, is entitled to priority, both in respect to the real and personal property, the judgment binding the former, and the execution delivered, the latter, in equity. It is a settled rule in respect to the satisfaction of judgments, and other liens upon an equitable fund, where neither has the legal title, that all are to be paid according to their priority in point of time, upon the maxim, in equali jure, qui prior est in tempore, potior est in jure.

143 Symmes v. *Symonds, 4 Bro. P. C. 328; (Tomlin's edi.); Brace v. The Dutchess of Marlborough, 2 P. Wms. 495. And in this case the fund is equitable, so far as the judgment creditors are concerned, the legal title being in the trustees for the security of the debt due to F. James & Co.

which has a priority over the judgments.

This leads us to a more particular examination of the questions, suggested in the argument, as to the extent to which the plaintiffs' judgments, and the proceedings under them, operated as an equitable lien upon the trust property. As to which, it was insisted, on the part of the appellants, that only three-fourths of the land was bound, a moiety by the first judgment and a moiety only of the remaining moiety by the second. This question might be very properly raised, if the subject upon which the judgments operated, was lands, of which the debtor was seised, and which might be extended at law. And, even in that case, I should strongly incline to the opinion, that two judgments at different times, would, under all circumstances, and no matter when elegits were taken upon them and executed, bind the whole of the debtor's land, each a full moiety. The words of the writ command, that a moiety of the lands of which the defendant was seised at the time of the judgment, or at any time after, shall be delivered to the plaintiff. If, therefore, an elegit upon the second be executed before one upon the first judgment, a moiety would be taken: for, the debtor in that case, would continue seised of the whole, and no injury would be done to the creditor who had the prior judgment, as a moiety would be left to satisfy his elegit; and as to the effect of two elegits under those circumstances, there does not appear ever to have been any doubt. So, if an elegit were executed on the prior judgment, and afterwards an elegit taken upon the latter, it seems to me that the remaining moiety might be taken; for, notwithstanding the extent under the first elegit, the debtor continues seised of the land extended, since the tenant by elegit has no freehold, but only a chattel interest which goes to his executor, and is extend-

144 ible only as a chattel. 2 Inst. 396; 10 Vin. Abr. 543; Execution, M. pl. 1, and the notes there; 11 Id. 173, 5, Executors; 2. 2, pl. 6, 23, 30, 34. Accordingly, it was held, that the whole of the land might be taken by two successive elegits, under these circumstances; 10 Ed. 2; Execution, cited at the end of the case of Huit v. Cogan, Cro. Eliz. 483. In this last case, however, the court held, that the second elegit should only take a moiety of the remaining moiety, but advised the sheriff to return the special matter: the point, therefore, does not appear to have been adjudged. Again, in the case of The Attorney General v. Andrew, Hardr. 23-27, in which it was held, that upon two contemporary judgments, the whole might be taken, a moiety under each, it was said in argument, that upon a second elegit only a moiety of the remaining moiety could be taken; for which was cited Huit v. Cogan, before notice, and Burnham v. Bayne, 2 Brownl. 96, in which that point was agreed by all the judges. And in Pullen v. Burbeck, 12 Mod. 357, Holt, C. J., said, that although, in such a case, only a moiety of the remaining moiety ought to be taken, yet if the whole of the remaining moiety be in fact taken, this is well, and no audita querela would lie. Although, then, there

is no adjudged case, contradicting that of the 10 Ed. 2, yet these repeated and imposing dicta would induce me to pause, if it were necessary to decide that point in this cause, though upon the whole, I should probably follow the ancient decision, as conforming to the literal effect of the writ, and the true spirit of the law.

It is, however, unnecessary to decide that point here, since if the lien of a judgment upon an equitable subject, was in all respects analogous to its lien upon lands of which the debtor had a legal seisin, upon the principle that equity follows the law; yet no *elegit* being in fact executed or capable of being executed, a court of equity upon the familiar principle of marshaling securities, according to which, when several have liens upon the same subject, they will be so arranged in equity, that he who has the prior security, shall use it in such a way as not to affect the interest of

145 the *others, if that can be done without injury to himself, would postpone the effect of James Williams's elder to that of Richard Williams's junior judgment, so as to make the case analogous to that at law, where an *elegit* upon a posterior judgment is executed before one is taken out on a prior judgment, in which case each would take a full moiety. (See the cases referred to in 1 Mad. Chan. 202, upon the subject of marshaling securities.) The rights, however, of judgment creditors, in respect to an equitable fund, are not analogous of their rights at law, but stand, particularly in respect to property in mortgage, upon an intirely different foundation. A judgment creditor acquires an equitable lien upon the equity of redemption in the debtor's property subject to mortgage. And a court of equity, upon the principle that equity follows the law, would, if it were practicable, only give the same effect to the equitable lien, as would be given to it at law, if the subject of the lien was a legal title; that is, would only subject a moiety. But that is impracticable; since the only means by which a court of equity can enable the creditor to reach the equity of redemption, is to allow him to redeem; which cannot be done, with a proper regard to the rights of the mortgagee, without requiring him to redeem in toto, and not for a moiety only. The consequence of which is, that, acquiring by that means the legal title to the whole, the creditor cannot be redeemed by the debtor, without paying not only the whole of the mortgage debt, but also the whole of the judgment, upon another principle of equity, that he that asks equity must do it. An example of this is to be found in the case of *Stileman v. Ashdown*, as reported in *Ambler*, p. 13. See also *Bacon v. Ashby*, *Finch. Rep.* 366; *Morret v. Westerne*, 2 Vern. 663. To the purposes of this case, the deed of trust has the same effect as a mortgage.

In strictness, R. Williams's judgment, upon which no execution had been put into the sheriff's hands, at the time of the filing of the bill, was no lien in equity, upon that portion of the trust property which was personal, nor could he rightfully

146 *resort to a court of equity as to that subject. *Shirley v. Watts*, 3 Atk.

200. Yet he was right in court, as to the lien of his judgment on the equity of redemption in the land, as was *James Williams*, in respect both to the real and personal subject. And R. Williams having placed an execution in the hands of the sheriff, pending the suit, which has been returned *nulla bona*, he might reach the personal fund, by filing a supplemental bill, if that were necessary. But it is not: he, like any other creditor who had acquired a lien upon the personal property in question, by judgment and execution delivered to the sheriff, may exhibit his claim before a commissioner without a bill, and have satisfaction out of the fund, according to his rights in respect to priority. *Burroughs v. Elton*, 11 Ves. 29.

The result is, that the defendants *Joseph, Philip and William Haley* are entitled, first, to satisfaction out of the trust fund, for the balance of the debt due originally to *F. James & Co.* secured by the deed of trust, and transferred to them, after deducting whatever they may be found to have received, from the hires of the slaves and the rents and profits of the mill and lands, or for the disposition of any of the slaves, and the value of the personal property which they acquired under colour of the sale of September 29, 1823; and *James Williams* next, and then *Richards Williams*, are entitled to satisfaction of their judgments, or of so much of *Richard Williams's* as may be due, out of the residue. And any surplus should be paid over to such of the defendants, as may shew that he or they are best entitled to it.

CARR, J. With respect to the remarks of my brother *Green*, on the subject of the *elegit*, viz. that if the *elegit* of A. be levied on the half of B.'s land to-day, and to-morrow C. get a judgment against B., C. by his *elegit* can take the other half of the debtor's land; I do not mean to say that I am against it: my impression has been otherwise; but I have not examined the subject, nor does it arise in this case. I mean merely to say, that I have no opinion with respect to it.

147 **CABELL, J.* I wish it to be understood, that I give no opinion on the question, how far two *elegits* may, under all circumstances, be made to reach the whole land of the debtor. That question is not necessary to be decided in this case.

The whole court concurred in a decree approving the principles of the chancellor's decree, but correcting several of its details, and conforming with the results stated in the opinion of judge *Green*.

Clarkson's Adm'r v. Garland and Another.

March, 1829.

(Absent *BROOKE, P.*, and *COALTER, J.*)

Usury—Case at Bar.—C wanting to raise \$2335, tells J. this, and offers him as many slaves as will command that sum: upon which, J. pays him \$2335, in gross, for 16 slaves, and C. gives him a bill of sale thereof; and it is, at the same time, agreed, that the slaves shall remain in C.'s possession, on hire, for one year; and if at end of the year, C. shall pay J. \$2335, J. shall, in consideration thereof, re-sell the slaves to him; if any of the slaves die during year, C. to pay same price and no less, for survivors; and if C. shall not pay the \$2335

punctually, J's agreement to re-sell them to him to be void. HELD, a shift to evade statute of usury, and contract usurious.

Same—When Equity Will Not Disturb Sale under Usurious Deed of Trust.—C. contracting usurious debt to G. gives him a deed of trust of slaves, to secure it: afterwards, C. voluntarily surrenders trust slaves to trustee, to be sold to satisfy the debt: at trustee's sale, in itself fair, G. buys greater part of trust slaves, and the proceeds of sales are applied to the debt. HELD, though deed of trust usurious, yet trustee's sales of the subject to G. the usurious creditor, shall not be disturbed in equity.

Same—Equitable Relief—Usury.—Though where one resorts to equity for relief against usurious debt yet unpaid, he shall be required to pay only the principal advanced to him without even lawful interest, according to the statute of Virginia; yet where debtor seeks, in equity, an account of and decree for money already paid on usurious contract, the measure of relief is, the excess paid above principal and lawful interest: and if his payments exceed principal and lawful interest, the surplus with interest shall be decreed to him.

Clarkson exhibited his bill against Garland and Jacobs, in the superiour court of chancery of Lynchburg, setting
148 *forth, that on the 23d March 1815, he in fact borrowed of Jacobs the sum of 2335 dollars, at exorbitant usury, though this usurious loan was covered by the device of a sale of 16 slaves by Clarkson to Jacobs, redeemable by Clarkson, on payment of 2935 dollars, on or before the 23d March 1816; and on the 22d May 1815, he in fact borrowed of Jacobs another sum of 2666 dollars 26 cents, likewise on usury, though this loan was also covered, in like manner, by the device of a sale of 14 slaves by Clarkson to Jacobs, redeemable by Clarkson, on payment of 3394 dollars, on or before the 23d March 1816. That, the slaves not being redeemed by Clarkson, Garland, with full knowledge of the usury, by an arrangement with Jacobs, became jointly and equally interested with him in the contracts; and, in August 1816, they procured Clarkson's bond for 7000 dollars, being the aggregate of the two usurious debts contracted to Jacobs, with the addition of further usury for forbearance. That, at the same time, Clarkson was indebted to Garland on other accounts, and Garland exacted usury for forbearance of these debts also; for which, and the usurious premium for forbearance thereof, amounting together to 2465 dollars 56 cents, Clarkson gave Garland another bond. And then, Clarkson, by a deed of trust, mortgaged 28 slaves, to secure payment, in March following, the debts due by both the bonds, with interest from the dates thereof. That, after these bonds and the deed of trust were executed, Clarkson delivered Garland his crop of 21383 pounds of tobacco, for which he was entitled to credit at the rate of 20 dollars per cwt. being the price stipulated by the previous contract; but Garland gave him credit for it, only at the rate of 11 dollars and some cents per cwt. That a large balance of the debts remaining unpaid, Garland, on the 6th August 1817, made a new contract with Clarkson, for farther forbearance thereof, on a new usurious premium,

and for the forbearance, on usurious premium also, of other debts claimed by Garland of Clarkson; and then took Clarkson's bond for 11250 dollars
149 *payable (with interest from the date) in June 1818: and Clarkson, to secure payment of the debt due by this bond, by a new deed of trust, mortgaged fifty-one slaves. Of what items this large debt of 11250 dollars was composed, Clarkson said he did not exactly know, and he called on Garland to explain; it consisted in part of the old balance of the former usurious debts, of new usurious premiums for forbearance thereof, of other debts claimed, and usurious premiums for forbearance of them too; a very large proportion of the whole sum was usury. That Clarkson paid Garland 15 hogsheads of tobacco, which Garland was to give him credit for, at the then fair market price, which was from 8 to 11 dollars per cwt. That in November 1818, Garland caused a sale to be made, of the slaves mortgaged by the deed of trust of August 1817, for the payment of the debt of 11250 dollars thereby secured: at which sale, two of the slaves were purchased by Garland, and twelve by third persons, for the aggregate sum of 7270 dollars: ten others were bought in, nominally by Garland, but really for Clarkson, at the price of 3856 dollars; Garland having agreed to let him retain them, at the prices at which he should buy them; but Garland afterwards refused to let him have them, without a premium of 600 dollars on the cost, to which extortion Clarkson was, in his necessities, forced to submit. That, after this sale, farther forbearance, for new usurious premiums, was given: and a new bond, dated in November 1818, was exacted of Clarkson, for 7483 dollars 70 cents, payable in November 1819, (embracing the accumulated usury of the former transactions, with new usury, the 3856 dollars, the price of the ten slaves, and the 600 dollars advance thereon) and a new deed of trust was executed by Clarkson, mortgaging 25 slaves to secure this debt. After this, Clarkson paid Garland 8 hogsheads of tobacco, the price whereof, 588 dollars 60 cents, Garland credited on the judgment he afterwards obtained on the last mentioned bond. That in November

1819, Garland caused a sale to be made
150 of the slaves mortgaged *by the last deed of trust, and purchased the greater part of them himself, at a great sacrifice; which he effected by refusing to let his own creditors bid at the sales, to the amount of the debts he owed them. The proceeds of these sales were 6020 dollars 50 cents, which sum was also credited on the judgment Garland afterwards obtained on the bond of November 1818. This judgment, recovered against Clarkson in August 1821, was for 7483 dollars 70 cents, the debt mentioned in the bond, with interest thereon from November 14th 1818, subject to credits for the said sums of 588 dollars 60 cents, paid October 1st 1819, and 6020 dollars 50 cents paid November 25th 1819. Clarkson acknowledged in the bill, that he had had, during the course of these transactions, various dealings with Garland, for merchandize bought of him; and that he could not state, exactly, how the debts he

*Equitable Relief—Usurious Contracts—Measure of Relief.—For a discussion of this question see the principal case cited in Spengler v. Snapp, 5 Leigh 489, 490, 501, 509, 511, and note: Moseley v. Brown, 76 Va. 433, 426; Munford v. McVeigh, 92 Va. 457, 23 S. E. Rep. 357; Davis v. Demming, 12 W. Va. 278, 280. See monographic note on "Usury" appended to Coffman v. Miller, 26 Gratt. 608.

had contracted in those dealings, had been brought into the bonds and deeds of trust before mentioned. But he charged, that all the contracts, bonds and deeds of trust, specified in his bill, were tainted with most exorbitant usury, and void; and therefore, that the sales made under the deeds of trust were void also, and as to all the purchases made by Garland himself, at those sales, especially the last, the sales ought to be held naught, and Garland compelled to restore the slaves to him, and render an account of the profits thereof. And he prayed that Garland and Jacobs might answer the allegations of the bill on oath; that Garland might exhibit detailed accounts of the transactions, and his books in which those accounts were kept; that an account of all the transactions between him and Jacobs, between him and Garland and Jacobs, and between him and Garland, might be taken, in which no interest whatsoever might be allowed to them, but only the principal sums due them; that they, respectively, might be decreed to refund the excess, if any, paid by him above the principal; that Garland might be compelled to restore the slaves he had bought at the sales, and render an account of, and pay him, the profits thereof; and that Garland
151 should *be enjoined from further proceedings on his judgment on the bond of November 1818; and general relief.

The injunction was awarded.

Jacobs, in his answer, went into the details of the two transactions of March and May 1815; and stated, that those contracts were bona fide sales by Clarkson to him, the first of the 16 slaves for 2335 dollars, and the last of 14 slaves for 2666 dollars 66 cents, and conditional re-sales of the same slaves by him to Clarkson, for 2935 dollars, and 3394 dollars, payable in March 1816, provided those prices should be then punctually paid: he denied, that the sales were devices to cover usurious loans, or that there was any treaty for a loan, or any borrowing or lending, actual or intended by either party: but he owned, that Clarkson told him he wanted certain sums of money, and offered as many slaves as would command those sums. He denied the usury charged to have been practised by him and Garland in 1816: but his account of the transaction was not very distinct: he said, that in March 1816, he agreed with Garland to take a moiety of the benefit and burthen of a contract which he had made with Clarkson, in February preceding, whereby Clarkson was to sell his crop of tobacco to Garland, for 11 dollars 15 cents per cwt. and Garland to lend Clarkson 7000 dollars on simple interest; and the product of the tobacco was to be applied to the payment of sundry debts of Clarkson due to different persons, and the debt due to Jacobs among the rest: that the 7000 dollars secured by the bond of August 1816, was made up of the debt due Jacobs on the transactions of March and May 1815, with simple interest thereon, and of some claims of Garland against Clarkson: that he contributed a moiety of the 7000 dollars; and Garland, in 1817, accounted to him for the same with interest thereon; and, thenceforth, he

ceased to have any concern in or knowledge of the transactions.

Garland, in his answer, denied all the allegations of the bill generally, and each allegation in particular, which imputed to him, usury, extortion or oppression,
152 or knowledge *of or participation in the usury and extortion imputed to Jacobs. He stated, that Clarkson in February 1816 sold him his crop of tobacco at the price of 11 dollars 15 cents per cwt. stipulated by contract in writing (which he exhibited), and he agreed to advance for Clarkson 7000 dollars more, to be applied to the payment of certain specified debts of Clarkson, of which the debt to Jacobs was one: in these contracts Jacobs had no concern. That the debt due to Jacobs, amounting to 6329 dollars, was paid off in March 1816. That, in August 1816, Jacobs took an interest in the debt of 7000 dollars, and in the tobacco contract: and Clarkson gave Garland his bond for the 7000 dollars, and another bond for 2465 dollars 56 cents, for moneys due Garland on other accounts; and a deed of trust mortgaging slaves to secure payment of both debts. That no usurious premium was included in either, nor was any contracted for. That in 1817, Garland, at Clarkson's request, paid Jacobs the portion of the debt of 7000 dollars due to him. That, in August 1817, Clarkson gave Garland a new bond for 11250 dollars, payable in June 1818, and a new deed of trust of slaves, to secure the debt: and these securities were given for the then amount of debt justly due to Garland, on good and valuable consideration, without any usurious premium for the loan or forbearance of money: but the answer did not state or explain how, or of what particular items, this large debt was made up. That all the payments made him by Clarkson were fairly credited. That at the sale of the trust subject in November 1818, which was a cash sale, he purchased ten of the slaves, without any previous arrangement with Clarkson on the subject, and afterwards sold them to him, at his earnest request, on a credit, at an advance of 600 dollars: and then he took Clarkson's bond for 7483 dollars 70 cents (the just balance of debt then due him, without any usury whatever) and the deed of trust of 25 slaves to secure the same. That this trust subject was sold in November 1819, and fairly sold, without any
153 contrivance of Garland to reduce the price, and fairly purchased *by him: the proceeds of this sale, as well as the price of 8 hogsheads of tobacco delivered by Clarkson in October 1819, were credited on the bond, and reduced the balance to 1331 dollars 32 cents, bearing interest from November 25th 1819, for which Garland had obtained judgment, and which was justly due to him.

There was much documentary evidence exhibited, and many depositions filed, bearing on the questions of fact put in issue.

1st. The written contracts between Clarkson and Jacobs, of March and May 1815, (considered in connexion with Jacobs's answer,) were relied on to prove the usury imputed to those transactions. The first was a bill of sale executed by Clark-

son and John Barnett to Jacobs, under date March 23d 1815, whereby they conveyed to him 16 slaves by name, in consideration of 2335 dollars; with two memorandums indorsed thereon; one, stating that the slaves were delivered to Jacobs; the other, stating that Clarkson and Garnett had the same 16 slaves, the property of Jacobs, then in their possession, on hire till March 23d 1816; and they being desirous of purchasing the slaves of Jacobs, he agreed, that if they should pay him 2935 dollars on or before March 23d 1816, he would and did thereby, in consideration thereof, sell the slaves to them, but if either of the slaves should die, Jacobs was to receive the same sum, and no less, for the survivors, and if the 2935 dollars should not be paid by the 23d March 1816, this agreement was to be utterly null and void. The other contract was a bill of sale executed by Clarkson to Jacobs, under date May 22d 1815, whereby Clarkson conveyed to Jacobs 14 slaves, in consideration of 2666 dollars 66 cents; with two memorandums indorsed thereon, exactly like those indorsed on the first contract, save only that the sum which was to be paid by Clarkson for these slaves, on the 23d March 1816, was 3394 dollars 17 cents. And for proof of Garland's knowledge of the true character of these contracts, 154 before he *mixed his own with them, many circumstances, disclosed by the evidence, were relied on.

2dly. The contract between Clarkson and Garland, for the sale of Clarkson's crop of tobacco to Garland, was exhibited. It was dated February 6th 1816; and it bore, that Clarkson sold Garland his crop of tobacco, supposed about 20000 pounds, deliverable the 1st May following, for which Garland was to allow him 11 dollars 15 cents per cwt. and to advance him besides 7000 dollars, to be applied to the payment of sundry specified debts, and among them 6495 dollars 83 cents to Jacobs. There were depositions taken on Clarkson's part, for the purpose of proving, that the fair market price of the tobacco, at the time, was 20 dollars per cwt.; that in the original contract made in February 1816, the price stipulated for the tobacco, was 20 dollars; that that was a verbal contract, and that the written contract exhibited, by which the price was reduced to 11 dollars 15 cents, was in fact signed some time after the contract was made. On Garland's part, depositions were filed, for the purpose of proving, that the agreed and the fair price of the tobacco, was truly stated in the written contract to be 11 dollars 15 cents.

3dly. As to the 600 dollars also, demanded by Garland and agreed to be paid by Clarkson, as an advance upon the price of the 10 slaves purchased by Garland at the sale of November 1818, and then sold by him to Clarkson, there was evidence on both sides; evidence on Garland's part, that he bought the slaves at the sale on his own account, and after his purchase sold them to Clarkson on a credit; evidence on Clarkson's part, adduced to sustain his charge of extortion and oppression in this particular.

4thly. Garland exhibited with his answer, a series of accounts of the transactions be-

tween him and Clarkson, wherein there was a debit to Clarkson, under date May 1st 1817, in these words: "To this sum, which you agreed to allow for trouble in attending to your business in settling your accounts with different persons, and for interest on various sums *of small amount, on which no interest has been charged, and for interest on about 1500 dollars advanced for you in 1816, and not contemplated in the loan of 7000 dollars—\$482 74."

5thly. From the accounts exhibited by Garland, it could not be ascertained, how the large debt of 11250 dollars, secured by the bond and deed of trust of August 1817, was made up.

6thly. There was no evidence to sustain the imputation against Garland, of unfair conduct and contrivance, at the sale of November 1819, to enable him to purchase the slaves he then bought, at under prices; and he adduced evidence to shew, that Clarkson himself voluntarily produced the slaves to be sold by the trustee, was present at both sales, and made no objection or complaint; and that Garland's conduct was fair, and the prices he gave, the reasonable value of the property.

Clarkson died pending the suit, and it was revived in the named of Rives his administrator.

On the motion of the plaintiff, the chancellor awarded an injunction (November 5th 1824) to restrain Garland from removing out of the state, the slaves held by him under his purchases at the sales of the trust subject.

The cause coming on for hearing in October 1825, the chancellor decreed, 1. That, as to Jacobs's purchases and Clarkson's repurchases of slaves, in March and May 1815, they were shifts to avoid the statute of usury, and the transactions consequently usurious; that, so far as Jacobs was individually concerned, Clarkson was to account for the prices Jacobs paid him for the slaves, and legal interest thereon, instead of the prices he contracted to pay Jacobs for the redemption of them; and that an account of these transactions should be stated by a commissioner on this principle. 2. That, as to the joint transactions of Garland and Jacobs with Clarkson, the commissioner should state accounts of them, and if there was usury in them, should strike it off, and charge Clarkson with legal interest 156 only. *3. That as to the transactions

between Clarkson and Garland, the commissioner should examine and state all the accounts between them, strike off the usury if any should appear, and charge legal interest. 4. That there was no objection to Garland's purchases at the sales of the trust subject. 5. That there was no necessity for the injunction awarded the 5th November 1824, and that it should be discharged, as having been improvidently awarded. And the court declared, that without giving any other opinion as to what might or might not be usurious in any of the transactions, or any opinion on the tobacco contract, it would expect of the commissioner, such a state of all the accounts, as he should consider just and proper, or as either party should require.

Clarkson's administrator appealed to this court.

The case was argued here, by Johnson, for the appellant, and Stanard, for the appellees. There were several points of law discussed. But much of the argument turned on questions of fact, and consisted of careful examination of the particular proofs in the cause bearing on them; the counsel for the appellant maintaining, and the counsel for the appellees controverting, the following propositions: That, supposing the two contracts of March and May 1815, between Clarkson and Jacobs, usurious, Garland was acquainted with their true character, and, with this knowledge, took a joint interest in them, mixed them with his own transactions, and exacted more usurious premium for forbearance of the debt: That those contracts were, mainly, the basis of all the subsequent transactions, which, therefore, on this account alone, were tainted with usury: That new and aggravated extortion was practised at every subsequent step in the progress of Garland's dealings with Clarkson: That the price at which Clarkson sold Garland his crop of 21283 pounds of tobacco, in February 1816, was fixed by the original contract at 20 dollars per cwt. and the reduction of the price to 11 dollars 15 cents, was an after-
157 operation, *and was in truth an usurious extortion: That the 6000 dollars advance on the price at which Garland bought the ten slaves at the sale of the trust subject in November 1818, exacted by him of Clarkson, on his re-sale of that property to him, was usurious: That the 482 dollars 74 cents, debited to Clarkson, in the accounts exhibited by Garland, for his trouble &c. and for interest &c. was usury: And that it was impossible to ascertain, from those accounts exhibited by Garland, how the large debt of 11250 dollars, secured by the bond and deed of trust of August 1817, accrued; on the contrary, the accounts shewed, that by no means so large an amount was or could be justly due; and Garland ought not to be allowed to charge the amount of that bond to Clarkson, without shewing the consideration of it.

As to the points of law: I. Johnson maintained, that the two contracts of March and May 1815, between Clarkson and Jacobs, were usurious. Jacobs acknowledged in his answer, that Clarkson told him he had to raise the two sums of money, which Jacobs gave him for the property, and offered as many slaves as would command those sums; that is, in substance, that he knew Clarkson's object was to borrow money upon the security of this property. It was his own real purpose to lend it upon that security. The contracts were upon the face of them, usurious: they were, in substance, mortgages of property for 2335 dollars advanced the 23d March, and 2666 dollars advanced the 22d May 1815, redeemable by the payment of 2935 and 3394 dollars, on the 23d March 1816. And if these contracts were not strictly mortgages, the form given to them was, palpably, a mere shift to evade the statute of usury.

Stanard remarked, that the contracts gave Clarkson a right to deliver the slaves, however they might depreciate in value, or, if

half or two-thirds of them had died, to deliver the residue, to Jacobs, on the 23d March 1816, and thereby to discharge himself from the payment of any money; while it gave Jacobs no right to refuse to receive the slaves, or such as should be living
158 at the appointed time, *and to demand money. The contracts were, surely, not mortgages. Jacobs took the hazard of the loss of the slaves by death, or by depreciation in the market, in the interval. He said, that wherever the person receiving money is not bound to return money, wherever the person advancing money is not entitled to demand money, whatever may be the character of the transaction, it is not usurious; since, in such case, there is no borrowing or lending or forbearance of money: and, wherever the bargain is one of hazard, where risk is one of its essential properties, the contract differs in its nature from a loan; and, though it may be hard, it is not usurious. Ord on Usury, 24, 39; Beddingfield v. Ashley, Cro. Eliz. 471; Chesterfield v. Janssen, 2 Ves. 125; 1 Atk. 301; 1 Wils. 286.

Johnson replied, that the argument for the appellees assumed, that the contracts were in substance and reality exactly what in form they seemed. But they were in truth loans of money, veiled under the form of sales and re-sales of property; and too thinly veiled to hide the true features of the case. The option, which the contracts gave Clarkson, was to pay the money, or to return slaves worth, in the estimation of both parties, doubtless, more than the money; and entitled Jacobs, if he did not get the money he advanced, with about 25 per cent. per ann. upon it, to property of greater value. The hazard was merely colourable; or rather no hazard at all; since, in all probability, the slaves would increase in numbers, and therefore in value. That the property was liable to depreciation, by casualties of any kind, entered not into the thoughts of either party. The provision that if any of the slaves should die, Clarkson should pay the same price for the survivors, shewed the true character of these contracts. Hazard, slight and colourable, had been often infused into contracts really usurious, to evade the law; it was an old and well-known shift; and was of itself, in general, conclusive proof of usury. Ord, 69, 70, and the cases there cited.

159 *II. Johnson contended, that, as the deeds of trust were tainted with usury and vicious, the sales made under them partook of the same vice, and ought to be avoided, so far as Garland was a purchaser and holder of the subject; and that he ought to be compelled to restore the property, and account for the profits of it, and Clarkson held accountable for the debt to the discharge of which it had been applied.

Stanard answered, that it was in proof, that Clarkson had himself produced the trust property to the trustee to be sold, without compulsion on Garland's part, and without any complaint on his own; and that the sales were fair in themselves. They were, then, nothing more than a willing application, by Clarkson, of that fund to the payment of the debt; and such payments could

not be distinguished, in principle, from any other payments out of any other funds.

III. A question arose, upon the supposition that the usury was established, what ought to be the measure of relief?

Johnson observed, that in England, when a party asked relief in equity against an usurious debt yet unpaid, he was relieved only from the usurious excess above the principal and legal interest; and, upon the same principle, when he sought to recover back money paid upon an usurious contract, he recovered only the usurious excess. But in Virginia, a party entitled to relief in equity against an usurious debt not paid, was held to the payment of the principal only, and was exonerated even from the legal interest. 1 Rev. Code, ch. 102, § 3; Young v. Scott, 4 Rand. 415. And, by analogy, the measure of relief in equity, or of damages at law, to a party entitled to recover back money paid upon an usurious contract, ought to be the excess paid beyond the principal sum advanced to him. The case of *Stone v. Ware*, 6 Munf. 541, might seem contrary to this proposition; but this point was not considered there; and besides, that case was decided before the construction of the third section of our statute was settled by the decision in *Young v. Scott*. The payments made by Clarkson,

ought to be applied to the principal of the debts he contracted to *Jacobs, Garland and Jacobs, and Garland; and the excess of his payments above the principal of his debts, ought to be refunded to him, with legal interest from the time when the principal was extinguished, and afterwards from the dates of the payments.

Stanard said this proposition could not be sustained. The principle of the provision contained in the third section of our statute, was very peculiar: it imposed on the usurer the forfeiture of legal interest on his money, as a penalty for violating the law in contracting for more; and it made the court of chancery the instrument to inflict the penalty, whose province it was, in general, to relieve against penalties and forfeitures, as well as extortion and oppression. But this section of the statute provided for a particular case; the case of a party resorting to equity for discovery of, and relief against, usury not yet paid. And he said, there was no reason for extending so harsh a principle beyond the case to which the statute applied it. A party seeking to recover back money actually paid by him on an usurious contract, could only ask what the party who received it may not *ex æquo et bono* retain. He may conscientiously retain legal interest on his money as well as the principal. The usurious excess above the principal and legal interest, is all that he may not conscientiously retain, and therefore all that he can be justly required to refund. This rule, long settled, and upon well known principles of justice, the legislature might have altered, but forbore to do so: and the court could not be justified in altering it, by analogy to a statutory provision made for another case. CARR, J., delivered the resolutions of the court:

1. That the contracts between Clarkson and Jacobs of the 23d March and 22d May 1815; the tobacco contract of the 6th February 1816; the charge by Garland against

Clarkson, of 482 dollars 74 cents, for trouble &c. and interest &c. and the re-sale by Garland to Clarkson of the ten slaves at an advance of 600 dollars on the price they cost him; were all usurious transactions.

161 *2. That Garland shall not be allowed to charge Clarkson with the bond of the 6th August 1817, for 11250 dollars, unless he shall shew the consideration thereof.

3. That in taking the accounts, all usurious gain should be expunged, or accounted for by the party receiving it: if Clarkson's payments shall be found to exceed the principal and interest of the claims unaffected by usury, together with the principal of the usurious debts, then legal interest should be allowed on the sums infected with usury, to the extent only of extinguishing such excess of payment; but if there shall still remain a balance of such excess, then that balance with interest thereon shall be paid to Clarkson by the party who received it.

4. The majority of the court was of opinion, that the sales made under the deeds of trust, are not to be disturbed.*

The consequences of these principles are:

That Clarkson should be charged to Jacobs, with 2335 dollars, as of the 23d March 1815, with interest thereon from that date, and with 2666 dollars 66 cents as of the 22d May 1815, with interest thereon from that date; and credited by 6329 dollars 17 cents, as of the 23d March 1816, that being the sum with interest for which Garland finally accounted to Jacobs: and Jacobs should be decreed to pay the balance with interest from the last date.

That, in stating the account between Garland and Clarkson, Garland should be allowed to debit Clarkson with 6329 dollars 17 cents as of the 23d March 1816, with interest from that date: but he should not be allowed the 482 dollars 74 cents: nor should he be allowed the advance of 600 dollars on the re-sale of the ten slaves: nor should he be allowed to charge the bond of 11250 dollars of the 6th August 1817, unless he should shew the consideration thereof; and if that bond

162 should appear to be usurious, he *should only be allowed to charge the true principal sum, with interest, upon the principles before stated.

And that Garland and Jacobs, jointly, should be charged with the difference between the 11 dollars 15 cents per cwt. and the true value of the tobacco, with interest from the delivery thereof; such value to be fixed by ascertaining the current market price of such tobacco, on or about the 6th February 1816, taking into consideration its quality, and the time allowed for the delivery thereof.

Decree reversed, and cause remanded to be proceeded in according to the principles here declared.

163 *Rankin v. Bradford and Others.

March, 1829.

(Absent BROOKE, P.†)

Bequest of Slaves in Trust for Maintenance of Testator's Daughter and Her Husband during Their Lives—Remainder to Children—Case at Bar.—E. C. bequeathed

*The court did not assign the reason on which it founded this resolution. It was that (it is presumed) which was suggested in Mr. Stanard's argument of the point.—Note in Original Edition. †He did not sit, because he was related to the appellees.

4 slaves to C. C. and F. T. trustees, in trust to apply the profits to maintenance of testator's daughter, J. B. and her husband, S. K. B. and their children, during lives of daughter and husband, and of survivor, remainder to the children of the daughter by that husband; both trustees declined the trust; no trustee was substituted; the ex'or delivered the slaves to Mrs. B. her husband being then in Europe, where he died; B. then married V. who, in 1798, sold R. all the trust slaves, for his wife's life, R. having notice of the trust; R. removed them from Fredericksburg to Augusta, held some there, gave away some, sold others: the second husband, V. died in 1806. Upon bill in chancery, by Mrs. V. and her children, by B. against R. praying discovery of names &c. of the slaves and their increase, restoration of them and account of profits, and (on a charge that R. would remove the property out of the state) an injunction to restrain him from doing so; and R. not pleading to the jurisdiction: Decreed.

Same—Right of Second Husband to Slaves.—1st. R. had no right to hold the slaves, even during Mrs. V.'s life, as they were a trust subject, and the profits applicable to maintenance of her and her children; though quære how far her interest passed by her second husband's sale to R.

Same—Discovery—Jurisdiction of Court of Equity.—2ndly. The court of chancery had jurisdiction of the case; because the charges in the bill of the necessity of a discovery, and of the design to remove the slaves out of reach, saved the bill from being demurrable, and if that charge were only colourable, R. should have pleaded to the jurisdiction; and (chiefly) because the slaves were a trust subject, represented by no trustee who could sue at law, and which equity alone could apply to the purposes of the trust.

Same—Statute of Limitations;—Application Where Party Buys with Notice of Trust.—3rdly. R. could not protect himself under statute of limitations; because he bought with notice of the trust, and so was charged with it; and because his removal of the slaves to a distant county, thus keeping owners in ignorance where they were, was an obstruction to the assertion of their rights by action, precluding him from pleading the statute, within § 14, 1 Rev. Code, ch. 128, p. 491.

Edward Carter, by his last will and testament, proved and recorded in June 1792, made the following bequest: "I give and bequeath to my son Charles Carter and Mr. Francis Thornton, four slaves, one male and three females, not under the age of ten nor over the age of thirty years, in trust for the

purpose of applying the profits of the 164 said slaves *to the maintenance of my daughter Jane Bradford and her husband Major Samuel K. Bradford and their children, during the lives of my said daughter and Major Bradford, and the longest liver of them, and after their deaths to be equally divided among the children of my said daughter Jane by the said Bradford." Charles Carter, the executor of the will, and one of the trustees, in 1793, had the four slaves selected from his testator's estate; and, he and Thornton both declining to act as trustees, he delivered them to Mrs. Bradford, her husband being then in Europe, whence he never returned. He died there. The trust slaves remained in Mrs. Bradford's possession during her widowhood, which continued four or five years: she married John

Verminet, and thus the property passed into his possession. Verminet, in November 1798, sold to Richard Rankin, for £190. all the trust slaves (then six in number) for the life of his wife; and she joined him in the bill of sale. After this, Verminet went to New Orleans, and there died about 1805 or 6. Rankin gave some of the slaves to his sons-in-law, J. A. Frayser and W. G. Dudley; and he and they sold the absolute property of some of them to Thomas Deverick and Thomas Johnson.

In 1819, Mrs. Verminet and her children by Bradford, brought this suit in the superior court of chancery of Staunton, against Rankin, Frayser, Dudley, Deverick and Johnson. They set forth in their bill the facts as above stated, with this difference, that the bill alleges that the trust slaves were delivered by the executor of Mr. Carter, to Major Bradford, whereas they were in truth delivered to Mrs. Bradford: and they stated, that at the time of Verminet's sale to Rankin, Mrs. Verminet was under the disability of coverture, and her children under that of infancy, and so remained for many years afterwards; that Rankin was apprised of the trust and every other circumstance affecting the property; that he removed the slaves from the neighbourhood of Fredericksburg to the county of Augusta, and thus concealed the locality of the subject from the real 165 owners *of it; that Deverick and Johnson also purchased of Rankin, the slaves

held by them, with notice of the true state of the title, and that Rankin's sons-in-law were mere volunteers. They prayed a discovery of the names, ages and residence of the slaves; and, suggesting that Rankin and his sons-in-law would probably remove the property out of reach, they asked an order to restrain them from doing so. And they demanded the slaves and their increase, and an account of profits.

Rankin, in his answer, admitted that he had bought the slaves of Verminet, for the life of his wife; and he exhibited the bill of sale. He admitted also, that at the time of his purchase, he had notice that the slaves were held in right of the wife; but in what manner she acquired the right, he said, he had no information. He admitted, that he had removed the slaves to Augusta, but denied that he had taken any pains to conceal them.

Deverick and Johnson, in their answers, stated, that they purchased of Rankin the absolute property of the slaves held by them, without notice of any trust affecting them, or other defect in the title, and paid him full prices: and they relied on the statute of limitations.

As to Frayser and Dudley, the bill was taken for confessed.

The answers of Deverick and Johnson were fully supported by the proofs. The proofs also identified the slaves, and established all the material facts of the case, as above stated.

The chancellor dismissed the bill as to Deverick and Johnson; but, being of opinion, that Rankin was not entitled to hold the possession of the trust slaves or any of them, and reserving the question how far Verminet could convey a good right to such portion of the profits of the subject as were by Mr.

Equity Practice.—The principal case is cited in Sheppards v. Turpin, 3 Gratt. 395; Handly v. Snodgrass, 9 Leigh 493; Armstrong v. Pitts, 13 Gratt. 243.

Statute of Limitations—Trust Subjects—Purchase with Notice.—In Lamar v. Hale, 79 Va. 164, it is said: "The trust follows the property into the hands of a purchaser with notice of the trust, and on statutory bar of limitation applies thereto. *Rankin v. Bradford*, 1 Leigh 171; *Hunter v. Spotswood*, 1 Wash. 145; *Redwood v. Riddick*, 4 Munf. 228; *Turner v. Campbell*, 3 Gratt. 77; *Rowe v. Bentley*, 20 Gratt. 762; 2 Perry on Trusts, §§ 859, 864, 865; *Hill on Trustees*, 264, note 3; *Angel on Limitations*, §§ 183, 189; 2 Pomeroy's Eq., § 1052." See monographic note on "Limitation of Actions" appended to *Herrington v. Harkins*, 1 Rob. 591.

Carter's will properly applicable to the support of Mrs. Verminet, he decreed, that Rankin, Frayser and Dudley, should deliver all the trust slaves then held by them respectively, to the marshal of the court, to be
166 hired out by *him &c. And that these defendants should render accounts of the values of the slaves by them respectively sold, and also of the profits, as well of those which had been sold, as of those which remained in their possession. From this decree, Rankin appealed.

Stanard, for the appellant. The case presented by the record is not properly relievable in equity. The bill, indeed, prays a discovery of the names, ages and residence, of the slaves in question, and an order to restrain the defendants from carrying the slaves away: but, as it appears from the sequel, that no such discovery was in fact wanted, and as a demand of bail in an action of detinue, would have answered every purpose of the restraining order, it is apparent, that the prayer of the bill in these particulars, was only designed to give colour for the jurisdiction of the court. If the appellees have a rightful claim to the property, that claim is founded on a legal title. The legal estate must be in some one. It either abides in the executors of Mr. Carter; or, if by disavowing and declining the trust, as they did from the beginning, they divested themselves of the legal estate in the subject, that was done only by their transfer of the possession, and with it the legal estate, to Mrs. Verminet, during the life of her first husband Bradford; and the possession being thus vested in Bradford, jure mariti, time perfected the right in him, and he had a complete legal title, which yet remains in him or his representatives. And if Bradford held the subject clothed with the trust created by Mr. Carter's will, still he held the legal estate in it. The holder of the legal estate (whoever it was) had complete remedy at law by action of detinue.

But Rankin claimed and held adversely to the legal estate, wheresoever it abided; and the statute of limitations affords him a complete protection against the claim of the appellees. There is no direct proof, that he knew these slaves were a trust subject, or had any notice of the rights of the cestuis
167 que trust, so as to charge him with the trust, *and thus to deprive him of the protection of the statute. Nor can such notice be fairly inferred from the fact, that he purchased Mrs. Verminet's life estate in the property; for it is a very common case for a married woman to have a life estate in slaves, not subject to any trust; as, for instance, slaves held as her thirds of a former husband's estate.

Johnson, for appellees. The property in question is a trust subject: the executors of Mr. Carter did not, and could not, by renouncing the trust, extinguish it: and there is nothing to take this trust, more than any other trust, from the cognizance of a court of equity. If there was any remedy for the cestuis que trust at law, it was an inadequate one; for the property is now not only to be restored to them, but to be settled and disposed of to their use, according to the intention of the donor; and this a court of law could not do. But there was no remedy at law. When the executor of Mr. Carter as-

sented to the legacy of the slaves in question, and delivered them to Mrs. Bradford, he divested himself of the legal title, as executor: when the trustees renounced the trust, they abandoned their legal title. The regular course would have been to apply to the court to substitute a trustee. As it was, the legal estate was and is wholly unrepresented. Mrs. Bradford, during the life of her first husband, during her widowhood, and after her marriage with Verminet, held the mere possession; the trust still subsisting, though a proper trustee was wanting. And if it can be supposed, that by the delivery of the property to Mrs. Verminet, during the life of her first husband Bradford, the legal estate vested in him, so as to pass at his death to his representatives, it does not appear, that there was ever any personal representative of his estate, and it is almost certain, from the circumstances disclosed, that there was none.

Then, as to the statute of limitations. If Rankin purchased with notice of the trust, he became himself a trustee, and cannot
168 avail himself of the statute. Now, he must be *charged with notice of the trust: he purchased only a qualified interest in the subject, the life estate of a feme covert, and required her to join her husband in the bill of sale, or rather required her husband to procure her to join in it; and it is not to be imagined, that he did not inquire into, and inform himself of, every circumstance affecting the title. Indeed, the very fact of a purchase of a qualified interest in such property, infers notice of the nature of the right, and the source from which it was derived to the vendor. Again; the trustees named in Mr. Carter's will having declined to act, and no trustee having been substituted in their stead, the legal estate was unrepresented: in which regard, the case is analogous to that of a decedent's estate remaining long unrepresented by any executor or administrator, which has been held to avoid the operation of the statute of limitations. Lastly, Rankin purchased this trust property, when all the beneficiaries were in a state of disability, (Mrs. Verminet under coverture, and all her children infants); and removed it to a distant part of the country, and thus kept them in ignorance of the locality of the property, without a knowledge of which they could not assert their claim to it: and the case falls within that saving of the statute of limitations, which prevents persons, who by any indirect ways or means, defeat or obstruct actions that lie against them, from pleading the statute in bar of such actions. 1 Rev. Code, c. 128, § 14, p. 491.

CARR, J. It seems to me, that the case is decidedly against the appellant.

Several objections to the decree. were taken in the argument. It was first contended, that this was not a fit case for equity. The bill being for a stock of negroes, which in the lapse of twenty years had increased very much, and were much scattered, the plaintiffs averred, that they could not without the aid of a discovery, ascertain the names, sexes and residence, of the slaves, so as to pursue their legal remedy. They also stated,
169 that the defendants were *about carrying them beyond the jurisdiction of the

court. If this had been supposed by the defendants colourable merely, they should have pleaded to the jurisdiction of the court. This court has sustained the jurisdiction in several cases of this sort. These allegations certainly saved the bill from a demurrer.

There seems to me, however, a much surer ground for the jurisdiction of equity. The bequest of these slaves, created a trust for the support and maintenance of a feme covert and her infant children; a trust, not to be discharged by a single act of the trustees, but requiring their care and attention, during the lives of the husband and wife and the survivor. During all this time, the trustees were to apply the profits of the slaves to the support and maintenance of the testator's daughter, her husband and children; and then the slaves with their increase were to be divided among the children. To mark his anxiety to keep these negroes not only beyond the controul of the husband but the wife also, the legal title, and the whole management of them, are given to the trustees; and they are to apply the proceeds of their labour, at their discretion, to the support of the cestuis que trust. This appears to me a case peculiarly proper for the protection and superintendence of equity.

On the death of the testator, his executor selected the slaves. But the trustees, from the first, declined to have any concern with them, and they went into the hands of the feme covert, her husband being in Europe. Can it be doubted, that equity would instantly have interfered, if any one as next friend either of the wife or children, had filed a bill, stating the refusal of the trustees to act, and praying the court to set up the trust, and preserve the subject, either by compelling the trustees to act, or by substituting others? Can there be a subject more appropriate to equity, than to preserve to the feme covert and her infant children, the bounty of the testator, and cause it to flow in the channel he had marked out for it? And if equity would have interfered at first,

170 imperative *now? The trust fund continues; the purposes for which the trust was raised continue. Nor, under the will, can the slaves be divided among the children, till the mother's death. If the names and places of abode of all the slaves and their descendants could be discovered, so as to enable the plaintiffs, in the names of the trustees, to bring actions of detinue, and recover at law, the court of law could go no further. It could not execute the trust, or make one of the arrangements necessary to preserve the property, or appropriate the profits to the purposes intended by the testator. In equity, one suit embraces the whole subject; a decree for the recovery of the slaves; an account for the hires and profits; and, finally, when these points are adjusted, the whole trust fund may be committed to new trustees, with such directions as may ensure the due execution of the testator's intention, and with leave to the parties interested to apply to the court, in case any future negligence or abuse of the trust should render it necessary. There is no force in the objection to the jurisdiction.

It was next contended, that the statute of limitations was a bar to the recovery. I

think not. Of this statute I have heretofore had occasion to declare my opinion. I consider it a wise and salutary law, tending to the security of titles, the discouragement of litigation, the repose of the community. I shall always be ready to give it a fair and full support: but to a case like this, I can never think that it does or ought to extend.

Courts of equity, not being within the words of the statute, apply it by analogy. In doing this, they must exercise a sound discretion. The defendant Rankin bought the slaves from Verminet, and bought them for the life of Mrs. Verminet only, as his bill of sale shews. He acknowledges too, in his answer, "that he was informed, at the time of his purchase, that the slaves, were held by the said Verminet, in right of his wife:" these are his words. Buying, then, with full knowledge, that Verminet had only a partial,

qualified interest in the property, and 171 this in right of his *wife, he is chargeable with notice of that right, and bought subject to it, whatever it might be. It is hardly possible to believe, that he did not inform himself of the actual state of the property: that were a course which no man of common sense would pursue in such a purchase. The conclusion is proper and necessary, that he did know the true state of Verminet's interest. And on this ground, the law implies notice, and charges him with all the consequences. Can the statute apply to protect such a purchaser, and enable him to bar the very right under which and subject to which he bought? Can this be called adversary possession? Does not the trust, which attached to the slaves the moment they were selected by the testator, follow them? None will deny that it did, while Verminet held; and can a purchaser from him with notice, occupy higher ground? Nor is this one of those constructive trusts, to which the statute of limitations is applied: there, the party takes possession in his own right and as owner, and is afterwards turned into a trustee, by matter of evidence and construction merely; here, Rankin took possession in subordination to Mrs. Verminet's right, and is as much bound by the trust, and as incapable of protection by the statute, as trustees the most directly and formally appointed.

The removal of the slaves also to a distant part of the state, and the sale of some of them to persons residing at a still greater distance, rendered it difficult, to a woman and children especially, to discover the place of their abode, so as to sue for them sooner; and thus the case of the appellees is brought within the saving of the 14th section of the statute of limitations.

The chancellor has dismissed the bill as to the purchasers from Rankin, and directed an account to be taken of the values of the slaves sold to them, and of their hires and profits; intending, no doubt, to decree the full amount of their values and profits, at the final hearing. We think, that so much of this order, as directs the account to be taken of the profits of the slaves sold, after the sale of 172 them to the *purchasers, is wrong; the true mode being to decree the amount for which the property was sold, and interest thereon, from the date of the sale, and profits only before the sales were made. The decree

must be corrected in this particular; but the appellant must pay the costs, the appellees being the parties substantially prevailing.

The court gives no opinion on the point which the chancellor reserved for future consideration.

The other judges concurred. The decree was corrected in the particular mentioned by judge Carr, and as to all things else affirmed.

Hunter, Pauper, v. Fulcher.*

March, 1829.

(Absent BROOKE, P., and COALTER, J.)

Slaves—Suit for Freedom—Case at Bar.—By statute of Maryland of 1796, all slaves brought into that state to reside, are declared free: a Virginia born slave is carried by his master to Maryland: the master settles there, and keeps the slave there, in bondage, for 12 years, the statute in force all the time: then, he brings him as a slave to Virginia, and sells him here. Adjudged, in an action brought by the man against the purchaser, that he is free.

This was a suit brought, in the hustings court of Richmond, by the appellant against the appellee, to recover his freedom. It was once before in this court, and was sent back to the hustings court for a new trial. 5 Rand. 126. The case was then stated and agreed by the parties, and was, in substance, thus:

George Hunter, the plaintiff, was born in the county of Fairfax, in Virginia, the slave of Thomas W. Offutt, a resident citizen of that county; by whom he was given to his daughter, who married William M. Offutt, and after her marriage, removed with her husband, from Fairfax to the

173 *county of Montgomery in Maryland. And upon their removal to Maryland, they carried Hunter with them, as their slave; and he resided, with his master and mistress, in Maryland, about twelve years. After this residence in Maryland, he was brought back to Virginia, and was sold by his master William M. Offutt, in the county of Jefferson, Virginia, for valuable consideration, to one Hill; who afterwards brought him to Richmond, Virginia, as his slave, and there sold him to the defendant Fulcher, for 450 dollars. The sale to Hill, as well as the sale to Fulcher, was made after the year 1819. By an act of the general assembly of Maryland, passed at its session of November 1796, entitled an act relating to negroes, and to repeal the acts of assembly therein mentioned, it was, among other provisions, enacted as follows, viz. "That it shall not be lawful from and after the passing of this act, to import or bring into this state, by land or water, any negro, mulatto, or other slave, for sale, or to reside within this state; and any person brought into this state as a slave, contrary to this act, if a slave before, shall thereupon immediately cease to be the property of the person or persons, so importing or bringing such slave within this state, and shall be free." And this provision of the statute of Maryland was, at the time when Hunter was carried thither by W. M. Offutt, and during all the time of Hunter's residence there, and still is, in full force, as part of the statute law of that state.

The question was, Whether upon this state of facts, Hunter was entitled to his freedom?

The hustings court held, that he was not, and gave judgment for the defendant. Hunter appealed to the circuit court of Henrico, which affirmed the judgment. And then he appealed to this court.

Scott, assigned counsel for the pauper. The appellant was born a slave in Virginia. He did not himself break his bondage: his owner, who was or became a citizen of Maryland, carried him to that state, to reside there, and in fact kept him there for twelve 174 years: and by the positive *law of Maryland, the owner forfeited all right of property in his person, and he was free. His right to freedom was completely vested in Maryland. But he did not assert it there. He was afterwards brought back to Virginia without any exercise of his own will, and sold here as a slave. And the only question is, whether he can assert in Virginia, the vested right of freedom he acquired by the law of Maryland?

If he cannot, it is difficult to imagine any reason, why the owner of a slave in Virginia, carrying him of his own accord to Maryland to reside, and there voluntarily emancipating him in conformity with the laws of that state, may not, if he can at any time afterwards find or bring him here, resume the property which he formerly held in him under the laws of Virginia: for an act of manumission of the owner conferring freedom on his slave, by authority of the law of Maryland, cannot be more effectual to confer freedom, than the very law of Maryland itself, acting on persons and property to all intents and purposes subject to her jurisdiction. Neither is there any just reason, why this right to freedom acquired under the law of Maryland should not be enforced in Virginia, as well as any other personal right acquired under the laws of that or any other state.

In *Lewis v. Fullerton*, 1 Rand. 15, the pauper claimed a right to freedom, on the ground that his mother had, before his birth, sojourned in Ohio, and so had been made free by the law of that state, and had been there adjudged free, upon a writ of habeas corpus. The only residence of the mother in Ohio, proved in the case, was, that she was once seen on a Sunday, working in a sugar camp there, in her owner's absence, and without any evidence that it was with his permission: but the court said, that such an occupation as that, had it even been for the owner's benefit, and in his presence, could not operate an emancipation of his slave. As to the judgment on the habeas corpus, it had not affirmed the mother's right to freedom; and if it had, the court intimated a strong 175 doubt, whether the judgment would

*have concluded the right of the owner, in that instance; that is, under the circumstances of that case. But the court indicated its opinion, clearly enough, that the effect of the residence of a Virginia slave in Ohio, for a great length of time, with the assent of the owner; the effect of that circumstance, in relation to that person who might thereby have become one of the permanent members of that state; would be to confer freedom upon him. Now, this is our case. And the previous adjudication in *Griffith v. Fanny*, Gilm. 143, is in point, and conclusive, that the pauper here is free. There, a slave was sold by Kincheloe her

*The principal case is cited in *Betty v. Horton*, 5 Leigh 615; *Foster v. Foster*, 10 Gratt. 492.

owner to Skinner a citizen and resident of Ohio, who held her there; the constitution of Ohio declared her free; and to avoid this her vested right to freedom, Skinner procured Kincheloe to make a bill of sale of her to Griffith; who finding her in Virginia, took possession of her, and claimed her as a slave. She asserted her right to freedom acquired in Ohio, under the constitution of Ohio: and this court adjudged her free.

Daniel, for the appellee. There are principles of peculiar interest involved in this case. Is it competent to the state of Maryland, by her laws, so to divest rights of property acquired under the laws of Virginia, and according to them never in any way divested, as not only to deprive, the owner of the property, while he and it are in Maryland, but also to deprive him of it, after he has returned and brought it back to Virginia? Can Maryland impose a forfeiture for the violation of her laws, of such universal efficacy, that, though it have never been exacted there, while the offender and the subject were within her jurisdiction, it may and must be exacted here, whenever the offender and subject come within our jurisdiction, though offending against no law or policy of our own? If it suit the policy of Maryland, to declare slaves imported into that state free, and to suffer slaves so emancipated to remain there, are our courts of justice to set them free in

176 Virginia, with liberty *to remain here, contrary to the policy of our own laws, which require slaves emancipated to leave the state? The appellant's counsel must be prepared to maintain the affirmative on all these points.

If Maryland may divest the right of property in a Virginia slave carried thither, every other state in the union may do the same; so, indeed, may any foreign nation; for, in respect to their own merely internal concerns, the U. States are foreign to each other. If Maryland may declare a slave carried thither to reside, immediately free; she, and every other state, may declare a slave free, if his owner wilfully carry or send him there, no matter for what purpose, or for how short a time. Her power is as competent to the one act of legislation, as to the other; for the constitution of the U. States (art. 4, § 2), only provides, that slaves escaping from one state into another, shall not, in consequence of any law therein, be discharged from bondage. The statute of Maryland under consideration, setting free all slaves brought there to reside, does not fix any term of residence, or allow any discrimination in respect of the citizenship or domicile of the owner; so that if the appellant be adjudged free upon the strength of that statute, he was equally free the first hour of his stay in Maryland, as at the expiration of his twelve years residence; and he would have been equally free, if his Virginia owner had never moved to Maryland himself, but had only sent his slave to his farm on the other side of the Potomac. The Maryland statute must be held effectual to this whole extent, if it be allowed to be effectual at all; that is, if it be allowed to operate in Virginia, it must be allowed to have the same effect here, as it had in Maryland.

It is not more the province of our courts of justice, to enforce this forfeiture, to inflict

this punishment, denounced by Maryland against a person violating her laws in this particular, than any other punishment for any other act, which, having regard to her own condition, she may think it just and politic to prohibit and punish. The general proposition would be rejected at once.

177 *If Maryland thought it wise to promote partial emancipation in her territory, it is not perceived how it could further even her views, or how any comity towards her would require, that we should set slaves free in our territory; and surely, it is contrary to our policy to do so. This slave was brought back to Virginia since 1819, when the law of Virginia permitted emancipation under its own authority, only on condition, that the freedman should leave the state within twelve months (1 Rev. Code, ch. 111, § 61): but if this slave be set free, his right to freedom, being derived from the law of Maryland, that statute of Virginia will not embrace his case. He may remain here for life. Indeed, I do not perceive, how a person, who has been always held in slavery in another state, though he may be justly entitled to freedom in that state, by its laws, can therefore be set free in Virginia; for, though our laws respect the right of freedom actually enjoyed by persons belonging to any other state, they allow no emancipation of persons actually held in slavery, but such as is made under their own authority, and in conformity with their own provisions. When we say a person has a vested right of freedom, we use a phrase (for the want of one more appropriate) applicable, in its proper sense, only to rights of property. To say that a man is free, is not to say that he has a vested property in himself, but to describe his status of condition. This imperfection of language sometimes leads to fallacy of judgment: this court corrected a fallacy of the kind, in *Maria v. Surbaugh*, 2 Rand. 230, 246. It seems a solecism to say, that a man actually in bondage, has a vested right of freedom. If the appellant be set free, his right to freedom will vest by the judgment of the court.

The constitution of Ohio declares, that there shall be neither slavery nor involuntary servitude in that state, even for a moment. In *Lewis v. Fullerton*, it appeared that the mother of the plaintiff, before his birth, had been once seen at work in Ohio, in the absence of his master, indeed, and for

178 aught that appeared without his permission; but this court *said her working there for so short a time, for her owner's benefit, and in his presence, would not have altered the case. By the constitution of Ohio she was free: this court, administering the law of Virginia, adjudged her a slave. The mother had been taken possession of, by one claiming her as his slave, and upon habeas corpus in Ohio, she was set at liberty; she was then actually free in Ohio: but this court strongly questioned, whether, if the judgment on the habeas corpus had affirmed her right to freedom, that would have concluded the right of her owner. The mother had been emancipated by deed made in Ohio, though under an agreement that she should be brought to Virginia, and serve her master here two years: this court held the deed

ineffectual to emancipate her; because it was not recorded according to our law; and because "the *lex loci* is to be taken, subject to the exception, that it is not to be enforced in another country, when it violates some moral duty, or the policy of that country, or is inconsistent with a positive right secured to a third person or party, by the laws of the country in which it is sought to be enforced. In such a case, we are told, *magis jus nostrum quam jus alienum servemus*. That third party in this case is the commonwealth of Virginia: and her policy and interest are also to be attended to. These turn the scale against the *lex loci* in this instance. For want of being emancipated agreeably to the provisions of our act, the duty of supporting the old and infirm slaves would devolve upon the commonwealth. That burthen is to be borne by the master in relation to slaves so emancipated; that is, emancipated agreeably to the provisions of the act." The decisions of *Lewis v. Fullerton*, then, and the reasoning it is founded on, sustain my view of the present case.

The court did not, in that case, decide upon the effect of a residence of a slave in Ohio, for a great length of time, and with the assent of the owner. It cautiously abstained from any decision upon it. And how can such a residence be material? It cannot vary the case in principle. It

is not less competent to Ohio by her 179 constitution, to give freedom *to all slaves permitted by their owners to set foot on her soil, than it is to Maryland by statute, to set free all slaves brought there to reside without fixing any term of residence. One term of residence does not disprove the owner's *animus revertendi* more than another: Where is the line to be drawn? In this case the owner has done more than evince the *animus revertendi*: he has returned.

As to *Griffith v. Fanny*, it does not appear from the report, that Fanny had ever been a slave in Virginia, or that Kincheloe, her first owner, was a citizen of Virginia. The transaction was a mere fraud on the law of Ohio. The case was not argued on any general principle: the court gave no reasons for its judgment: and *Lewis v. Fullerton*, which was fully considered, was decided after it.

In England, it is now settled, that a person who is a slave by the laws of one country, cannot acquire freedom, by going or being carried into another country, by the laws of which he is free while there, so that if he return or be brought back (by whatever means) to his former country, he is exempt from his former bondage. Lord Mansfield's decision of the case of *Somerset* (Howell's state trials, vol. 20), seems to have made a general impression, that when once a slave got to England, he was thenceforth absolutely free. But Lord Mansfield decided nothing as to the operation of the laws of England beyond the limits of the realm: he only determined, that by the constitution of England, slavery could not exist there; and that, consequently, there was no authority in that kingdom, by which a slave, transported thither, could be compelled to return to a state of bondage in the country from which he was brought. Later decisions have corrected the false inferences deduced from *Somerset's*

case. In *Williams v. Brown*, 3 Bos. & Pull. 69, it was held, that a fugitive slave, coming to England from Grenada, and afterwards returning to Grenada, was subject to his former bondage in Grenada. And in the case of *The mongrel woman Grace* (of which we have as yet only a newspaper report) Lord

Stowell decided, that a slave brought 180 by her owner from *Antigua to England, and then carried back by her owner to Antigua, was lawfully held in bondage there. So, in our case, the appellant, a slave by the law of Virginia, was carried to Maryland, where he could not be lawfully held in bondage, but was in fact held as a slave there, and then brought back as a slave to Virginia, where he was born a slave, and where he might be still lawfully held in bondage.

Scott, in his reply, said, that the english cases determined no more than this, that though the law of England afford no means of enforcing the rights of the owner of a slave over his person, while there, yet it does not emancipate the slave, because he comes or is brought to England. But, in this case, the law of Maryland did expressly emancipate the slave. The owner was domiciled in Maryland: he had voluntarily submitted his slave, and himself too, to her authority. Surely, it was a competent exercise of legislative authority in Maryland, to devert her own citizen's right of property in a slave imported in defiance of her laws, and to change the status of the slave from bond to free. In *M'Michen v. Amos*, 4 Rand. 142, this court held that a slave imported into and held in Virginia, contrary to our statute of 1792, acquired a perfect vested right of freedom, so that, though held in actual bondage till all penalties and forfeitures incurred under that statute, had been taken away by another statute, he was all the time free.

GREEN, J. The decision of this case in favour of the appellant, does not appear to me to involve the proposition, that in all cases and under all circumstances (except that of persons bound to service in one state, escaping to another, provided for by the constitution of the U. States), a slave born and owned in Virginia, and found in another state, may be emancipated by the laws of that state, so as to enable him to assert that right in our courts. If it did, I should wish the cause to be submitted to the consideration of a full court. My strong impression is, that such a proposition cannot be supported, and was rightly denied by this court in

181 **Lewis v. Fullerton*, where it was held, that a slave temporarily employed in Ohio, for the benefit of her master, a resident citizen of Virginia, was not thereby entitled to be considered as free in the courts of Virginia, although she might be so considered in those of Ohio.

In this case, a slave born and owned in Virginia, was carried to Maryland to reside there, and he was kept there for twelve years, by one who acquired a title to him by marriage, then being a resident citizen of Maryland, or soon afterwards removing and domiciliating himself there; thus voluntarily becoming a permanent member of that community, and submitting himself and his property to the full force of the laws of Maryland, by which the slave was declared

to be free; and thereby also (according to the opinion of judge Cabell, in *Murray v. McCarty*, 2 Munf. 393, in which I concur) becoming, upon the principles of natural law, and the spirit of our institutions, a citizen of that state. We are, therefore, called upon in this case, to enforce rights acquired in Maryland, under the laws of that state, against one claiming under a citizen of that state, after those rights were vested. And I see no objection, in principle, to giving full effect here, to those laws, operating on the rights of persons, who were to all intents and purposes justly subjected to them, and touching the rights of no others: in this respect, the case is like that of *Griffith v. Fanny*, where a citizen of Virginia carried a slave to Ohio, and there sold and delivered her to a resident citizen of that state, who, in fraud of the laws of Ohio, took a bill of sale to a resident citizen of Virginia, in trust for himself, and retained possession of the slave in Ohio for two years. The court there, enforced the laws of Ohio against a resident citizen of that state, without affecting the rights or interests of any other.

The English cases cited do not touch this, in any point. They were all collated and examined by lord Stowell in the case of *The mongrel woman Grace*, decided by him in 1827. And he declared their effect to be, that the laws of England did not emancipate slaves brought there, or annihilate the 182 *master's rights, but afforded no remedy for enforcing them, the relation of master and slave not being known to the common law; and that, upon the return of the slave to the country from whence he was brought, the subsisting rights of the master might be there enforced, according to the laws of that country.

CARR, J. Agreeing, as I do, with the general view taken of this case by my brother Green, I should not add a word, but to mark the exact extent to which I mean to go. The law of Maryland, having enacted, that slaves carried into that state for sale or to reside, shall be free; and the owner of the slave here, having carried him to Maryland, and resided there with him for twelve years, thus becoming himself a citizen of Maryland, and voluntarily subjecting himself and the slave to the operation of her laws; I think the right to freedom vested, and could not be divested, by the bringing him back afterwards to Virginia.

CABELL, J., concurred in the opinion, that the judgment should be reversed, and judgment entered for the appellant.

183 **Edwards v. Van Bibber.*

March, 1829.

(Absent BROOKE, P., and COALTER, J.)

Contract for Sale of Land—Specific Performance*—Case at Bar.—A. by covenant in July 1779, contracts to sell land to B. for £3500. whereof B. pays £1754. in cash, and covenants to pay balance, on A.'s making him a conveyance; in September following, B. pays balance in full, to A. in person, and receives possession; but A. makes no conveyance; or, if he made one, it cannot be found: in July 1791, B. by assignment sealed and indorsed on A.'s covenant, assigns all his right &c. in the land to

C. for value received; and C. takes possession: in October 1797, C. contracts to sell the land to D. for £800, whereof £500. was to be paid in 1798, and £300. in 1799; and C. covenants to give D. possession on receiving the first payment in 1798, and to make him a lawful title on receiving the last payment: D. makes the first payment in 1798, and receives possession, which he and his heirs have ever since held: D. never makes or tenders the last payment; C. never makes or tenders the conveyance; and they both die. Upon a bill by C.'s adm'r and heirs, against D.'s adm'r and heirs, for specific execution of the contract of Oct. 1797, the chancellor decrees specific execution, and charges the balance of purchase money on the land; and decree affirmed.

Same—Same—Escheat—Case at Bar.—Pending the bill in the court of chancery, the escheator takes an inquisition on the land, whereby it is found that A. died seised thereof, without heirs, and without having disposed thereof, so that it has escheated: D.'s heirs make no opposition to this proceeding, and give C.'s heirs no notice thereof. HELD, this escheat is no obstacle to the specific execution claimed by C.'s heirs against D.'s heirs: but the commonwealth and her officers shall be enjoined from any farther proceeding on the escheat.

Same—Presumption as to Conveyance—Quære.—Whether, under the circumstances, a deed from A. to B. conformably with the contract of July 1779, must not be presumed?

The executors of William Johnson, by deed dated June 5, 1778, conveyed to James Nicholson in fee, a tract of land lying on the Mattapony in King William county.

Nicholson took possession immediately: and, by articles between him and Abraham Van Bibber, dated July 2, 1779, contracted to sell this land to Van Bibber, for £3500. Pennsylvania currency; of which sum the articles stated, that Van Bibber had paid £1734. in cash, and that he bound himself to pay the residue of £1766. on Nicholson's making a conveyance. On the 3d August following, Van Bibber paid Nicholson £1040. and on the 15th September, the balance, £726. in full of the purchase money, as appeared by Nicholson's receipts indorsed on the articles.

184 *Abraham Van Bibber was let into the possession, and held it till August 22, 1791, when he sold the land to Andrew Van Bibber. The evidence of this sale was a writing of that date, signed and sealed by Abraham, and indorsed on the articles between him and Nicholson of July 2, 1779. in these words: "I hereby assign all my right, title and interest, to the within mentioned tract of land, unto Andrew Van Bibber, his heirs and assigns, for value received in full therefor. Witness my hand and seal &c."

Andrew Van Bibber thenceforth held the possession, until October 27, 1797, when by articles between him and Charles Edwards, he contracted to sell the land to Edwards, for £800. whereof £500. was to be paid January 1, 1798; £150. October 27, 1798; and £150. October 27, 1799; with legal interest from the date of the contract, on the two last payments: and it was stipulated, that possession should be given to Edwards, so soon as he should make the first payment of £500. and that upon his making the last payment, Van Bibber should make him a lawful title.

Edwards made the first payment of £500. received possession, and held it during his own life and Van Bibber's; and after Edwards's death, his heirs continued to hold it, without disturbance from any quarter. The residue of the purchase money (£300.) was never paid. Neither did it appear, that

*The principal case is cited in *foot-note* to *Griffin v. Cunningham*, 19 Gratt. 574. See monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 8 Gratt. 243.

Van Bibber had ever tendered Edwards a conveyance, and demanded this residue of the purchase money; or that Edwards had tendered him the money, and demanded a conveyance, or offered to rescind the contract on account of defect of title.

In February 1821, after the death of both the vendor and vendee, Sarah Van Bibber the administratrix, and Andrew and Hester Van Bibber the heirs, of the vendor, exhibited their bill, in the superiour court of chancery of Richmond, against Thomas Ware and Sarah his wife, who was relict and administratrix of the vendee, and Charles and Thomas Edwards, his heirs; wherein, after setting forth the facts above stated,

they added, that Nicholson, who sold 185 the land *to Abraham Van Bibber in 1779, was dead, leaving no heirs known to them; that they were unable to say, whether he made a conveyance to Abraham Van Bibber, as by the contract of July 1779 he had agreed to do, before or upon the payment of the balance of the purchase money, but they believed he did make such conveyance, and that it had been lost by accident and never recorded; and that, if proof of the actual execution of such a conveyance by Nicholson could not be adduced, yet, under all the circumstances, a conveyance by him ought to be presumed. And they prayed a specific execution of the contract of October 1797, between Andrew Van Bibber and Edwards; that the heirs of Edwards should be compelled to accept a conveyance with general warranty from the heirs of Van Bibber; that the balance of the purchase money with interest should be decreed to the administratrix of Van Bibber; and that the land itself should, if necessary, be subjected to the debt; or, if specific execution could not be decreed, that the contract should be rescinded, the land restored to the heirs of the vendor, and that part of the purchase money which had been paid by the vendee, refunded with interest, after discounting therefrom the profits of the subject during the possession of the vendor and his heirs.

The administratrix and the heirs of Edwards, in their answers, admitted, that the balance of the purchase money (£300.) due by their ancestor to Van Bibber, had not been paid, because (they said) Van Bibber could never convey a legal title; and they insisted, that the Van Bibbers could not even yet convey a good title; and that, therefore, the contract ought to be rescinded, the purchase money refunded with interest, and compensation allowed them for improvements, they accounting for the profits. They added, that the only personal estate of Edwards, which had come to the hands of the administratrix de bonis non, was two slaves, of which distribution had been made before the commencement of this suit; but the first administrator of Edwards was David Smith, whose letters of admin- 186 istration had *been revoked, though he was still living, and had never rendered any account of his administration.

The plaintiffs did not make Smith a party defendant.

The chancellor, in March 1823, directed a commissioner to examine and report the state of the title. The commissioner reported, that, as by the contract of July 1779,

Abraham Van Bibber was not to pay the balance of the purchase money to Nicholson until Nicholson should make him a conveyance, and as it appeared that the whole balance was in fact paid to Nicholson in person, in September 1779, it was thence fairly to be inferred, that Nicholson had performed the covenant on his part, and made the conveyance to Van Bibber, and that the conveyance had been lost or destroyed. Upon the coming in of this report, the chancellor in January 1824, decreed a specific execution according to the prayer of the bill; but he set aside this decree, at the same term, because he thought that the fact of the actual execution of a conveyance by Nicholson, was not so distinctly averred in the bill, as to justify a decree for specific execution on that ground.

Hereupon, the plaintiffs obtained leave to amend their bill. But after this leave was obtained, and before the amended bill was filed, the escheator of King William proceeded to escheat the land in question to the commonwealth, by inquisition of escheat, in which it was found, that James Nicholson was seised thereof in his lifetime, and being so seised, died without heir, and without having made any disposition of it. The heirs of Edwards, residing in the county, and holding the land in possession, made no opposition to this proceeding, while it was pending, and no effort to avoid it after it was accomplished; nor did they give any notice of the proceeding, to the heirs of Van Bibber, who resided in the county of Mathews.

After this escheat, the plaintiffs filed an amended bill; in which they alleged, positively, that Nicholson executed a conveyance to Abraham Van Bibber, pursuant to the contract of July 1779, and that this 187 conveyance was lodged in *the clerk's office of King William, to be recorded, but the office was burnt in 1787, and thus the instrument was destroyed; and they prayed (in general terms) that the escheator might be made party defendant to the suit.

The answers to the amended bill, denied that any conveyance by Nicholson to Abraham Van Bibber, was deposited in the King William office, and there destroyed in the manner suggested, or that any such conveyance was ever executed. And the escheator moreover denied, that either Abraham or Andrew Van Bibber ever had any interest in the land, legal or equitable, or any possession thereof.

It was proved, that though the clerk's office of King William was destroyed by fire in 1787, yet all the deed-books from 1778 (inclusive) were preserved, and that no deed from Nicholson to Van Bibber could be found on record there; that the fee-books of the period, had also been preserved, and that no fee was there charged for the recording any such deed.

There was proof also, that the plaintiff Mrs. Van Bibber, administratrix of Andrew Van Bibber, had said, in 1818 or 1819, that she had not a right to the land, that the right lay in Mrs. Nicholson, that she had gone to Mrs. Nicholson to get a right (meaning, as the deponent supposed, a deed) but found her sick, blind and deaf.

Pending the proceedings, Mrs. Ware, the

administratrix de bonis non of Edwards, the vendee, died, and no personal representative of that decedent was afterwards made a party.

The cause coming on again for hearing, in January, 1827, the chancellor decreed, that upon the heirs of Andrew Van Bibber, executing and tendering to the defendants, the heirs of Edwards, a deed conveying the land to them in fee simple, with general warranty, those defendants should pay to the administratrix of Van Bibber, the balance due of the purchase money, viz. £300. with interest from October 27, 1797, and the costs of suit; and if they failed to make such payments, within six months from the time when the

188 *deed should be tendered to them, the marshal should make sale of the land, and bring the proceeds of sale into court, to be applied to the satisfaction of the debt, interest and costs.

The heirs of Edwards appealed to this court.

The cause was argued by Johnson for the appellants, and by Schmidt and Leigh for the appellees.

1. The first objection taken to the decree by the appellants' counsel, was, that it not only subjected the land to the debt due on account of the balance of the purchase money thereof, but adjudged the heirs of the vendee Edwards, personally, to pay this debt of their ancestor. The counsel for the appellees acknowledged, that this objection was well founded, and that the decree ought to be corrected in this particular.

2. It was next objected, that the heirs of Edwards had a right to have his personal estate accounted for, and applied to the satisfaction of this debt; yet no account of the personal estate had been required, and at the time the decree was made, there was no personal representative of Edwards before the court. His first administrator, Smith, was never made a party, and called to account for the assets which came to his hands; and Mrs. Ware, the administratrix de bonis non, who was originally made a party defendant, died pending the suit; and thenceforth there was no proceeding against the personal estate or personal representative of the debtor.

To this it was answered, that the defendants had all stated in their answers, that the whole of the personal estate, which came to the hands of the administratrix de bonis non, had been regularly distributed: that fund was in their own hands. And as to the first administrator, Smith, the defendants, who were the distributees, had never thought it worth while to call him to account, and they could not complain, that the creditors had declined the trouble and expense of doing what they themselves deemed useless.

189 *3. It was earnestly contended, that the chancellor, instead of decreeing a specific execution of the contract of sale between Andrew Van Bibber and Edwards, ought to have rescinded the contract, and restored the land to the heirs of the vendor, and to the representatives of the vendee, that part of the purchase money which had been paid, with interest, holding the latter accountable for profits, and the former bound to make compensation for improvements. Specific execution ought not to have been decreed, because the Van Bibbers, even at the date of the decree, could

not convey a good title. Equity never compels a purchaser to take a doubtful or an equitable title, or any title not free even from suspicion. Sugd. law of Vend. c. 7, § III., p. 243. Now, so far from there being any reason to infer, that Nicholson ever in fact executed a conveyance of the land to Abraham Van Bibber, in pursuance of the contract of July 1779, the circumstances lead to the opposite conclusion, that he never made such a conveyance. The suggestion, that the deed was made, and lodged in the clerk's office of King William to be recorded, and was destroyed when the office was burned in 1787, is refuted by the proof, that all the deed-books and all the fee-books of the period were preserved from the flames, and that no trace of such a deed can be found in either: had the deed been fully proved it would have been registered in the deed-book: had it been only partly proved, a charge for such probat would have been found in the fee-book. That Nicholson never made the conveyance, is manifest from the fact, that Abraham Van Bibber transferred his right in the land to Andrew Van Bibber, in 1790, by assignment indorsed on the executory contract between Nicholson and him: he did not convey the subject; he only assigned the right to demand a conveyance of Nicholson in pursuance of his contract. And Mrs. Van Bibber, as late as 1818 or 1819, acknowledged that she had not the right (meaning, that she had no deed) and that the right was in Mrs. Nicholson.

Neither is this a case in which the court 190 can presume a conveyance from *Nicholson. A purchaser has a right to require a title commencing at least fifty years before his purchase, because the statute of limitations cannot, in a shorter period, confer a title. Sugd. c. 7, § I., p. 237. But from the date of Nicholson's contract (July 1779) to the date of the decree (January 1827) is only forty-seven years, and six months; from which deducting about a year and a half, according to the proviso of the statute of limitations (1 Rev. Code, c. 128, § 11), only about forty-six years can be counted.

The appellees' counsel answered, that considering that by the terms of the contract in July 1779, Abraham Van Bibber was to pay Nicholson the balance of the purchase money, only upon Nicholson's making a conveyance of the land; that the balance was paid by Van Bibber in person, to Nicholson in person, in September 1779, when there could be no manner of obstacle to the complete performance of the contract on Nicholson's part, by making the conveyance; and that the vendee, and those claiming under him, had ever since held quiet and undisturbed possession; it was fair to infer, that Nicholson had in fact made a conveyance. The state of the country at the period, and the length of time that has since elapsed, sufficed to account for the loss of the instrument without shewing how it was lost. It might have been lodged in the clerk's office of King William, without any probat, complete or partial; and in that case, no trace of it could be expected, either in the deed-book or in the fee-book. So soon as Nicholson received full payment of the purchase money, he was a bare trustee of the legal title for Van Bibber, and bound immediately to convey it to him; and it is an inference of law, that he did in fact convey. Lade

v. Holford, Bull. N. P. 110; England v. Slade, 4 T. R. 682. And the court, under the circumstances, ought to presume the conveyance from Nicholson. *Hillary v. Waller*, 12 Ves. 239; *Ricard v. Williams*, 7 Wheat. 109. At all events, seeing that Edwards took possession of the land upon his purchase from Andrew Van Bibber, in 1797; that he and his heirs have ever since held and enjoyed it, "undisturbed; and that they never complained of defect of title, or offered to abandon the contract, or claimed to rescind it on that account, till they filed their answers in this suit; under such circumstances, they could not, with any colour of justice, at this late day, claim that the contract of their ancestor should be rescinded; and the chancellor was right in compelling them to accept a deed with general warranty from the heirs of Van Bibber.

4. It was objected, that the escheat was an insuperable bar to the specific execution decreed by the chancellor. That proceeding was, on the face of it, fair and regular: it established, that Nicholson died seised of the land, without heirs, and without having conveyed it away in his life-time: it vested the title in the commonwealth: it stands unimpeached: there is not only no proof, but there is no charge, of any collusion between the escheator and the heirs of Edwards.

It was answered, that the proceeding of the escheator, was procured by the heirs of Edwards themselves, and consummated by their connivance, in order to disappoint the apprehended decree for a specific execution of the contract of their father. The land had been held in undisturbed possession, by the Van Bibbers and by Edwards and his heirs, from July 1779 to January 1824, when the chancellor made a decree, which though afterwards set aside, sufficiently evinced his opinion on the merits, that the balance of the purchase money ought to be paid to the Van Bibbers. Then, for the first time, the escheator of King William discovered, that the land in question had been conveyed to Nicholson in 1778, that no conveyance of it by him was to be found on record, that he was dead without any known heirs: in short, he discovered all the facts unfavourable to the title, but none of those favourable to it, which the previous proceedings in this cause disclosed. From whom did he, at that critical period, derive the information on which he proceeded? From whom but the heirs of Edwards, whose interest alone it was that he should proceed? The escheator made his inquisition in the county in which they reside; they were in actual possession; they took no pains to shew the long possession of themselves and those under whom they claimed, and the payment of public taxes for near half a century; they made no resistance to the proceeding while it was pending, no effort to avoid it afterwards; they gave no notice of it to the Van Bibbers, made no call on them to defend the title. *Res ipsa loquitur*: the proceeding of the escheator was commenced and consummated by the procurement and collusion of the appellants themselves; and if any inconvenience result from it, they ought to bear it. But there was, in truth, no reason to apprehend any serious effect from this escheat.

5. The counsel for the appellants insisted, that if, under the circumstances of the case, it was right to decree a specific execution of the contract, the principal only of the purchase money yet remaining due, without interest, ought to have been decreed. The purchaser was in no default. He was not bound to pay the balance of the purchase money, till a conveyance of the title was made or tendered to him; it was the fault of the vendor, that no conveyance was made, or rather the vendor had no title to convey; nor does it appear that he ever offered to make a conveyance.

The counsel for the appellees said, that the purchaser and his heirs have enjoyed the profits of the land, and of the purchase money too; and they cited *Sugd. c. 10, § 1, p. 353, 4*, and *Selden v. James*, 6 Rand. 465.

CARR, J. The question is, whether, under all the circumstances of the case, it will be most conducive to justice, to execute or to rescind the contract between Andrew Van Bibber and Edwards?

It is insisted by the appellants, that we ought not 'to force upon them a purchase of land, to which they cannot get a perfect title. This might have been a very different question, if the vendee, who by the contract was to get a title on making the last payment, had, when that payment fell due or soon after, tendered it, and demanded his title: a bill to rescind, then, would in all probability (if the title proved 'materially defective) have been successful, though possession had been taken. But he and his heirs have held the land above thirty years; they made no effort to perfect their title or to rescind the contract; and it is only now, when pressed by the other side, that they resort to it as a defence. If, under such circumstances, they can be made reasonably secure in the title, justice seems to say, that they ought to be compelled to take it, and pay the residue of the purchase money. It appears, that Nicholson acquired the land in question, by conveyance from the Johnsons, in 1778, upwards of fifty years ago; that on 15th September 1779, Abraham Van Bibber had bought of Nicholson and fully paid for the land, and by the terms of the contract, had a perfect right to a deed; and that he was, in 1779, put into possession, which has, by him and those claiming under him, been held uninterruptedly to the present time, a period wanting but a few months of fifty years. In this state of things, it was strongly contended, that the court ought to presume that a deed had been made by Nicholson to Van Bibber: for, as Van Bibber was not bound to pay till a title was made, nor had Nicholson a right to call for payment till he made a conveyance; as Nicholson had a clear legal title, and there were no impediments to his conveying; as it was his duty to convey, and Van Bibber's interest to insist on a deed; and as Van Bibber's possession had been uninterrupted ever since; the necessary conclusion is, that a deed was made when the last payment was made, which by time or accident has since been destroyed. And this conclusion, it was insisted, rested upon the presumption, that Nicholson, who after the money paid was but a mere trustee, had done what he was

bound to do; and also upon that more general ground of presumption, that, from the infirmity of our nature, and the difficulty of retaining or producing evidence of ancient transaction, it has been found convenient and necessary, for the preservation of property and rights, to have recourse to some general principle, to take place of individual and specific belief. There is, to my

194 understanding, *much weight in these considerations: but I shall not decide, whether in this case we ought to presume a deed. (The doctrine on this subject, is well treated of in the following cases: *Hillary v. Waller*, 12 Ves. 239; *Prevost v. Gratz*, 6 Wheat. 481; *Cowp.* 102, 217; 7 Wheat. 109; 8 East. 467; 3 Stark. Ev. part IV. 1200, 1228.*) The question with us, is, whether upon all the facts, it will be just and equitable to decree, that the appellants shall accept a deed with general warranty, from the heirs of Andrew Van Bibber, and pay up the residue of the purchase money?

I am clearly of that opinion, unless the escheat shall be found to present a difficulty. There is something in this proceeding, which I find it difficult to account for, on fair principles. This suit, in which the rights of the parties are set out, had been pending before the court three years, when the inquest was taken; and whatever might be the conclusion as to the legal title, it was most manifest, that Nicholson more than forty years before had sold the land, and received full payment; most clear also, that the Van Bibbers, and those holding under them, had been in possession, as purchasers for value, and as such had paid taxes to the commonwealth upwards of forty years. This, we all know, was a full answer to any claim the commonwealth could make. And yet, in the face of all this, an inquest was found, escheating this land to the commonwealth for defect of heirs of Nicholson. The jury was sworn to inquire, what lands Nicholson died seised of, and whether he left any heir, or made any disposition of the lands in his life-time; and they found that he died without heir, and made no disposition of this land. Why did not the appellants, by traverse, monstrans de droit, or petition of right, contest this finding? The answer cannot be doubted: they wished it to succeed, supposing that it would strengthen their case for a rescission of the contract. As to the escheator, it is charitable to suppose, that he has acted from misguided zeal to

195 be doing *something in his office. It is most clear to me that this proceeding ought not to present the slightest obstacle to the decree of the court.

The decree, however, is a personal one against the heirs of Edwards the vendee, and so far erroneous. It must, therefore, be reversed, and a decree entered, that unless the money be paid in six months the land be sold; and, in addition, that the commonwealth and her officers be perpetually enjoined from taking any proceeding on the escheat.

The other judges concurred. The decree was reversed with costs, for the errors mentioned by judge Carr, but approved in all other respects.

*The edition referred to is Ingraham's. Boston. 1823.—Note in Original Edition.

Ambler and Others v. D. Warwick & Co.

March, 1829.

(Absent COALTER, J.)

Deeds of Trust—Remedy of Creditor Where Debtor Sells Property Conveyed—Case at Bar.—M. by deed of trust conveyed (inter alia) 20 slaves to a trustee, to secure a debt due to W. & Co. payable twelve months after date of the deed: Within the year, M. sold one of the slaves to A. two to B. one to C. and one to R. who alleged that M. sold at request and by authority of W. & Co. When the debt fell due, all the rest of trust subject was sold, and the proceeds fell far short of the debt due W. & Co. W. & Co. brought suit in chancery against M. the purchasers of the five slaves, and the trustee: denying M.'s authority to sell the five slaves: praying a foreclosure of the equity of redemption thereof and that the purchasers be decreed to deliver them up to be sold under the deed of trust. HELD, that though W. & Co. might have brought actions at law in the trustee's name, to recover the slaves of the respective purchasers, yet their case was properly relievable in equity.

The house of D. Warwick & Co. and D. Warwick individually, exhibited their bill in the superior court of chancery of Richmond, against Ambler, Robertson, Burton, Chilton, Winfree, Morris in his own right, and Morris & Mitchell, merchants and partners, setting forth this case:

196 *On the 12th November 1818, Warwick & Co. having made advances to Morris & Mitchell, to the amount of 8847 dollars, and agreeing to make farther advances to them, to an amount not exceeding 12000 dollars more, upon a stipulated security for re-payment of the sums so advanced and to be advanced, Morris executed a deed, dated the same day, conveying to Winfree, four tracts of land in Campbell, a lot in Lynchburg, and twenty slaves, upon trust, that if Morris & Mitchell should fail, on or before the 12th November 1819, to reimburse to Warwick & Co. all the money advanced, or to be advanced to them, in pursuance of the arrangement, the trustee should then, at the request of either party, proceed to sell the trust subject for cash, to satisfy the debt. Warwick & Co. made the additional advances to Morris & Mitchell, as they had agreed to do; and on the 12th November 1819, Morris & Mitchell were indebted to them, on that account, 19352 dollars, with some arrears of interest. Warwick & Co. thereupon, required the trustee, Winfree, to make sale of the trust subject, under the deed of trust; and he, accordingly, in December 1819, sold all of it (except five slaves) and D. Warwick was the purchaser. The net proceeds of the sales, amounted only to 11924 dollars, leaving a balance of 7428 dollars due Warwick & Co. D. Warwick accounted with the house of Warwick & Co. for the above sum of 11924 dollars, upon this understanding, that if the

***Equity Jurisdiction—Bill Aided by Other Pleadings.**—When there is an answer supported by evidence, though on its face the bill may not show a case proper for equity jurisdiction, and though the defendant has failed to demur, nevertheless the court must, at the hearing, consider not only whether the bill alone makes such a case, but also whether the bill, aided by the answer and the proofs taken together, makes a case proper for interposition of the jurisdictional powers peculiar to a court of equity. *Graveley v. Graveley*, 84 Va. 151, 4 S. E. Rep. 218, citing *Ambler v. Warwick*, 1 Leigh 196. To the same effect the principal case is cited in *Salamone v. Kelley*, 80 Va. 95; *foot-note* to *Green v. Massie*, 21 Gratt. 356.

Same.—The principal case is cited in *Tabb v. Cabell*, 17 Gratt. 175; *Crawford v. Thurmond*, 8 Leigh 88; *Com. v. Drake*, 81 Va. 316; *Sheppards v. Turpin*, 3 Gratt. 389, 390, 393.

title of any part of the property he had bought at the trustee's sale, should fail, his partners should make restitution to him of the value of the property he should thus lose. No conveyance of the property bought by D. Warwick at the trustee's sale, had as yet been executed by the trustee; and it was doubtful whether it could properly be executed; Morris having hinted objections to the sale, sometimes denying the amount of the debt claimed by Warwick & Co. and insisting that their claim, if fairly liquidated, did not amount to as much as 11924 dollars, and sometimes questioning the regularity of the sale, as not having conformed with the provisions of the deed of trust; and,

197 therefore, *Winfree, the trustee, was reluctant to complete the execution of his trust, by conveying the subject to the purchaser, without the sanction of a court of equity. And thus the accounts between Warwick & Co. and Morris & Mitchell, remained to be adjusted, and the accounts between D. Warwick and Warwick & Co. in the actual state of things, could not be adjusted. As to the five slaves, not sold at the trustee's sale; they were in Morris's possession, and were his property, at the time he executed the deed of trust; but, at the date of the trustee's sale, one of them was in the possession of Ambler; one, in the possession of Robertson; and two, in the possession of Burton; and one, in the possession of Chilton: these slaves had been demanded by the trustee, of the respective holders of them, and they had refused to deliver them; sometimes pretending they purchased the property of Morris, (who had no right to sell them); and sometimes, that Warwick & Co. had no just claim on Morris & Mitchell, which the sale of these slaves was necessary to satisfy. Winfree, the trustee, who alone could maintain actions at law for the slaves, declined to bring such actions or meddle in the controversy. Morris and Mitchell were insolvent; and the slaves in question was the only subject, out of which Warwick & Co. could hope farther satisfaction of the balance due them. The bill, therefore, prayed, that Morris might disclose the particulars of the titles of the property he had mortgaged by the deed of trust, and which had been sold by the trustee, in order that the same might be examined and ascertained; that the accounts between Warwick & Co. and Morris & Mitchell (if the latter denied the balance claimed by the former, or if the proofs which should be adduced should not shew satisfactorily the true state of them) might be settled before a commissioner; that the sale made by the trustee might be confirmed, and he decreed to convey the property by him sold, to D. Warwick, the purchaser; that Ambler, Robertson, Burton and Chilton might, respectively, disclose the particulars of their claim to the slaves they held; when, how, from whom,

198 they acquired *possession of them, and if they purchased them, the prices they paid; render an account of the profits of them; be decreed to deliver them to the trustee, or to the proper officer of the court, to be sold under the deed of trust, and the proceeds applied to the debt thereby secured; and general relief.

Ambler, Robertson, Burton and Chilton, in their answers, stated, that they purchased

the slaves, by them respectively held, of Robert Morris, early in the year 1819, and set forth the prices they gave for them: they alleged, that Morris was authorised and requested by Warwick & Co. to make sale of these slaves, and to remit the proceeds of sales to them; and that Morris did accordingly remit all the proceeds of the sales to them. And Chilton said, that he knew nothing of the state of accounts, between Warwick & Co. and Morris & Mitchell; and, so far as his rights were affected, he required full proof on that head.

Morris, in his answer, also affirmed, that Warwick & Co. authorised and requested him to make the sales of the slaves which he had sold, and to remit the proceeds of such sales to them; and that they were so remitted. He declared, that he never denied the justice of the debt claimed by Warwick & Co. or questioned the regularity of the sale, made by the trustee, Winfree; and as to the title of the property conveyed by the deed of trust, and sold by the trustee to D. Warwick, he said, the title papers were on record, and any one might procure copies of them who would pay the cost.

The trustee, Winfree, and the house of Morris & Mitchell, did not answer: as to them, the bill was taken *pro confesso*.

The trustee, Winfree, was examined as a witness. He did not say, and he was not asked, whether he declined (as is stated in the bill) to bring suits at law, or to allow such suits to be brought in his name, to recover the slaves held by Ambler, Robertson,

Burton and Chilton.

199 *The chancellor's decree, (inter alia) directed Ambler, Robertson, Burton and Chilton, to deliver to the marshal of the court, the slaves which they had respectively bought of Morris, to be sold to satisfy the debt secured by the deed of trust to Warwick & Co. and to render accounts of the profits thereof. And those defendants appealed to this court.

The question, on the merits, was, Whether, in fact, Warwick & Co. authorised Morris to make sale of the five slaves which he sold to Ambler, Robertson, Burton and Chilton, and to remit the proceeds of sales to them, and whether Morris made such remittance? And upon this question of fact, there was a good deal of evidence; and it was earnestly argued by counsel. But the only question of law in the cause, was a question of jurisdiction: Whether this was a case properly relievable in equity?

Nicholas and Johnson for the appellants. The real object of the bill was, to try the title of the appellants to the slaves they had respectively purchased: and, obviously, the counsel, who drew the bill, felt the difficulty of the question of jurisdiction; and to sustain the jurisdiction of the court, carefully and skilfully introduced a variety of allegations, on subjects never controverted, and not material to the question of title in the appellants. The claim of the appellants is purely legal, and adversary, not merely to the equitable claim of Warwick & Co. but to the legal claim of their trustee: they claim several titles, by several purchases, each holding an adversary possession, the right whereof might and ought to have been tried in an action of detinue against each, in his

own county. It was oppressive, to drag the appellants from distant parts of the state, into an inconvenient and expensive forum.

As to the refusal of the trustee to bring actions at law, there is no proof, and indeed, no attempt to prove, that he did refuse: he does not say so, in his deposition, and no question was asked him about it: nor was the taking of the *bill pro confesso as to him, an admission of the fact, so far as the other parties were concerned. And if he had refused, Warwick & Co. would have been justified in using his name in actions at law; or he would have been compelled, by a court of equity, to bring the actions.

There is no analogy between this case, and that of a mortgagee, who, seeking to foreclose, brings before the court the mortgagor and the purchasers of the equity of redemption; because, though the mortgagee have the legal title, and may recover in ejectment, that recovery will only be the foundation of a suit in equity to redeem. The mortgagee can never sell without the aid of a court of equity. His claim is substantially a claim for money, and can be asserted no where but in equity. So, the claim of the mortgagor and of those who purchase the equity of redemption is purely equitable. The matters in controversy, therefore, between the mortgagor, or those claiming the equity of redemption, and the mortgagee, can only be finally settled in a court of equity. But, in the case at bar, the whole question between Warwick & Co. and the purchasers of the slaves, might have been settled, without going into equity. The suits at law would have decided, whether the trustee, or the purchasers, were entitled to the slaves; if the purchasers, there was an end of the controversy; if the trustee, then he might have proceeded to sell, without the aid of the court of equity. The bare possibility that the purchasers might have gone into a court of equity to redeem, could not justify Warwick & Co. in going there, by anticipation, especially in a case where the purchasers never claimed an equity of redemption, and where it is manifest, that the value of all the slaves was not equal to one third of the remaining debt.

This is not a case, in which the court can take jurisdiction to prevent multiplicity of suits. For, though the title of Warwick & Co. to all the slaves be derived under one deed, yet the titles of the purchasers are derived under several purchases, and each depends in some degree on its own circumstances.

201 *And Johnson cited *Bowyer v. Creigh*, 3 Rand. 25; *Randolph v. Kenney*, Id. 394, and *Stuart's heirs v. Coalter*, 4 Rand. 74, as directly in point, and decisive of the question.

Stanard, for appellees. There are several grounds on which the jurisdiction of the court may be maintained.

The rights of Warwick & Co. were merely equitable; and, certainly, they could not, directly and in their own names, have asserted those rights any where but in equity. Creditors, claiming under a deed of trust conveying property to a trustee to secure debt, are so closely assimilated to creditors claiming under a mortgage, as to afford no just ground of discrimination as to their

remedies. Their rights, to every substantial purpose, are exactly the same. The intervention of the trustee, indeed, exempts the creditor, in ordinary cases, from the necessity of asking the chancellor's aid; but it does not deprive him of the right to ask such aid, if convenience dictate, or if his interest require, that course. The creditor secured by deed of trust, ought to be allowed to treat his security as a mere mortgage, if he will: no party, howsoever concerned, can be injured by his so treating it. There is no reason to apprehend, that such a *cestui que trust* will ever, unnecessarily and wantonly, incur the expense and delay of a suit in chancery: if he should do so, the chancellor has it in his discretion to refuse him costs. And surely, they who purchase the subject pledged by a deed of trust, from the grantor, purchase only an equity of redemption; an interest, of which equity alone can examine and determine the right and the extent, secure the enjoyment of it, or take it away, in whole or in part, according to circumstances. Had Ambler and the other purchasers from Morris, exhibited, against Warwick & Co. and their trustee, a bill to redeem, equity would doubtless have entertained that bill; and the converse of the proposition seems undeniable, that the bill exhibited by Warwick & Co. against them, to foreclose, ought to be entertained; the bill of the one to foreclose, and of the other 202 to redeem, *properly presenting the same matters for adjudication, and matters peculiarly of equitable cognizance.

Warwick & Co. allege, in their bill, that Winfree, the trustee, declined to bring suits at law for the slaves in question; and the fact was not controverted by any of the defendants. Upon this ground, Warwick & Co. had a right to go into a court of equity, and claim, directly for themselves, their right to satisfaction out of the trust subject.

But, if the legal title of the subject had been vested in Warwick & Co. (as it would have been, had their security been, in its form, a mortgage instead of a deed of trust); or, if the trustee had been ready to bring suits at law; or, if Warwick & Co. might, without his consent, have brought such suits, in his name; still they had a right to resort at once directly to a court of equity. They were incumbrancers, whose recovery of the subject in actions at law, would have left them exposed to the equities of the other parties, and to their suits in chancery to assert those equities. Their rights depended essentially on the state of their accounts with Morris & Mitchell, which the defendants, each and all, had a right to have examined and settled, and without the settlement of which their rights could not be concluded: no admission of Morris & Mitchell, as to the state of the accounts, could have bound the defendants who had purchased the slaves from Morris. And Warwick & Co. had a right to have the proceedings of the trustee under the deed of trust, fortified by permanent evidence of the regularity of them; to have those proceedings, if regular, confirmed by the chancellor; and thus to avoid the hazard of trusting to fugitive and precarious evidence of acts in pais, essential to the regularity of the proceedings, and the validity of the title acquired under them.

Warwick & Co.'s resort to a court of equity, was proper, especially as against the appellants, to avoid circuity and multiplicity of suits. If they had resorted to the courts of law, they must have instituted, in the trustee's name, four several actions of detinue or trover, against the four purchasers, 203 *Ambler, Robertson, Burton and Chilton. In those actions, the defense now set up in equity, by the purchasers of the slaves, (for they all take exactly the same ground,) could not have availed them: I apprehend it is quite clear, that they could not, in the actions at law, have resisted the legal title of the trustee, on the ground, that the grantor had sold the slaves to them, at the request and by authority of the cestuis que trust. The recovery at law would have been as certain, as it would have been merely formal. And, then, each of the purchasers must either have abandoned his claim, or have exhibited his separate bill in equity, alleging his purchase from Morris, with all its circumstances, praying an examination thereof, and the protection of his equitable rights against the trustee's judgment at law. The purchasers, might, too, in these bills, each, severally, have claimed to redeem that part of the trust subject which they had bought : and to that end, they might, each, have contested the justice or the amount of Warwick & Co.'s claim against Morris & Mitchell ; they might, each, have contested the fairness or regularity of the trustee's sale; they might, each, have insisted on a fair settlement of accounts, whereby Morris & Mitchell's debt to Warwick & Co. might have been reduced, and on a re-sale of the trust subject which had been sold by the trustee, whereby the proceeds thereof might have been enhanced. Thus, after four suits at law, (which would have determined no real point in controversy, since the legal title of the trustee would not have been more certain after judgment than before), there would have been four suits in chancery ; and, in each of the latter, exactly the same matters would have been presented for examination and decision, which have been presented by the bill exhibited by Warwick & Co. and in each of those suits in chancery, too, all the parties whom Warwick & Co. have now convened before the court, might and ought regularly to be made parties. Warwick & Co. therefore, had a right to bring all parties, by one suit, into that forum to which each and every party, if he persisted in his claim, 204 must at last have *resorted, convening there every other party, in four suits at the least.

BROOKE, President. Several objections were made to the decree. The first, which meets us at the threshold of the cause, is the objection to the jurisdiction of the court : and, after a critical examination of the bill, I have not been able to perceive how it can be obviated.

Without inquiring, whether a foundation is well laid for the jurisdiction of the court, as regards the other defendants than the purchasers of the slaves (who alone have appealed from the decree), it may be remarked, that upon the evidence in the record, it appears to be merely colourable. The pretexts for the jurisdiction of the court,

as regards the appellants, is still less to be countenanced.

One is, that the trustee declined suing at law ; that is, he was willing, that the appellees should proceed, either at law or in equity, as they should be advised. It is neither alleged in the bill, that he refused to sue at law, nor that he refused to permit the appellees to use his name. Such an allegation would have laid a better foundation for the jurisdiction of a court of equity, though it may be questioned, whether it would have been sufficient, as the appellees might have used the name of the trustee, and a court of law would not have permitted him to dismiss the suit, upon the plaintiffs' indemnifying him against all costs.

Another ground is, that this is a proper case for a court of equity, to prevent a multiplicity of suits. But this is not tenable. The case does not come within the principle, on which courts of equity take jurisdiction to prevent the multiplicity of suits at law : it does not rest upon a right, which is in common, objected to by many persons whose pretensions are in all respects similar, and in controverting which, the decision for or against any of them, must turn on the same evidence ; as in the case of an exclusive claim to fish in a particular water ; a claim affecting the pretensions of many who may controvert it. For, though the 205 appellants *are all purchasers from Morris, mediately or immediately, they are so under variant circumstances, and at different times : they hold possession of the slaves severally, independently of, and adversely to, the claim both of Morris and of the appellees under the deed of trust.

Nor can the case be likened to the case of mortgagor and mortgagee. The appellants holding adversely to the deed of trust, occupy an entirely different ground from that of a purchaser of mortgaged property. In the case of mortgagor and mortgagee, in whom ever the legal title and possession of the mortgaged subject may be, the equity of redemption in the mortgagor or his assignee, follows it, and can only be foreclosed in a court of equity. Not so in the case of a sale of property under a deed of trust, in pursuance of the deed. In such case, there remains no equity of redemption any where. But the claim of the appellants is not under but against the deed of trust : it is strictly legal, as is that of the trustee under the deed of trust ; and it ought only to be controverted in a court of law.

The suggestion, that the appellants after a decision at law against them, might come into a court of equity, and shew that, though the slaves purchased by them were subject to the deed of trust, yet that there was other property to satisfy the claim of the appellees, exclusive of the slaves so purchased, is not countenanced by the evidence in the record ; and, if it were, it would be no ground, on which to compel the appellants to relinquish their right to a trial by jury and viva voce testimony, and to submit to the delays and costs of a court of equity. Nor have they lost their right to controvert the claim of the appellees in a court of law, by failing to insist on it by plea or in their answers ; it being the settled rule of the court, that if it appear from the face of the bill, that the

matter thereof is not proper for a court of equity, it should be dismissed, even after answer filed, and though there be no plea to the jurisdiction. *Pollard v. Patterson*, 3 Hen. & Munf. 67.

206 *In this opinion of the President, the other judges at first concurred; and an order was accordingly entered, reversing the decree as to the appellants, dismissing the bill as to them, for defect of jurisdiction, and remanding the cause as to the other defendants. But, afterwards, Stanard moved the court to correct the decree, by adding, 1. that the dismissal of the bill should be without prejudice to any actions at law, which should be brought to recover the slaves of the appellants, which Johnson agreed to; and 2. a provision inhibiting the appellants from pleading the act of limitations in bar of such actions at law (he cited *Anon. 1 Vern. 73*; 4 Bac. Abr. 481,) which Johnson earnestly resisted. And in the course of the conversation on this point, the court expressed its willingness to re-consider the question of jurisdiction, and directed another argument of that point. It was accordingly argued again, by the same counsel, more elaborately than before, but the general topics of argument, advanced and insisted on, by the counsel on both sides, were essentially the same. The judges then delivered their opinions seriatim:

CARR, J. My experience in courts, has convinced me, that much mischief is done, by stretching the jurisdiction of equity beyond its proper limits, to take in particular cases, which seem to address themselves to our feelings of compassion, or sense of justice. I have found too, that this jurisdiction will encroach, unless it be steadily watched; for, in our anxiety to attain exact justice in the case immediately before us, we are apt to overlook remoter consequences, and to forget, that no decision which conforms to settled rules, can do so much mischief, as one which, though it may seem to fit the special case, violates and unsettles fixed rules and principles. This being the bent of my mind, I am sometimes, no doubt, carried too far the other way, by my anxiety to avoid this mischief: and this, I incline to think, was the fact in the case before us.

207 *To the proposition, that the creditor has the same right to the aid of equity, to execute a deed of trust, as to foreclose a mortgage, I can by no means assent. They are both securities for money: but the law of the contract, by which the parties have agreed to be governed, is materially different. The mortgagee must come into equity; no other mode is given: but the cestui que trust has no such need. The parties have appointed a disinterested agent, who representing them both, is, in case of non-payment, empowered to act definitively on the subject; to sell the property, pay the debt, and return the excess to the debtor. His deed (if the proceeding has been fair) gives a perfect and irredeemable title to the purchaser. To hold, that, notwithstanding this contract, the creditor may, at will, and though no obstacle is raised to the execution by the trustee, draw the debtor into litigation, were to violate the agreement of the

parties, and force a man to incur costs and charges, who is willing and anxious to comply with his undertaking, and deliver the property into the hands of the trustee. I cannot, therefore, on this ground, entertain the plaintiffs' bill.

I consider the case made by the bill (so far as relates to the appellants) to be substantially this: that Morris executed to the plaintiffs a deed of trust of these slaves (*inter alia*) and that the appellants have, since the date of that deed, acquired possession of the slaves, in some way, from Morris; and they are called on to say, how and when they acquired such possession. In answer, they state, that they purchased from Morris; give the particular dates of their purchases, which are after the execution of the deed; and put their defence on the ground, that Morris was authorised by the plaintiffs to sell the slaves, provided the proceeds were sent to them, and that they were so sent. If the bill had stated, that the defendants held the slaves by a claim paramount the deed of trust, I have no doubt it might have been demurred to: and, though not so stated by the bill, if it had appeared by plea or answer, that the defendants did not claim under Morris, but by adverse legal title, I think

208 it would have shewn a *case not proper for relief in equity. Of this kind was the case of *Stuart v. Coalter*. But it appears here, that the defendants all bought after Morris had executed the deed, and departed with the legal title. Of course, they acquired nothing but an equity; no title, which they could in any way vindicate at law. In the first argument, these features of the cause did not strike me; especially, that this is not a claim adverse to the title of Morris, but an equity derived from him, after the execution of the deed. In this aspect of the case, I incline to think the jurisdiction of equity may be sustained; particularly, when we consider the multiplicity of suits which will be saved by it; for if the plaintiffs be dismissed from this court, the trustee must bring four actions of detinue against the holders of the slaves, and each of these holders, may then file his bill against the other parties. Upon these grounds I am content to entertain the cause.

GREEN, J. Upon the first hearing of this cause, I concurred, without hesitation, in the opinion, that it did not present a fit case for the jurisdiction of a court of equity; principally upon the grounds, that the parties had, by their contract, provided the means by which the appellees might enforce their rights, without a resort to that tribunal; and that there was no circumstance in the case, which presented such an obstacle to the assertion of those rights in the stipulated mode, as to make such a resort necessary or proper, particularly as against the purchasers under Morris, as to whom they might, even if the trustee was unwilling, have proceeded in his name at law, or if not, could have coerced him in equity, to the performance of his trust, without making those purchasers parties.

The second argument upon the point of jurisdiction has changed my opinion. Although I am not prepared to say, that every creditor by deed of trust, has, like every mortgagee, a right, at his pleasure, to call his debtor into a court of equity, the latter

being under a necessity to resort
 209 there *for the purpose of foreclosing the equity of redemption, and enforcing a sale, while the former, in general, is under no such necessity for the attainment of either of those objects; yet, I think, there are circumstances in this case, which support the jurisdiction. The deed of trust was made to secure a large debt then due, and farther advances stipulated to be made by the appellees to Morris & Mitchell. All the property (except the five slaves in question) had been sold by the trustee, and its proceeds exceeded considerably the debt due at the date of the deed, but left a large balance on the account including the subsequent advances; the amount of which had been adjusted between the appellees and Morris. The bill, after stating these facts, charges, that four of the slaves in question, were in the possession of Ambler, Burton, and Chilton, respectively, and that the other was obtained from Morris, by the defendant Robertson; that the plaintiffs are ignorant of the manner or terms, on which they acquired possession of the slaves, or the title under which they claim; but that Morris was possessed of and entitled to the slaves, when he conveyed them by the deed of trust, and that the rights of those defendants are subordinate to those of the plaintiffs. All of those defendants rely upon the same defence in one particular: admitting, that they claimed under sales made by Morris, after the date of the deed, and before the settlement of the accounts between Morris and the plaintiffs, they insist, that the sales were made by Morris under the authority of one of the plaintiffs, and that he had remitted the proceeds to them. I pass by the suggestion in the bill, of a doubt as to the possible invalidity of Morris's title to the property, sold and purchased by one of the plaintiffs, and the claim that, in such event, Morris & Mitchell would not be entitled to a credit for the amount of the sales, and thus the balance due to the plaintiffs would be increased: for the trustee sold only such title as was vested in him by the deed; and, consequently, the debtors are entitled to full credit for the amount of sales, whether the title was good or not. I pass by, also, the suggestion,

210 that the trustee declined *to sue at law for the recovery of the slaves. These suggestions, if well founded, afford no ground of jurisdiction against the purchasers from Morris. The other matter, is, I think, sufficient for that purpose.

The bill does not, indeed, expressly affirm, that the defendants, Ambler, Burton, Chilton and Robertson, claim under Morris, subsequent to the execution of the deed. If it had alleged, that they claimed paramount to Morris, that would of itself have put an end to the jurisdiction: or, if it had been totally silent as to the character of their claim, and they had demurred, it might have presented a doubtful question. But it virtually affirms, that they claimed title, (if they claimed any) under Morris, subsequent to the date of the deed, by alleging, that he possessed and was entitled to the slaves at that time. And it appears, from their answers, not only that such was really the character of their claims, but that they were of such a nature, that they could only be asserted in a court of equity, and also that they purchased under Morris,

before the settlement of the accounts between him and the plaintiffs, which therefore (they say) did not bind them. The consequence of which is, that, if this bill was dismissed for want of jurisdiction, the plaintiffs would be driven to prosecute four several suits at law, in the name of the trustee, in which they would upon the matter in this record inevitably recover: and, then, each of the defendants claiming the slaves, would have a right to resort to a court of equity, to assert the equitable titles insisted on in their defence here, and also to call for a settlement of the accounts between the appellees and Morris & Mitchell, without being bound by the settlement already made between them. One of the defendants claims such a settlement in this cause: To prevent this multiplicity of suits, all depending upon the same facts, is, I think, a sufficient foundation for the jurisdiction of the court of chancery.

The only objection to this, is, that this ground of jurisdiction appears (in part) only from the answers; and that according to the former decisions of this court (*Pollard v. *Patterson*, 3 Hen. & Munf. 67), if the bill do not shew sufficient matter to sustain the jurisdiction, it is not saved by the provision of our statute, that "after answer filed, and no plea in abatement to the jurisdiction of the court, no exception for want of jurisdiction shall ever afterwards be made." 1 Rev. Code, ch. 66, § 86. This statute was certainly intended to strengthen the jurisdiction of the courts of chancery, so that, if a bill state a case fit for that jurisdiction, and the facts be not denied, but some other matter which would destroy the jurisdiction appear after answer, in the course of the proceedings in the cause, it shall not abate the bill. And, upon the fair construction of the act, I think it may be said, that, if the bill do not present a case for the jurisdiction of the court, and other matter appear in the progress of the cause, which supplies the defect, the defendant, not having demurred to the bill, cannot object to the jurisdiction at the hearing: as, if the bill was for an account, without shewing that the accounts were of such a character as to give jurisdiction, and that appeared from the answer or proof.

It was insisted, that to maintain the jurisdiction in this case, would be in opposition to some of the former decisions of this court; *Stuart v. Coalter*, *Bowyer v. Creigh*, and *Randolph v. Kinney*.

In the first of those cases, a party having an equitable title to an undivided part of a tract of land, in common with another who had a legal title to a part, filed a bill against several coterminous tenants, claiming adverse titles against the plaintiff, and those under whom he claimed, for the purpose of adjusting the boundaries, not in respect to one line only common to all, and depending upon the same evidence, but as to several depending upon different evidence. Here, all the parties claim under the same title, and their rights depend upon the same evidence. There, the defendants had legal rights which they could vindicate at law, and which they had a right to try there and there only. Here the defendants claim equitable rights, which cannot be discussed in a court of law.

212 *In *Bowyer v. Creigh*, also, the

defendants claimed against the trustee and cestui que trust, and asserted a legal right against the deed, which they also were entitled to vindicate exclusively in a court of law. And, besides, the interference of a court of equity in such a case, would have counteracted the policy of the statute of frauds, and of the statute authorising a creditor to enforce the sale of property taken in execution of which the title is contested, by indemnifying the sheriff.

And, in *Randolph v. Kinney*, the plaintiff sought to reach parties upon the principle of substitution, through a long series, when the rights were intirely distinct, in a case in which there was no right of substitution whatever.

I do not see, that the principles of any of those cases have any application to that under consideration.

CABELL, J., concurred.

BROOKE, President. On the merits of this case, I concur in the decree, which has been agreed upon by my brother judges. But I am not satisfied, that there is error in the former opinion of the court on the point of jurisdiction. If it were admitted, that a proper foundation is laid in the bill, for the jurisdiction of the court, as against those defendants who have not appealed from the decree of the chancellor, it would not follow, that a proper ground is also laid for the jurisdiction, as regards the appellants. But, as that point has been argued, for the purpose (as was said) of laying a foundation for the jurisdiction as to the appellants also, I shall make some general remarks on it.

If (as was insisted) a deed of trust was, in all respects, as regards the jurisdiction of the court, nothing more than a mortgage, it would be admitted, that, in every case, resort might be had to a court of equity, to adjust the rights of the parties under it. But they are essentially different. A mortgage is only an equitable security for the payment of money; and the moment the property

in it is forfeited to the mortgagee, 213 *by a failure to pay the money, and to comply with its terms, it exclusively belongs to equity, to relieve against it upon a bill to redeem, or to adjust the rights of the parties on a bill to foreclose. The mortgagor has an inherent equity in the contract itself, which it belongs to the court of equity, exclusively, to take cognizance of; an equity, which follows the mortgage in whosever hands it may be. But it is not so in the case of a deed of trust. That is a legal security for the payment of money &c. recognized as such by statute law. The property in it, is not liable to forfeiture, in any event, as in the case of a mortgage. There is nothing in it against conscience, to give a court of equity jurisdiction. The trustee may sell the property in it, and execute the trust confided to him by the parties to it; and having done so, in pursuance of the deed, there is nothing for a court of equity to act on. Neither the debtor nor the creditor can come into the court, on the contract in the deed alone, as in the case of the mortgage. If either come into the court, it must be on ground foreign to the deed. Each party has a right to insist on the execution of the trust by the trustee. Having the legal title to the

property, under the deed, his remedy to get possession of it is adequate at law; or, on his declining to sue there, the cestui que trust may, in his name, recover the property at law, in order that it may be administered by the trustee, according to the terms of the deed.

Whether, independently of the deed of trust, a proper ground for the jurisdiction of the court, be alleged in the bill, as to those defendants who have not appealed, it is not necessary, for the reason before stated, to examine: the inquiry is, have the appellees stated in their bill, any ground of jurisdiction as against the appellants? As regards them, the appellees come into the court of equity, to assert their legal right under the deed of trust, to the slaves in their possession; that is, they come into the court of equity, to assert the legal rights of the trustee; which

is the same thing, since they might 214 assert the legal right of the trustee*at law. There is nothing in the bill, which shews that the remedy at law was inadequate: for if it were admitted, that on the contract contained in the deed of trust, there is ground for the jurisdiction of the court of equity, as to the parties to it and those claiming under it, the appellants cannot be affected by it; they are strangers to the deed, had no notice of it, and do not claim under it. This is conceded in the admission, that if the appellees be not relieved in a court of equity, on their bill in this case, they will be barred by the act of limitations at law, unless there be a reservation in the decree.

The allegation in the bill, that the appellants purchased the slaves in question of Morris the debtor, and that he had possession of them and title to them when he executed the deed of trust, lays no foundation for the jurisdiction of a court of equity; as, if true, it might have been proved at law, as well as in equity. And if this be the only ground, a demurrer would have been fatal to the bill. The inference from these facts, that the appellants, after judgments at law against them would have an equity which they might assert in a court of equity, is not enough: it ought to have been directly charged in the bill, as the court will not take jurisdiction by inference. And if it were, the answer is, that such an equity is not under the deed of trust, but is founded on the general principles of the court, and might or might not be asserted, according to circumstances: it ought not to deprive the appellants of a trial at law on viva voce testimony: it ought to have no influence on the question of jurisdiction. Nor will the answers of the appellants help the case stated in the bill, though a part of the defence relied on, be only proper in a court of equity. The jurisdiction of the court depends on the character of the bill, and on the construction of the provision of the statute, 1 Rev. Code, ch. 66, § 86. The construction of the statute has been given by this court in the case of *Pollard v. Patterson*. In that case, the jurisdiction was held to depend on the bill only; nothing was said of 215 the answers; and, *though Pollard, in his answer, virtually admitted the jurisdiction, by offering to substitute other seventy-five thousand acres of land, for the lands of the plaintiff, which he had sold to Morris by mistake, the court took no notice of the

answer, and dismissed the bill for the want of jurisdiction.

The other ground taken in the argument, that the court will take jurisdiction to avoid a multiplicity of suits, I think more questionable. Though it is virtually alleged in the bill, that the appellants claim title to the slaves in question under Morris, by purchase subsequent to the execution of the deed of trust, that is no part of their title, but belongs to the pretensions of the appellees. Possession stands for the right, both at law and in equity, until a better right be shewn: so emphatically, indeed, that five years adversary possession of slaves will prevail over the right of the true owner, even though he again get possession. Property in slaves passes by delivery of possession only, except in the cases of deeds of gift, mortgages, deeds of trust and wills, under neither of which do the appellants claim. The possession of each of the appellants is foreign to the possession of the others: they have no common interest in any respect: the trial of the right of one, cannot affect the right of the others: not claiming under the deed of trust, they do not claim from one common source. Their case, then, does not fall within the principle, on which courts of equity take jurisdiction to avoid a multiplicity of suits.

Looking to the bill only, (as was done in the case of Pollard v. Patterson) there is nothing in it to warrant the jurisdiction of the court. In that case, Pollard, in his answer, offered an equitable compromise for the injury he had done the plaintiff, by selling his lands to Morris by mistake: but the court disregarded it. If the answer is to come in, before the question of jurisdiction arises, no demurrer to the bill can be sustained. To put the jurisdiction of the court, on the ground of a failure to demur to the bill before answer filed, were to abandon the correct construction of the 86th section of the chancery law, and to overrule the case of Pollard v. Patterson.

216 *I am still, therefore, of the opinion, that the bill ought to be dismissed as to the appellants, and the cause remanded as to the parties who have not appealed.

The majority of the court, sustaining the jurisdiction, proceeded to consider the proofs, touching the controverted questions of fact, and reversed the chancellor's decree upon the merits: dismissed the bill, as to the appellants, Ambler, Burton and Robertson: and remanded the cause to the court of chancery, as to the appellant Chilton, and the defendants who had not appealed from the decree; as to these, for further proceedings generally; and, as to Chilton, that an issue might be directed to ascertain the true state of his case, in one particular, which the proofs then in the cause left in doubt.

Rowt's Adm'x v. Kile's Adm'r.

May, 1829.

Evidence—Handwriting—Proof of by Comparison.*— Upon the trial of issue on plea of non est factum whether the party's signature to the instrument in question be genuine or no: HELD inadmissible to

***Evidence—Signature of Written Instrument—Proof of by Comparison.**—Upon the trial of an indictment for forgery, when it becomes necessary to prove

lay other proved specimens of the party's handwriting before the jury, that it may judge by comparison thereof with the writing in question, whether this be genuine. Such comparison of hand-writings is not proper evidence. **Judgments—Reversal for Exclusion of Evidence—What Record Must Show.**†—The judgment of a court shall not be reversed for excluding evidence, unless the case stated on the record shew the relevancy of the evidence excluded.

This case had been here before; when this court reversed a judgment of the circuit court of Frederick for the appellee against the appellant, and directed a new trial. See Gilm. 202. It was a suit brought by the administrator of Fanny Kile against the administratrix of John Rowt, upon an instrument bearing date January 3, 1807, signed and sealed by John Rowt, and attested by Robert Kile, Richard Stage, and William Rowt. The material plea was

217 non est factum. At the second trial, Rowt's adm'x filed a bill of exception to opinions of the circuit court; which stated,

1. That, after she had introduced witnesses for the purposes of proving, that the signatures of John Rowt and of the subscribing witnesses to the instrument in question were not genuine, and that Richard Rowt, a bastard son of John Rowt by Fanny Kile, and after her death (in 1813) one of her distributees, was capable of counterfeiting John Rowt's signature very exactly, and had been seen to write it so like his own signature, as not to be distinguishable from it, and was a man of infamous character; and after the plaintiff had introduced witnesses to prove that John Rowt's signature was genuine, some of whom had not seen him write more than once or twice, and that many years ago, and none of whom (as the defendant's counsel alleged, though the plaintiff's counsel denied this) were skilled in the knowledge of hand-writing: the defendant offered in evidence a book of accounts kept by John Rowt, which she proved to be in his hand-writing, and another paper proved to be in his hand-writing by a witness who saw him write it, in order that the jury might, by comparison of the hand-writing of these papers with that of the signature to the instrument in question, judge whether this was genuine or not. But the court would not suffer the book of accounts and paper so proved to be written by John Rowt, to be given in evidence to the jury; and told the jury, it was not permitted by the law, that a question of this kind should be determined by a comparison of hand-writing, and that such comparison

the genuine signature of the party whose name is alleged to have been forged, it is inadmissible to give in evidence to the jury the genuine signature of such party, although written in the presence of the jury, that they may judge by comparing the same in whole or in part with any part of the alleged forged signature, whether the party who made the forged signature tried to imitate any part of the genuine signature of the party whose name is alleged to have been forged. State v. Koontz, 31 W. Va. 127. 5 S. E. Rep. 328, citing Rowt v. Kile, 1 Leigh 216, at pages 331, 332. To the same effect the principal case is cited in Clay v. Robinson, 7 W. Va. 362, 363; State v. Henderson, 29 W. Va. 147, 1 S. E. Rep. 225.

†**Exceptions—Exclusion of Evidence—What Bill Must Show.**—For a discussion of this proposition see the principal case cited in Johnson v. Jennings, 10 Gratt. 8, and note; McDowell v. Crawford, 11 Gratt. 387, 398; Shifflet v. Com., 14 Gratt. 657; Foot-note to Dickinson v. Dickinson, 25 Gratt. 321; Langhorne v. Com., 76 Va. 1015; Lawrence v. Com., 86 Va. 579, 10 S. E. Rep. 840; Strader v. Goff, 6 W. Va. 264; Carlton v. Mays, 8 W. Va. 247.

was not proper evidence for it to act upon.

2. That the defendant offered in evidence the fragment of an old deed, proved to have been executed by Richard Staige (one of the subscribing witnesses to the instrument in question) for the purpose of proving, that he wrote his name Staig, without the final e; and the court permitted that paper to go in evidence to the jury, for that purpose; but told the jury, they ought not to compare the signature of Staige to that paper with his attestation of the instrument in

218 *question, for the purpose of ascertaining whether this was his genuine signature.

3. That the defendant offered to prove by a witness, "that after the first trial of the cause, the before-mentioned Richard Rowt, in conversation with the witness about it, said, his pen had not forgot to write:" but this testimony was objected to, and the court would not permit it to be given to the jury.

There was another verdict and judgment for Kile's adm'r, and Rowt's adm'r again appealed to this court.

Johnson, for the appellant. The first two exceptions present the same question. It seems to be the received doctrine, that evidence by comparison of hands, that is, comparison by the juxtaposition of two writings, in order thereby to ascertain whether both were written by the same person, is not admissible. Stark. Ev. part iv. 654-9; * 1 Phil. Ev. ch. 8, § 2, [428],† where all the cases are collected. Both those writers, while they state the rule, intimate, that its reasonableness has been doubted. And it will be found, that such evidence has not been rejected in any of the cases; and in one case at nisi prius, it was received by lord Kenyon. *Allesbrook v. Roach*, 1 Esp. Ca. 351. The question was argued at the bar, in *Gardner v. Vidal*, 6 Rand. 106, and *Redford v. Peggy*, Id. 316, but, in truth, it was not presented in either case. It may be considered as still open here. When a witness acquainted with the hand of a party, from having seen him write, testifies as to the genuineness of a particular writing attributed to him, he compares the writing in question with the image of the party's writing in his own mind, and his testimony is only the result of that comparison; and it makes no odds, how faint this mental image may be, from the unfrequency of the

219 impression, or *remoteness of time; there is no question, now, but such evidence is admissible. When the genuineness of an instrument is tried, by the comparison of it with known specimens of the party's writing, the writing in question is compared with what is more certain and exact than the strongest image on the mind of a witness; with the actual hand-writing of the party.

But if it be right, as a general rule, to exclude comparison of hands, it is not right to apply such a rule, inflexibly and universally. Exceptions have been allowed. In *Roe v. Rawlings*, 7 East, 282, note (a), where, from the antiquity of the writing, no living

witness could have seen the party write, comparison of the writing in question, with documents known to be in his hand, was admitted. Bull. N. P. 236. The case before the court may well form another exception. The witnesses had testified, on the one side, that the writing was genuine; on the other, that it was not; and the paper was of some antiquity; it bore date in 1807. The direct evidence, thus hanging in balance, and the instrument being of such age, as to abate much from the confidence which the testimony on either side might challenge, a comparison of the writing in question with the proved specimens of the party's writing, was the best means of ascertaining the truth; and ought, therefore, to have been received.

The circuit court ought not to have excluded the evidence of Richard Rowt's remark, in conversation touching the former trial of the same question, that his pen had not forgot to write. It is quite obvious, that the real question was, whether that man had not forged the instrument; and it was in proof that he could imitate the obligor's signature with great exactness. It was this imputation, and this ground of it, which he most probably alluded to, when he said his pen had not forgot to write; and the remark might well be given in evidence, in aid of other proof, that he had forged the instrument. The evidence should have been admitted on the same principle, on which this court admitted evidence to impeach his general character; as forming

220 *one of the links of circumstances to shew, that the instrument in question was not the deed of John Rowt. *Gilm.* 208.

Leigh, for the appellee. The question before the jury, was, whether or no, a party's signature to a deed was genuine. There was direct testimony on both sides, of witnesses professing to be acquainted with his hand-writing; and their testimony was contradictory. Now, the only province of the jury was to decide which was the more worthy of credit; and that depended on the characters of the witnesses, their manner of testifying, their opportunities of becoming acquainted with the party's writing, their skill in judging of the genuineness of hand-writing. Instead of leaving it to the jury to weigh the evidence, it was proposed, that it should compare the signature to the deed in question, with the party's book of accounts and another paper, of the genuineness of which proof was adduced. Many men habitually sign their names in a peculiar hand, very different from their hand-writing in the body of papers written by them. Many men early adopt and persevere in a particular form of signature, while their general hand is constantly changing. The comparison proposed in this case, therefore, was likely enough to throw doubts upon the paper in question, while hardly any like comparison could have added to the proof of its genuineness. There is nothing, then, to induce a departure from the general rule, which rejects such evidence; the case rather exemplifies the propriety of the rule.

It is said, the specimens offered were proved: but they were proved by witnesses; and the weight of that proof could only be decided by

*The edition referred to is Ingraham's, Boston, 1828. The passage here cited is in vol. 2.—Note in Original Edition.

†New-York edition of 1820.

the jury. Other specimens might have been offered on the other side, and multiplied without end: all must be proved, and the proof of each weighed by the jury. Thus, instead of trying the point in issue only, the genuineness of the writing in question, the jury would have had to try as many questions as there were specimens, and to perform the same duty in regard to 221 each specimen, *as they had to perform in regard to the principal writing; to judge which set of witnesses, all circumstances considered, was the more worthy of credit. To that, all such collateral questions, as well as the main question, must come at last.

Evidence by comparison of hands, must always lead to like consequences. The general rule which excludes it, is dictated by convenience, almost by necessity. And, on close examination, the rule will appear to have its foundation laid in the very nature of jury trial. Each and every juror ought to have exactly the same evidence before him to inform his judgment: and all have the same materials before them, to estimate the weight of oral testimony as to the genuineness of a paper in question: but all cannot have equal means of judging of its genuineness by comparison of hands; for there is nothing, in which peculiar skill is more the effect of particular practice and habit; and, thus, comparison of hands may communicate knowledge to one juror, which it cannot communicate to another.

As to the exclusion of the evidence of Richard Rowl's remark, that his pen had not forgot to write: it was not the conversation in which that remark was made, that was offered in evidence, but only that single detached expression. Without the context, its meaning was unintelligible; nor could the court judge of its relevancy. It could afford no proof; it could, at most, only raise vague and groundless suspicion. For, whatever was the meaning of the expression, as used by Richard Rowt, we may be quite sure, that he did not mean by it to avow the forgery of the instrument in question. If not the sense of guilt and shame, his interest and the fear of punishment would have prevented any such avowal.

CARR, J. The first point presented to and decided by the circuit court, was this simple and general proposition, Whether on the plea of non est factum, it be proper to submit to the jury, papers proved to 222 have been written by the *party whose hand-writing is in contest, that the jury, by a comparison of those papers with the instrument before it, may decide whether it be genuine or forged? It was indeed attempted in the argument here, to found some reliance on the antiquity of the paper; but that wholly fails; for the paper bears date January 3d 1807, and the suit was brought in 1815: and the decisions on this point, go no farther than that where the antiquity of the writing makes it impossible for any living witness to swear that he ever saw the party write, comparison with documents known to be in his hand-writing has been admitted.

In the case of Redford v. Peggy, the general question, whether evidence by comparison of hands be admissible, was not

directly before the court; yet the very nature of that case seemed to bring the point under review; and it will be found, that out of the four judges who sat, two expressly say that such evidence is inadmissible, and the same conclusion may be fairly drawn from the opinion of a third. The writers on evidence, Peake, Phillips and Starkie, concur in saying, that though there has been formerly considerable diversity, it is now settled law, that evidence by comparison of hands is not admissible; and the cases they refer to support (I think) the position. It may be remarked, that what is now meant by comparison of hands, is not exactly what was formerly meant. The case of Algernon Sydney, and that of the seven bishops, shew the ancient meaning. By comparison is now meant the juxtaposition of two or more writings before the jury, that it may, from its own inspection and comparison of the paper in contest, with others admitted or proved to be genuine, decide the question. The cases collected by the writers before referred to, shew, that this is not permitted. There is also a case (Eagleton v. Kingston, 8 Ves. 438), in which lord Eldon discusses this question with much ability and learning. He says, "When I first came into the profession, the rule as to hand-writing in Westminster hall, in all the courts, was this: You called a witness, and asked him whether he had ever seen the party 223 *write. If he said he had, whether more or less frequently, if ever,

that was enough to introduce the subsequent question, whether he believed the paper to be his hand-writing. If he answered, that he believed it to be so, that was evidence to go to the jury. If he refused to answer to his belief, he was pressed, perhaps too much, to form a belief: but if he would not go the length of belief, his evidence went for nothing. Or you might ask a witness, who had not seen him write for a length of time, if you could not get a witness of a subsequent date. You might call one who had not seen him write for twenty years; and if he said he believed it was the writing of the person, that evidence might go to the jury; but to be affected by all the rest of the evidence; as it is the nature of all evidence to be more or less convincing"—"This rule was laid down with so much clearness, that till very lately, I never heard of evidence in Westminster hall, of comparison of hand-writing by those who had never seen the party write; though such evidence had been frequently received in the ecclesiastical court." Lord Eldon then reviews the cases on the question of the admissibility of comparison of hand-writing, as evidence before a jury, and concludes with saying, that "the later cases appear to have brought back the law to the state in which it stood twenty-five years before;" namely, that comparison of hands is not evidence. His discussion of the rule seems to me very sensible and sound; and, I think, we had better suffer it to rest on the ground it now occupies, especially as it is said to work well in practice.

Then, as to the exclusion of the evidence of the remark of Richard Rowt, that his pen had not forgot to write: it is certain, the jury ought to have all the evidence which is

relevant: of its weight it is to judge. But, when we are called on to reverse the decision of a judge, it is incumbent on the party seeking this, to shew that there is error; and to this end, he ought to present to us such a case as shews the relevancy of the evidence rejected. I cannot see it here. The issue

was, whether John Rowt had executed
224 the deed, *which bears date in 1807.

Twelve or thirteen years after this, in a conversation about the cause, Richard Rowt, (no party) says, "my pen has not forgot to write." There is no ground laid connecting this with the issue; no conversation stated, which led to or followed the remark; nothing to shew how it could possibly bear on the case. I cannot think, that so light and trivial and unconnected a remark should induce us to send back a case, where there have been two trials, in both of which the jury has found the same way.

GREEN, J., concurred.

COALTER, J. As to the evidence offered by the appellant to prove, that after the last trial of this cause, Richard Rowt, in a conversation with the witness about it, said that his pen had not forgot to write; the rest of the conversation, if any was detailed, not being stated, so as to shew the relevancy or irrelevancy of that remark, I am unable to perceive why evidence of such a remark was offered, or indeed why it was objected to. Richard Rowt may have said many things, which, according to circumstances, or other expressions, might be either relevant or irrelevant; and if the latter, surely the court would not be bound to hear all of his irrelevant conversations and declarations. Indeed, I am not clear, that conversations of his tending to impugn his own character in this, or any other transaction, ought to be admitted, from the difficulty thrown thereby on the other party, to meet such particular matter, of which he could have no notice. But at present, it suffices to say, that no grounds are given, on which we can say, that the court erred in rejecting this evidence.

The other question, if it involved the whole doctrine of the proof of hand-writing, would be one concerning which the decisions, so far as I have examined them, are not, I think, very consistent with the general rules of evidence, or with each other, or with
225 the principles by which they profess *to be governed: nor, indeed, have I as yet been fully able to comprehend those principles.

The reason why a witness must see another write in order to form an opinion of the character of his hand-writing, is not, I apprehend, because seeing the party write gives you a knowledge of the character of his hand: he must see the hand-writing itself, after the act of writing is performed, in order to acquire that knowledge. But when he sees the manual operation himself, he knows that the hand-writing, which he at the same time or afterwards inspects, is the hand-writing of the party. He thus acquires a knowledge (more or less perfect, according to frequency and opportunity, and his skill in such matters) of a hand-writing, which he knows to be that of a certain individual; and having this knowledge within his mind, as he has of the human countenance, he compares with it a

writing, alleged to be the act of the same individual but which he has not seen him write, in order to decide, whether it does or does not possess the same characteristic marks. This kind of evidence was formerly called comparison of hand-writing, in as much as it was, in fact, a comparison thus made in the mind of a witness, in contradistinction to his witnessing the manual operation itself.

But the character of a hand-writing, may be as well or even better known, by one who never saw another write, as by one who has. Cases of this kind occur in a course of a long correspondence, on business, between parties who never saw each other write. The perfect knowledge of hand-writing arises from frequently seeing the writing itself, not the manual operation, from which, without looking at the writing itself, you can form no opinion. Being accustomed to see the operation, is only full evidence, that the writing which you have thus seen, and the character of which is more or less distinctly impressed on your mind, according to circumstances, is the character of the manual writing of that individual. In the course of business and

correspondence, you acquire an equally
226 perfect knowledge of the *hand-writing of the individual; you equally recognise it as an individual hand, which you can distinguish (as you can the human countenance) from any other hand, with as much certainty as you would the hand-writing of one you are accustomed to see write; and yet, if you should meet your correspondent in the street, you would not know him. But this writing may have been performed by the clerk of the person in whose name it is, and if so, you have no knowledge of the hand-writing of that person, though you have of that of his clerk: yet all the correspondence being in one hand, and it being usual for the party himself to carry it on, such witness has been admitted to prove the hand-writing to be his. This would be intirely defeated by proof that the letters were written by the clerk; and is weakened in proportion to any doubts that may exist, whether the party, whose hand-writing is to be proved, wrote the letters or not. As to the character of the hand itself, the proof is much stronger than that of a witness who has seen him write but seldom. The weight of all human testimony must depend on the credibility of the witness, and his opportunity of acquiring knowledge of the facts to which he deposes. Here, one witness has a better knowledge as to the character of the hand-writing; but whether it be the hand of him in whose name the writings are, he knows not; that is to be presumed or not, according to circumstances; and, so far, his evidence is weaker than that of him who has seen, though but in a few instances, the manual operation, from which he has derived a less perfect knowledge of the character of the hand. But, suppose the person who has received these letters, is not in being, or (like myself) is so bad a judge of the character of hand-writing, that he could hardly swear to his own, and this correspondence is placed in the hands of one skilled in this art, who thus becomes acquainted with the character of the hand-writing, will he not be equally or more competent to decide, whether the writing in contro-

versy is by the same hand or not? And if he can thus acquire a knowledge of a hand-writing to-day, and may to-morrow, *compare it in his mind with the hand-writing in controversy, may he not, when examined as a witness, first inspect the one, so as to possess himself of the character of the hand, and then the other, so as to compare it in his mind with the knowledge so acquired, and say whether he think it the same or not? If he may, why may he not examine them together, by juxtaposition? If knowledge of the character of the hand-writing, so as to be able to form an opinion, whether certain writings are or are not written by the same hand that wrote the paper in controversy, may thus be acquired, perhaps with as much or more certainty than by distant comparisons in the mind; and if the legality or weight of the testimony depends on the knowledge of the witness; why may he not, in this way, qualify himself to depose, that the character of the hand-writing is or is not the same? Whether the first was written by the person charged with writing the last, he may not know, any more than he who received the letters or other writings: unless that be satisfactorily established, his evidence of course goes for nothing. It frequently happens, that one piece of evidence is good for nothing unless something else is proved. Thus, in the case of *Burr v. Harper*, 1 Holt's Ni. Pri. Rep. 420; 3 Com. Law Rep. 147, the witness testified, that he once saw the party sign his name, but the fact made so slight an impression on his mind, that, judging from that simple occurrence, he was unable to say whether the hand-writing to the agreement was the defendant's or not; yet he was permitted to compare the signature with the one which he had seen him sign, and on that comparison to give evidence that it was the party's hand-writing. If this was right, I presume there could have been no doubt, but that the defendant might have called witnesses to examine the same papers, and give their opinions that the hand-writing was not the same, and that the plaintiff might fortify his witness, by the examination of others agreeing with him. His evidence was nothing, though he saw the defendant sign the paper he produced: he had nothing in his mind to

228 compare *by, any more than other witnesses, who never saw him write, until he compared them: and why should he be more capable of making a correct juxtaposition comparison than they? Probably (as I should have been) he was less capable than many of the by-standers of forming a correct opinion. Other cases of a like kind are referred to in the notes of the late editor of Phillips's law of evidence, which tend to shew, that the doctrine on this subject is not yet fully settled. The legislature of Massachusetts is said to have settled it there, in favour of comparison, by express enactment. Phillips lays down the general doctrine to be, that the proof of the hand-writing is founded on the knowledge of the general character. The witness is supposed to have found a standard in his own mind, and with that standard to compare the writing in question. But, he says, no other kind of comparison will be allowed: that

it is an established rule of evidence, that hand-writing cannot be proved by comparing the paper in dispute, with any other papers acknowledged to be genuine; that one reason usually assigned is, that unless a jury can read, they would be unable to institute a comparison, or judge of the supposed resemblance, (a reason, he thinks, too narrow for a rule of such general application); that another reason is, that the writings intended as specimens, would be presented by a party interested to select such writings only as may suit his purpose, and not likely to exhibit a fair specimen of the character of the hand-writing. He adds, that it has been thought by some, an inconsistency in the rules of evidence, to allow a witness to compare, in his mind, the disputed paper with the impression which a short and transient view of writings may have made upon his memory; and yet, on the other hand, not to permit the jury to compare it with writings proved to be authentic, present in court, and open for inspection: and, he says, the only answer which occurs, is that suggested, namely, that the writings which are produced as specimens, having been selected by an interested party, to serve a present purpose, are open to suspicion, and liable

229 to the imputation *of contrivance.

The comparison here spoken of, is evidently one to be made by the jury themselves, not by witnesses examining the papers, either separately or in juxtaposition, in the manner I have above supposed. These may be very different questions. And as the first, viz. a comparison to be made by the jury themselves, is the question presented by this record; and as, from the hasty examination I have given it, I am not prepared to decide on the other; I must be considered as confining myself to the precise question, presented by this case. And, I think, there may be reasons to support the opinion and judgment of the circuit court, which might not apply to the other proposition above stated, and which will enable us to leave that point open and undecided, until it shall come fairly before us. With due deference, I think that mentioned by Phillips, a very strong reason, why the jury should not enter into the comparison. Those of them who cannot write, would have no evidence before them of which they could judge; for the opinions of their fellow jurors, they not being on oath, would not be evidence for them to act on; they must, consequently, decide on a part of the evidence, the testimony of witnesses to the hand-writing, if any; and so may be unable to unite in the verdict with the others. Other jurors, though able to write their names, and perhaps to read plain writing, may be so unskilled in the art, as not to be competent witnesses, or entitled to any weight were they examined, touching the character of a hand writing. The result would be, that the jurors, capable of forming an opinion of the hand-writing, must each severally for himself examine the writings, and then be sworn and examined as witnesses; for a juror or jurors, possessing a knowledge of a matter of fact pertinent to the issue, cannot impart that knowledge to his fellow jurors, so as to weigh with them, except on oath, and an examination in court in presence of the parties. A juror, for in-

stance, has seen the party write, and has a knowledge more or less perfect, of the character of his individual hand: he compares the paper in question in his mind, with this *knowledge, and thinks it is, or is not the same: but he cannot give this in evidence to his fellows, except on oath as aforesaid. So here, he examines the specimens, and fixes in his mind the character of the hand-writing of the person who wrote them, and then compares that with the paper in controversy, and comes to a conclusion, one way or another; another examines also, and comes to a contrary conclusion: how are they to impart this knowledge to their fellows? One may yield his opinion to the other, believing him to be a better judge, and thus, in reality, they give evidence to each other not on oath. The specimens are not evidence, properly so called; they decide nothing; it is the result of the comparison, that is the evidence; and that depends for its weight on the superior knowledge, skill or veracity of some jurors over others. The motion to the court here, was not that such of the jurors, or by-standers who were skilled in writing and judges of the character of hands, should examine the specimens, and give evidence of the result of that examination (concerning which I mean to give no opinion), but to give the specimens as evidence to the jury for it to weigh in its retirement. This motion, I think, was properly overruled; and, consequently, that the judgment should be affirmed.

The other judges concurred in the opinion, that the judgment should be affirmed.

231 *Allen and Others v. Smith.

May, 1829.

(Absent COALTER and GREEN, J.)

Pretensed Titles—Equitable Rights—Statute.—The statute against buying and selling pretended titles, does not prohibit the sale and purchase of equitable rights in land.

Tax Sales—What Purchasers Must Show—Deed—Effect.—In a sale of lands by a collector of taxes imposed by the act of Congress of 1798, the collector must comply strictly with the requisitions of the act, in his proceedings preparatory to the sale: it is incumbent on a purchaser claiming under such sale, to prove the regularity thereof: the marshal's deed to him is not even *prima facie* evidence of the regularity of the collector's proceedings; nor shall the regularity thereof be presumed from twenty-two years quiet possession under the sale, or from any time short of that from which any other link in the chain of title to real estate may be presumed.

Equity Practice—Want of Proper Parties—Leave to Amend.—A court of equity ought not to dismiss a bill absolutely, for want of proper parties, the plaintiff shewing enough to give colour to his claim for relief against the parties not before

***Pretensed Titles—Statute.**—For the proposition that the statute against buying and selling pretended titles, does not prohibit the sale and purchase of *equitable rights* in lands, the principal case is cited in *foot-note* to Tabb v. Baird, 3 Call 475; Ruffners v. Lewis, 7 Leigh 740; Waggener v. Dyer, 11 Leigh 392, and *note*; Steed v. Baker, 13 Gratt. 387; Middleton v. Arnolds, 13 Gratt. 491, and *note*.

†Tax Sales—Purchaser—What Must Show.—On this question the principal case is cited in Jesse v. Preston, 5 Gratt. 180, and *note*; Flanagan v. Grimmer, 10 Gratt. 428 (see *note*); Boon v. Simmons, 88 Va. 265, 13 S. E. Rep. 439; Hutchings v. Gilmer, 1 Va. Dec. 503; Dequasie v. Harris, 16 W. Va. 353; Hays v. Heatherly, 36 W. Va. 628, 15 S. E. Rep. 229.

‡Equity Practice—Want of Proper Parties.—For the proposition that, a court of equity ought not to dismiss a bill absolutely, for want of proper parties, where the plaintiff shows enough to give color to

the court: in such case, the chancellor is right in giving plaintiff leave to amend, and make the proper parties.

Sale of Land—Specific Execution—Acknowledgment by Heir That Vendee Entitled to Land—Effect.—A vendee claiming specific execution of a contract for sale of lands, proves, that there was a contract in writing, but does not prove the terms of it, the instrument being alleged to be lost: the heir and devisee of the vendor, by deed, which does not pass the title, acknowledges that the vendee is entitled to the land: *H.M.D.* that this, in a contest between the vendee, and third persons, is enough to shew his right to specific execution.

The appellee exhibited his bill against the appellants, in the superior court of chancery, of Clarksburg, in November 1824, setting forth, that a tract of 100,000 acres of land in Randolph county was granted to general Daniel Morgan assignee of Joseph Tidball, by patent dated March 9th 1796. Morgan sold this land to Jesse Sims, received the purchase money, and gave him a bond binding himself to make a conveyance; but this bond had been lost or mislaid. After this, on the 27th August 1800, Sims, being in embarrassed circumstances, conveyed this land, among other property, to John and Peter Wise, trustees, for the benefit of his creditors, with a provision, that any of his creditors might elect to take any parcel of the trust subject, at the valuation contained in a schedule attached to the deed, in satisfaction of their claims. This deed conveyed

the trust subject to the trustees and 232 their heirs, but it only authorised *the trustees personally to act in disposing of the subject; and it made provision only for Sims's debts contracted for his own use and benefit. Sims became insolvent, and not long after died insolvent. The appellee was a creditor of Sims, and elected to take this tract of 100,000 acres of land in Randolph, in satisfaction of the debt due him; and, thereupon, the heirs of John Wise, the surviving trustee, conveyed the same to him, by deed dated September 25th 1821. That Morgan, who died in 1802, by his will gave all the residuum of his estate to his daughter, Mrs. Neville wife of Pressley Neville of the state of Ohio; and she, after her husband's death, by deed dated November 4th 1823, conveyed the legal estate of the land in Randolph, to the appellee, and revoked as far as she could, a previous conveyance of her right in the land, made by her husband and herself, in 1818, to the agents of Peter Allen and others. The appellee found Peter Allen and others in possession of the land, claiming title, 1. Under the conveyance of Neville and wife; and 2. Under a sale of the land to them, on the 27th December 1802, by the collector of the U. States' direct tax, for the amount of tax due thereon, and a conveyance of the marshal of the district of Virginia, in consequence of that sale, dated December 11th 1805. As to the conveyance of Neville and wife to the agents of Allen and others, it was accompanied by an agreement, on their part, executed at the same time with the conveyance, that if and when they should use the deed of Neville and wife, to defend their title to the land, they should

his claim for relief against the parties not before the court, but leave should be given to amend, the principal case is cited in *Kincheloe v. Kincheloe*, 11 Leigh 406 (see *note*).

Same—Order for Account.—The principal case is cited in *foot-note* to Watkins v. Young, 31 Gratt. 84; Bank v. Parsons, 42 W. Va. 144, 24 S. E. Rep. 556.

pay Neville and wife, a consideration equivalent to the advantage the deed should thus give them, to be fixed by arbitrators; and if they should never make such use of the deed, they should re-convey to Neville and wife: and Mrs. Neville, being informed that her father had sold the land to Sims, gave notice to Allen and others, that she considered the conveyance made by her husband and her to them, in 1818, null and void; and that she had therefore, so far as it lay in her power,

conveyed the legal title to the plaintiff claiming *the equitable title under Sims. And, as the sale of the lands for U. States' taxes, it was irregular, illegal and void; and, moreover, the land was sold as the property of Tidball, the original locator, instead of Morgan, the grantee, or his heirs. The bill made Peter Allen and others, tenants in possession of the land, and their agents, who had obtained the conveyance from Mr. Neville, and Mrs. Neville, defendants; and prayed that the defendants might be decreed to release the legal title of the land to the plaintiff, and account for rents and profits; and general relief.

Peter Allen and others, the tenants in possession, answered, that in 1795 several persons residing in New England formed themselves into a company for the purchase and settlement of lands in Randolph county, and obtained a grant of 100,000 acres there, by patent dated November 17th 1796, and under this New England company, the defendants claimed. In 1798, one Peebles, himself a member of the company, and agent for the rest, entered into possession of the 100,000 acre tract, and began to clear and build upon it; others shortly after followed; and the New England company, and others claiming under them, have continued to hold the possession ever since, making settlements and improvements, paying all public dues, and defending the lands against conflicting claims; and so incurring great expense. The New England company soon discovered, that their survey of 100,000 acres, interfered with the survey of 100,000 acres, then called Tidball's, it not being known, that this tract had been granted to Morgan. The tract included in Tidball's survey and Morgan's patent, was assessed for the direct tax of the U. States, as the property of Tidball; the tax was not paid; the land was advertised for sale by the collector; and the New England company, finding a part of the land, which they claimed and had settled, thus offered for sale as Tidball's, bought 95,000 acres of his survey, paid the price, and on the 11th December 1805, received from the marshal a conveyance thereof, in pursuance of the laws of the U. States. That by the laws

234 *of the U. States, the selling of the land as Tidball's, when it was not his property in fact, did not at all affect the regularity of the sale. That the New England company then brought a suit in chancery, to perpetuate the evidence of the regularity of the collector's sale; pending which they heard, for the first time, that Tidball's survey had been assigned, and the land therein included, granted to Morgan; upon which, determined if possible to purchase peace, they procured a conveyance from Neville and wife, to whom the title of Morgan had, as they were informed, been devised; and think-

ing their title now secure, they ceased to prosecute their suit to perpetuate the evidence of the regularity of the collector's sale. Of Sims's claim, they had, at the time, no knowledge. They relied on the lapse of time, as a bar to inquiry into the regularity of the collector's sale for taxes: they called in question the fairness of Sims's deed of trust, under which the plaintiff claimed: they called for proof, that the plaintiff was a creditor of Sims: they denied his right, if a creditor, under Sims's deed of trust, to elect to take this land at a valuation, after the lapse of twenty-one years: they denied the right of Sims, or of the plaintiff claiming under him, to a specific execution of Morgan's alleged contract for the sale of the land to Sims, no written contract between Morgan and Sims being produced, and no evidence of the payment of the purchase money by Sims to Morgan: they relied on the act of limitations as a bar to the assertion of such an equity as that set up in the bill: and they denied the efficacy of Mrs. Neville's conveyance of the legal title to the plaintiff.

As against Mrs. Neville, the bill was regularly taken pro confesso.

The plaintiff exhibited the patent to general Morgan of March 9, 1796; a receipt of general Morgan to John B. Armistead, dated January 5, 1797, for 18,000 dollars in Morris and Nicholson's notes, in part payment of the price of the 100,000 acres of land in Randolph; Sims's deed of trust to John and Peter

Wise, trustees, for the benefit of his 235 *creditors, of August 27, 1800, and the schedule therein referred to, containing the valuation of the trust subject; the deed from the heirs of John Wise, the surviving trustee, to the plaintiff, of September 25, 1821; general Morgan's will proved in 1802, whereby his daughter Mrs. Neville is made his residuary devisee and legatee; Mrs. Neville's deed to the plaintiff, of November 4, 1823; the agreement between the agents of the New England company and Presley Neville and wife, dated March 17, 1818, which was made contemporarily with the conveyance of the land by the latter to the former; and a written notice from Mrs. Neville to the agents of the New England company, dated November 4, 1823, and duly served on them, that she considered the conveyance made in 1818, by her husband and her to them, null and void, and that she had conveyed the legal title to the plaintiff, who claimed the equitable title under Sims, to whom general Morgan had sold the land in 1796 or 7. The substance of these documents is set forth in the above state of the allegations of the bill.

The defendants exhibited the patent to the New England company of November 17, 1796, granting them 100,000 acres of land in Randolph: The deed of the marshal of the district of Virginia to the New England company, of December 11, 1805, which recites the acts of Congress concerning the direct tax, the assessment of the tax on the land claimed by the plaintiff, as the property of Tidball, the proceedings of the collector and his sale of the land, all stated to be in strict pursuance of the acts of congress, the purchase of 95,000 acres thereof at that sale by the New England company, the expiration of the time allowed the owner for redemption, and the payment of the purchase money, by the pur-

chasers to the collector; and conveys the 95,000 acres to them: And the receipt of the collector of the U. States, dated December 30, 1802, for 54 dollars 24 cents, in full of the purchase money of this land, paid by the New England company. But the defendants did not exhibit the conveyance made by Neville and wife to their agents in 1818.

236 *It appeared, that Sims became insolvent, August 30, 1800.

The plaintiff filed the depositions, 1. Of John B. Armistead; who deposed, that he, as the agent of general Morgan, sold the tract of 100,000 acres of land in Randolph, to Sims: the purchase money was to be paid in Morris and Nicholson's notes; Sims paid him 18,000 dollars in such notes, and he paid it over to general M. who thereupon gave the receipt of January 5, 1797, and executed a bond binding himself to convey the land to Sims, which he put, with the patent, into the deponent's hands to deliver to Sims: he believed the balance of the purchase money was paid by S. to general M. for general M. was in the habit of conversing very freely with the deponent about his affairs, and of complaining of his debtors if they failed to make due payment; and he never complained that S. owed him anything. 2. John Summerton, general M's clerk; whose deposition was to the same effect as Armistead's. 3. Edmund J. Lee; who deposed, that he was retained to prosecute a suit on a bond, assigned by Sims to the plaintiff Smith, for about 17,500 dollars, against the obligor; the money was not recovered; and thus Smith became the creditor of Sims for the amount, and was so at the time when Sims executed his deed of trust for the benefit of his creditors. This deposition was the only evidence in the cause, shewing that Smith was a creditor of Sims.

The defendants, on their part, filed sundry depositions, proving, that in 1798, the New England company laid off 20,000 acres of the land granted to them, in lots: in November 1799, they and persons claiming under them commenced clearing, improving, and building upon it: in 1802, the company to perfect their title, purchased at the collector's sale for U. States' taxes, the lands included in Tidball's survey, intending to take possession of all not claimed under prior grants, and have ever since claimed the title and the possession under that purchase, as well as under their own patent.

On the hearing of the cause, chancellor Tucker declared, in substance:

237 *That it was important to decide, whether either party had the legal advantage?

"That the institution of this suit by Smith, excluded the idea that he had the legal title, since if he had, he should have exhibited his claim in another forum: and, in fact, Mrs. Neville's deed to him, being confessedly subsequent and actually referring to a prior deed to the defendants, the legal title could not have passed to him by her deed; and there was no other way, in which it could be pretended that he had the legal title.

"That, as to the defendants, they claimed, first, under the New England company's patents; but that being overreached by Morgan's, they rested their pretensions to the legal title upon Mr. and Mrs. Neville's deed,

and upon their purchase under the sale for the U. States' direct tax. To their title under that sale, it was objected, that the sale was made in the name of Tidball, though Morgan's patent on Tidball's survey, had issued several years before such sale: and such objection would prevail, without more saying, if the act of congress had not authorized the sale of the land, in the name of a person not the owner. Bioren's Laws U. S. vol. III., ch. 272, § 5, p. 459. Still, the title claimed under that sale, could not prevail, unless the requisitions of the law (Id. ch. 92, § 11, p. 103), were proved to have been complied with, or unless such compliance was to be presumed (as was contended) in favour of possession after such a length of time. No such proof was offered. And such a presumption ought not to be raised, to defeat a legal title (Morgan's) upon a mere possession of twenty-two years, counting from the date of the sale to the date of the suit: it should be more cautiously admitted, in a case, where a party's rights have been sold in the name of another, and where, from the nature of the requisition of the law, the presumption of compliance with them might so easily be fortified, by the evidence of one at least of the many numbers of the four gazettes, in which the notification required by law, must

238 have appeared. The requisition of all such *statutes must be strictly pursued; and no purchaser is blameless, who buys without seeing that they have been so, or who has failed to preserve so essential a muniment of his title. The defendants themselves tacitly admitted the insufficiency of their title under the collector's sale, when they fortified it by a release or conveyance from Morgan's devisee; and thus afforded decisive evidence against the presumption on which they would rely, as late as 1818, about sixteen years after the sale. Therefore, the collector's sale and the marshal's deed did not convey the legal title to them. Nor did the deed of Neville and wife place them in a better situation. If that deed was executed by Mrs. Neville, in whom the title was, (which was left in doubt, as the deed was not filed) yet it was not such a deed, as would give to the defendants, the advantage of purchasers of the legal title without notice of a precedent equity; because it was expressly stipulated, that when the legal use should be made of the deed, the value of the transfer should be ascertained and paid to Neville and wife, and if no use should be made of it, the company should re-convey to Neville and wife; whence it is not only obvious, that there was no payment of any purchase money, (which is necessary to make a complete purchaser without notice, who will be protected,) but there was no transfer which the New England company may not at any time re-transfer. Such a transfer could not be forced within the influence of those principles, which govern the case of a purchaser without notice. Under the plaintiff's contract with Mrs. Neville, he would have title to all her interest in the contract with the company: for, if the company should pay Neville any thing, the plaintiff would have a right to receive it, both as claiming through Sims under Morgan, and under Mrs. Neville's own deed to him. The company, by

their contract with Neville, were to pay Neville in proportion to the advantage to be gained by the transfer; and should they succeed upon the strength of this title of Neville's, the advantage gained must be measured by the value of
239 the land: *if they should succeed against the plaintiff upon Neville's title, they must pay Neville, or the plaintiff, her assignee, for the land. And thus it was obvious, that Neville's deed to the company could not serve as any protection to them.

"That, as the plaintiff claimed an equitable title under Morgan, and as the defendants could only claim under him with any prospect of success, this was, in effect, a contest between equities under Morgan or his heirs; and as the plaintiff's equity was prior to the defendants', it must prevail, unless it was inferior.

"That the defendants' equity was, 1st, that arising from payment of taxes and from improvements; but this created an equitable charge, not an equitable title: 2dly, an equity arising from their contract with Neville; but that was an executory contract, for which no consideration had been paid.

"That the plaintiff, however, must succeed by the strength of his own equity, not merely by the weakness of his adversary's. The equity of Sims against Morgan, was sufficiently proved by the depositions, and Morgan's receipt, filed in the cause; and though it was not shewn, what he was to pay, or what he had paid, the conveyance of Mrs. Neville, the heir and owner of the estate, was the best evidence, that nothing was due, and concluded all inquiry on the subject. The validity of Sims's deed of trust could not be a matter of inquiry here, where no creditors of Sims were parties: as between him and the trustees claiming under him, it was valid. Though the proceedings of the plaintiff had been dilatory, in claiming under Sims's deed of trust, yet the evidence, that he was a creditor of Sims, sufficiently appeared to entertain him here, as standing in Sims's shoes, claiming the legal title derived from Morgan, who had sold to Sims.

"That the equity of Sims against Morgan's heirs, was better than that of the defendants, and must prevail over them, because it was proved, that he had paid part of the purchase money, and was admitted by the heir, against her own interest in every respect, to have paid the whole;
240 *whereas the defendants have as yet paid nothing, and by losing their contract with Neville would only be replaced in statu quo.

"But that although the plaintiff be permitted to assert this equity to preserve it, yet his case was too defective to entitle him to a final decree, at that time. A conveyance from the heirs of the trustees, on whom indeed the title but not the confidence descended, ought not to be held sufficient. Sims's heirs should be made parties in the cause, in order to a final decree.

"That the New England company having paid the taxes on the land in dispute, to the collectors of the U. States, were entitled to a lien on the lands for the amount, with interest thereon from the date of such payment, and were in like manner entitled to a lien on the said lands for all taxes paid since; and,

moreover, having settled on the lands many years ago, and made valuable improvements thereon, under the faith, first of their patent, and afterwards of the sale for taxes, and on the supposition, that Tidball's was the best right, and that they had acquired it; and Morgan, and those claiming under him, having quietly looked on; the defendants were entitled to a full and liberal allowance for permanent improvements, so far as they exceeded the rents and profits."

Therefore, the chancellor gave the plaintiff leave to amend his bill, by making the heirs of Sims party defendants: and he appointed a commissioner to ascertain and state the amount of taxes paid by the defendants to the U. States, and the taxes paid by them to the state of Virginia, on account of the land in the bill mentioned, and also to state and report the value of the permanent improvements made by the defendants on the land, and an account of the rents and profits thereof, during the time that they or those claiming under them have had the same in possession; and remanded the cause to the rules for further proceedings to be had therein as to the heirs of Sims, and continued it as to the other defendants.

241 *From this order, the defendants appealed to this court.

The cause was argued here, by Johnson for the appellants, and Leigh for the appellee.

I. Johnson took several objections to the appellee's claim to relief, upon his own case, as stated in the bill, and the proofs adduced in support of it.

1. He insisted, that Smith had shewn no right in himself to assert Sims's equitable title under Morgan to the land in question. The only evidence adduced to shew that he was a creditor of Sims, was the deposition of Lee; and that deposition shewed, that the evidence of the debt consisted in the record of a proceeding and judgment in a court of law; it was indispensable to produce the record: no parol evidence of its contents ought to have been heard. If he was a creditor of Sims at all, he was not a creditor entitled to claim the benefit of Sims's deed of trust of August 1800; for the deed provided only for Sims's own proper debts; but his debt to the plaintiff, arose out of the assignment of the bond of another person to him; and the assignor of a bond is, in reality, only a surety for the obligor, bound to pay the debt to the assignee, if he cannot recover it of the obligor. And if he was a creditor, whose claim was provided for by the deed of trust, he was bound, if he claimed the benefit of that deed, to have elected to take the trust subject, at the valuation, within some reasonable time: he ought not to be allowed to wait, as he did, twenty-one years, and then elect to take, at a valuation made in 1800, a parcel of land, the value of which might now, in all probability, be quadrupled. Had this deed of trust been a mortgage of this land, for the security of this very debt to Smith, after the lapse of twenty years, payment of the debt would have been presumed, and his bill to foreclose would have been dismissed. He went into equity to disturb an adverse claim in the highest degree meritorious; a claim asserted under a patent, to lands, which the grantees had taken early possession of, defended against conflicting claims, settled, im-

242 proved, *and preserved from forfeiture by the payment of public dues: and there was no such merits in Smith's claim, as should have induced the chancellor to shew it any favour or indulgence. He presented his cause for a hearing; and, not having shewn and proved a case entitling him to a decree, his bill should have been dismissed.

Leigh denied, that these objections had any good foundation: but supposing they had, the questions they presented, were questions between Smith and the heirs of Sims; questions, in which the New England company had no interest. The chancellor had not decided them: in requiring that Sims's heirs should be made parties, he left them open to be litigated by them, and to be considered by the court, after they should be heard. Enough appeared to shew, that Smith's claim, as against them, had very strong colour of justice, to say the least; and it would have been unprecedented and unjust, to dismiss his bill absolutely, merely because it had not made all the proper parties. There could be nothing meritorious in the case of either party, distinct from the law and equity on which his claim was founded.

2. Johnson objected, that Smith had shown no case, entitling himself, claiming under Sims, to ask a specific execution of Morgan's contract to sell the land to Sims. He had not proved, that the title bond, given by Morgan to Sims, was lost or mislaid; and without proof of that, the court ought not to listen to parol evidence of its contents. The parol evidence only proved, that there was a contract; it did not prove what were the terms of it, or that Sims so complied with its terms, as to have entitled him to demand a specific execution of Morgan. And Sims had never had possession under the contract.

It was answered, that this was a question between Smith claiming under Sims, and Morgan's heir or devisee. Mrs. Neville was the residuary devisee and legatee of Morgan; entitled to the land, if Morgan was not bound to convey it; entitled to any balance of the purchase money, which Sims might have left unpaid. She admitted her father's sale
243 to *Sims, and that he had entitled himself, and those claiming under him, to a conveyance.

3. It was urged, as an objection against giving any relief in the case, in whatever shape it might be presented, and however it might be sustained by proofs, that, at the time Morgan contracted to sell to Sims, or at least when Sims conveyed the land in question to trustees for the benefit of his creditors, the New England company, and those claiming under them, were in actual possession, claiming adverse title under their patents; and, at the time the heirs of the surviving trustee conveyed the land to Smith, and when Mrs. Neville conveyed her legal estate to him, the company were in possession, claiming under their patent, under the marshal's deed, and under the deed of Neville and wife. And thus, Smith's claim stood condemned by the statute against conveying or taking pretended titles; 1 Rev. Code, ch. 103.

The answer was, that Morgan's sale to Sims was made before the New England company had taken possession; and, for the

rest, the statute inhibits the purchase of pretended legal estate, not of equitable interests in lands.

II. Johnson made two objections to the details of the chancellor's order: 1. That in requiring new parties, he had not required all the proper parties; for, not only Sims's heirs but his personal representatives, and Morgan's personal representative too, as well as Mrs. Neville his devisee, were proper and necessary parties: 2. That the decree was premature in directing an account of rents and profits, at the suit of Smith, while it was yet uncertain, whether he had any just right to the land.

In answer to the first objection, Leigh denied, that Sims's personal representative could be a necessary party in any possible state of the case: And, as to Morgan's personal representative, if it were proper to make him a party, it could be so only and merely for form sake; for it was apparent, that Mrs. Neville, the residuary legatee as well as devisee of Morgan, was entitled

244 not only to the legal estate *in the land, but to any balance of the purchase money, which might possibly have been left unpaid by Sims to her father; she was a party; and far from setting up any such claim, she had disclaimed it. As to the account directed, it was hard to say, to which of the parties the decree, in that particular, was most beneficial: it was an account of permanent improvements made, taxes paid, and expenses incurred, by the appellants, as well as of rents and profits; and it was probably more convenient to them, than to the appellee, thus to expedite the accounts.

III. Johnson strenuously contended, that the New England company had acquired a good title under their purchase at the collector's sale for U. States' taxes, and the marshal's deed of December 1805. That which would strike one as the principal objection to the regularity of the sale, and to the efficacy of the marshal's deed to pass the title, namely, that the land was assessed for the taxes, and sold, as the property of Tidball, was cured by the express provision of the act of congress. He admitted, that it had been settled by the decisions both of this court and of the supreme court of the U. States, that in sales of land by a collector for taxes, he acts under a naked power, and must strictly comply with all the requisitions of the law, as to all the steps preceding the sale; that a purchaser claiming under such a sale, is bound to preserve and adduce evidence of the exact regularity of it; and that the marshal's conveyance to him, is not even prima facie evidence, that the provisions of the law have been complied with. Christy v. Minor, 4 Munf. 431; Nalle v. Fenwick, 4 Rand. 585; Stead v. Course, 4 Cranch, 403; Parker v. Rule, 9 Cranch, 64; Williams v. Peyton, 4 Wheat. 77. But, he said, though the purchaser be bound to prove the collector's exact compliance with the provisions of the law, in the steps preparatory to the sale, he could not justly be held to strict proof at any distance of time: and this was admitted in Williams v. Peyton: for C. J. Marshall, after referring to the provisions of the act of congress
245 prescribing the duties *of the collector, said, "If these duties be examined,

they will be found to be susceptible of complete proof on the part of the officer, and consequently on the part of the purchaser, who ought to preserve the evidence of them, at least for a reasonable time." The purchaser at such a sale, ought not to be held to preserve fugitive evidence of acts in pais, longer than twenty years: after such a lapse of time, the regularity of the collector's proceedings ought to be presumed. Such presumption was allowed to supply the place of direct proof, in a stronger case. *Abraham v. Matthews*, 6 Munf. 159. There, a slave claimed his freedom, on the ground that he had been imported into Virginia contrary to law: whether he was illegally imported or no, depended on the question of fact, whether the master had, within ten days after his removal to the state, taken a particular oath, prescribed by law to justify the holding him as a slave here: and it was held, that the taking of the oath would be presumed from the lapse of twenty years' possession without claim of freedom on the part of the slave.

Leigh remarked, that the appellants had supplied evidence enough to rebut the presumption now insisted on. For, in the first place, they had alleged and proved, that they commenced the settling and improving the lands as early as 1799; and it was hardly possible, that there was not personal property enough on the lands, out of which 54 dollars (the amount of tax) could have been made by distress; and if there was, the collector's sale of the lands for the taxes was contrary to law. 3 Bioren's Laws U. S. ch. 92, § 10, 11, p. 102, 3. And, in the next place, the appellants had deemed it necessary to procure a conveyance of the legal title from Neville and wife, as late as 1818, to fortify the title they claimed under the marshal's deed. But there was no ground on which the court should allow any such presumption. The collector's sale was made December 27, 1802; the term for redemption allowed by law, two years (*Id.* § 13), expired December 27, 1804; the marshal's deed was made in December 1805.

246 This *suit was brought in November 1824. Twenty years had not elapsed from the time when the title under the sale for taxes accrued. And if they had, the court would hardly indulge a presumption, on the mere strength of which a purchase of 95,000 acres of land for 54 dollars, was to be upheld. The expression of the chief justice, in *Williams v. Peyton*, that the purchaser is bound to preserve the evidence of the regularity of the collector's proceedings preparatory to his sale, "at least for a reasonable time," must be taken with due regard to the nature of the facts of which the evidence is required to be preserved: and the chief justice, in the sequel of his opinion, said, that the purchaser ought to preserve the gazettes (in which the collector's advertisements were published); and that "it was imposing no greater hardship on him to require it, than it would be to require him to prove, that a power of attorney, in a case in which his deed had been executed by an attorney, was really given by the principal." Surely, the execution of a power of attorney, in such a case, could not be presumed from a possession of twenty years, or any time short of the period pre-

scribed by the act of limitations in regard to land titles.

CARR, J. Many objections to the decree, were urged in the argument.

The first was, that Smith did not shew himself possessed of the equitable claim of Sims upon Morgan: because, 1. he had not proved himself a creditor of Sims, since the evidence of Lee was secondary, speaking of a suit on a bond assigned by Sims to Smith, of which suit there must be a record, which being the highest evidence, was alone admissible: but, 2. if Smith had been a creditor in 1800, this debt must be presumed to have been paid before 1821, when he elected to take the land: or if not, 3. after such a lapse of time, and especially the death of the trustees, he had no right to take the land, nor had the heirs of the surviving trustee any power to

247 make a deed to him, the confidence *as to that being personal: and 4. their deed was utterly ineffectual, both because there was adverse possession, and it was a contract for a pretended title. It was denied on the other side, that there was weight in these objections: but the answer to them mainly relied on, was, that they were points, not one of which had been decided by the chancellor; that, when he directed the heirs of Sims to be made parties, he meant to give them an opportunity to contest the claim against their ancestor, on every ground which might avail them, and of course, could not intend to forestall them, by deciding any point of their case in their absence; that when they should appear and answer, if they admitted the claim of the plaintiff, there would need no further proof; if they contested it, the whole case, as to those parties, would be open; new evidence might be taken on either side; and whether it was or not, the chancellor would decide upon the claim of Smith against Sims, as a part of the case untouched before. I think there is great force in these remarks, and that they dispose, for the present, of these objections, unless it be true, that the chancellor instead of directing new parties, ought at once, to have dismissed the bill, either for defect of proof of the claim against Sims; or, because that claim was attempted to be satisfied, by taking a pretended title, which the court was called on to assist.

As to the first, the language of the chancellor is, "that although the plaintiff may be permitted to assert this equity, to preserve it, yet his case was too defective, to entitle him to a final decree at that time." I think the distinction here taken a very sound one. There may not be proof sufficient to establish a claim, nor exactly of that kind which is the best evidence the case will admit of; yet it may be such as to create a strong belief, and also to shew, that better and full evidence can be produced. In the case before us, the plaintiff had the deed of the heirs of the trustee, stating that he was a creditor of Sims; and he had the evidence of Lee, stating that he was a creditor; but Lee adds, 248 that he *had prosecuted a suit to judgment, on a bond assigned by Sims to Smith. The chancellor could not properly decide against the heirs of Sims, when they were not before him. But was not here enough to prevent him from dismissing the bill at once? Did not this proof go pretty strongly to shew a debt from Sims to Smith,

at the same time, that it pointed to a source (the record) from whence indubitable evidence could be obtained? And was it not likely to be most conducive to equity, to call those before the court, who could properly discuss this matter, and at the same time, give opportunity to the plaintiff to produce this record-evidence, if the heirs of Sims should dispute his claim? I think so. It was an equity, with which the defendants had no connection.

Neither can I see, that the taking this deed from the heirs of Sims's trustee, was a transaction within the letter or the spirit of the statute against buying and selling pretended titles. That law, as I have always understood it, means the buying and selling legal, not equitable titles. In *Wood v. Griffith*, 1 Swanat. 43, lord Eldon says, "It is extremely clear, that an equitable interest, under a contract of purchase, may be the subject of sale;" and after some further remarks, he adds, "If I were to suffer this doctrine to be shaken, by any reference to the law of champerty or maintenance, I should violate the established habits of this court." In our case, Sims's original purchase from Morgan, was in 1797, before there was any adverse possession: but he did not get the legal title: he conveyed this equity in trust to pay his debts; and the plaintiff, a creditor, takes the deed from the heirs of the trustee, in order to carry into effect, the deed of his debtor, and obtain payment of his debt. Whether this effort be successful or not, there was surely nothing criminal in it.

The counsel for the appellants also objected, that, though there was no doubt of a contract for the land between Sims and Morgan, yet there is not such evidence of it, as equity will deem sufficient on a bill for specific execution: for Sims *never had possession of the land; neither is there any such written evidence of the contract, as discloses the terms; the contents of the title bond are not proved; and the receipt, though it acknowledges 18,000 dollars paid in Morris and Nicholson's notes, in part payment for 100,000 acres of land in Randolph, does not give us the particulars of the contract: that thus we do not know what was the price to be given: that the depositions of Armistead and Summerton merely state their belief, that all the purchase money was paid, which is not full proof, and if it were, payment is not such part performance, as will authorise a decree for specific execution. There is no doubt with me, that Armistead sold this land for Morgan to Sims; and I think we may also fairly conclude from the evidence, that full payment has been made. Armistead swears, "that Morgan put into his possession, a title bond for a conveyance of the land to Sims, and the patent, both to be delivered by him to Sims, in virtue of that contract." What he did with them, he does not say. It is probable, that he delivered them to Sims; and the subsequent insolvency of Sims, together with his death, and that of both his trustees, and the lapse of so many years, may well support the assertion in the bill, that the bond is lost. I do not say, that these circumstances are such, as clearly to authorise equity to decree a specific execution, if the heirs of Morgan were resisting it: but I do say, confidently, that, when the resid-

uary devisee of Morgan, (Mrs. Neville) having the sole right under him, releases all that right to the plaintiff as representing Sims, and thereby acknowledges the contract, and satisfaction for it, equity will feel itself fully authorised, so far as Morgan's right is concerned, to decree in favour of the plaintiff. It was said, that this deed of Mrs. Neville could have no operation whatever, both because she had before passed the legal right to the defendants, and because of their adversary possession. Whether Mrs. Neville, who was then a feme covert, was privily examined in the execution of the deed to the defendants, we do not know, as the defendants, though they refer *to this deed in their answer, have not filed it. But, however this may be, and however inoperative the deed of Mrs. Neville may be in the way of conveying title to the plaintiff, it would certainly be conclusive against her, to shew that she admitted the contract between Morgan and Sims, and was willing to do all she could in execution of it.

It was also objected, that the chancellor erred in deciding that the marshal's deed was not effectual to pass the title. The counsel admitted the general rule, that he who claims under one of these sales, founded on a forfeiture, must shew that the law had been strictly pursued; and that such titles, where (as in this case) 100,000 acres of land are bought for 54 dollars (the mere tax due on it) ought not to be encouraged: but yet he insisted, that the same presumptions from length of time, which govern other cases, would apply here also; and that, the defendants having been in possession under the sale for twenty years, it ought to be presumed, that every pre-requisite of the law had been complied with. It has been decided, in several cases, both in the federal court and in this, that an officer, who acts under a naked power, especially if by the exercise of that power the rights and property of others may be lost, must pursue his authority to the very letter, and that those claiming under his acts must shew this, as nothing will be presumed. In *Williams v. Peyton*, the deed of the marshal made under this very act of congress, was decided not even to furnish *prima facie* evidence, that the advertisements &c. required by the law, had been set up in the country, and published in the papers; and from the manner in which the question is treated there, it seems clear to me, that the court would have permitted no other presumption, than such as would be received as to any other link in the chain of title to real property. The chief justice, who delivered the opinion, says, "It is a general principle, that the party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends on an act in pais, the party claiming under that deed is as much bound to prove the performance *of the act, as he would be bound to prove any matter of record on which its validity might depend. It forms a part of his title; it is a link in the chain which is essential to its continuity, and which it is incumbent on him to preserve. These facts should be examined by him before he becomes a purchaser, and the evidence of them should be preserved as a necessary muniment of title." He then

goes on to shew, that these general principles apply, with peculiar force, to the marshal's proceeding to sell lands under the law of congress for non-payment of taxes; where the officer's duties are clearly pointed out, and his compliance with them easy of proof, and where, for the opposite party to prove that they had not been complied with, would be always difficult, often impossible. Now, if the validity of the marshal's deed depends on these acts in pais (the publishing advertisements of the sale in the gazette, and setting them up in public places); if the party claiming under such deed, is as much bound to prove their performance, as he would be to prove any matter of record, on which the validity of the deed might depend: how can it be supposed, that he would be permitted to supply evidence of these acts, by presumption from time, sooner than he might supply the want of the deed itself, by such evidence? The very nature of such titles, it seems to me, ought to warn the purchasers, to see that all the prerequisites of the law are complied with ad unguem. They buy often large and valuable tracts of land for a mere trifle; and they ought always to expect, that the owner will attempt to recover them. This is notice, intrinsic in the transaction, that they must be ready for defence; and they ought, at once, to collect the proper evidences of compliance with the law; and these documents, being written, can be just as easily preserved as their deed. My opinion, then, is, that the time which has elapsed, did not release the appellants from the necessity of strict proof; and that, failing altogether in producing it, the chancellor was right in saying, that the marshal's deed did not help their case at all.

252 *He was equally correct, I think, in saying that the deed from Mr. and Mrs. Neville (even if she was privily examined), did not give the appellants the position of purchasers without notice, against the plaintiff; because nothing was paid by them, and it was in their option, at any time, to reconvey.

With respect to the order of account made by the chancellor, I think it neither incorrect nor premature. Its object was to ascertain, for the benefit of the defendants, principally, the amount of taxes they have paid, and the value of their improvements, as well as the rents and profits. It cannot, therefore, be said to disturb them; for it is not probable, that a step will be taken in it, unless at their instance; and if the plaintiff should unnecessarily be the means of incurring costs in the case, the chancellor will have it in his power to make him pay all such costs, however he may decide the cause.

Upon every ground, therefore, I am for affirming the decree.

CABELL, J. I concur in the opinion of judge Carr, as to the correctness of the decree, in all respects, excepting the requiring an account of rents and profits. In my opinion, it was premature, in the actual state of the cause, to order such an account to be rendered; since it may hereafter appear, upon the amended bill, that the plaintiff has not acquired any just right to Sims's equitable title to the land; and it is wrong to put the defendants to the trouble of rendering

an account of rents and profits, till it be ascertained, that the plaintiff has a right to demand it. I am, therefore, for correcting the decree in this respect, and reversing it for this cause, and affirming it as to all things else.

BROOKE, President. As respects some of the objections taken to the decree, in the argument, the appeal to this court was certainly premature.

The chancellor having rightly decided, that the legal title to the land in controversy, was in neither of the parties, the
253 *next question was, which of them had the better equitable right. Morgan's patent being older than the patent under which the defendants claimed, the legal title was in his devisee, Mrs. Neville. Sims under whom the plaintiff claimed, there can be no doubt, purchased the land of Morgan, and paid for it. The evidence of Armistead, corroborated by that of Summertown, might not be conclusive of that fact; but the release of Mrs. Neville, the devisee of Morgan, to the plaintiff, though it conveyed nothing, was conclusive evidence that she claimed no title to it. And the plaintiff having shewn by Lee's evidence, enough to give colour to his claim under Sims, the chancellor was correct in not dismissing his bill, until an opportunity was afforded him to make Sims's representatives parties, and then to prove, if he could, by the record of the suit spoken of by Lee, that he was a creditor of Sims, and by other evidence, that he had a right to elect to take the land in question, in discharge of his claim. It might have been more regular to have made Sims's representatives parties before; but a court of equity will not dismiss a bill for the want of parties only, especially in this case, in which the plaintiff could not be sure that his title under Sims would be controverted by the defendants.

The objections, that the claim upon Sims, accruing in 1800, ought to have been presumed paid in 1822, and to the title of the plaintiff under the deed of trust for the benefit of Sims's creditors, the confidence in the trustees being personal, and not devolving on the heirs of the surviving trustee, from whom the plaintiff obtained his deed; are objections of the same character, and ought not to have been discussed until Sims's heirs were made parties.

The other objections are of a different character and deserve more consideration.

The objection, that the purchase of the land, either by Sims from Morgan, or by the plaintiff from the trustees of Sims, was the purchase of a pretended title, is not sustainable upon the facts in the case. At the

254 time of the purchase*by Sims of Morgan, there was no adverse possession of the land in question; and the purchase by the plaintiff of Sims's equitable title, under its circumstances, was no violation of the letter or spirit of the act against the purchase of pretended titles. That act imposes a penalty, but does not avoid the conveyance (Tabb v. Baird, 3 Call, 441), even where the legal estate is conveyed; and cannot affect the conveyance of equitable rights. And, though equity will not enforce an equitable title, purchased by a party under circumstances, which if it were a legal title, would sub-

ject him to the penalty of the act against the purchase of pretended titles, that is not the case before us. The plaintiff elected to take the land under the deed of trust, in discharge of a prior debt. He violated neither the letter nor the spirit of the act. The opinion of lord Eldon in *Wood v. Griffith*, is directly in point. There can be nothing clearer, I think, than that this objection to the decree of the chancellor has nothing in it.

Another objection was, that though there was a contract between Morgan and Sims, for the land, yet there is not such evidence of it, as equity will deem sufficient on a bill for specific execution, Sims never having been put into possession, and there being no written evidence of the terms of the contract, as to price &c. If Morgan's representatives were resisting this contract, I think this objection would be entitled to great weight. The title bond spoken of by Armistead from Morgan to Sims, ought to be produced, or its loss accounted for, and its contents proved. But the proof, I think, is full enough of the payment of the whole of the purchase money by Sims. Armistead swears, that Morgan put into his hands the patent and title bond to be delivered to Sims, in virtue of that contract. The insolvency of Sims, his death, and that of his trustees, and the lapse of so many years, might, with other circumstances, account for the nonproduction of the bond, even if Morgan's representative was contesting the claim, and Sims's representatives were also parties: but in the present

state of the cause, the release of
255 *the representative of Morgan to the plaintiff, must be considered a full acknowledgment of the contract alleged in the bill.

The last objection to the decree was, that the deed from the marshal to the defendants, in virtue of the sale for taxes, was pronounced to be invalid. It was admitted, that, by the decisions both of the supreme court of the U. States, and of this court, a purchaser claiming under these deeds, must shew that all the requirements of the act of congress have been complied with; but it was insisted, that after the lapse of twenty years, compliance with the requirements of the act may be presumed, though the party be unable to prove it. If such a presumption were applicable to a case like this, the defendants could not avail themselves of it. When they purchased the land under the sale for the nonpayment of the taxes, they had full notice of the rights of Morgan; indeed, the purchase was made, to evade the title of Morgan, and to fortify their own. They were put on their guard, and ought to have preserved all the documents and proofs of their title under the deed. When an officer acts under a naked power, and the property of others is to be affected by his acts, it must be shewn, that he has acted in pursuance of his authority to the very letter. In *Williams v. Peyton*, the deed of the marshal under this same act of congress, was held not to be even *prima facie* evidence, that the requirements of the act, previous to the sale, had been complied with: and from the manner, in which the question is treated in that case, it is pretty clear, that the court would have permitted no other presumption, than such as would be received as

to any other link in the chain of title to real property. [This the judge shewed, by several parts of the opinion, which he quoted.] Neither is it fairly inferrible, from any part of the opinion of the court in that case, that if presumption in such a case were admissible, it would be allowed on a shorter lapse of time, than is required to found such presumption, where any other link in the chain of title to real property, may be presumed,

in the absence of proof otherwise indispensable. And that is a *case at law, where forfeitures may be strictly insisted on. But courts of equity rather favour presumptions to relieve against forfeitures, than to sustain them. In the case of *Abraham v. Matthews*, the presumption after the lapse of twenty years, that a party bringing a slave into this state, had taken the oath before a magistrate, prescribed by statute, was allowed to save the forfeiture under the statute. Whether, in any case, a court of equity will allow presumption to sustain a forfeiture, where the party claims immediately under it, it is not necessary to decide. The case of *Christy v. Minor*, and other cases, in this court, concur in the principle of *Williams v. Peyton*.

Upon the whole, as the object of the decree was to preserve the equity of the plaintiff under Sims, until it could be properly controverted by his representatives, the order that they be made parties was correct.

But I concur with judge Cabell, that the decree is wrong in the particular mentioned by him, and must for that cause be reversed.

The day after these opinions were delivered, the president mentioned, that the objection taken by the appellants, in their answer, that their twenty years possession was a bar to the assertion of the equitable right to the land claimed by the bill, if it had been presented in the argument, had not been considered by the court; and that the point might now be argued.

It was spoken to accordingly. The case of *Elmendorf v. Taylor*, 10 Wheat. 152, was referred to; in which it was held, that twenty years adverse possession is a bar in chancery to the assertion of an equitable title, whenever it would bar an ejectment, if the plaintiff claimed the legal title. The principle was not contested: the only debate was, whether it was applicable to this case.

The president afterwards announced, that the court saw no reason to alter its decree. The reporter was afterwards informed, that the court did not think it necessary, in the present state of the case, to decide the point.

257 **Jackson v. Heiskell.*

May, 1839.

Judgments—Ca. Sa.—Subsequent Judgment by Commonwealth—Fl. Fa.—Priority.*—H. obtains judgment against J. and sues out a ca. sa. on which the debtor is taken in execution: while he is in custody, the commonwealth obtains a judgment against him, and sues out a fl. fa. under which

***Judgments—Ca. Sa.—Subsequent Fl. Fa. by Another Creditor—Priority.**—In the principal case it is held, that where a judgment is obtained against a debtor and a ca. sa. is sued out and the debtor is taken in execution and while in custody the commonwealth obtains a judgment against him and sues out a fl. fa. under which his lands are sold, and the debtor then takes the oath of insolvency and is discharged from custody, the lien of the judgment creditor

his lands are sold: and then the debtor takes the oath of insolvency, and is discharged from custody under H.'s ca. sa.

HELD. the line of H.'s ca. sa. executed, given by the statute 1 R. C. ch. 134, § 10, overreaches the lien of the commonwealth's judgment, and gives the priority to H.

In a suit brought in the superiour court of chancery of Clarksburg, in June 1825, by the appellee, Heiskell, against Thompson, Willson, and the appellant, Jackson, the case alleged proved to the satisfaction of the chancellor and of this court, was thus:

Thompson bought of Willson, a lot in Clarksburg, for 150 dollars. The contract was merely verbal: but Thompson immediately took possession of the lot, according to the bargain, with Willson's knowledge; paid him the greater part of the purchase money; and built a dwelling-house and out-houses upon it. Willson, however, never made him any conveyance.

After this, Heiskell recovered a judgment against Thompson for debt, in the circuit court of Harrison, at its fall term 1822, and sued out a ca. sa. upon which Thompson was arrested and committed to jail, December 2, 1822. He gave a prison-bonds bond, which he broke; and afterwards, December 2, 1823, he took the oath of insolvency, and was discharged from custody. In the schedule he gave in, he mentioned three debts due to him, as the only effects he owned: no mention was made of the lot he had bought of Willson, or of any right he had in it. Nevertheless, whatever estate, right, or interest the insolvent debtor had in that property, was vested in the sheriff, for the benefit of the creditor, by force of the statute, 1 Rev. Code, ch. 134, § 34.

In the general court, June term 1823, the commonwealth recovered judgment against Thompson and others, for 258 debt *due on account of revenue collected; and sued out a fi. fa. under the statute concerning the recovery of debts due to the public. 2 Rev. Code, ch. 189, § 8, 9, 10, p. 51. This process being delivered to the sheriff of Harrison, he levied it on the tenement in Clarksburg, which Thompson had bought of Willson. The tenement was appraised by the valuers, at 1000 dollars. Thompson's interest in this tenement was offered for sale by the sheriff, to satisfy the commonwealth's execution, October 21, 1823. At that sale, Willson declared, that Thompson had never bought the lot of him; that he had built upon it without his leave; and that he had no right to it whatever: but all Thompson's interest in it was purchased by Jackson (who was Willson's son-in-law) for 180 dollars.

under his ca. sa. has priority over the commonwealth's *A. fa.* This case was cited and overruled in *Foreman v. Loyd*, 2 Leigh 285. To the same effect the principal case is cited in *Evans v. Greenhow*, 15 Gratt. 159; *Charron v. Boswell*, 18 Gratt. 226.

In *Rogers v. Marshall*, 4 Leigh 425, where it is held that by the actual service of a ca. sa. the judgment lien is destroyed, it is said at page 432 in reference to the principal case, in that case, too, the judges who were inclined to give the ca. sa. lien the greatest extent admitted, that no creditor, after taking out a ca. sa. and getting it executed could stand upon the lien of the judgment.

The principal case is cited in *Stuart v. Hamilton*, 8 Leigh 508, in a note by the president to the point that while the debtor remains in custody, he is not liable to be proceeded against in equity. See monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 428.

The sheriff, by deed dated October 30, 1823, conveyed Thompson's interest in the tenement to Jackson: and afterwards, by deed dated July 16, 1824, Willson also conveyed the tenement to him.

At the time Willson made the conveyance to Jackson, and at the time of the sheriff's sale under the commonwealth's execution, Jackson had actual and full notice, of the service of Heiskell's ca. sa. on Thompson in December 1822, and that his claim remained yet unsatisfied.

The claim asserted in Heiskell's bill, was, that Thompson, before the service of Heiskell's ca. sa. on him in December 1822, had a complete right to demand of Willson a specific execution of his contract for the sale of the lot to him; that this equitable title of Thompson in the tenement, was bound by the service of Heiskell's ca. sa. on him; that that process, having been served before the commonwealth's judgment was obtained, gave Heiskell priority over the commonwealth, to have satisfaction out of the subject; that Jackson's purchase of the tenement at the sheriff's sale under the commonwealth's execution, was subject to Heiskell's prior lien; and that, notwithstanding Willson's conveyance of the legal title to Jackson in July 1824, the property was liable to Heiskell's claim, in like manner as if it had 259 been *conveyed by Willson to Thompson, before he was arrested under Heiskell's execution.

Willson, in his answer, denied that he had ever made any contract with Thompson, written or verbal, to sell him the lot.

Thompson averred, that the contract was made; that he had paid Willson the greater part of the purchase money; that possession of the lot was given him; and that he put valuable improvements upon it under Willson's eyes. And the facts were proved.

Jackson insisted, that Heiskell acquired by the service of his ca. sa. on Thompson, no such lien on his equitable title in the lot in question, as gave him priority over the commonwealth's fieri facias; and that he himself having fairly acquired the legal title from Willson, in addition to the right acquired under the sheriff's sale, was entitled to hold the subject exempt from the alleged lien of Heiskell.

Chancellor Tucker held, that Thompson had acquired a right to demand of Willson a specific execution of the contract for the sale of the lot, before the service of Heiskell's ca. sa.; that Heiskell's judgment having been obtained, and his ca. sa. having been served, before the judgment rendered for the commonwealth, he acquired a lien on the tenement in Thompson's hands, prior and preferable to the lien of the commonwealth's judgment; and that Jackson had purchased with actual and full notice of this lien; therefore, he decreed, that the tenement should be sold by his marshal, and the proceeds applied to the payment, first of any balance of the purchase money that might remain due from Thompson to Willson for the lot (of which he directed an account), and then to the payment of the debt (289 dollars with interest) due to Heiskell, and the costs.

From this decree Jackson appealed to this court.

The cause was argued here, by Schmidt,

and on one point by Leigh* also, for the appellants, and by Johnson for the *appellee. There were several questions discussed, which arose out of the peculiar circumstances and details of the case: but the argument turned chiefly on a question of general interest, which Schmidt and Leigh stated to be, Whether Heiskell's ca. sa. executed on Thompson in December 1822, gave him such a lien on Thompson's real estate, as anticipated the lien of the commonwealth's judgment against him of June 1823, and, upon his availing himself of the act of insolvency in December 1823, overreached and avoided the sale of the land under the commonwealth's execution in October 1823? A question presenting for the consideration of this court, for the first time, the construction and effect of the provision of the statute concerning executions, introduced at the late revisal, 1 Rev. Code, ch. 134, § 10, p. 528.† They held the negative.

The rule (they said) is settled and certain, in England, that, if an elegit be sued out on a judgment, and the debtor's lands be actually extended in virtue of it, the creditor can have no other execution afterwards, and especially he cannot have a ca. sa. and if a capias be sued out, and the debtor be actually taken and charged in execution on that process, the creditor can have no other execution, and especially he cannot have an elegit. There are, indeed, exceptions to the rule in both its branches; but those exceptions are founded on after circumstances, which defeat the effect of the process, and disappoint the creditor of that satisfaction, *which the law supposes such process to afford: as, the rescue, escape or death of the debtor in execution; the eviction of the tenant by elegit &c. But the creditor can never take and hold both body and lands for the same debt: either process, if it take effect, works complete satisfaction. 3 Black. Comm. 414, 419; 11 Vin. Abr. Execution, X. a. Y. a. p. 37, 42; 2 Wils. Bac. Abr. Execution, D. 718, 719; 2 Wms. Saund. 68, a., note 1. The law of Virginia is exactly the same. 1 Rev. Code, ch. 134, § 3, 4, 8, 9, the provisions of which are partly taken from english statutes in pari materia, and partly embodied from judicial decisions.

In the present case, then, Heiskell having taken, and holding, his debtor's body in execution, never could have a right to sue out an elegit to extend his lands. And, as the only reason why a judgment constitutes a lien on the debtor's lands, is, that the creditor has a right to sue out an elegit upon it,

*Leigh was not retained in this case; but the same point was involved in another case, in which he was retained.—Note in Original Edition.

†The section is in these words: "And it is hereby declared and enacted, That every sale, conveyance and transfer of any lands or tenements, made by any person charged in execution for any debt or damages, shall be absolutely null and void, as to the creditor or creditors at whose suit he is so charged in execution; unless such sale, transfer or conveyance, be absolute and bona fide, and be made for the payment of the debt and damages due to such creditor or creditors, and the proceeds of such sale, conveyance or transfer, be paid, or be secured to be paid within a reasonable time, to such creditor or creditors: and that all executions of capias ad satisfaciendum, levied after the commencement of this act, shall bind the real estate of the defendant, from the time when they shall be levied."—Note in Original Edition.

so that the instant the right to sue out that process is gone, the lien of the judgment on the debtor's real estate is gone too; therefore, certainly, Heiskell, at the date of the commonwealth's judgment against Thompson, of the levy of her fieri facias, on his tenement in Clarksburg, or of the sale of it to Jackson, had no subsisting lien on Thompson's real estate, by force of his prior judgment. He must rely wholly on the lien, with which the statute endues his ca. sa. from the date of its execution.

If this lien be an absolute one, to all purposes, and as against all persons, and all rights whether conferred by act of the debtor or by act of law, it is fraught with some very odd consequences. 1. It changes intirely the character of the ca. sa. which, in its own nature and direct object, does not affect lands at all, though it may ultimately compel the surrender of them. 2. It makes the service of the capias a lien on the debtor's lands, at the same time that the service of the process destroys the creditor's right to sue out an elegit on his judgment, and thus destroys the lien of the judgment itself on the debtor's land. 3. It makes the capias executed a lien on the debtor's land, to double the extent of the lien given by the judgment which the process is sued out to enforce: it is a lien on all the debtor's lands, whereas the judgment is a lien on the moiety only, since no more is extendible on an elegit. 4. The capias executed will put an end to all questions among creditors, concerning priority of satisfaction out of the debtor's lands, according to priority of judgment and right. If there be two contemporary judgments, and an elegit be sued out upon one, and a capias on the other, and the body of the debtor be taken on the capias, before his land is extended on the elegit, the capias will certainly sweep all. But more; it is to be supposed, that the express positive lien, given to the ca. sa. by the legislature, must prevail over the lien of the judgment, which is only an implication of the judges from the right to sue out an elegit; in other words, that express legislation is paramount to judicial inference. And then, if there be two judgment creditors, and the younger sue out a capias, and this process be executed, he gets an indefeasible advantage over the elder judgment creditor, though he resort to an elegit within the year. Or if there be two judgment creditors, and both sue out writs of ca. sa. but the younger resorts to that process first, and has it executed; nay, if the elder first sue out his capias, but the younger has his first executed; the younger gets priority over the elder.

The sweeping construction of this new and untried provision, which leads to consequences like these, ought not to be upheld by the court, unless it be unavoidable. Happily, it is not so. The lien with which the provision endues the capias from the date of its execution, must be viewed, in connexion with the previous provisions of the section which gives it, with the mischiefs the lien was given to prevent, and with the laws of insolvency, by means of which the debtor taken in execution, may discharge himself.

Considering the context, one would think it obvious, that the lien given to the ca. sa. executed, in the last sentence of the section,

was given only to avoid, more effectually, those acts of the debtor while in execution that are prohibited by *the first sentence of the section (namely, alienations of his land, made by the debtor himself to defraud or disappoint the creditor at whose suit he is in execution) not to avoid the action of the law upon his property, at the suit of other creditors.

Before this new enactment, a debtor charged in execution at the suit of several creditors, might (often very conscientiously, as he might always lawfully) devote his whole property to the satisfaction of some of those creditors, to the exclusion of the rest; and, with or without reason, he was apt to exercise this right of preference, before he availed himself of the laws of insolvency. Very few left much to be administered by the sheriff. The first part of the new section avoided all conveyances of his lands by a debtor in execution, but such as might be made to pay or secure the creditor or creditors at whose suit he should be in execution; and if the provision had stopt there, it would have left him the right of giving preference among them, before he surrendered his effects, in order to his discharge as an insolvent. And, perhaps, the additional provision, which gives a lien to the ca. sa. from the time it is levied, might have been only designed to deprive the debtor of this right of preference among the creditors at whose suit he was in execution, and to prefer each, according to his diligence in having his ca. sa. served.

But the legislature, probably, looked deeper. Before this enactment, a debtor charged in execution, might and frequently did sell his lands to a favoured and indulgent creditor, who had not even brought suit, and thus give him preference to the more diligent creditor, at whose suit he was in execution; and then resorted to the laws of insolvency for a discharge, leaving the land so sold out of his schedule. And this he might lawfully do; *Bullock v. Irvine*, 4 Munnf. 450. Sometimes, a debtor in execution would convey his land for a feigned debt, or for a fair debt inadequate to the value of the subject, and then resort to the laws of insolvency for relief, without (of course) inserting the

land so sold *in his schedule: thus disappointing the creditor at whose suit he was in execution; absolutely, if his conveyance was for a fair debt; if for a feigned debt, unless the creditor could eviscerate the fraud (a work of time and difficulty): while the debtor relied on his confederate, or his favourite, for the restoration of the property, or of the surplus value of it, at a future day, to himself or his family. Nay, as the creditor who sued out a ca. sa. and took his debtor's body in execution, thereby abandoned his right to an elegit, and consequently, the lien of his judgment on the debtor's lands; it was not impossible, in fact or in law, for the debtor to make a fair and valid sale of his lands to a purchaser for the full value; in which case the mischief to the creditor was, that money, easily concealed and dissipated, was substituted for land, a subject fixed, tangible, and incapable of diminution or destruction. Such conveyances by the debtor were preparatory steps to a discharge under the laws for relief of insolvents. They were designed to elude the full surrender of

his effects. And perjury was generally necessary to the consummation of the purpose. It was to prevent such practices, frauds and evasions of justice, that this amendment to the law of executions, made the ca. sa. a lien on the debtor's land, from the date of its service. It requires, in effect, that, in order to entitle a debtor to a discharge under the laws of insolvency, all lands sold and conveyed by him while in execution, under whatever pretext, shall be put in his schedule, so that the creditor may have the benefit of them. It gave the creditor a lien on the debtor's land from the date of the service of his ca. sa. to avoid alienations of the debtor while charged in execution, by his own acts, not to avoid transfers of the property made by act of law; to prevent the debtor from contriving and doing injustice to the creditor at whose suit he is in execution, not to hinder the law from doing justice to other creditors, diligently and honestly availing themselves of regular means of coercion. The lien should be held co-extensive with the mischief it was created to remedy, and no more.

265 *It is certain, that this lien can never enure to the benefit of the creditor, until and unless the debtor resort to the laws of insolvency for a discharge. If the debtor die in execution, his lands descend immediately to his heir: the creditor's lien under his *capias* executed, is gone to the grave with the debtor: not even the saving power of a court of equity can reanimate it. The creditor must resort to a new execution, as provided by the 8th section of the statute of executions; and if he now elect to have satisfaction out of the lands of his deceased debtor, he must begin with a *scire facias* against the heir or terre-tenant, and can have execution only of a moiety of the lands, which belonged to the debtor at the time of the judgment and subsequent to it. 2 Wms. Saund. 6, 7, notes 1, 4. Thus the lien of the ca. sa. executed, depends at last upon the act of the debtor; upon his obtaining a discharge, as an insolvent debtor. He may defeat the lien by omitting to obtain such a discharge.

It should be considered, that whatever extent the court shall allow to this statutory lien of a ca. sa. executed as to the debtor's lands, that same extent it must allow to the lien with which a subsequent statute endues a ca. sa. in regard to the debtor's personal property. The act of 1820, ch. 34, § 4, provides, that every writ of ca. sa. shall bind the property of the goods of the debtors, from the time such writ shall be levied. So that, now, no one can purchase the most trivial chattel, any more than the land, of a person in execution for debt, without being bound to account for the subject and the profits to the creditor, whenever the debtor shall be discharged as an insolvent; and no one can sell him food or raiment while he is in custody, without being bound to account for the price with interest. The debtor is laid, in a manner, under sentence of excommunication. This severity may serve the purpose of compelling him to a prompt surrender of his effects to his creditor. But it is hard to imagine any rational purpose which the legislature could have had in view, if it really intended to provide, that the lien of a ca. sa. executed, at the suit of one creditor,

266 *shall not only suspend the debtor's dealings, but suspend too all other process of execution against him; for this will be the effect of giving this lien the extent contended for. If another creditor sue out a fieri facias, levy it on the debtor's chattels, and make his money, he will have to account for the amount with interest, to the creditor who has previously taken the body, whenever the debtor shall be discharged as an insolvent: or, the purchaser under the fieri facias, will be bound to surrender the property, and account for the profits. So, if another creditor sue out an elegit, and extend the lands of the debtor in execution, he will be bound, whenever the debtor shall be discharged as insolvent, to restore the land and account for the profits. For if the lien extend to the subject, it must extend to the profits likewise. This will place a debtor in execution, in a situation the reverse of an outlawry: all others will be in a state of outlawry as to him. Some debtors may choose, and even contrive, to be taken under a ca. sa. and instead of fraudulent alienations of debtors in execution, we may expect collusive judgments and collusive writs of ca. sa. No prudent creditor can give his debtor a moment's indulgence, if he be at all embarrassed with other debts. No creditor, who shall regard only his own interest, will ever resort to any other process of execution but the ca. sa. And this process will, in practice, so soon as its effect shall be understood, supersede all other kinds of execution. Whatever the legislature intended by these provisions, it never could have intended this.

Johnson, for the appellee, agreed that the question was fairly stated by the appellant's counsel; and he maintained the affirmative of it.

The 10th section of the statute of executions, on the construction of which the question depends, arose from a doubt which had attended the interpretation of the 8th and 9th sections, as I happen to know personally, and as, indeed, is plainly to be inferred from the language of the 10th section,

267 *and from the place it holds in relation to the two former. The 8th section had given new process of execution against the lands of a debtor dying in execution; and the 9th had provided, that such execution should not be levied on those lands which the debtor, after the date of the judgment against him, had sold bona fide for the payment of any creditor at whose suit he was in execution. It had been thought that, as this proviso exempted from execution, those lands only, which were sold for the satisfaction of the creditors at whose suit the debtor was in execution, all other sales and alienations, made while he was in execution, were void as to those creditors. This opinion had been adopted by the late chancellor Brown of Staunton, and had been the basis of one of his early decrees. He acted on it again, in the case of Bullock v. Irvine; and, in that case, extended it further, perhaps, than its reason would warrant; for though Bailey (the debtor there), while in execution at the suit of several creditors, sold his lands in satisfaction of one who had never sued him, yet the plaintiff Irvine was not one of the creditors at whose suit he was in execution, had no judgment against him at the time,

and brought his suit, upon a judgment rendered afterwards, impeaching Bailey's sale as fraudulent. This court reversed the chancellor's decree; and though it did not, in terms, overrule his construction of the 8th and 9th sections of the statute, the principles of its decree were thought by many to be in conflict with the chancellor's opinion. Very soon after this case was reported, the reversal furnished the occasion to settle the law on this subject; and this 10th section declared and enacted it accordingly.

The purpose of the first clause of this section, was to avoid alienations of land made by a debtor in execution, unless made for the benefit of the creditor; that of the second, to make the execution a lien on the land, and fix the time when that lien should commence. There is no question as to the construction of the first clause: it clearly makes void, as to the creditor at whose suit the debtor is in execution, 268 tion, *every sale, conveyance and transfer of lands made by the debtor while in execution, unless it be bona fide, absolute, and for the benefit of such creditor. The second clause declares, with equal clearness, that the execution "shall bind the real estate of the defendant, from the time when it shall be levied." And the question upon this clause, is not as to the existence of the lien, or the time of its commencement, but as to its character: does it overreach voluntary alienations only? or has it preference also to alienations by act of the law?

I concede, that the lien of the prior judgment does not aid the lien of the execution; and that he who claims under a levied ca. sa. must rely wholly on the lien with which the statute has endowed it.

The language of the statute is general, not importing a restricted lien, and is appropriate to create a lien giving preference as well over judgment creditors as over purchasers. The lien of the judgment, so long known to the english law, is a mere implication from the statute of Westminster giving the elegit, and that lien gives preference to one judgment creditor over another judgment creditor, as well as over a subsequent purchaser. The express lien given by our statute to the ca. sa. executed, cannot in reason be less efficacious than the implied lien given to the judgment by the english statute. Judges and jurists, in speaking of the effect of the english statute, tell us, habitually, that the judgment binds the land of the debtor from its date. The law of England and the law of Virginia employ the same language in describing the effect of judgments and executions on the property of the defendants: the judgment binds the lands, the delivery of a fi. fa. binds the personal property. Our statute adopting this language, so familiar to the profession, declares that the ca. sa. executed shall bind the real estate from the time of the levy. Bind it to what extent? The plain answer is, to the same extent to which the lands of debtors are bound by other judicial process; so bind it as to give the creditor preference 269 over subsequent purchasers, *and subsequent liens of every kind. No good reason can be perceived for departing from the plain import of the provision, or for restraining its generality. Neither will the

strange and mischievous consequences that have been anticipated, follow from our construction.

There is nothing strange or mischievous in the change it makes in the remedy by execution against the body. That remedy, unknown to the common law, was introduced by an ancient english statute, in a form of great severity : when the debtor's body was taken under it, he must die in prison or pay the debt. But, in our law, this execution against the body had been long used, not to punish or oppress, but to compel an unjust debtor to surrender his property for the payment of his debts. He might at any time discharge himself from confinement, by the surrender of all his property. In the mean time, to give an opportunity of bringing that property into fair market, he might take his own time, and was indulged with the privilege of the prison rules. If he surrendered it, it was sold for the payment of his debt, and the surplus, if any, restored to him. If he died in execution, without surrendering his effects, the lien of the judgment was revived, and a new execution might go against his property, with a proviso, that his lands bona fide sold to pay the debt for which he was imprisoned, should not be liable to such execution. When it was found that debtors abused the privilege of the prison rules, by often establishing their home within them, enjoying their property during life, and unjustly delaying the creditor, this privilege was curtailed, and they were required to pay the debt within twelve months after the arrest, surrender their property, or go into close jail. The legislature having gone thus far, to enable the creditor, by means of an execution against the body, to obtain satisfaction from the property of his debtor, and having found these means habitually evaded, by fraudulent sales, by unjust and often feigned preferences, given to indulgent, favourite, or fictitious creditors, it was not strange,

that it should go a step farther ; that it should forbid alienations *after the levy of a ca. sa. unless for the purpose of paying the debt, and give to the creditor, whose execution was levied, a preference, from that time, over all creditors having then no lien on the property of the debtor. It was a consistent and rational advance in that path of policy, which led to the single end of subjecting the debtor's whole estate, within a reasonable time, to the payments of his debts.

It is not a consequence of our construction, that the ca. sa. executed will put an end to all questions of priority among judgment creditors, or that the junior judgment creditor may by the levy of a ca. sa. displace the lien of a prior judgment, or that the lands of a debtor in execution, will be locked up from the process of other creditors.

The judgment creditor, who sues out an execution against the body of his debtor, and levies it, surrenders thereby the lien of his judgment, by having elected this process of execution ; and that lien can never be revived, but by the death of the debtor in execution, or his escape, or rescue. In lieu of the lien so surrendered, he obtains the statutory lien of the execution, commencing at the date of the levy. This lien has no relation back ; it affects no prior right of cred-

itor or purchaser ; every fair purchaser and judgment creditor, whose rights are prior in time, have preference by law. 'Every judgment creditor, therefore, whose judgment is prior to the levy of the capias, may sue out his elegit, which will have preference to the capias. So, too, a judgment rendered after the levy of the ca. sa. will sustain an elegit levied upon the lands of the debtor in custody. The levy of such elegit will be valid, till the lien of the capias be consummated by the oath of insolvency, or till it be superseded by an elegit issued after the death of the debtor in custody. Meantime, the tenant by elegit will be entitled to the rents and profits in satisfaction of his debt ; and whenever evicted, will have the same remedies upon his judgment for the recovery of the balance, as are given to every other evicted tenant by elegit. The lien given by the statute to the capias levied, does not bind the meane profits. It binds the land

271 *only, and the profits can no more be sequestered, under this lien, prior to its consummation by the oath of insolvency, than they would be under the lien of a judgment before its consummation by an elegit, or under the lien of a mortgage before its forfeiture. The statutory lien of the execution, was intended to preserve the lands of the debtor in custody, so that when surrendered under the oath of insolvency, they might be delivered up for the benefit of the creditor with no other incumbrance than that which bound them on the day of the arrest.

Encountering, then, none of the anticipated mischiefs in our construction of the law, why should we depart from the plain import of its words, and hold, that the lien was given only to avoid those acts of the debtor, that are prohibited by the first sentence of the section, or to regulate the preference between several creditors, at whose suit the debtor was in execution ?

If it be admitted, that the legislature meant to give one creditor a preference over another creditor, the admission surrenders the argument, that the second clause in the sentence is to be limited by the first. What reason can there be, why the legislature would prefer a creditor whose execution is levied to-day, over one whose execution is levied to-morrow, and that without reference to the dates of their respective judgments, and yet allow a subsequent creditor to obtain a judgment, while the lien of both executions is in full force, and by an elegit gain a preference over them both ?

Again, nothing would be easier than to evade the restrain upon alienations imposed on the debtor, if a subsequent judgment creditor were allowed to have a preferable lien. The debtor in execution, who could not sell, might nevertheless contract debts, confess judgments, suffer his whole real estate to be extended by elegits, and then discharge himself by the oath of insolvency. There is, in truth, no safety, in the interpretation of this statute, but by following its plain letter and obvious spirit.

272 *It will be time enough to interpret the subsequent act of 1820, declaring the lien of the ca. sa. on the personal property of the defendant, when a case shall arise under it. It does not follow, however,

that the two statutes must necessarily receive the same interpretation, though they should be found to employ the same words. Nothing is more usual than to construe the same words differently, when applied to different subjects; and, especially, when these subjects are real and personal property. When the statute of 1819 declares, that the *capias* shall bind the lands, from the time of its levy, it is manifestly proper to interpret this lien, by analogy, to other liens on real estate: and when the act of 1820, declares, that the *capias* shall bind the personal estate, from the time of its levy, it may be equally proper to interpret this lien, by analogy to other liens on personalty. The act which declares, that the *fi. fa.* shall bind the personal property, from the time of its delivery, may furnish that analogy, and, with many reasons ab inconvenienti, may justify the opinion, that the lien of the *capias* levied will not save the personal property of the debtor, from seizure and sale under a subsequent *fi. fa.*

CARR, J. Though several questions were raised and discussed, in the argument of this cause, there is but one which seems to me worthy of consideration by the court. That is a question wholly new, and very important. I sincerely wish, therefore, that it had been heard by a full court. It was said at the bar, that there is another case in court involving the same point: and, so far as I am concerned, I shall be perfectly willing, when that shall come before us, to hear the point again argued.

The question arises upon the 10th section of the statute concerning executions; a provision first introduced at the revision of 1819. As the law stood, up to that date, when a debtor charged in execution died, the party at whose suit he was so charged, might sue out new execution against his lands and goods: but such new execution could
273 not be taken *against any lands, tenements or hereditaments, which the person dying in execution, should, at any time after the judgment or judgments on which he was so charged, have sold bona fide for the payment of any of his creditors, at whose suit he should have been in execution, and the money paid; or secured to be paid, to any such creditors with their privity, in discharge of his or their debts, or some part thereof. These provisions of the former law were retained at the revision, and from the 8th and 9th sections of the revised act. And then follows the new section.

In the case before us, Heiskell had a *ca. sa.* levied on Thompson: and while he was in execution upon it, the commonwealth obtained judgment against him, took out a *fi. fa.* and under it sold his tenement in Clarkeburg to the defendant Jackson. Thompson afterwards swore out. And the question arising under this new provision of the law, is, whether the lien of Heiskell's *ca. sa.* do not overreach the sale of the commonwealth and the title of Jackson?

If we take the literal meaning of the words, it would seem to decide the question at once: for they say that the *ca. sa.* shall bind the estate of the debtor, from the time

of the levy; and here the levy was before the judgment of the commonwealth, and the *ca. sa.* in full force, when the sale took place. It was strongly contended, however, at the bar, that this would be giving the law a meaning much too large, and going far beyond the mischief intended to be cured. That mischief was said to be this, that a debtor in jail might give preference to some *ca. sa.* creditors over others; and the object of this clause was to take away such power, and give the *ca. sa.* creditors priority according to the levy of their executions. If a judge might be permitted the expression, I should say, I wish this were the true construction: for, it seems to me, that there is a harshness in the other, not in harmony with the general humanity of the law. It seems to hold out an invitation to creditors to take the bodies of their debtors. But such considerations can have

no weight with the judge, where the
274 words of the law are *plain, and the meaning clear: and to me it seems that they are so here. The "*ca. sa.* shall bind the real estate from the time it shall be levied:" bind the real estate, how? not sub modo, but without exception. I can only understand it to mean, that from the moment the *ca. sa.* is levied, there is a lien which attaches to the real estate, and which, when the state of things happens that shall give it activity, will overreach every subsequent lien, incumbrance or sale. A creditor gets his judgment and levies his *ca. sa.* So long as the debtor chooses to remain in execution, the lien is dormant. When he swears out, it is awakened into life and activity, and vests in the sheriff a right to recover for the creditors (each in his turn) all land, to which the debtor had title on the date of the levy. But it looks not beyond the levy. If A. and B. have judgments, A.'s being prior, and B. levies a *ca. sa.* and then A. takes an elegit, he can never be disturbed by the lien of B.'s *ca. sa.* because his judgment was before it.

It was said this construction changes wholly the nature and effects of the *ca. sa.* And this is most true. But the legislature had the right to do this; and its words are so plain, that I am compelled to believe it meant to do it. If inconveniences are found to follow, the same hand which gave the wound, must administer the cure.

GREEN, J. Of the various objections taken to this decree, only one requires serious examination; that which presents the question, Whether a *ca. sa.* executed, and the discharge of the debtor afterwards under the act for the relief of insolvent debtors, so binds the debtor's lands, as to give the creditor a right to satisfaction out of them, against a purchaser of the same lands, before the discharge of the debtor, under a writ of *fieri facias* upon a judgment of the commonwealth, obtained after the service of the *ca. sa.*?

This depends upon the true construction of our act of 1819, declaring that all executions of *ca. sa.* shall bind the defendant's real estate, from the time when they shall be *levied; a provision extended
275 to personal property by an act of 1820-21. These provisions seem, at first view, very odd, and almost unintelligible.

Before they were enacted, a ca. sa. whether executed or not, neither bound nor in any way affected the debtor's property, real or personal: and these new enactments provide no means, by which to render the binding force given to a ca. sa. executed, available to the creditor. We can readily understand, how a judgment binds a moiety of the debtor's land; because it may be taken by *elegit*: how a *fiel facias* bound the debtor's goods, from its date at the common law, and from its delivery to the sheriff by statute; because they might be taken under it, notwithstanding an alienation after the date in the one case, and after the delivery of the writ to the sheriff in the other: and how a writ of *warrantia chartæ*, or a writ against an heir upon the obligation of his ancestor, binds all the lands of the defendant in the one case, and all the assets descended in the other, from their dates; because upon the judgments in such suits, the land itself may be taken. But there is some difficulty in comprehending how any proceeding, under which no property can be taken, without the assent of the debtor, can bind it, or in what way, or to what purpose or extent. Yet these provisions certainly meant to give some new capacity to the ca. sa. when executed; and it is our duty, to inquire into the true object of the law, and to carry it into effect by the means intended, if that can be ascertained, or otherwise, by means most convenient and conformable to the general spirit of our legislation. To this end, an attention to the state of the law, when these provisions were introduced, is necessary.

Before the statute of 21 Jac. 1, ch. 24, after a ca. sa. executed, the creditor had no further remedy upon his judgment, even if the debtor died in execution, except perhaps in the case of an escape. That statute authorized the creditor, in case the debtor died in execution, to resort to new executions against the debtor's lands and goods, as if he had never been taken in execution, with a proviso exempting *all lands, which the debtor might have sold bona fide for the payment of any of his creditors, and the money so applied. The provisions of that statute were incorporated into our code in 1726, with slight verbal variations, not varying the effect. And so the law continued until the revival of 1792, when it was so changed, as to exempt only such lands as the debtor might have sold bona fide for the payment of any of his creditors at whose suit he was in execution, and the money so applied with their privity.

This was the state of the law, when the provision in question, in respect to lands, was introduced at the revival of 1819. Still, as at the common law, a creditor, at whose suit the debtor was taken or charged in execution, could have no further remedy upon his original judgment, unless the debtor died in execution, or perhaps in the case of an escape; and then, he was remitted to his remedies upon his original judgment, in no degree strengthened by the circumstance that the debtor had been in execution. But, if the debtor was discharged from custody under the acts for the relief of insolvent debtors, these statutes

did not apply to the case; and while in custody he might dispose as he pleased, provided it were done bona fide, of all his property, real and personal, which the creditor could not in any way reach or subject to his demand. *Bullock v. Irvine*, 4 Munf. 450. Again, one of the effects of our acts for the relief of insolvent debtors, was to distribute all the effects of such a debtor, amongst all his creditors, at whose suit he was in execution, *pari passu*, without regard to the dates of their judgments or executions, or of the levying of them.

At the revival of 1819, the former provisions, in respect to the case of debtor's dying in execution, were retained unaltered; and two new provisions introduced, 1. that every conveyance, &c. of lands made by a debtor charged in execution shall be void as to the creditors at whose suit he is in execution, unless it be absolute and bona fide and made to pay or secure the debts of such creditors, and the proceeds paid or secured to be paid to them (dropping 277 the *words, "with their privity," found in the preceding section). 2. "And that all executions of ca. sa. shall bind the real estate of the defendant, from the time when they shall be levied."

These provisions were certainly not intended to apply to the case of a debtor dying in execution; for that had been provided for in the sections immediately preceding, in a different way: in some respects more beneficial to the creditor, remitting him to the original lien of his judgment, and overreaching all alienations since its date, unless made for his satisfaction, whereas the section in question affected no lands alienated in any way before the levying of the *capias*: in some particulars less beneficial, the ca. sa. binding all, the original judgment only a moiety, of the debtor's land. Nor were they intended to apply to the case of an escape; in which case, the creditor might perhaps resort to other executions on his judgment; or if not, there are no means in that case, by which any effect can be given to the binding force of the ca. sa., and, especially, those provisions cannot apply to the case of an escape, if there be any other case, to which they can be applied with effect, in the ordinary course prescribed by law. And that, I think, is the case of a discharge of the debtor under the acts for the relief of insolvent debtors, in which case, all his alienations, unless made for the payment of the creditors at whose suit he is in execution being avoided by the provision under consideration, the lands so alienated would vest in the sheriff for the benefit of those creditors, to be distributed among them *pari passu*, but for the provision declaring that each execution binds the property from the time it was levied, which establishes the priorities amongst them, according to the dates of the levies. And this, I think, was one of the purposes of that provision; whilst the other was, to deprive the debtor in execution, of the privilege which he before had of giving a preference amongst his creditors and disposing of his property *ad libitum*, if it was done bona fide, and their swearing out of jail, and thus wholly frustrating the cred-

itor at whose suit he was in execution.

278 *But then comes the question, which this case presents, Whether these provisions affect the rights of third persons, obtaining judgments against the debtor, and taking his property in execution while he is in custody? I doubt, whether this consequence was in the contemplation or design of the legislature; but it seems to be necessary and unavoidable; for the same quality given to the ca. sa. executed, which, by binding the property, establishes priorities amongst the creditors at whose suit the debtor is in execution, must, from its very nature, and being given in general terms, operate throughout, and affect alike the rights of all persons indiscriminately.

I am sensible of the great harshness, and (in its practical application) inconveniences, of this new law: but those considerations belong to the legislature, and not to the courts of justice. There are, however, many palliating circumstances, and such as may prevent the consequence anticipated in the argument of his cause, that the execution of ca. sa. will be universally resorted to. In the first place, the law is totally unavailing, unless the debtor be discharged under the insolvent debtor's acts; for, in no other case, is there any means of enforcing it. And the debtor's lands may be extended under any judgment, rendered in favour of any other creditor, at any time before the levying of the ca. sa. and the extent cannot be disturbed, if the debtor be discharged as an insolvent, even though the judgment, under which he was in execution be anterior in date to that extended. So, an extent may be levied upon any judgment obtained while the debtor is in execution, and the property enjoyed as long as he remains in custody; and, unless he is discharged as an insolvent, the tenant by elegit cannot be affected, otherwise than he would have been liable to be affected if the ca. sa. had never issued, that is, by an extent on the prior judgment. And the whole of the personal property of the debtor in custody, may be taken in execution under any judgment no matter when obtained, or sold by him; and unless he avail himself of the acts for the relief of in-

279 solvent debtors, dying in execution or escaping, the creditor at whose suit he was in execution, can never, by any means, subject the property or its proceeds so sold or taken in execution.

In strictness, Thompson's interest in the lot in question, could not be taken in execution nor transferred to Jackson, by the sheriff's sale under the execution, it not being such a trust as is subjected to execution by our statute. Yet the execution delivered to the sheriff, bound his right in equity, as it would have bound it at law, if his title had been legal, or such a trust as is subjected by the statute to execution. And Jackson's purchase entitles him to be substituted to the rights of the commonwealth, to the extent of the price paid by him; and if the execution of the commonwealth had a priority over the rights of Heiskell, he might have availed himself thereof. In a court of equity, therefore, the rights of the parties, such as they are, have the same effect as if they had been legal.

CABELL, J., said he concurred in the opinion of his brethren: but the point was one which ought to be argued before a full court, and whenever it should arise again, he should be ready to re-consider it.

The decree was affirmed.

280 *Coplin and Others v. M'Calley.

Same v. Sehon.

May, 1829.

[19 Am. Dec. 748.]

(Absent CARR. J.)*

Court of Chancery—Marshal—Failure to Reappoint after Three Years—Liability of Sureties.—A marshal of the court of chancery (an officer appointed by and holding during the pleasure of the court, required to give bond with surety for due discharge of his office, which the court is required to have renewed from time to time at intervals not exceeding three years) on being appointed gives bond with sureties; but no new bond is required within three years; and he continues in his office. HELD, the sureties are answerable for his misconduct after the expiration of three years.

When Officers Must Account for Clerk's Tickets.—If a clerk's tickets be delivered after 1st June in any year, to sheriff or marshal for collection, he is not bound to account for them on 1st November following, nor before 1st November in the next year.

Isaac Heiskell was appointed by the chancellor marshal of the court of chancery of Clarksburg, May 22, 1817; and with the appellants, Coplin and others, his sureties, executed an official bond, on the same day, conditioned according to law, for the payment of all moneys which he might receive by virtue of his office, and for the faithful discharge of all the other duties thereof. The court did not cause this bond to be renewed, at any time within three years from its date, or after the expiration of three years, as the statute directs. See 1 Rev. Code, ch. 66, § 62, 3, p. 209, 10.

Heiskell, in his official character, under a decree of the court of chancery, collected 254 dollars due to M'Calley, October 18, 1822. He failed to pay the money to M'Calley: who thereupon made a motion against him and Coplin and others, his sureties, in the court of chancery, for a judgment for the money, so collected and withheld, and damages at the rate of 15 per cent. per ann. thereon. The chancellor gave judgment for the principal sum of 254 dollars, with damages at the rate of 6 per cent. per ann. and costs. The sureties, Coplin and others, appealed to this court.

281 *On the 5th June 1821, Sehon, the clerk of the court of chancery, put into Heiskell's hands sundry accounts or tickets (as they are commonly called) for fees accruing for his official services, to be collected by him as marshal. See 1 Rev. Code, ch. 85, § 21, 24, 29, p. 319, 321. Heiskell failing to account for and pay the amount of fees collected by him, Sehon made a motion in the circuit court of Harrison, against him and his sureties, for judgment for the balance of the fees unaccounted for, with damages according to law. And the circuit court gave him judgment for 446 dollars (the balance of the fees collected and unaccounted for by the marshal) with damages

*He did not sit, because he decided one of the causes in the court of chancery.

thereon, to be computed from the 1st November 1821, at the rate of 6 per cent. per ann. and costs. And the sureties appealed to this court.

The causes were (of course) heard together here.

Leigh for the appellants. I. The official bond of the marshal did not bind the sureties for any act or omission of the marshal, after the expiration of three years from its date. Though the statute provides, that the marshal shall hold his office during the pleasure of the court, and shall give bond with sufficient sureties, conditioned for the payment of all moneys he shall receive by virtue of his office; yet it also imperatively directs, that "the court shall cause the official bond to be renewed from time to time, as occasion shall require, not exceeding in any case three years;" and provides, that such new bond "shall supersede the former so far only, as that the sureties in the former, shall be in no manner liable under it, for any act done, or for any omission, after the date of the latter." Now, the sureties of the marshal contracting the obligation under and in pursuance of the provisions of this statute, those provisions enter into, explain, and limit the extent of, their obligation. They contract the obligation, in the faith that the court will perform the duty imposed on it by the statute, and require a new bond of the officer, at

the expiration of three years at most: 282 they bind *themselves, then, for the good conduct of the officer during that time at most. If the bond had been renewed as required, and at the time required by law, the appellants would not have been responsible for the neglect of the marshal to account for and pay the moneys he collected for the appellees: the new bond would have been the security for his good conduct in regard to those collections. It was the duty of the court to have the bond renewed, at the expiration of three years, not the duty of the sureties to see that it was done: it was owing to the omission of the court, that a new bond was not taken: and to hold the sureties of the marshal liable for these moneys, is, in effect, to make them responsible for the inadvertence of the court, as much as for the fault of the officer. The case is analogous, in principle, to that class of cases, in which it has been held that a bond for an officer's faithful performance of an office of limited duration, during his continuance in office generally, though the officer be in fact continued in the office after the term, is binding on the sureties, only for his conduct during the existing term of office. *Arlington v. Merricke*, 2 Wms. Saund. 412-414, note 5; *Commonwealth v. Fairfax*, 4 Hen. & Munf. 208. There can be no just distinction, as to the obligation of the sureties, between the case where the office is limited by law to a certain term, and the case where the official bond is limited to a certain term, as is the case here.

II. As to *Sehon's* case: 1st, He had no right to the summary remedy by motion, in this case, for his fees collected by the marshal. All those summary statutory remedies, trenching upon the common law, are to be confined strictly to the cases in

which the statute expressly gives them. The statute provides (1 Rev. Code, ch. 85, § 21, p. 319), that the clerks shall deliver their accounts of fees to the collecting officers, annually, before the 1st June, and (Id. § 24), that the officers shall account for and pay them on or before the 1st November; and gives the motion for fees so delivered, and not so accounted for. Here the fees were delivered

283 *to the officer on the 5th June 1821.

2ndly, At all events, the officer was not bound to account for these fees on the 1st November 1821. At best, they could only be considered as fees delivered for collection before the 1st June 1822, and the officer accountable for them on the 1st November 1822. Therefore, damages (if allowable at all) should not have been computed from November 1821, but only from November 1822. But, 3rdly, Neither damages nor interest should have been given against the sureties. The statute (§ 24), allows damages, not exceeding 15 per cent. per ann. against the principal; but against the sureties (§ 26), it gives a motion for the amount of the fees only.

Johnson, for the appellees. I. The tenure of the marshal's office was during the pleasure of the court. The sureties in his official bond were bound for his good conduct in that office; that is, during his continuance in it. He continued in the office, whether he renewed his official bond or not; the statute not requiring that he should be appointed anew at the expiration of three years, but only directing that his bond should be renewed. The case, then, is not at all analogous to *Arlington v. Merricke*, and *Commonwealth v. Fairfax*. The statute, in providing that the chancellor shall cause the bond to be renewed, from time to time as occasion may require, not exceeding in any case three years, is directory to the court; and the purpose of the direction was to take care of the interest of the suitors in the court, not of the sureties of the officer. The statute also plainly intends to hold the sureties in each bond, liable for all acts of the officer, done before the execution of a new bond, whenever it may become executed: for it provides, that the new bond shall supersede the former, so far only, as that the sureties in the former, shall not be liable for acts or omissions after the date of the latter. And any of the sureties had a right at any time, to represent the case to the court, and ask that it should demand another bond.

284 *II. With regard to the clerk's case, the most that can be contended for, is, that his accounts of fees, not having been delivered before the 1st June 1821, are to be considered as fees delivered before the 1st June 1822, so as to make the officer accountable for them on the 1st November 1822.

PER CURIAM. The doctrine of *Arlington v. Merricke*, and that class of cases, is, that where an official bond is given for the faithful discharge of the duties of an office, by the officer during his continuance in office, and the office is of a certain limited term of duration, though the officer be in fact re-appointed to or continued in the office for another term or longer, the obli-

gation of the bond is only co-extensive with the existing term of office. But the tenure of the marshal's office was during the pleasure of the court: his official bond bound his sureties for his conduct in office: and the obligation of this bond was co-extensive with the duration of this office. The failure of the court to require a new bond, did not determine his office. The statute directs the new bond for the better security of persons interested in the officer's official conduct. It provides, in express words, that the new bond shall supersede the former, so far only as to exempt the sureties in the former, from liability for official acts and omissions after the date of the latter. The marshal's sureties in the first bond, became thereby bound for his official conduct, until his office should be determined by removal or otherwise, or until he should give a new bond.

There is, indeed, an error in M'Calley's case, but it is an error against him. The statute entitled him to damages at the rate of fifteen per cent. per ann. on the amount collected by the marshal for him, and not paid over. 1 Rev. Code, ch. 134, § 48, p. 542, 3. The judgment gives him damages only at the rate of six per cent. Of this he has not complained, and the appellants cannot. This judgment is to be affirmed.

285 *There is error in Sehon's case, prejudicial to the appellants. The appellee's clerk's tickets were delivered to the marshal for collection, after the 1st June 1821, and the officer was not bound to account for them on the 1st November following. Upon a just construction of the fee law, those tickets are to be considered as delivered before the 1st June 1822, and the officer accountable for them on the 1st November 1822. The judgment awards damages to be computed from the 1st November 1821. It ought to have allowed them only from November 1822. This judgment is to be reversed for this cause, and corrected in this respect.

Peter v. Butler.

May, 1829.

(Absent BROOKE, P., and CARR, J.)*

Foreign Attachments—Claim on Contract Made Out of State.—A claim arising on contract of bailment made out of Virginia, against a non-resident of Virginia, is a claim for debt, for which a foreign attachment in chancery lies.

Butler, a farmer of Jefferson county, Virginia, had deposited with Peter, a merchant of Georgetown in the district of Columbia, in a warehouse kept there by him for the storage of flour, a parcel of flour, to be kept on storage, and re-delivered on demand: but before the flour was demanded, Peter's warehouse, with whatever flour was in it at the time, was accidentally consumed by fire. And a dispute arose between the

parties, which should bear the loss? whether Peter had fairly performed the contract of bailment on his part? and whether or no he was bound, under the peculiar circumstances of the case, to account to Butler for the value of the flour, 286 which he had deposited with "him on storage? Hereupon, Butler, finding persons in Virginia indebted to Peter, proceeded by way of foreign attachment in chancery (1 Rev. Code, ch. 123, p. 474,) exhibiting his bill, in the superiour court of chancery of Winchester, against Peter, as an absent debtor, and against his debtors in Virginia as garnishees, praying a decree for the value of the flour, against Peter, and the attachment and application of the moneys due him in Virginia, to satisfy the claim. Peter, besides making strenuous defence upon the merits, objected to the jurisdiction of the court of chancery. The chancellor sustained the jurisdiction; and, upon the merits, decreed Butler the amount of his claim. And Peter appealed to this court.

The cause was argued here by Leigh for the appellant, and by Wickham and Standard for the appellee.

The facts of the case were much controverted, and several interesting questions of law were discussed, both in the court of chancery, and here: but, in the view of this court, the cause turned wholly on the questions of fact. These the court decided against the appellant, and affirmed the decree.

The only point of law involved in the decision, was the question of jurisdiction. This court concurred with the chancellor, that a claim, arising on a contract of bailment made out of Virginia, against a non-resident of Virginia, is such a claim for debt, for which the foreign attachment in chancery is a proper remedy.

287 *Vaughan v. Doe on Demise of Green.

June, 1829.

Wills—Not Duly Executed as to Real Estate—Effect after Seven Years.—Will, disposing of real and personal estate, but not duly executed as to the real, was admitted to probat by county court, in general terms, in 1785, and never contested: HELD, this was full probat: the heir could only have contested the will, by bill in chancery, within seven years: and he, instead of so contesting it having taken as devisee under it, it must be now regarded as a complete will of lands.

Bills of Exception.—Defendant in ejectment, relies on 20 years adverse possession, as a bar: verdict against him, which he moves court to set aside, as contrary to evidence: court overrules the motion: then, he moves court to certify the facts that were proved, which went to establish his 20 years adverse possession: this the court refuses to do. HELD, the court was right in so refusing. Quære, Whether, if the judge, in such case, refuse to certify a proper state of the facts proved, the party may take an exception for that cause, and appeal from the judgment? or ought to tender a fair and full state of the facts proved, and upon the judge refusing to certify it, take evidence of its fairness, and then ask the appellate court for process to compel the judge to sign and seal it?

***Wills—Probate—Conclusiveness.**—On this question the principal case is cited in *foot-note* to Parker v. Brown, 6 Gratt. 554; Robinsons v. Allen, 11 Gratt. 787; Ballow v. Hudson, 13 Gratt. 678 (see *foot-note*). See monographic note on "Wills."

***Bills of Exception.**—The principal case is cited in Jackson v. Henderson, 3 Leigh 216; Page v. Clifton, 30 Gratt. 423; Henry v. Davis, 18 W. Va. 248. See monographic note on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

*CARR, J., did not sit, because he had decided the cause in the court of chancery.

***Attachment—Unliquidated Damages.**—For the proposition that an attachment will lie for unliquidated damages, the principal case is cited in Dunlop v. Keith, 1 Leigh 432; Zerera v. McDonald, 80 Fed. Cas. 981. The principal case is also cited in Bank of U. S. v. Merchants' Bank of Baltimore, 1 Rob. 586. See monographic note on "Attachments" appended to Lancaster v. Wilson, 27 Gratt. 624.

Ejectment for a small parcel of land, brought by Green against Vaughan, in the circuit court of Halifax. Vaughan filed two bills of exceptions to opinions of the court given at the trial. There was a verdict for Green. Vaughan moved for a new trial: the court overruled the motion, and he excepted to this opinion also. Judgment was then given upon the verdict; and Vaughan appealed to this court.

1. The first bill of exceptions stated, that Green, who claimed title under William Boyd, in order to shew that he (Green) and those he claimed under, had been in possession of the land in controversy, since the grant thereof to col. Byrd, the patentee, offered in evidence, 1. A paper purporting to be a will of William Boyd, wherein all his lands as well as his personal estate, were given to his wife and children: this paper was dated January 2d 1785, and though it appeared not to have been duly executed as a will of lands, the county court of Halifax, at September term 1785, stating that it was exhibited in court as the will of Boyd, and proved by the oaths of two witnesses, admitted it to probat in general terms, recorded it, and granted administration with the will annexed to the testator's widow. *2. An instrument, indorsed on the original will, signed and sealed by Francis Boyd, eldest son and heir of the testator, dated January 5th 1785, whereby reciting that his father had died before he could complete his will, he assented to and confirmed that incomplete will, and relinquished all right and claim to the lands left by his father, except to a share thereof under the will: he acknowledged this deed in the county court, at the same time the will was proved, and it also was recorded. 3. A report of commissioners, appointed by the county court of Halifax, to divide the lands of the testator William Boyd among his children, returned to the court, and recorded September term 1789; whereby one share of land was allotted, in the partition, to the testator's son Francis Boyd, and another share to his son William Patrick; in one or the other of which (it appeared) the land in controversy was included. 4. A deed from William Patrick Boyd to his brother Francis, dated October 16th 1792, and duly recorded; whereby all the land allotted to William Patrick, in the partition of his father's estate, was conveyed to Francis. 5. The will of Francis Boyd, dated October 24th 1802, and duly proved January 24th 1803; whereby he devised all his lands to his wife Clarissa for life, remainder to his children. And 6. A deed from Francis Boyd's devisees to Green, the lessor of the plaintiff, dated September 26th 1810, and duly recorded; whereby they conveyed to Green a tract of land devised to them by Francis Boyd, of which (it appeared) the land in dispute was claimed as parcel. Whereupon, Vaughan's counsel objected to the two papers first above mentioned, (that purporting to be the will of William Boyd, and that indorsed thereon, purporting to be the deed of his heir Francis Boyd) going in evidence to the jury: but the court allowed these papers to go in evidence to the jury, connected with the other evidence in the cause, for

the purpose of proving the possession of Green and those under whom he claimed.

Vaughan excepted.

289 *The second exception stated, that Vaughan, having introduced witnesses for the purpose of proving, that he had been in possession of the land in dispute, from the latter part of the year 1801, till the institution of this suit, moved the court to instruct the jury, that Green could not succeed in this action, unless he proved that he, or those he claimed under, had been in actual possession thereof within twenty years next before the commencement of the action. This instruction the court refused to give; but it instructed the jury, that, if it should find that Vaughan had held adverse possession for twenty years next before the commencement of the suit, such possession would be a bar to this action. Vaughan excepted.

The third exception was in the following words: "Be it remembered, that after the jury had rendered a verdict in this cause, the defendant's (Vaughan's) counsel moved the court for a new trial, because the verdict was contrary to evidence, the defendant having relied that there was an adverse possession in him and those under whom he claimed, for more than twenty years before the institution of this suit: and the court having overruled the motion for a new trial, the defendant's counsel requested the court to certify the facts which were proved, which went to establish the defendant's adverse possession for twenty years before the institution of this suit: but the court refused to certify the said facts, as requested by the defendant's counsel; and stated that such facts were insulated, and therefore it refused to certify them. And to such opinion of the court, in overruling this motion for a new trial, and in refusing to certify the said facts, the defendant's counsel excepted &c."

Johnson, for the appellant, said, he could not see how the will of William Boyd and the deed of his heir at law assenting thereto, mentioned in the first exception, and objected to as inadmissible evidence, could, both or either, be at all relevant to the point to which it was adduced, namely,

290 the possession of the Boyds (under whom Green claimed) at *the dates of those papers. They only shewed, that W. Boyd, and his family after his death, claimed a right to the land; they did not, they could not, shew possession according to the right claimed. Evidence of a claim was not proper evidence of possession. The will of W. Boyd was not well executed as a will of lands; and though the probat of it in the county court be expressed in general terms, yet the probat ought to be referred to the personal subject, as to which it was a good testament. This paper then proved nothing. The deed of the heir at law, indorsed on the will, was certainly not proper evidence: there was no proof of the execution of it; for, as it was not such a deed as the county court had jurisdiction to receive proof of, the record of the acknowledgment and registry of it there, was not proof of execution. Illegal or improper evidence, however unimportant, ought never to be left to the jury:

per Pendleton, P., in *Lee v. Tapscott*, 2 Wash. 281, 2; *Brown v. May*, 1 Munf. 291. Neither ought evidence wholly irrelevant to be admitted, for it can only tend to confuse the jury. See *Turner v. Fendall*, 1 Cranch, 132.

Upon the second exception, he contended that the instruction proposed by Vaughan, ought to have been given to the jury. Vaughan having proved continual possession in himself, and that unqualified, for twenty years next before the institution of the suit, it behoved Green to prove an actual entry, in order to sustain this action. This was the true meaning of the proposition which Vaughan contended for; and, thus understood, the proposition was correct.

The court erred, in refusing to certify the facts proved touching the point, on which Vaughan insisted that the verdict was contrary to evidence. He relied on twenty years adverse possession in himself, as a bar to the ejectment: if he proved such possession, he was entitled to a verdict: and, therefore, though the facts relating to that point, might have been unconnected with other facts in proof, or (in the language of the court) insulated, yet the party had a right to require that the facts proved touching the possession, should

291 *be stated and certified by the court, as those were the facts, upon which the motion for a new trial was to be determined.

Leigh, for the appellee, contended, that the will of W. Boyd professing to devise the land in 1785, whether the devise were valid in law or not, and the deed of his heir at law relinquishing his right to the land by descent, and agreeing to take a share of it by devise, were acts of ownership exercised over it; and, as no possession inconsistent with the right asserted, was pretended to have existed at the time, and as, in 1789, the land was actually divided among the testator's devisees, so that it was then certainly in possession of his family, the will and the deed of the heir, taken in connexion with the subsequent partition, was evidence, circumstantial if not direct, that W. Boyd at the date of his will, and his family after his death, held the possession. The will was admitted to probat, not only as a will of personality, but generally as the testator's will; and whether the judgment of the court of probat, was right or wrong, it was too late to correct or even to question it. The deed of the heir, assenting to and confirming the devises contained in the will, was apparently a piece of evidence of little importance; but it appears to have been the original deed that was offered in evidence, not an office copy; it was an ancient deed, in conformity with which, as confirming the previous questionable devise of the ancestor, the land was thenceforth held by, and afterwards divided among, the devisees; and such an ancient deed proved itself. *Phil. Ev. (N. York ed. 1820) p. 404.* Besides, in *Lee v. Tapscott*, 2 Wash. 276, an office copy of an ancient patent, recorded in the county court, which never had jurisdiction to record patents, was held to be admissible evidence.

As to the second exception, he said, that the instruction which the court was asked

to give the jury, was, that Vaughan having adduced evidence for the purpose of proving possession in himself for twenty years next before the ejectment was brought, it was necessary to sustain the action, 292 *that Green should prove that he, or those he claimed under, had had actual possession within the twenty years: that is, as the proposition was propounded to the court, that the introduction of evidence for the purpose of proving his possession, whether the evidence should be satisfactory proof of the fact to the jury or not, and whether if it proved his possession, that possession were an adverse one or not, was enough to put Green to the proof of actual possession in himself or actual entry within the twenty years. And that the court so understood the proposition, and therefore refused to give sanction to it, was manifest from the instruction which it did give: that if Vaughan had held adverse possession for twenty years next before the ejectment was brought, that would be a bar to the action. And this instruction was, undeniable, the law upon the point.

The third exception, he said, might have been inaccurately penned; yet this court could only look to the record for the state of the case. According to the record, Vaughan asked the court to state and certify "the facts which were proved, which went to establish his adverse possession for twenty years," not, all the facts in proof, in relation to that point. Well might the court say, that the facts it was required to certify, were insulated, and refuse to spread a partial state of the case on the record.

A question was made, upon the third exception, and discussed at the bar, but was not noticed in the opinion of the court. Whether, if a motion for a new trial, on the ground of the verdict being contrary to evidence, be overruled by the court, and the court then refuse to state and certify the facts proved at the trial, the party may take an exception to such refusal of the court to state and certify the facts proved, and complained of that as error, in the appellate court? Or, whether, in such case, it be not the proper and the only course for the party aggrieved, to have a correct state of the facts proved at the trial, set forth in a bill of exceptions, and require the judge to put his seal thereto, and if the judge refuse, then to take affidavits that his 293 state of the facts *is correct, and apply to the appellate court for process to compel the judge to sign and seal his bill of exceptions?

CARR, J. The proper court of probat, in 1785, admitted the paper purporting to be the will of William Boyd, to full probat, had it recorded, and granted administration under it. There has never been any bill filed, or attempt made in any other form, to impeach it. And, in 1823, thirty-eight years after the probat, it is objected, that this will shall not be introduced in evidence, in a contest about the lands held under it. I do not think this objection can be sustained on any ground. In *Bagwell v. Elliott*, 2 Rand. 198, *West v. West*, 3 Rand. 373, and *Nalle v. Fenwick*, 4 Rand. 585, this court decided, that a will admitted

to probat by the proper court, could only be contested by bill; and that, no party appearing within seven years to contest the will, "the probat shall be forever binding." The circuit court, therefore, committed no error in suffering this will to go to the jury. Nor can I see what possible effect the instrument indorsed on the will could have: it could neither add to nor take from the will, being merely the assent of the heir.

The second bill of exceptions states, that the defendant introduced witnesses for the purpose of proving, that he had been in possession of the land in controversy, more than twenty years; and then moved the court to instruct the jury, that the plaintiff could not support ejectment, unless he, or those under whom he claimed, had been in actual possession of the land within twenty years. The court refused, but instructed the jury, that if it should be of opinion, that the defendant had had adverse possession of the land, for twenty years before the institution of the suit, such possession would bar the plaintiff's right to recover in this action. Ejectment is an action of trespass. When first this remedy was applied to the trial of disputed titles, the term was created, by the party claiming title making an actual entry upon the disputed premises, accompanied by another, to whom, while on the lands, he sealed and delivered a lease for years. It

294 *is from the necessity of this entry, that the remedy by ejectment is confined to cases, in which the claimant has a right to the possession: where only a right of property, or a right of action, remained to him, the entry would be illegal, and of course not sufficient to enable the party making it, to convey a title to his lessee. And, as the principles of the action remain the same, though the proceedings be changed, the right to make an entry is still requisite, though no actual entry be now necessary. Whatever takes away this right of entry, and turns it to a right of action, deprives the claimant, of the remedy by ejectment, though the legal title may still remain in him. Our statute of limitations (following 21 Jac. 1, c. 16, § 1,) enacts, that "no person, who hath any right or title of entry into any lands &c. shall make any entry but within twenty years after such right or title accrued;" saving to persons under the disabilities enumerated in the proviso, ten years after such disabilities removed. The possession of the defendant gives him a right against every man who cannot establish a good title: the plaintiff, therefore, must recover on his own strength. The defendant may meet his claim, either by shewing title in himself and those under whom he claims, or he may rest intirely on his possession: when he does this last, he must shew in himself and those under whom he claims, a possession of twenty years adverse to the claim of the plaintiff. When he relies on possession, the idea of right is excluded. 9 Johns. Rep. 180. Nothing less, therefore, than the twenty years required by the statute, will do; nor even this, if the plaintiff can bring himself within any of the savings. The circuit court, then, was right in refusing to instruct the jury, that the plaintiff must shew

actual possession within twenty years; and the instruction given would have been intirely correct, if after telling the jury, that twenty years adverse possession, if proved by the defendant in himself and those under whom he claimed, would bar the plaintiff's action, the court had added, unless the plaintiff could bring himself within some saving of the statute. This

295 omission however *is of no moment, as the plaintiff against whom it was calculated to operate, was satisfied with it.

Then, as to the third exception. In the case of Bennett v. Hardaway, 6 Munf. 125, there was a verdict for the plaintiff on the general issue: a motion for a new trial was made, and overruled: the defendant excepted to the opinion of the court, and prayed that the evidence might be certified of record, and that being done, appealed. This court, upon reasons given at large, shewing the inconvenience of the practice, was of opinion, that the bill of exceptions, because it brought up the whole evidence, was not properly taken, and therefore furnished no ground to reverse the judgment: it therefore affirmed it. But, taking up a point not then before it, the court proceeded thus: "Whether a party can, overruling a motion for a new trial, on the alleged ground of the verdict being contrary to evidence, require the judge to state in a bill of exceptions, the facts as they appeared in evidence to him, and carry up the case to the appellate court thereupon, is a different question. We are inclined to think, it has been affirmatively settled, by the admissions of this court, and the practice of the country." After several further remarks, tending to shew the advantages of this mode of proceeding over the other, the court concluded thus: "For this reason, and because we see none of the evils resulting, which exist in the case before us, we should be disposed to entertain a bill of exceptions of the description last mentioned." I do not consider this case as settling, authoritatively, the question, whether an appellate court can reverse the decision of an inferior tribunal, refusing a new trial moved for on the ground of a verdict being contrary to evidence; nor have I met with any case in our books, where the point has come directly before the court, and been discussed and examined: yet it seems to be considered as settled, and (my brethren think) correctly settled by the above case, and others that have since passed sub silentio. If this were still an open point, I confess I should think, with the su-

296 preme court of *the U. States,* that an appellate court ought not to review the decision of the court who heard the evidence. It seems to me impossible, that any certificate, either of the whole evidence, or of the facts which the court may certify as proved, can give to the appellate court such a view of the real ground, as to enable it to pronounce upon the judgment of the court below: it cannot see or hear the witnesses: and when the jury has found the

*That court has repeatedly so decided, and that in cases from Alexandria, where the law of Virginia is the law of the land. Henderson v. Moore. 5 Cranch, 11; Marine I. C. v. Young. Id. 187; Same v. Hodson, 6 Cranch, 206.—Note in Original Edition.

verdict, and the court which presided agrees with it, I should think it safest for the ends of justice, and best for the parties, that there should be an end to the matter. This, however, is my opinion simply: the point is considered as settled differently.

But still, I think, the court, in the case before us, committed no error in refusing the certificate asked for. The counsel (it will be remarked) did not ask for a certificate of all the facts that were proved, touching the adverse possession, but of such facts only as went to establish his adverse possession. If the court had complied with this request, we should have been presented with the evidence on one side only, all the countervailing evidence, being shut out. The very reason which the court gives, for refusing to certify as requested, shews that it so understood it; such evidence (it said) would be insulated. The court was clearly right in refusing to give this one-sided certificate.

I think the judgment must be affirmed; with less hesitation, indeed, as this is an action in which a judgment does not preclude another trial of the right.

The other judges concurred; and the judgment was affirmed.

297 *Crews v. Pendleton and Mountcastle.

June, 1829.

[19 Am. Dec. 750.]

Mortgages—Foreclosure*—Case at Bar.—Mortgage of land, slaves and stock: chancellor, in May 1822, decrees foreclosure, and directs his marshal, unless the debt be paid within six months, to sell the subject to satisfy the debt: mortgagor is allowed to retain possession, and sows crop in spring of 1823: marshal sells the subject in June 1823, and mortgagee purchases it, and completes crop: afterwards, and before marshal's sale reported and confirmed, creditors of mortgagor levy *fi. fa.* on crop of 1823, then gathered. **Held.**

1. **Same—Same—Growing Crops.**—Vendee at marshal's sale entitled to the then growing crop.
2. **Same—Same—Emblements.**—Tho' mortgagor in possession be tenant at will to then growing crop, yet doctrine of emblements does not apply to his case.
3. **Same—Same—Protection of Vendee.**—Chancellor ought, in such case, to protect vendee's property in the crop, by injoining mortgagor's creditors from proceeding under their execution.

William Long, by deed dated September 18, 1819, and duly recorded in the county court of Amherst, mortgaged to Thomas

***Judicial Sales—When Absolute.**—In *Cocke v. Gilpin*, 1 Rob. 39, and *note*, it is said a purchaser at a judicial sale acquires no right until a confirmation of the sale by the court, and until the order confirming the report, he is only inchoately and not absolutely a purchaser having till then no fixed interest in the subject. That such is the English doctrine is well settled. The same doctrine has been recognized by this court in several cases, *Crews v. Pendleton*, 1 Leigh 297; *Heywood v. Covington*, 4 Leigh 373; *Taylor v. Cooper*, 10 Leigh 317, from the first of which it will be seen that before the confirmation of the report and conveyance of the title, the purchaser must resort to that tribunal in which the proceedings were had, for the adjustment and enforcement of his claim. For this last proposition the principal case is cited in the last named case and *Terry v. Coles*, 80 Va. 708. See also, citing the principal case on the first proposition laid down, *foot-note* to *Hudgins v. Marchant*, 28 Gratt. 177; *Kable v. Mitchell*, 9 W. Va. 515; *Childs v. Hurd*, 25 W. Va. 538. See monographic *note* on "Judicial Sales" appended to *Walker v. Page*, 21 Gratt. 638.

+Sale of Land—Growing Crops.—For the proposition that, if land is sold without any reserve, all the crops, not severed, will pass to the purchaser, the principal case is cited and approved in *Kerr v. Hill*, 27 W. Va. 606, 614. See monographic *note* on "Mortgages" appended to *Forkner v. Stuart*, 6 Gratt. 197.

Crews, and William, Betsey and Nancy Brydie, two tracts of land in Amherst, about forty slaves, sundry household furniture, and stocks of horses, cattle, sheep and hogs, to secure payment of a debt of 8,320 dollars due by him to Crews, and a debt of 10,081 dollars which he owed to the Brydies. The deed appointed the 20th day of the same month for the payment of the first debt, and the 25th for the payment of the last; and provided, that the mortgagor should hold and enjoy the subject till he should make default of payment; and that, from and after such default, the mortgagees might "enter upon, have, hold, possess and enjoy," the whole subject real and personal, "and receive and take the rents, issues and profits thereof, without hindrance &c. until the debts should be fully paid off and discharged."

Shortly after the execution of the mortgage, several creditors of the mortgagor (the appellee Pendleton was one of them) sued out writs of *fieri facias* against him, and caused them to be levied on some of the mortgaged slaves; and the mortgagees, in October 1819, exhibited their bill against the mortgagor, and against the creditors whose executions had been so levied, setting forth their rights under the mortgage,

298 *praying an injunction to stay further proceedings upon the executions, a foreclosure of the mortgagor's equity of redemption, and a sale of the mortgaged subject to satisfy the debts thereby secured to the mortgagees. The injunction was awarded. Some of the defendants put in answers, impeaching the mortgage as fraudulent; others, and among them, Long, the mortgagor, made default. And on the hearing, May 18th 1822, the chancellor decreed that, unless Long should pay the mortgagees the debts due to them, respectively, and the costs of the suit, within six months from the date of the decree, his equity of redemption in the mortgaged subject, should be foreclosed, and that the marshal of the court should sell the whole of it, for cash, and after defraying expenses, pay the mortgagees the debts and costs due to them, and pay the surplus if any to the mortgagor; and make report of his proceedings in order to a final decree.

Under this decree, the marshal sold all the mortgaged subject in June 1823, when there was a crop of wheat, oats, indian corn, and tobacco growing on the land, which had been sown and planted by Long, who had been allowed to retain the possession of the land, and the slaves and stock upon it, till the day of sale. The whole subject was purchased at the sale, by the mortgagee Crews.

Afterwards, and before the marshal's sales had been reported, and confirmed by the court, Pendleton and Mountcastle, in the autumn of 1823, sued out a writ of *fieri facias* against Long, the mortgagor, and caused it to be levied on the tobacco hanging unstript in the tobacco houses, a parcel of indian corn, and of fodder and oats in the stacks, being part of the crop of 1823, then gathered. This proceeding gave occasion to the present controversy.

For Crews immediately exhibited his bill against Pendleton and Mountcastle, setting

forth all the proceedings in the other suit; that he had purchased the land at the sale, with the growing crops upon it; that the proceeds of the marshal's sales had fallen far short of the amount of the debt
 299 *secured by the mortgage; that he had with his own means finished and gathered the crops, and that they were his property, though he intended to apply the net proceeds thereof towards the satisfaction of the balance of the mortgaged debts: and praying an injunction to restrain the sheriff from selling, under Pendleton and Mountcastle's execution, the crops on which he had levied it.

The injunction was awarded the 28th October 1823.

On the 30th, Pendleton, on behalf of Pendleton and Mountcastle, filed an answer, in which he denied, that Crews purchased the growing crops at the marshal's sale in June 1823, and insisted that they were properly taken to satisfy their execution: and he alleged, that the land was sold by the acre; that Long had always been permitted to hold the whole subject, both before the marshal's sale and since, to have complete control of the crops, and to sell and appropriate them to his own use; that there was a fraudulent combination between Long and Crews to defraud Long's other creditors; and that the debt due to themselves was contracted by Long for supplies of cloathing &c. for the mortgaged slaves, in the year 1819. Of these allegations, no proofs were adduced.

On the 31st, the chancellor dissolved the injunction. And from this order, Crews appealed to this court.

Johnson, for the appellant. The chancellor's order dissolving the injunction in this case, could not, possibly, have been founded on the imputation contained in Pendleton's answer, of a fraudulent combination between Crews and Long, to defeat the just claims of Long's other creditors; since there is no proof in the record, nothing to justify even a suspicion, of any such fraud; and, since, moreover, the chancellor's own decree of foreclosure (in the first suit) in which all parties have acquiesced without complaint, plainly evinced, that, in his opinion, this charge of fraud was wholly groundless.

300 *Nor can it be supposed, that the chancellor dissolved the injunction, under the impression, that he had no jurisdiction to interfere, in that way, with the proceedings upon Pendleton and Mountcastle's execution. The principle of *Bowyer v. Creigh*, 3 Rand. 25, does not touch this case. There, an execution at the suit of one creditor, was levied on chattels that had been conveyed by the debtor to a trustee, in trust to secure a debt due to another creditor, who asked the chancellor to stay proceedings on the execution by injunction: a complete legal title was vested in the trustee; and there was nothing to prevent him, or the cestui que trust, who had a right to sue in his name, from vindicating his rights at law. But, in this case, the legal title of the property taken in execution, was not in Crews or in any trustee for him: he was in a court of equity, asserting his equitable lien upon the subject; the

chancellor had decreed a sale of it by his marshal, whose office was only ministerial, and Crews was only a purchaser at the sale, which yet remained to be confirmed. The title lay at the chancellor's own disposal. He was bound to protect the purchaser of a subject sold under his decree, in the possession and enjoyment of it.

The case, then, is to be decided on its merits. Was Crews entitled to the crops growing on the land at the date of his purchase from the marshal? The sale was in June. The crops then growing had been sown and planted by Long, but he did the work with the slaves &c. that belonged, as well as the land, to the mortgaged subject. The crops of wheat and oats were reaped and secured by Crews's own means: the indian corn was in an early stage, the tobacco in the earliest stage of its growth; and as to these, especially the tobacco, the labour and expense of tillage, must have been supplied, for the most part, by the purchaser. Crews must be regarded as a purchaser for cash: interest on so much of the debts due on the mortgage, as the proceeds of the sales discharged, ceased immediately. It is an established rule, that a purchaser under a decree in chancery, is entitled to

be let into possession from quarter
 301 *day preceding his purchase, he paying his money before the following one; that is, where the subject yields rents payable quarterly: if the subject yield profits settled monthly, the purchaser is entitled to the profits from the beginning of the month in which he purchased, paying the purchase money in the course of that month. Sugd. law of Vend. 41, 2; **Wren v. Kirton*, 8 Ves. 502; *Barker v. Harper*, Cooper's Ch. Ca. 32. There are cases, which may, at first view, seem at variance with this rule; but these turned on their own peculiar circumstances, and leave the rule undisturbed. *Twigg v. Fifield*, 13 Ves. 517; *Ex parte Minor*, 11 Ves. 559. Crews was a purchaser for cash, under a decree foreclosing a mortgage, wherein it is expressly provided, that, in default of payment of the debt, the mortgagees may enter on the real and take possession of the personal subject, and thenceforth take the rents, issues and profits of the whole, till their debts shall be discharged; and the profits he claims, are chiefly the fruits of labour furnished by himself.

The appellees cannot maintain their claim to take these crops in execution, on the ground that their debtor Long was entitled to them as emblements. A mortgagor in possession is, in some sort, a tenant at will or at sufferance of the mortgagee; but not a tenant at will entitled to emblements. Emblements are given by an equitable principle of the law, in order that the tenant may not be deprived of the fruits of his industry, by the sudden and unexpected determination of his tenancy: in this case, to give Crews the crops, is not to deprive Long of them; it is the application of them to the payment of his debts, and that in pursuance of his express agreement. But of whom was Long the tenant at will? of Crews? of the marshal? of the court? Crews

*Ingraham's edition, Philadelphia, 1820.

had resorted to the court, to assert his equitable rights; he thenceforth had no will to exercise; he was to take what the chancellor should mete to him. The marshal was a mere ministerial officer, who certainly had no power, 302 by *express grant or tacit permission to constitute Long his tenant upon any terms. The court, which had the whole subject at its disposal, gave Long a precise term of six months from the date of its decree of foreclosure: that term expired November 18th 1822. If Long continued to sow, without regard to the duration of the term, he was not entitled to reap.

R. C. Nicholas and Scott, for the appellees. If Crews acquired by his purchase at the marshal's sale, a right to the growing crop, upon which, after it was severed, Pendleton and Mountcastle's execution was levied, he might have maintained trover for the subject, whether his right was perfect or qualified, and recovered damages commensurate with his interest; or he might have forbidden the sale, in which case the sheriff would have proceeded to sell at his own peril, unless he took an indemnifying bond; and if P. and M. gave the bond, Crews might have recovered upon it full satisfaction for the injury. Crews, then, had an adequate remedy at law; and the authority of Bowyer v. Creigh is in point, and conclusive, that his case is not proper for relief in equity.

But, Crews acquired, by his purchase, no right to the crops growing at the time on the land. The rule of the english court of chancery, referred to by Mr. Johnson, can rarely be applicable, in this country, where lands are seldom let out upon leases, rendering a certain rent, payable at stated times; and can hardly, by any ingenuity, be adapted to the present case. This is a case that stands on its own peculiar circumstances. The decree of foreclosure gave Crews a right to require the sale of the mortgaged subject, immediately after the 18th November 1822; and Long was entitled to hold the subject, until the marshal should make sale of it under the decree. The mortgagees had perfect control over the sale: the marshal was bound to proceed when they required him to do so, and was not bound to proceed until so required.

303 Long, then, was in *fact left in the possession and enjoyment of the subject from November to June, by permission of the mortgagees: he had their consent to employ, in sowing and planting the crop, the slaves &c. which were mortgaged to them: he devoted to the tillage his own industry also, which was not mortgaged. The general creditors of Long have certainly a right to have the fruits of his industry applied to the satisfaction of their just demands; but these, with the acquiescence and by the permission of the mortgagees, have been inseparably mingled with the profits of the mortgaged subject. Crews is asking now, not only the profits of the mortgaged subject, but the profits of Long's industry. He does not ask, that his rights as purchaser of the subject, shall relate back to a quarter day from which rent began to accrue: he asks the court to attach those rights to the sub-

ject from the time when Long, with his own permission, sowed the crop.

Long was strictly entitled to the growing crops, as emblements. A mortgagor in possession, after default of payment, is a tenant at the will of the mortgagee; much more is a mortgagor in possession, after a decree of foreclosure, which the mortgagee may enforce when he pleases, tenant at will of the mortgagee. Why should not he, as well as any other tenant at will, be entitled to emblements? The only reason suggested, is, that the proceeds of the growing crops are to be applied to the payment of the debts secured by the mortgage. But Crews claims the crops as his own; and it is only as a favour to the mortgagor, or the other mortgagees, that he declares his intention to apply them to the reduction of the debts. He cannot exercise his bounty at the expense of Long's other creditors. He can only claim as a purchaser at the sale: he cannot fortify that claim, by uniting with it his original claim as a mortgagee. If any other person had been the purchaser, could he have availed himself of Crews's sudden determination of Long's tenancy at will, and claim the growing crops? If not, neither can Crews.

304 *If Long was entitled to the growing crops, the appellees' execution was rightly levied on them. In all events, they are entitled to have the profits accruing from those crops, apportioned between Long and Crews, and to have Long's portion of them, applied to the satisfaction of their claim against him.

CARR, J. The order of dissolution does not state the ground on which the chancellor proceeded: it must have been, either, 1. that he had no jurisdiction; or 2. that there was fraud; or 3. that the purchase of Crews gave him no right to the growing crops.

Upon the ground of fraud, I can hardly suppose the chancellor acted. His decree in the first suit (acquiesced in by all, and to which the appellee Pendleton is stated to have been a party) had pronounced the mortgage fair, decreed their debts to the mortgagees, and ordered a sale. If the allegations in the answer of the use by Long of the crops, of his continued possession, and of a fraudulent combination between him and Crews, had raised suspicions in the mind of the chancellor, of the fairness of the transactions subsequent to the decree; he surely would not have taken these allegations (not responsive to the bill) as proofs, but would have given time for the taking of evidence. He would not have dissolved the injunction the very day after it was granted.

As to the question of jurisdiction (though few are more jealous of equity on this point than I am) I think there can be no doubt about it. The chancellor had decreed a sale of the mortgaged property: under that sale, Crews had bought, and received possession from the officer of the court: the whole matter was still pending. If the marshal had made his report, the court had not acted upon it. The order of sale did not authorise the marshal to make a deed to the purchaser, but merely to sell for cash, pay the debts due the mortgagees, and report his proceedings to the court. Crews's purchase

305 did not give him the legal title till the *chancellor should confirm the sale, and a deed should be made to him. Till this was done, it was the bounden duty of the court, to protect the purchaser. In contemplation of law, the property was still in possession of the court. The application to the chancellor, then, was the natural and proper resort.

With respect to the growing crops, the question does not seem to me to involve the general doctrine of emblements, but to depend on the particular contract of the parties. There can be no doubt, that if one sell his land without any reserve, all the crops, not severed, will pass to the purchaser. They are a part of the subject, and enter into the price. The contract between the mortgagor and mortgagees is, in effect, this: "I convey you my land, slaves &c. as a security for the debts I owe you; I bind myself to pay you those debts by a given time, and if I fail, you may proceed, and get a decree for a sale of the subject; meantime, I remain in possession, use the slaves, and take the profits of the land; but, whenever you get a decree, you may immediately sell every thing." Under this agreement, if the mortgagor goes on and makes preparation for a crop, he does it with a full knowledge, that the land with the crop is subject to be sold, if the decree be obtained before he severs it. Nor does he lose any thing by this: for the crop on the land enhances the price; if by this increase, the debt be overpaid, he gets the overplus; if not, still the full value of his labour goes (as he had agreed it should go) to the payment of the debts secured by the mortgage.

In this case, such a result seems the more just, as the crop was prepared with the mortgaged slaves, and as (the sale being in June) a great portion of the labour in producing, gathering, and saving the crop, was performed by the purchaser.

The other judges concurred: and the decree was reversed, and the cause remanded, that the injunction might be reinstated.

306 *Harpers and Another v. Patton.

June, 1820.

Payment*—Case at Bar—H. indebted to P. on forthcoming bond, solicits him not to move for award of execution thereon, and to take flour for the debt; which P. refuses to do; but it is at last agreed, that P. shall send H.'s flour to his own commission merchant at Richmond, to be by him sold there, and the net proceeds to be applied to H.'s credit on the bond: P. in March, sends the flour to R., consigns it to his commission merchant, and directs him to sell it, and remit proceeds in May to himself at Baltimore, where he should then be: the merchant writes to P. that he has received and sold the flour, and will remit proceeds to him at B. according to his directions; but before time appointed for remittance, the merchant fails, and the money, without any fault of P. is wholly lost. HELD, that H. must bear the loss.

Forthcoming Bonds—Validity—*Fl. fa.* against three. A. T. & H. Forthcoming bond taken, the condi-

***Payment**—The principal case is distinguished in *Exchange Bk. v. Cookman*, 1 W. Va. 77, where it is said that it was decided upon its own circumstances and decided no principle of law. It is also cited in a dissenting opinion in the same case at page 80.

***Forthcoming Bonds—Validity**—The principal case is cited in *Central Land Co. v. Calhoun*, 16 W. Va. 308. See monographic note on "Statutory Bonds" appended to *Goolsby v. Strother*, 21 Gratt. 107.

tion whereof does not distinctly state to which of the three defendants the property taken in execution belonged, and omits to state that it was restored to the debtor: HELD, the bond is good. **Same—Judgment—Irregular in Form—Effect**—Judgment on forthcoming bond, instead of awarding execution thereon, is, that plaintiff recover the debt against defendants. HELD, irregular in form, yet well in substance.

Motion, in the county court of Rockbridge, at March term 1822, by Patton against Andrew, Thomas and Hugh Harper and James Anderson, for an award of execution on a forfeited forthcoming bond, executed by them, upon the levy of a fieri facias, which had been sued out by Patton against the three Harpers. The defence set up, was, that Andrew Harper had, since the forfeiture of the bond, paid the debt.

The forthcoming bond was dated the 28th December 1819. The condition was, that whereas Patton had sued out a fieri facias against Andrew and Thomas Harper, and Hugh Harper their appearance bail, upon a judgment of the county court of Rockbridge, amounting with interest &c. to £72. 14. 0. and directed to the sheriff of that county, and the sheriff, by virtue of the said writ, "had taken the following property, belonging to the said Andrew Harper &c. to satisfy the same, to wit" [here the property was specified] "and the said Andrew and Thomas Harper &c. being desirous of keeping the same in their possession until the day of sale thereof, had tendered James Anderson, as *security for the forthcoming and delivery of the property at the day and place of sale; now, if the above bound Andrew Harper, Thomas Harper, Hugh Harper and James Anderson, or either of them, should deliver the said property to the sheriff or either of his deputies at the court house of the county, on the 15th January next, then and there to be sold to satisfy the said Patton's execution, then the obligation to be void &c." 1

As to the question, whether the debt had been paid, the case was thus: The forthcoming bond was forfeited, and a notice was given to the three Harpers and Anderson their surety, that a motion would be made for an award of execution upon it, at March term 1820. On receiving that notice, Andrew Harper went to Patton, and requested him not to proceed upon the notice, and to take a parcel of flour, which Harper then had at Lindsey's mill in Rockbridge, in part satisfaction of the debt: but Patton refused to purchase the flour, or to decline proceeding with his motion. The request was urged again, and again rejected. But, at length, Patton was induced by Harper's urgent solicitations, to forbear his motion on the notice; and agreed at Harper's request, to send the flour to Richmond, with the understanding, that the net proceeds should be applied to his credit on the forthcoming bond, and that some indulgence should be given for the residue of the debt. Harper was told by Patton that he should send the flour to his commission merchant in Richmond, to which Harper made no objection. In pursuance of this arrangement, Patton stayed his then intended proceeding on the forthcoming bond, (by which the debt was perfectly secured, the Harpers

and their surety being all in good circumstances); and, shortly afterwards, he caused the flour to be boated to Richmond, and consigned it to his own commission merchant there, with directions to remit the proceeds to him at Baltimore (where he expected to be) about the 1st May 1820, by which time it was supposed the proceeds of the flour would be in the commission merchant's hands. The commission

308 merchant *wrote to Patton informing him that the flour had been received and sold, and that the proceeds should be remitted to him according to his directions. Soon after receiving this letter, Patton left Rockbridge for Baltimore, and on his way thither, learned that the commission merchant had failed. He immediately took measures to secure the money, but without success: it was intirely lost. Indeed, Patton lost by the failure of the commission merchant, a large sum, the proceeds of other flour he had consigned to him; and several other merchants of Lexington in Rockbridge (where Patton resides) sustained losses by this failure. At the time Patton consigned Harper's flour to the commission merchant, he was in good credit. An attempt had been made to settle this controversy, by arbitration; and Harper had distinctly admitted before the arbitrators, that Patton had exerted all the diligence in his power, to carry the arrangement with Harper into effect, in causing the flour to be sold, and endeavouring to obtain the proceeds, and that if the flour had been sunk in the river on its way from Rockbridge to Richmond, it would have sunk his (Harper's) flour; but he contended, that he knew nothing of the commission merchant, that he was not his agent, and that he ceased to be responsible, after the flour had reached its destination, and its value was ascertained. The net proceeds of the flour were not equal to the debt, but Harper had paid Patton the balance, before the motion on the forthcoming bond: so that the only question now was, whether or no, Harper was entitled to credit for the net proceeds of the flour? in other words, which of the parties ought to bear the loss resulting from the failure of the commission merchant who sold it?

Upon this state of facts the county court held, that Harper was entitled to the credit claimed for the flour, and so the debt due on the forthcoming bond had been paid in full; and therefore overruled Patton's motion for an award of execution upon it. Patton appealed to the circuit court, which reversed the judgment of the county

309 court, and entered *judgment for Patton against all the obligors in the bond: but this judgment, was, in its form not a mere award of execution on the forthcoming bond, but a judgment that Patton should recover of the obligors, the penalty of the bond, to be discharged by the debt mentioned in the condition, with interest and costs, subject to credit for the sums which had been paid in cash. And then they appealed to this court.

Johnson, for the appellants. The bond on which the motion was made, being a statutory bond, if its terms do not conform with the provisions of the statute, the sum-

mary remedy by motion, given by the statute, cannot be sustained. This bond does not pursue the provisions of the statute, 1 Rev. Code, ch. 134, § 16. The recital in the condition, leaves it uncertain, whose property was taken in execution; it states, that the execution was levied on property belonging to A. Harper &c. and then, that A. and T. Harper &c. were desirous of keeping possession till the day of sale. The &c. is no where explained. Nor does the condition state, that upon the execution of the bond, the property which had been taken in execution, was returned to the owner or owners: if it was not so returned, the bond never had any obligation, and it could not be forfeited.

The judgment of the circuit court, also, is irregular. It is an original judgment for the penalty of the bond, to be discharged by payment of the debt mentioned in the condition. But the bond itself had the force of a judgment, and the court should only have awarded execution upon it.

These objections are technical; and if they should prevail, they will not decide the point in controversy. I have little care for the fate of them. For,

I insist, that upon the plain justice of the case, the judgment of the circuit court was wrong, and that of the county court right. The net proceeds of the flour sent to Richmond, must be considered as so much paid by H. to P. in satisfaction of the debt

310 pro tanto. While it was in transitu *from Rockbridge to Richmond, while

it lay unsold in the hands of the commission merchant, while the proceeds of the sales remained uncollected by him, it may safely be admitted, the subject was Harper's property, and therefore, that the risk of loss was his also. But the moment the proceeds of sales were received by the commission merchant, the money belonged to Patton, simply, exclusively, absolutely. Harper had no right or power over it, in any way; it was not passed to his credit; it was irrecoverably gone from him. The absolute right to the money, the power to direct the disposition of it at pleasure, to give the commission merchant credit for it as long as he pleased, to direct the time when, the place to which, the manner how, it should be remitted to him; all, in fine, that constituted property in the subject, was in Patton. And, in fact, he exercised complete ownership over it: he consigned the flour to the commission merchant, without any intimation that Harper had any interest in it; he directed that it should be sold, and that the proceeds should be remitted to himself, at Baltimore, at a comparatively distant day, giving credit to the commission merchant in the meantime for the amount. It was, actually passed to his credit, and mixed up with his other funds in the merchant's hands. Harper had no right to demand the money, and no right of action to recover it of the commission merchant; nor any right to adopt any legal means to save or secure it, if he had apprehended a loss. Patton alone could, or can now, maintain an action for it. Should the agent retrieve his affairs, Patton may yet, and Harper never can, recover it of him. The money was,

therefore, from the moment it got into the hands of the commission merchant, and it is still, Patton's money, paid him by Harper; and, if it shall be ultimately lost (which cannot as yet be certain), the loss must fall on the owner.

Leigh, for the appellee, left to the court, without any remark, the objections taken to the form of the forthcoming 311 *bond, and to the regularity of the judgment of the circuit court.

Upon the merits, the judgment of the circuit court was right. The transaction was of a singular character, and the case must be decided on its own peculiar circumstances. Patton had prosecuted his claim against Harper, to the last stage; the debt was perfectly secure; the means of recovery sure and speedy: his debtor had no reason to ask, and he no motive to give, indulgence at any risk whatever to himself: and it is hardly to be imagined, that the one intended to incur any risk, or that the other wished or expected him to do so. The whole object of both parties, was, to give the debtor time to convert his flour into money, with which to pay the debt, and to ensure to the creditor the certain application of the proceeds to the debt. To accomplish these objects, Harper constituted Patton his agent, to send the flour to market, to have it sold, to receive the proceeds, and credit him for them; and as Patton was not expected to execute this agency in person, he proposed, and the other consented, that he should employ his own commission merchant as a sub-agent in the business. If Patton undertook this agency for Harper, in perfect good faith, and executed it with diligence, Harper, his principal, was bound to bear any loss that might happen, without his default. If he was honest in recommending the sub-agent, and faithful and industrious to save the proceeds of the property in the wreck of the sub-agent's affairs, Harper must bear the loss occasioned by the sub-agent's default; for he was Harper's own agent, employed by Patton, with his acquiescence and approbation. Both parties knew, that the proceeds of the flour must, in the nature of things, remain for some time, in the hands of the commission merchant: both, then, Harper as well as Patton, intended that he should be trusted with them. Admitting, then, as Harper most explicitly admitted, the integrity and diligence of Patton's conduct, how can he be held to bear this unlooked for loss? It is said, that after the

money was received by the commission merchant, Harper 312 *had no right to demand it of him, or to sue him for it; that there was no privity of contract between them; that Patton alone had, and he only even now has, a right to demand and sue for the money; therefore, it was and is his money; and therefore, this was a payment by Harper to Patton. But, if the flour was Harper's property, the proceeds of it were his property too; and if the commission merchant was the agent of Harper, employed by Patton his other agent, to dispose of his property, it is not perceived, why Harper might not, and may not, maintain an action for the proceeds of his flour, as so much money had and re-

ceived by the commission merchant to his use.

Johnson, in reply. Upon the doctrine of the law of agency, Patton made the proceeds of the flour his own, by giving the commission merchant credit for them, to answer his own purposes: for he authorised him to hold them from March till May, at which time he directed him to remit them to himself at Baltimore; meanwhile, they were put to his credit, and mixed with his other funds in the commission merchant's hands. Paley on Agency, p. 45; Wren v. Kirton, 11 Ves. 377.

CARR, J. I think the judgment of the county court was right. I admit, that no sale of the flour by Harper to Patton, was intended or effected by this transaction: Patton agreed to take Harper's flour, send it to Richmond, and have it turned into money: therefore, all fair risks on the flour were to be incurred by Harper, while it remained his. If the agreement had been, that it should be sold on a credit, (which does not seem to have been the fact), Harper, I think, would have hazarded the solvency of the purchaser: but so soon as the flour was turned into money, and that money in the hands of the commission merchant, it became, I think, Patton's money, and a payment by Harper of his debt. We are not told, that in sending the flour to the merchant, Patton gave him any in-

313 formation, that it was *Harper's flour: he treated it precisely as his own, sent it to his own commission merchant, to whom he was in the habit of sending his produce, and directed him to sell it, and remit the money to him at Baltimore. Suppose, after the money was in the merchant's hands, Harper had been in Richmond, and, having a most pressing call for money there, had applied to this merchant for it: would he have got it? would not the merchant have told him, "I know nothing of you in this business; I have received flour from Mr. Patton, have sold it according to his directions, and am bound, both by those same directions and my own letter to him, to remit the proceeds to him at Baltimore?" could Harper have enforced his demand? No. Between him and the commission merchant, there was no contract, no privity. If Harper had seen the merchant about to abscond full-handed, he could not have saved the debt, as one due to him, by attachment or any other process. This, then, was no longer his property, or his money. Whose then? Patton's. The merchant had passed it to his credit, along with all his other funds in his hands. Is it not clear, that this was the idea of the parties? Harper had parted with all control over the flour, with the understanding that it should go to Patton's agent, and the proceeds be a payment, pro tanto, of his debt: when? whenever received by Patton's agent. It appears, that Patton was in the habit of sending produce to this same agent to sell; this proves, that he thought his money safe in his hands. We may fairly conclude, then, that he had no objection to that risk in regard to this flour, which he was constantly incurring in all his other produce. Nor do we hear, that he made any difference in this consignment;

that he informed the merchant, that this was not his flour, nor at his risk, or desired him to enter it as Harper's flour, and to credit him by the proceeds: on the contrary Patton's orders were, "sell this flour, and remit the proceeds to me at Baltimore, about the 1st of May, when I expect to be there." Suppose Patton had gone to Richmond, immediately after the flour was sold;

314 *and, having occasion for the money, had made application to the merchant for it: ought he not to have paid it to him? Suppose Patton had got timely notice of his tottering condition, could he not have made any arrangement in regard to this money, precisely as he could for his other funds in the merchant's hands? These are the indicia of property: they all prove, that it was in Patton. I must conclude, then, that, both from the meaning of the parties, and the operation of the law, this was a payment to him. The money in the merchants hands was his; and his must be the loss from that merchant's failure.

GREEN, J. I think the judgment of the circuit court should be affirmed.

The substance of the transaction was, that Harper constituted Patton his agent, to dispose of his flour for him, in the usual course of Patton's business, and to apply its proceeds, when received, to Harper's credit with him: and an authority to dispose of it through the instrumentality of a sub-agent, was not only implied from the nature of the transaction, but more strongly, from the contemporary declaration made by Patton to Harper, that he should dispose of it through the agency of a commission merchant, with whom he usually dealt, and whose solvency and integrity he had no reason to doubt. And Harper admitted, that Patton had used all the diligence in his power, to carry the arrangement into effect, in causing the flour to be sold, and endeavouring to secure the proceeds. Suppose the arrangement had been, for Harper's accommodation, and in order to induce some other creditor to forbear, that Patton should send the flour to his commission merchant to be sold, and should account for the proceeds to such other creditor; could such other creditor have held him accountable for the proceeds, though never received by him, and that without any default in him? The circumstance, that Patton alone would maintain an action against the commission merchant

(if that were admitted) does not vary
315 the case: for, in that *case, he would be held accountable to Harper, only as a trustee for him.

There is no valid objection to the form of the forthcoming bond, or the judgment. It is sufficient, that the bond recites the levying of the execution, and upon what specific property: if that had been the property of a stranger, the bond would have been nevertheless good and binding. The irregularity in the terms of the judgment is only matter of form.

COALTER, J. I am of opinion, that the judgment of the circuit court must be affirmed. I cannot perceive how the circumstance, that the merchant entrusted to sell the flour, was the commission merchant who usually transacted Patton's business

in Richmond, can affect this case. It is said, that Patton confided his other business to him, and therefore all he wanted was to get the flour into his hands, as he would then be sure of the money, so soon as the flour was sold. No doubt, he thought it would be safe in his hands: if he had not thought so, if he entertained a suspicion of the agent, he ought to be held accountable for not making his suspicions known. The more confidence he had, the more innocent and honest he is. He acted with good faith. Both parties are equally innocent: and the question is, who shall bear the loss? The debtor, who has gained time from his creditor, to try and make his crop available to discharge his debt? or the creditor, who has granted this indulgence, and moreover rendered services, without compensation, in sending the flour to market?

The debt has not been actually paid to the creditor. There has been an effort to pay it; but the money has been lost, without the fault or neglect of either party. It seems to me, that the case must be decided, as it would be if Patton had had no particular commission merchant in Richmond, but the flour had been sent to one named by either party, and agreed on by both, to be the person to whom it was to be sent; or, as if Patton had been authorised
316 to *send it to any one he might select, and had made the selection with due caution and care.

The question is, whether Patton, by himself for his agent, ever received this money in discharge of this debt? Was the merchant his agent to collect this debt for him? to receive the money from Harper, or from the sale of his effects, for Patton, so that, so soon as the effects were sold, and the money received, the payment of the debt was complete, as much so as if it had been paid into Patton's own hands, and he had given a receipt therefor? It is admitted, that Patton was to be at no risk in the transmission of the flour. He had a right to have the proceeds remitted to him at Lexington, or at some other equally convenient place. His debtor was bound to seek and pay him his debt, he had an execution hanging over him, which would force a payment into his hands at home: therefore, it cannot be supposed, that he was to travel to Richmond, to collect it there, unless perfectly convenient for him to do so: or that he was to be at the risk of its remittance to him from thence. He received no premium for any risk, and was to be at none. This seems to be admitted on all hands: and yet it is insisted, that he must lose the debt.

Suppose the merchant had not failed, but had remitted the money in bank bills, and they had been lost. This could not be Patton's loss, unless the risk of remittance be thrown on him. Suppose the remittance had been in a bill of exchange, believed at the time to be good, but was dishonoured, and finally proved good for nothing: it seems to be admitted, that if such a bill had been taken in payment for the flour, the loss would have been Harper's. Should it be otherwise, if the money had been paid for the flour, and instantly laid out in a bill, for the purpose of remittance?

But why was Patton to have any thing to do with the flour? His aid was called in, no doubt, that he might be certain, that the money, when received, would be paid into his hands. Suppose this object had been effected in some other way: suppose, for

example, Harper had said to Patton, 317 "I will send this flour to such a merchant in Richmond; I will assign the bill of lading to you: I will moreover write to the merchant, that my property is under execution for your debt, and that the net proceeds of the flour, when received, are to be paid to you; that he shall consider this as an irrevocable order in your favour for those proceeds, and shall pay the same over to you or your order, as if you yourself had sent the flour to him." The flour is received and sold for cash, and the merchant fails. Surely, this would be no payment of the debt by Harper. I cannot well see how such a case would be materially variant from that before us.

It is admitted, that Patton has been guilty of no negligence; that he was to receive no benefit by the transaction, but on the contrary, submitted to delay, and encountered some trouble, for nothing; and this, at the pressing solicitation of his debtor.

But it is said the merchant was the agent of both parties, in different stages of the transaction: that, in receiving and selling the flour, and even in receiving the money for it, he was the agent of Harper, but that, from the moment he had accomplished the receipt of the money, he was the agent of Patton, and answerable to him alone for his conduct, since he knew nothing of Harper in the business, and could only be responsible to him, in a controversy to which Patton was a party: that the moment he sold, and the money was received, Harper's risk ceased; it was then Patton's money. How so? True, he has a right of action for it: but so he would have had, if the flour had been lost by the negligence of the merchant; or if he had, without authority, sold it on a credit, and the debt had been lost; in which cases, it is admitted, the loss must have been Harper's. The liability of the merchant to Patton then, cannot be the test of the question, who is to bear the loss. He would have been in like manner liable, if the contract between Harper and Patton had expressly stipulated, that, until the money was actually paid into Patton's hands, it should be at Harper's risk. Nor would these

318 have been "contradictory, unlawful, or unreasonable stipulations. It would only have been expressly stipulating for what appears to me to be the legal and necessary meaning and result of the contract that was made. The merchant (it seems to me) held Harper's money to be paid over to his creditor, who had also a lien on it in his hands, or rather an absolute right to enforce payment of it, but he was not less Harper's agent for the purpose of paying over, than he was his agent for receiving and selling; nor can he be otherwise considered, merely because he did not know Harper in the transaction. This also would equally have been the case, if there had been an express stipulation (unknown to him) between Harper and Patton, that

all was to be at Harper's risk, though transacted in Patton's name, until the money was paid over. He stood (as it seems to me) in the nature of an acceptor of Harper's draft, in favour of Patton, to pay the proceeds of the flour over to him as soon as they were received.

If Patton had drawn on the merchant for the proceeds of this flour, to be paid the moment it was sold and the proceeds received, (which would have been a method of drawing it out of his hands, with as little risk as possible to Harper,) and this order had been presented and accepted, on the day of sale, for the net proceeds, naming the sum, for which the flour was sold, and (the acceptor failing at the instant) the draft had been dishonoured: would this have been Patton's loss? or, suppose he had arrived in Richmond, an hour after the sale and receipt of the money, and had demanded it in vain. In either case, would it have been a payment by Harper of his debt? If it would, it must be because the money was to be at Patton's risk, whether in a course of remittance or otherwise, from the moment the merchant received it, it being then a complete payment to him, not simply a right in him to receive and enforce the payment of it, to be placed to Harper's credit, when received.

On the whole, I think that the merchant, though responsible to Patton, was, nevertheless, so far as it regards the 319 *question of risk, as much the agent of Harper, to pay over the money, as he was to receive and sell the flour; and that, until the proceeds were actually so paid over, unless some fault in Patton should occasion loss, the whole risk was on Harper.

CABELL, J. The question is, on whom the loss occasioned by the failure of the commission merchant, shall fall?

The arrangement between the parties certainly constituted a bailment. But the question, as to the loss, depends not so much on any principle peculiar to the law of bailments, as on the intention of the parties, as to the time when the net proceeds of the flour were to be applied to the credit of Harper on the forthcoming bond. If it was intended, that the money should be thus applied, at the moment it got into the hands of the commission merchant, then the receipt of the money by him, made it, ipso facto, Patton's money; and, consequently, the loss of it must fall on him. If, on the contrary, it was not intended by the parties, that the net proceeds of the flour should be applied to the credit of Harper until Patton himself had received them, or had applied them to his own use, or until by due diligence, he might have so received or applied them, then it is manifest, that the mere receipt of the money by the commission merchant, did not make it Patton's money; and, consequently, that as Patton has been guilty of no negligence, the loss must fall, not on him, but on Harper. Bearing these principles in mind, let us look at the situation of the parties, and the terms of the contract. Patton's debt was perfectly secure, and he had already resorted to legal measures to enforce payment of it; and that object would have been speedily

accomplished, if the law had been left to take its course. Overcome by Harper's repeated and urgent solicitations, he consented, most reluctantly, for Harper's accommodation, to suspend legal proceedings, and to send the flour to Richmond, to be sold by the instrumentality of a third person, with the understanding, that the net proceeds *should be applied to the credit of the forthcoming bond.

320 Did the parties intend, that Patton should take on himself the risk of the insolvency of the agent of sales? Did they intend that Patton should be debited with the net proceeds of the flour, although they might never come to his hands? In the situation in which the parties stood towards each other, it would have been most unreasonable in Harper to ask such a stipulation, and folly in Patton to have acceded to it. No such stipulation can be inferred from the case presented by the record. The contract undoubtedly was, that the proceeds of the flour should be applied to the debit of Patton, when they should be received by him. This view of the case is not changed by the circumstance, that the person selected to sell the flour was the commission merchant who transacted Patton's own business: he was selected, not because he was Patton's merchant, but because he was believed to be a safe hand. Nor is it material, that Patton might have sustained an action against the commission merchant: he might also have sustained an action against the common carrier, by whom the flour was sent to Richmond, if that carrier had violated his trust by selling the flour, and applying the proceeds to his own use; and yet, in that case, nobody would pretend, that the loss, if the carrier proved insolvent, would fall on Patton.

The objections taken to the bond, are not valid. The bond recites the levying of the execution, and the property on which it was levied; and even if that property had belonged to a stranger, it would not impair the obligation of the bond. And, from the nature of the transaction, the property which had been taken by the sheriff in execution, must have been restored to the owner, upon the execution of the bond for the forthcoming and delivery of it: if it had not been so restored, that would have been a substantive ground of defence; but nothing of the kind was pretended.

The irregularity in the terms of the judgment is merely formal.

Judgment of the circuit court affirmed.

321 *Griffith v. Thomson and Others.

June, 1829.

(Absent BROOKE, P., and CABELL, J.)

Wills—Executory Limitations—Case at Bar.—G. T. having three legitimate children and a natural son, by his will in 1803, makes provision for each, and then adds: In case all my children by my wife die without heirs, my natural son C. shall fall heir to my whole estate; and in case he also die without heirs, my estate shall be divided into six

parts, and 3-6ths shall go to my father's brothers that are alive, and the heirs of those that are dead receiving no more among them than my father's brothers would have received had they been living: 2-6ths to go to C. Leland, S. Leland, L. Leland, H. Gaskins, and T. Legg; and the other 6th to go to my wife, to be disposed of as she may think proper: but my wife is to have the use of the whole as long as she lives, if all her own children die without issue: Two of the testator's legitimate children, and his natural son, die without leaving issue: his legitimate daughter, E. G. T. survives all her paternal uncles, the three Lelands, H. G. and T. L. and the testator's wife: and then dies without leaving issue:

Same—Same.—HELD, as to the personal subject, that the executory bequest thereof, after the death of the natural son without heirs, was void in its creation; and that E. G. T. was entitled to the whole in absolute property.

George Thomson of Westmoreland, made his last will and testament in 1803, and shortly after died. At the time he made his will, he had two children by his wife, a son Thomas, and a daughter Elizabeth Griffith Thomson, and a natural son called Charles Thomson, alias Briarly; and his wife was pregnant of a child, who was born after the will was made and before the testator's death, and called George. All these children, and the testator's wife, survived him.

The testator by his will made divers devises and bequests of land and slaves to his son Thomas, to his daughter Elizabeth Griffith, to his natural son Charles, and to the child his wife was pregnant with, the expectation of which occasioned a great many alternative provisions in case it should prove a son or a daughter: but the lands and slaves were in every devise, given, in the first instance, to the devisee and his or her heirs forever; and then, he annexed to these devises, a string of limitations, all to the like effect, that in case either devisee should die without
322 heirs, the property *given to him or her, should pass to one of his other children, or should be divided among them in a manner prescribed. And then followed an ulterior limitation in these words: "It is my will and desire, that in case all my children by my wife, should die without heirs, that my son Charles Thomson alias Briarly, shall fall heir to the whole of my estate: and in case he should also die without heirs, it is my desire that my estate be divided into six parts, and that three-sixths go to my father's brothers that are alive, and the heirs of those who are dead, receiving no more among them than what my father's brothers would have received had they been living; two-sixths to go to Charles Leland, Sally Leland, Lucy Leland, Harry Gaskins and Thomas Legg; and the remaining one-sixth to go to my wife, to be disposed of as she may think proper—but my wife is to have the use of the whole as long as she lives, if all her own children die without heirs."

The testator's widow, his sons Thomas and George, and his natural son Charles, all died before his daughter Elizabeth Griffith Thomson; who also survived Charles, Sally, and Lucy Leland, Harry Gaskins, Thomas Legg, and all the brothers of her father's father. She died in 1824, and by will gave almost all her estate to Sally W. Griffith, the appellant, whom she also appointed her executrix.

A bill was exhibited, in the superiour

***Wills—Executory Limitations.**—On this question, the principal case is cited in *foot-note* to *Dunn v. Bray*, 1 Call 338; *foot-note* to *Higgenbotham v. Rucker*, 2 Call 313; *Deane v. Hansford*, 9 Leigh 257, 259, 260, and *note*; *Callava v. Pope*, 3 Leigh 106; *Nowlin v. Winfree*, 8 Gratt. 348; *Moore v. Brooks*, 12 Gratt. 150. See monographic *note* on "Wills."

court of chancery of Fredericksburg, by a surviving child of one of the brothers of the testator George Thomson's father, who died before the testator, and by the personal representatives of another child of the same brother; of the other brothers of the testator's father who survived him; of the testator's widow; of the three Lelands; of Gaskins and of Legg, against Sally W. Griffith, legatee and executrix of Elizabeth G. Thomson; setting forth the will of the testator George Thomson, as well as that of his daughter Elizabeth, and all of the facts, as above stated; claiming all the personal estate of the testator George Thomson, which had come to the defendant's hands as executrix of the daughter, 323 under *both wills; and praying an account of profits &c. The answer of Sally W. Griffith admitted all the facts alleged in the bill, but contested the plaintiffs' claim to the property. The chancellor held the executory devises well limited as to the personal property, and decreed for the plaintiffs according to the prayer of their bill. The defendant appealed to this court.

Leigh and Wickham, for the appellant. The case turns wholly on that clause of Mr. Thomson's will, which contains the last set of executory limitations: no other part of the will has any bearing on the point in controversy. The limitations (under which the appellees claim) of the "whole estate" to the testator's natural son, in case his legitimate children "should die without heirs," and of the "estate" over to others, in six portions, in case the natural son "should also die without heirs," are both void in their creation, as being limited on too remote contingencies, unless there be some expression used, or some circumstance indicated, in the will, which the court can lay hold of, to tie up the generality of the expression dying without heirs, and confine it to a failure of heirs within the period allowed to executory bequests.

The ulterior limitation, after the dying of the natural son without heirs, gives three-sixths of the estate to the testator's father's brothers that are alive, and the heirs of such as are dead (to take per stirpes); two-sixths to the three Lelands, Harry Gaskins and Thomas Legg, not to them and their heirs; and the other sixth to the testator's wife, to be disposed of as she may think proper. And it may perhaps be thought, at the first view, that the limitation over, being to the Lelands and others, by name, without any words of perpetuity, is within the principle, on which the executory bequest was held good in *Timberlake v. Graves*, 6 Munf. 174. But the authority of that case cannot govern the decision of this. In that case, specific property was given to the devisee over, after the failure of issue of the first taker, 324 *without words of perpetuity; and the court supported the executory bequest, on the ground, that it was made to the executory legatees themselves, and was intended as a personal benefit to them, since nothing was given to their heirs or representatives. But, in this case, the devise over is of the estate and of the whole estate; which is fully equivalent to a devise

to them and their heirs, and certainly carries the whole interest; as was determined, in a case of real estate, in *Goodrich v. Harding*, 3 Rand. 280. Much more ought it to be so determined in a case of personal estate. Besides, the principle on which *Timberlake v. Graves* was determined, though it has been followed by several cases in this court since, is very questionable at least, if not plainly wrong. It was never before affirmed: it was supported by no authority: it was contrary to many, very many, previous adjudications, and to the whole doctrine of executory limitations of the kind. In particular, it was considered and condemned by Mr. Fearne, in his commentary upon the case of *Keily v. Fowler*: he says, "as to any thing that might be inferred from the devise over to the sister's children being intended as a personal benefit to them, as much may in all cases be inferred from a devise over to any relation or other person; and therefore seems to be of no weight." *Butler's Fearne*, 483.

The provision, in this will, that the wife should have the use of the whole, as long as she should live, if all her own children should die without heirs, might have led to the construction on which the chancellor has founded his decree, if it had stood alone, and if the testator had only given the whole property to her for life, though, in the actual event of her death before her children, she could have taken nothing by it. But the devise to her for life, being connected with the devise of five-sixths to others and one-sixth to herself, in absolute ownership, the devise of the life estate to her in remainder, cannot alter or affect the construction of the previous devises. Her life estate is only a part of the fee or absolute property, and is given over to her 325 on the failure *of issue of the children: and, as her dying in the lifetime of her children, would not have rendered the devise over to the natural son, after failure of issue of the legitimate children, or the devise over to the others, in portions, after failure of heirs of the natural son, ineffectual as to the devisees in remainder, if those devises had been in themselves well limited; so neither can it have the effect of abridging the interests given to the testator's legitimate children in the first instance, and, failing issue of them, to his natural son.

But, if it be conceded, that the limitation of the estate, after the dying of the children without heirs, to the three Lelands, Gaskins and Legg, without any words of perpetuity, was intended as a personal benefit to them, and therefore, the dying of the children without heirs, on which the limitation depends, imports not an indefinite failure of their heirs, but a failure of heirs during the life of some one or more of those devisees in remainder; or, conceding that the limitation of a life estate to the wife, after the dying of her own children without heirs, shews that the contingency in the testator's mind, was a failure of heirs of the children living the wife: this would only prove, that the contingency of the failure of heirs of the children was restrained to a failure of their heirs within the compass of a life or lives in being, and

that, therefore, these executory devises were good in their creation; not, that they are effectual in the event that has actually happened. The executory devisees cannot resort to these circumstances, for the mere purpose of restraining the generality of the contingency within a reasonable compass, and, that purpose answered, discard all farther consideration of them: they are, surely, as influential in ascertaining the precise event in the testator's mind, upon which he intended to limit his estate over, as in ascertaining that the event intended was one which could only happen, if at all, during the lives of the devisees in remainder. They ascertain, that the testator intended to give his estate over to his natural son, only in the event of his legitimate children dying without heirs living his wife, and to the others, "only in the event of all his children dying without heirs during the lives of the three Lelands, Gaskins and Legg, or some of them. And, then, if these executory devises were good in their creation, they fail of effect, because the events on which they are limited have not happened. The testator's children have not died without heirs living his wife, or living the three Lelands, Gaskins and Legg, or any of them: his daughter Elizabeth survived them all.

Stanard, for the appellees. The case of *Timberlake v. Graves* was decided by this court (as it tells us) upon consideration of the authorities affecting the question; and the principle, there laid down, has been repeatedly recognized and followed in cases since decided. *Greshams v. Gresham*, 6 Munf. 187; *James v. M'Williams*, Id. 301; *Didlake v. Hooper*, Gilm. 194. It is as well settled as a series of adjudications of this court can settle any principle. Counsel have been guided by it, in advising parties concerning their rights under executory bequests of personal property: claims have been asserted or surrendered, acquiesced in or adjudged, in conformity with it. Nor was the principle any otherwise new, than the principle of every case was new, in which an executory devise has been held good, upon its own peculiar circumstances, varying from the circumstances of any former case of the kind. There is an infinite variety in the language of wills; and the courts have been always studious and astute to find, and have been continually finding, new circumstances to support executory limitations of personalty, and thus to give effect to testamentary intention; and have been, in this sense, continually asserting new principles; yet those principles, far from being ever after objected to, on the ground of their novelty, have been immediately, and indeed eagerly, received. The principle of *Timberlake v. Graves* is also reasonable in itself: for it only serves to extricate executory limitations from the influence of technical rules of construction, which almost universally lead to a result contrary to the known intent; and to enable the court to give effect to such limitations, when no wise repugnant to the policy of the law, according to the real sense of the words in the acceptance of the authors of them.

As to the diversity that has been sug-

gested, between the circumstances of *Timberlake v. Graves* and those of this case, namely, that there, specific chattels were limited over to persons in being, without any words of perpetuity, whereas, here the whole estate is limited over, which carries the whole interest as effectually as if words of perpetuity had been added: in the first place, it cannot be pretended, that the same diversity exists between this case and that of *Greshams v. Gresham*; in which the testator gave "the balance of his estate to his brother Isaac, and in case he should die without issue, to be equally divided between this uncle J. G.'s children," naming them; and the executory bequest to the uncle's children was held good. In the next place, in cases of limitations over, after a dying of the first taker without issue, the sole object is to ascertain, from the whole will, whether the contingency of the failure of issue, in the testator's mind, be an indefinite failure of issue, or a failure of issue within the period allowed to executory devises; and if it appear, that in making the executory limitation, the testator intends a personal benefit to individuals then living, it follows, that, in his apprehension, the contingency on which he designs them that benefit, is one that is to happen during their lives; that the dying of the first taker, in his contemplation, is a dying without leaving issue. And then, it can make no odds, what is the extent of the benefit, or quantity of estate, intended for the devisees in remainder.

When the testator, George Thomson, said, "my will is, that in case all my children by my wife should die without heirs, my son Charles Thomson alias Briary shall fall heir to my whole estate;" had he in contemplation, the failure of heirs of his legitimate children, at any distance of time, however remote? When he said, "and in case he (his natural son) should also die without heirs," his estate should go over, in portions, to the persons who and whose representatives are now claiming it; had he in his mind, the indefinite failure of heirs of the natural son? These are the questions. If he did not contemplate an indefinite failure of heirs of his children, in either limitation, he must be understood to have intended (for there is no middle ground) a failure of their heirs living at the death of them respectively; and then the executory devises are good and effectual.

He surely did not intend the indefinite failure of the heirs of his legitimate children, as the contingency on which the estate was to go over to his natural son: for he gives a life estate in the subject to his wife upon the same contingency; which he intended should take effect before the limitation to the natural son; thus plainly evincing, that the failure of issue he had in contemplation, was one that was to happen while his wife was living. He did not intend the indefinite failure of the heirs of his natural son, as the contingency on which the estate was to be divided into six parts, and to go over to the ulterior devisees, in portions: for he made this ulterior devise for the personal benefit of the Lelands, Gaskins and Legg, and therefore

contemplated a failure of issue of his children during the lives of those whom he wished to enjoy the estate, upon the principle of *Timberlake v. Graves*.

It being thus ascertained, that the events of his children dying without heirs, in the sense in which this testator used the phrase in these executory limitations, was not an indefinite failure of issue, and consequently was a failure of issue at the death of the previous takers, the executory bequests, limited upon those contingencies, are good and effectual; and, as possibilities of this kind are transmissible to representatives, it is wholly immaterial, that the persons, out of regard to whom the testator framed the executory devises, have died before the events happened, upon which he intended they should vest.

329 *CARR, J. This is another of that numerous class of cases, where the contest is between the alienee, heirs or devisees, of the first taker, and those who claim under a subsequent limitation, as executory devisees. In the cases of *Goodrich v. Harding*, 3 Rand. 280; *Bell v. Gillespie*, 5 Rand. 273; *Broaddus v. Turner*, Id. 308; *Ball v. Payne*, 6 Rand. 73, heretofore decided, I have given my opinion on this question generally, with the reasons and authorities on which it was founded. These, I shall not repeat, but will simply inquire, whether, and in what degree, the principles governing those cases, where land was devised, apply to the present, where the subject claimed is personal estate.

In the early ages of the law, there could be no limitation over, after an interest given in personal estate, the rule being, that a gift for an hour, as to it, was a gift forever: but this has long been changed; and it is laid down by Mr. Fearne, as settled by numerous decisions, that there may be as well an executory bequest of personal, as an executory devise of real estate. They are governed too, by the same general rules. Thus, in either case, the devise must be such, that in the very nature of the limitation it must vest within twenty-one years, after a life or lives in being; if more remote, it is void in its creation: and the question, whether the contingency be too remote, depends on the construction of the will at the time of making, and cannot be influenced by after events. The possibility, at the creation of an executory devise, that the event on which its existence depends, may exceed the prescribed limits, vitiates it from the very beginning. Hence, in all limitations over, after a failure of issue, the question arises, whether it be a definite or indefinite failure, which the testator intended. If a precise time is fixed and clearly defined, and that time be within the prescribed limits, the limitation over is a good executory devise: but if from the whole will it appear, that the testator meant to give it to the first taker and his descendants, and that the limitation over should take effect only when the issue of the first taker should become extinct, without reference

330 *to any particular event or time, then the devise is void, though the first taker should die without issue within

twelve months. Thus, a devise to A. and his heirs, and if he die without heir, or without heir of his body, or without issue, to B. and his heirs: the devise to B. is void, as being too remote. But a devise to A. and his heirs, and if he die without heir living at his death, or without heir living B. then to B. and his heirs, is a good limitation over to B.; because it must vest, if at all, within the time allowed. And, although the failure of issue be not tied up to the death of the first taker, by express words; yet if it can be clearly seen from the whole will, that such was the meaning of the testator, the devise will be good. Upon this question of intention, the courts seem to have taken some distinction between executory devises of real, and bequests of personal estate; being much more inclined in the latter, than in the former, to lay hold of any words in the will, to tie up the generality of the expression dying without issue, and confine it to dying without issue living at the death of the first taker. Mr. Fearne, in his essay on executory devises (Butler's edi. ch. 3), treats this subject with his usual learning and ability: and after citing and commenting upon all the cases touching the points, his conclusion seems to be, that the words dying without issue, when they stand alone, mean an indefinite failure of issue, and make the devise over, whether of realty or of personalty, too remote; but that the signification of these words, in bequest of personal estate may be confined to a dying without issue then living, by any clause or circumstance in the will, which can indicate or imply such intention. After all, then, it is a question of intention.

The testator, in this case, had two sons and a daughter by his wife. To these he gives real and personal estate, to them and their heirs, and if they die without heirs, he gives the property first to one of them, and then to the other, so as to shew, that by heirs he meant issue; making it to each an estate tail. It is most clear to me,

331 that in each of these *devises, he meant that the first taker should have an estate transmissible to his descendants, so long as any existed; and that, whenever the line of the first taker should fail, the property should go to the second taker, without reference to the time of such failure. I think thus, because this is the very nature of such estate as is given; an estate tail necessarily implying issue, in indefinite succession: and as it is given to the first taker, so long as he shall have descendants, we cannot suppose it was intended to limit the commencement to the estate of the next taker, to an earlier period, without words to that effect. Thus, it seems to me, that each of the legitimate children took an estate tail, which the statute enlarged into a fee. Then, as to the natural son, the testator gives him, two negro boys, two negro girls, and their future increase, to him and his heirs forever; and if he die without heirs, he gives the negroes among his legitimate children. I see nothing in the will tying up this bequest to a dying without issue living at the death. Then comes the clause under which the plaintiffs claim: "in case all my children

by my wife should die without heirs, it is my will, that my son Charles, shall fall heir to the whole of my estate." By these words, "if all my children by my wife should die without heirs," it seems to me, that (recollecting the manner, in which the testator uniformly uses the word 'heirs') an implied estate tail is given to each of his lawful children in his whole estate, and then a fee simple to Charles, by the words "my son Charles shall fall heir to the whole of my estate." But this fee is cut down, I think, by the next clause (the testator by heirs always meaning issue): "And in case he (Charles) should also die without heirs, it is my desire, that my estate be divided into six parts, and that three-sixths go to my father's brothers that are alive, and the heirs of those who are dead, such heirs receiving no more among them, than my father's brothers would have received had they been living, &c." Now, it seems to me impossible to doubt, that the intention here was to give this estate to the family of Charles, as long as there should be

332 "any descendant of his in the lapse of time. Nor can I think the testator meant, that unless his father's brothers, and the other devisees, could take at the instant of the death of Charles, they should never take; that if Charles should have a child which should die the next hour, this should defeat all the limitations over in that clause. I must think he meant that whenever the issue of Charles failed, his uncles and the other devisees should take; and this we know, was a contingency too remote. The plaintiffs acknowledge this to be the case as to the real estate, by making no claims to it; and it is clear to me, that the intention as to both was the same.

The cases of *Timberlake v. Graves*, and *Gresham v. Greshams*, 6 Munf. 174, 187, were cited as governing this. Judging from the reports of these cases, they underwent but little discussion, either from the bar or the bench. Understanding them as the counsel did, I acknowledge I cannot see clearly how they are to be reconciled to the otherwise unbroken current of decision, both in England and here; yet they do not profess to overrule or depart from the former cases. In *Timberlake v. Graves* (which governed the other) there was a devise of slaves and their increase, "to my beloved nephew, J. A. and his heirs forever; and if he die without heir, then and in that case, what I have given him, to be equally divided between my two nieces, M. A. and P. A." The first taker J. A. sold one of the slaves, and died without issue. The executory legatees brought detinue against the purchaser. A special verdict stated these facts, and the court below gave judgment for the defendants. This court reversed it, and entered judgment for the plaintiffs. Judge Roane, who pronounced the opinion of the court, assigned the following reasons: "the ground on which the opinion of the court is founded, is, that the devise over to the nieces, is to them merely, and not to them and their heirs. It purports a limitation to themselves, and was intended as a personal benefit to them. This construction is fortified by the words then and in that case, and equally to

333 be divided, *found in the bequest; which, though singly taken, they might not be complete to limit the previous words, have that effect in conjunction with the circumstance above mentioned." The ground here assumed, is, that the nieces took no estate transmissible to their representatives; nothing but a life estate: that it was a personal benefit intended for them alone, which would be intirely defeated, if it did not take effect in their lives: and on this principle, it was considered as tying up the failure of issue to a life in being. If the court had believed, that the devise to the nieces carried the whole interest in the slaves, it must, upon its own ground, have pronounced it bad; for then it would not have narrowed the operation of the preceding words, which of themselves clearly meant an indefinite failure of issue. Taking the case thus, (and I can understand it no other way), it would seem to make against the plaintiffs in this case: since, if the devise here were intended solely as a personal benefit; if the interest it gave, was but a life estate; then, the contingency on which it was to vest, has never happened, for it was to take effect only after the death of all the testator's children, and one of them outlived all the executory devisees. The same reply may be given to the proposition, that from the devise to the wife in this same clause, it is evident the contingency was limited to happen in her life: if this be true, the contingency has not and cannot happen, for the daughter Elizabeth survived her mother.

But, it seems to me, the devise to the testator's uncles, was not a mere personal benefit: it is to those who are alive, and the heirs of those who are dead; and such heirs are to take no more among them than the uncles would, had they been living: When? Not at any particular period, but whenever the failure of issue should happen. Moreover, the devise (as was admitted at the bar) gives them the whole interest, the fee: this takes it wholly out of the influence of *Timberlake v. Graves*.

334 *GREEN, J. The last member of the clause of Mr. Thomson's will, on which this case depends, giving the testator's wife the use of the whole of the estate for life, in case all her children should die without heirs, should, in its natural order, be read as occurring in the commencement of the clause, thus: "It is my will and desire, that, in case all my children by my wife, should die without heirs, she is to have the use of the whole of my estate as long as she lives, and that my son Charles shall fall heir, &c." It is clear, that the word "heirs," wherever it is used in this clause, means issue; that the expression used, in relation to the brothers of the testator's father "who are alive," meant such as might be alive upon the death without issue of all those who were to take before them; and that this expression was intended, not to prescribe as a condition upon which the limitation over was to take effect, that some one or more of them must be then alive, but the mode in which those alive, if any, and the descendants of those dead,

or of all, if all were dead, should take; that is, per stirpes.

This, then, is a naked case of a limitation over after an indefinite failure of issue, unless the limitation being to persons in esse, without the addition of words of perpetuity, restrains it within the limits allowed to executory bequests: for, the interposition of an estate for life to the wife, between that of the first takers and the ultimate limitation has no effect in imposing such a restraint. The testator did not mean, that the death of the wife before the failure of the issue of the first takers, should defeat the other limitations over, or that her being alive at that time, should be a necessary condition to the right of those who were intended to take ultimately, upon the failure of the issue of the first takers: he only intended, that she should take the life estate, in the event that she was then alive. This was expressly held in *Barlow v. Salter*, 17 Ves. 479, in the case of personal estate; and the case of *Clare v. Clare*, Ca. Temp. Talb. 21, is to the same effect. There, the devise was of a term in

trust for A. for life, and after his death for his issue male for life, and when the issue male should happen to be extinct, for C. for life, remainder in trust for the issue of C. for life, remainder to the issue male of the family of Clare: and it was held that all the limitations over, after the life estate of A. (he dying without issue in the lifetime of C.) were void, and a residuary legatee entitled.

There is no adjudged case in this court, which touches the question under consideration, except *Timberlake v. Graves*, and the other cases turning upon the same principle, and which followed that, in quick succession. *Dunn v. Bray*, 1 Call, 338, turned upon the word leave. In *Higgenbotham v. Rucker*, 2 Call, 313, the word issue was explained by the word children. In *Pleasants v. Pleasants*, 2 Call, 319, the devise of partial freedom was to persons in esse and their immediate descendants: Yet the court established a perfect perpetuity, and allowed the will of a testator to determine the condition of their descendants forever; slaves until a given age, and afterwards free; a partial slavery once allowed, but before that will was made, abolished by our laws. And in *Royall v. Eppes*, 2 Munf. 479, the quality of the property bequeathed decided the cause; slaves which came by the wife, to return to her in person, without embracing their issue or increase.

In *Timberlake v. Graves* (decided March 1818) the limitation over to particular persons, without words of perpetuity, was held to restrain the dying without issue, to the period of their lives; as purporting a limitation to themselves, and intended as a personal benefit to them. But the court did not rely upon that circumstance alone: they considered the words then and in that case, and to be equally divided, as aiding that construction, although singly taken they might not be complete to limit the previous words. This effect attributed to those other words, had some countenance, though perhaps was not justified, by the case of *Pinbury v. Elkin*, 1 P. Wms. 563, where the words then after her decease,

were held to tie up the event upon which the limitation over was to take effect, to a dying without issue then living; 336 *and *Doe v. Lyde*, 1 T. R. 593, in which the words, to the children share and share alike, and if he die without issue then over, was held to have that effect. In *Gresham v. Greshams* (October 1818) the limitation over to particular persons, without words of perpetuity, was connected with a direction that the subject should be equally divided between them. Then followed the case of *James v. M'Williams* (February 1819) in which there was no circumstance, except the limitation over without words of perpetuity, to determine the construction; and the limitation over was held to be good. In the case of *Didlake v. Hooper*, the bequest to A. for life, and if he have issue, to them at his death; and if he should die without issue, to two, by name, without words of perpetuity: there, the limitation over might be construed to be intended to take effect, only upon a dying without such issue as could take at the death of the first taker, who took only for his life. In the reports of these cases, we have none of the arguments of counsel: indeed, none of them, except the first, appear to have been argued: all the others, except perhaps the last, must have been decided upon the authority of the first, and upon the admission, that that proceeded upon the ground, that a limitation over after the failure of issue, without words of perpetuity, was good, without the aid of any other circumstance.

This doctrine was, for the first time, asserted in *Timberlake v. Graves*; and, so far from being supported by any insinuation in any prior case, is expressly contradicted by great numbers. In *Bigge v. Bensley*, 1 Bro. C. C. 187; *Glover v. Strothoff*, 2 Bro. C. C. 33, and *Robinson v. Fitzherbert*, Id. 127, we have the very words of the wills; and in the last, an equal division was also directed. The limitations were held to be too remote, although the circumstance under consideration occurred in all of them. The counsel, in those cases, did not even suggest, that it was entitled to any weight, nor has it ever been suggested in any of the multitude of cases to the same effect, which 337 *might be cited. Neither is it reconcilable with the general principle of executory bequests. The settled rule, frequently recognized in this court, is, that to the validity of an executory devise or bequest, it is necessary, that it be so framed as to shew, that the testator intended it should not take effect, unless the event, upon which it was to do so, was such as must necessarily happen, if at all, within the period allowed by law. If a devise over for life only, be good, it is because it cannot take effect at all, unless the failure of issue take place in the lifetime of the devisee, who is to take a life estate in that event. But a contingent limitation of personal estate, without words of perpetuity, always gave as absolute a right, as if given with words of perpetuity; an interest, which, before the contingency happens, is vendible, deviseable and transmissible to the representatives of the devisee. *Fearne*,

Butler's edi. 548, 552. Upon what ground, then, can the presence or absence of words of perpetuity, make any difference in the construction? It is said, because the want of such words indicates the state of the testator's mind, and that he contemplated the probability that the event might or would take place in the lifetime of the party designated to take in that event. That must necessarily be in his contemplation, in all possible cases: but that alone is not enough to make the limitation good: he must also intend, that the limitation over shall not take effect, unless the event does happen in the lifetime of the party; or it is void.

The only ground, upon which the cases of *Timberlake v. Graves*, and those that followed it, can be supported, is, that the omission of words of perpetuity proves, that the testator intended that the limitation should not take effect, unless the failure of issue happened in the lifetime of the person designated to take in that event: otherwise, the legal restraint upon perpetuities is utterly abrogated, and a testator may controul his property ad infinitum, by limiting it to some person, or a succession of persons, in esse, after a general failure of issue, without words of perpetuity; 338 in which case,* upon a failure of issue after many generations, the limitation being good in its origin, his remote executors or administrators will be entitled, for the benefit, first, of his creditors, and then of his descendants or collateral kindred. This we cannot suppose the court intended, by the decisions in those cases; and they are not authority for the case at bar, as all those intended to take upon the failure of the first taker, died in his lifetime: otherwise, this absurdity would follow, that the limitation being valid, because the testator intended only a personal benefit to the executory legatee, his executors, and through them, his creditors, may take it in the event in which it was impossible for him to take or enjoy the personal benefit intended; and that the testator, intending that the bequest should not take effect, unless the legatee were alive when the event happened, yet his right to take exists, and is transmitted to his personal representative, though the event has not happened in his lifetime.

If I am wrong in this, there is another ground, on which all the limitations over, in this clause of the will, were clearly void. That to the testator's natural son, which preceded all the others, was accompanied with words of perpetuity: if all the other children died without heirs, he was to fall heir to the whole estate; and if he died without heirs, then over to those now claiming. These words give him, upon the expressed intention of the testator, as absolute an estate, as if the gift had been to him and his heirs in terms. So that the limitation over to him, upon a general failure to issue, was clearly void. And, when a preceding limitation is too remote, all that succeed it, even although limited to take effect in good time, are defeated. Thus, in *Proctor v. Bishop of Bath and Wells*, 2 H. Blacks. 358, a devise to the first or other son of T. P. (he having none)

that should be bred a clergyman and be in holy orders, and to his heirs and assigns, but if T. P. shall have no such son, then to his grandson T. M. and his heirs: T. P. died without ever having had a son; and it was held, that the first limitation over was too remote, as none could take holy orders until the age of twenty-four, and as T. P. might have a son born a short 339 *time before his death, who might take holy orders at the age of twenty-four, which would be beyond the fixed limit of executory devises; and that the devise over was, consequently void also. The same principle is affirmed in *Chatham v. Tothill*, 7 Bro. P. C. 453; *Tomlins' ed.*

One word as to the influence, which our statute of 1819, prescribing the construction of future limitations after a failure of issue, ought to have upon our judgment, in cases like this. *Elizabeth G. Thomson* had, as the law was clearly settled when her father made his will, and her mother and brothers died, an absolute right to the property in question, with an unlimited power to dispose of it at her pleasure. Surely, it is too much to say, that the court should now deprive her devisee, or purchasers from her, of those vested rights, because the legislature has changed the law, even if that was done in consequence of an opinion, that the courts had given an improper construction to the effect of such limitations. Those constructions, right or wrong (and I think, they were founded in sound principles of public policy and private convenience) had fixed the law, and gave rights, which, like all others, should be held sacred.

COALTER, J., concurred in opinion with the other judges, that the executory bequest, under which the appellees claim the property in question, was limited upon a failure of issue of the first takers, not restrained by any expression in the will, or by any circumstance indicated in it, to a failure of issue within the limits indulged to executory devises; a general, indefinite failure of issue. Therefore, the limitation was void in its creation. It was so, in respect to the real estate, clearly and acknowledgedly: and, as the executory bequest of the personal estate, was limited over in the same words with the executory devise of the real, and was intended to take effect at the same time, upon the same contingency, upon the same failure of issue, the executory bequest of the personal subject was also ineffectual.

Decree reversed, and bill dismissed.

340 *Carrington v. Bennett.

June, 1829.

(Absent BROOKE, P. and CABELL, J.)*

Bills of Exception—Certificate of Facts or Evidence—
Quere.†—Question, whether exceptions to an opinion of a court, overruling a motion for a new trial

*CABELL, J., did not sit, because he was related to the appellee.

†**Bills of Exception—Certificate of Facts.**—On this question, the principal case is cited in *Rohr v. Davis*, 9 Leigh 33, and *note*, in which note there is a discussion of the question: *Ewing v. Ewing*, 2 Leigh 340, 342, 345; *Jackson v. Henderson*, 3 Leigh 215; *Green v. Ashby*, 6 Leigh 141, 143, 145, 146, 148, 149, 150, 151; *Slaughter v. Tutt*, 12 Leigh 162, 164; *Tallafarro v. Franklin*, 1

on the ground that the verdict was contrary to evidence, were well taken or not? whether the exceptions stated the facts proved, or only the evidence adduced to prove them?

Debt in the county court of Halifax, brought by Bennett as assignee of Boyd, against Carrington, on a bond for 353 dollars, executed by Carrington to Boyd, and by him assigned to Bennett. Carrington pleaded, that the consideration of the bond was money won of him by Boyd, at unlawful gaming, by playing at cards: and on this plea an issue was made up. The jury found a verdict for Bennett; which Carrington moved the county court to set aside, and grant him a new trial: the court overruled the motion, and gave judgment upon the verdict. Carrington filed a bill of exceptions to the judgment of the county court denying him a new trial, and appealed to the circuit court, which affirmed the judgment; and then he appealed to this court.

The bill of exceptions was as follows: "Be it remembered, that on the trial of this cause, the plaintiff introduced, in support of the issue on his part, a bond in these words"—Here the bond was set out in *hæc verba*: it was a single bill, executed by Carrington to Boyd, for 353 dollars, dated September 18, 1819, and one William Thaxton was the subscribing witness: and an assignment of the bond by Boyd to the plaintiff Bennett, was indorsed on it—"And this being all the evidence on the part of the plaintiff, the defendant introduced a witness, who proved, that in the month of March, 1819, the witness was present when the obligee in the said bond (Boyd) and the defendant gamed, and the next morning the obligee told the witness that he had won about 600 dollars of the defendant.

341 That afterwards, *sometime in the month of September in the same year, the obligee in the said bond and the subscribing witness thereto (Thaxton), who was admitted to be the agent of the plaintiff (Bennett), came together to the house of the witness, and stated to him, that they had come for the purpose of meeting the defendant there, who had agreed upon that meeting, in order to give his bond to the obligee; that the debt for which the bond was to be given was a gaming debt; that a part of the debt was transferred to the plaintiff (Bennett) for whom the bond was to be taken. That the defendant did not meet the obligee and the subscribing witness, on that day; but that the witness afterwards, in the same month, saw the subscribing witness and obligee, who then stated, that they had obtained the bond from the defendant, and that the bond was taken for a less amount than the original gaming debt, for that they had been compelled by the defendant, to allow credits, in order to obtain the bond, which he the obligee would not otherwise have allowed. It was

also admitted on the part of the defendant, that he had purchased a slave of the obligee (Boyd) at the price of 500 dollars, some years previous to the date of the bond upon which this suit was instituted. The witness also stated, that he did not know, that this bond upon which the suit was brought, was given for gaming consideration. And these being all the facts proved in the cause, the jury retired from the bar, and brought in a verdict for the plaintiff"—which was set forth in *hæc verba*—"Whereupon, the defendant moved for a new trial; which motion was overruled by the court; to which opinion of the court the defendant excepts, and prays the court to seal this his bill of exceptions: which is done accordingly."

Leigh, for the appellant, said, the bill of exceptions to the judgment of the county court, on the motion to set aside the verdict and grant a new trial, was well taken, according to the opinion of this court in *Bennett v. Hardaway*, 6 Munf. 125, and

Keys v. M'Fatridge, Id. 18. The facts 342 were *stated in the exceptions, as admitted by the parties, and as proved by a single witness: nothing was offered to contradict the facts stated by him, nothing to impeach his credit.

The exceptions were certainly intended to state, that the facts therein set forth, were facts proved; for it was expressly said, that these were all the facts proved in the cause.

The fact, that the bond in question was founded on a gaming consideration, was not, indeed, directly and positively proved: the facts proved, were only circumstances bearing on the principal fact in issue; but such circumstances, as should have led the minds of the jury and the court, to infer, undoubtingly, that this was a gaming debt.

Johnson, for the appellee, denied, that the bills of exceptions was well taken, according to the doctrine laid down in *Bennett v. Hardaway*; and he entered into a critical examination of it, to shew, that it did not profess to state facts as proved to the satisfaction of the court, but only the evidence adduced at the trial.

The jury which tried the cause, and the county court before which the trial was had, which knew the parties and the witness too, and heard the evidence, were better able than any appellate court, to determine, whether or no the evidence proved the facts it was adduced to prove.

And, even supposing the bill of exceptions to state, not merely evidence offered, but facts proved, the proof did not sustain the plea: the plea alleged, that the money was won at unlawful gaming at cards; the proof was, at most, that it was won at gaming, without ascertaining what kind of gaming; and there are many games, at which men may play, and at which money may be won, without offending against any law.

CARR, J. It was questioned at the bar, whether the bill of exceptions in this case, contained a statement of all the evidence before the jury, or a certificate by the judge of such facts only as he considered proved. To my understanding, it is a

Gratt. 244: *Patteson v. Ford*, 2 Gratt. 34: *Willard v. Overseers of Poor*, 9 Gratt. 141: *Bell v. Snyder*, 10 Gratt. 353: *Pryor v. Kuhn*, 12 Gratt. 617: *Gimmi v. Cullen*, 30 Gratt. 450, 452, 453, 454: *McClung v. Ervin*, 33 Gratt. 523, 529: *Danville Bank v. Waddill*, 31 Gratt. 475: *Goodman v. R. & D. R. Co.*, 31 Gratt. 563, 568: *Cluverius v. Com.*, 31 Va. 864, 865, 866, 867: *Moses v. O. D. Iron etc.*, Co., 32 Va. 24, 25, 26, 28: *Muse v. Stern*, 32 Va. 26: *Morgan v. Fleming*, 24 W. Va. 194: *State v. Flanagan*, 26 W. Va. 119: *Travis v. Peabody Ins. Co.*, 28 W. Va. 600. See monographic note on "Bills of Exception" appended to *Stoneman v. Com.*, 25 Gratt. 387.

simple detail of the evidence, drawn 343 by the *counsel, and signed by the judge, not omitting one title of the testimony before the jury. It begins thus: "Be it remembered, that on the trial of this cause, the plaintiff introduced, in support of the issue on his part, a bond in these words, &c." setting out the paper with its indorsements verbatim et literatim: and then is added, "and this being all the evidence on the part of the plaintiff, the defendant introduced a witness who proved &c." going on to detail, with great particularity, the evidence of this witness. It is then added, "the defendant admitted, that he had purchased a negro of the obligee, at the price of 500 dollars, some years previous to the bond, on which this suit was instituted. The witness also stated, that he did not know, that this bond upon which suit is brought, was given for a gaming consideration. And these being all the facts proved in the cause, the jury" &c. notwithstanding these last words "facts proved," it is clear to me, that this is a detail of the evidence, and all the evidence, before the jury, not a statement, by the court of such facts, as it considered proved by the mass of evidence. The whole frame and manner of the exception shews this.

This then, is the very question which was before the court in *Bennett v. Hardaway*, in which judge Roane delivering the opinion of the court, after stating the case, says, "the question is, whether it is competent to a party, to carry all the evidence to the appellate court, by a bill of exceptions, and on the ground of it to reverse a judgment of the court below, refusing to grant a new trial?" He proceeds to give strong and conclusive reasons, why an appellate court, cannot upon the evidence reverse the opinion of the trying court. "It does not follow, (he says) that the judge believes every witness who gives evidence before him; as he may well hesitate to do, from the manner of testifying, and other extraneous circumstances; nor can he do it, where they conflict with one another. It is evident, therefore, that, in this case, the opinion of this court might be founded on the testimony of witnesses, who were discredited both by the jury and the court below."

344 Now, apply this reasoning to *the case before us: we have the statement of a witness, who says, that in March 1819, he saw the obligor and obligee gaming, and the next morning the obligee told him, he had won of the defendant about 600 dollars: that, in September 1819, the obligee and the subscribing witness to the bond, came to the house of the witness, and said they had come to meet the defendant there, who had agreed to give his bond to the obligee; that the debt for which the bond was to be given was a gaming debt, and that a part of it was transferred to the plaintiff, for whom this bond was to be taken: that the defendant failed to meet, but afterwards, in the same month, the obligee and the subscribing witness told the witness, that they had obtained the bond from the defendant, but had to take it for less than the original gaming debt, being compelled to allow credits in order

to get the bond. The witness added, that he did not know, that this bond now in suit was given for a gaming consideration. It is insisted, that this evidence makes it very clear, that the bond in the record was the very bond given for the gaming debt; and that the jury and court grossly erred, in not drawing this inference, instead of the contrary one. But, how do we know, that the court and jury believed this witness? They may have discredited his whole tale. They saw and heard him; and there may have been that in his manner (though wholly hidden from us) which proved to them he was intirely unworthy of credit. Is not this more likely, than that the jury and court should have come to a conclusion the very opposite of that, at which (if they credited the witness) it is insisted they must inevitably have arrived? And if upon the strength of what this witness swore, we reverse the judgment and set aside the verdict, may not our opinion (in the words of judge Roane) be founded, upon testimony discredited both by the jury and court below? "This (the judge adds) would be for this court, not only to revise and reverse the opinion of the court below, on a question touching the weight of evidence and the credit of the witnesses, but to do it in the dark, or, at least, with lights

345 *inferior to those possessed by that court. That court while it can faithfully transmit to this, the actual words spoken by the witnesses, can give it no fac simile of the manner of testifying, the hesitation or partiality manifested on the trial, or the like. With respect to these important circumstances, as they relate to the weight of testimony, and credibility of witnesses, this court is intirely in the dark; the advantages are exclusively confined to the court of trial." The judge then illustrates his position by several analogies: among others, the case of a verdict found on a view, in which the court will hardly ever grant a new trial "because the jury may have been influenced by what they saw on the view, and which the court did not see. This last position (he adds) is intirely analogous to the case before us, and decisive of it. The jury and court below saw what this court cannot see. They had, or may have had, the most cogent reasons for discrediting witnesses, on whose testimony (it appearing only on paper) this court might found its judgment." Upon this reasoning the court decided, that it is not competent to a party to carry up the evidence to an appellate court, by a bill of exceptions, and upon the ground of it to reverse the judgment of a court below refusing to grant a new trial: and this decision seems to me conclusive of the present case.

But in *Bennett v. Hardaway*, the court after deciding the case before it, puts another, and says, that if a bill of exceptions were taken to the refusal to grant a new trial, in which bill the judge should state the facts (contradistinguished from evidence) as they appeared in evidence to him, they would be inclined to entertain such a bill of exceptions. "In that case, the exception is not liable to the objection existing in the case before us. The appellate court does

not, in that case, depart from or overrule the decision of the trying court, as to the weight of testimony, or the credit due to any witness. It only acts upon his own certificate and acknowledgment of his opinion upon the subject. Such an exception

only states briefly the facts as they
346 appeared *to the judge, and are admitted by him to have been proved; and in consequence of such his admission, the appellate court founds its decision, upon the same facts as those which governed the court below." In the case here put, it seems to me, that the appellate court must receive and act upon the facts stated, as it would act upon a special verdict, in which it is to have facts, not evidence; and is to infer or imply nothing: the inferences must be made by the judge who tried the cause, because they depend on the weight of evidence, the credibility of witnesses; and he alone, who saw and heard them, can weigh them. In the case before us, for instance: the bond shewed no gaming; the fact, that the defendant had bought a slave from the obligee, some years before, shewed, that the bond might have been given on that account. But the evidence of the witness, detailing what he saw, and what the obligee told him, went strongly to the conclusion, that the bond was for a gaming debt. The jury, however, have said, that it was not so, and the court agreed with them. Now, they both heard this witness; and their decision must have been governed very much by the credit they gave him. If they believed him, we can hardly see, how they avoided the conclusion, that it was a gaming debt. If they disbelieved him, the verdict of the jury was intirely correct, and so was the refusal of the court to grant a new trial. If this bill of exceptions, then, had intended to give us the court's state of the facts, as proved, it ought to have stated, not the evidence of this witness, but its opinion of the effect of that evidence; the facts it proved.

I think, then, in every aspect in which we can view the case of Bennett v. Hardaway, whether we take the case actually decided by the court, or that hypothetically put, it condemns the bill of exceptions before us.

It seems a little strange, that the defendant, knowing that he had to prove his plea, did not summon the only witness, who could have placed the fact beyond question. The subscribing witness to the bond must have known all about
347 *the matter: we do not hear, that he had removed, was dead, or could not be found.

Upon the whole, I do not think we can reverse this judgment, without the hazard of acting upon evidence, which the jury and court below discredited: I am therefore for affirming it.

GREEN, J. I think the exception in this case was well taken. The effect of the case of Bennett v. Hardaway is, that it is not competent to a party, by way of an exception to the granting of or refusal to grant a new trial, to refer to the judgment of the appellate court, the credit of the witnesses; and that, therefore, the facts

considered by the court as proved upon the trial, and not the evidence by which they are proved, should be stated. If the rule there laid down, were considered as extending further than this, and to require, that the court should not state the proved facts from which the fact in issue might or might not be inferred, but only the inference made by the court; then, there could be no case, in which an exception to the allowance or refusal of a new trial, could be successfully taken, (except where the court below erred in declaring the law arising from an admitted state of facts,) even in a case, where the ground of the application for a new trial, is, that the verdict was contrary to the evidence. For, if the proof of the fact in issue, was direct and contradictory, the court must state, that the fact was proved, in its judgment, according to the credit it gave to the testimony; and to such a case the rule in Bennett v. Hardaway, applies. But, in a case in which there was no direct evidence to prove the fact in issue, but only proof of other facts from which the matter in issue might or might not be inferred; if the court, instead of stating the proved facts, from which such an inference might arise, were required to state its own inference, this would be, not to state the fact or facts proved, but the judgment of the court as to their effect: and there would be nothing for the appellate court to
348 decide *or act upon. Yet, the jury and court below may err as essentially, and as fatally to the rights of the parties, in their inferences of other facts from the admitted facts, as in respect to the law arising from the facts proved. And, as I understand the decisions of this court, such an error may be corrected by exception and appeal.

This is such a case. The clear inference from the proved facts, was, that the bond in question was given for a gaming consideration. Those facts are, that the parties gamed in March; and the obligee, afterwards, declared that he had then won 600 dollars of the obligor. In September, the obligee and the agent of the subsequent assignee declared, that they went to a certain place to meet the obligor, by appointment, who was then to give his bond for a gaming debt due to the obligee, a part of which had already been transferred to the subsequent assignee of the bond: not meeting the obligor at the appointed place, they afterwards, in the same month, declared, that they had obtained the bond from the obligor, for less than the original gaming debt, the obligor having compelled them to allow credits, as a condition of giving the bond, which he would not otherwise have allowed. The bond in question, is dated the sixteenth and was assigned the eighteenth of September; and the agent of the assignee is the subscribing witness, both to the execution of the bond and the assignment. The only fact directly proved, was that of the gaming: all the rest were inferrible from the admissions of the obligee and the agent of the assignee; an agent for procuring the bond and assignment, whose declarations being a part of the res gesta, and therefore admissible, or if not,

unimportant, since those of the obligee were sufficient. The court could not truly certify, that it was proved that the obligee won money of the obligor, and that he took this bond for the money so won. It could, with truth, only state, that those facts had been admitted by him, from which the existence of the facts might be fairly inferred.

349 *To avoid the plain inferences from the facts proved, the appellee insisted on the fact, that the obligor had, some years before the date of the bond, purchased a slave of the obligee at the price of 500 dollars, and so this bond for 353 dollars might have been for the balance of that purchase; an inference decisively repelled by the fact, that the bond was given for less than the gaming debt, in consequence of set-offs claimed and allowed, so that, upon their transactions, independent of the gaming debt, the obligee was indebted to the obligor.

It is said the evidence did not support the plea, which alleges that the bond was given for money won by unlawful gaming at cards, while the evidence is silent as to the manner of gaming. It does not appear, that this objection was taken at the trial, or upon the motion for a new trial. To allow it now to prevail, would be a surprise on the party. Suppose no inquiry was made of the witness, by either party, at the trial, as to the manner of the gaming, and this objection had been made upon the motion for a new trial: ought not the court to have inquired how the fact was, and if it found that the gaming was at cards, and there were no other objection, to have allowed a new trial upon the ground of surprise? I think it ought: and, as the appellee failed to make the objection in the court below, where it might have been met and obviated, it ought not to be heard here.

I think the verdict was manifestly contrary to evidence, and that both judgments should be reversed, and a new trial of the issue directed.

COALTER, J. I am of opinion, that this is a bill of exceptions, which, according to the authority of *Bennett v. Hardaway*, presents a fit case for the judgment of this court on a refusal of a court below to grant a new trial, on 'the ground of the verdict being contrary to evidence.

There was no conflicting evidence in the case: only one witness was examined; and the facts not proved by him, were admitted by the parties, and inserted in the bill of exceptions.

350 *If the bill of exceptions had stated, that the defendant introduced a witness who testified to such and such a purpose; perhaps, it might have been said (though the court below does not say so) that the court did not believe him, and so was right in not granting a new trial. But, I incline to think, that, in such a case, the court ought so to have stated it, as its reason for refusing a new trial, where, otherwise, such new trial ought to have been granted. This would not be necessary, if there was a contrariety of evidence; because two conflicting witnesses, however credible, cannot both be believed; one or the other must be mis-

taken, or willfully perjured; and the court and jury must judge of this; and then the court must certify the fact as it believes it to be proved. I presume it would not be less a fact, because certified in the language of the witness. It may be necessary so to certify it; because as in this case, what the witness proves may only amount to circumstances, from which the main fact in controversy may be inferred one way or the other. Suppose there had been another witness who had testified, that he was present at the same times and places, mentioned by the witness whose evidence is detailed in this cause, and who had stated contradictory facts, which, if believed, would overthrow his evidence, but which was not believed, either from the manner of giving evidence, or infamy of character, or for any other reason: such evidence ought to form no part of the bill of exceptions, since it proved nothing, and therefore it would be improper to introduce it, according to the case of *Bennett v. Hardaway*, unless, indeed, for the purpose of shewing to this court, that there was contrariety of evidence, and that on that score the court below ought not to have interfered, the jury being the proper judges of credit &c. But here, the bill of exceptions does not state, that the defendant introduced a witness who testified, but a witness who proved, certain facts, and confessions of the obligee, going to shew that the debt sued for was a gaming debt; and then concludes, "these being all the facts proved in the cause." &c. Now,

351 I confess, *I cannot see the difference between the case as thus stated, and a statement, that the defendant proved, that in the month of March 1819, the obligor and obligee gamed together, and that on the next day the obligee confessed that he had won 600 dollars of the other: that in September, (the bond in question bearing date the sixteenth day of that month) the subscribing witness (who the plaintiff admitted was his agent) together with the obligee, repaired to a certain place, as they confessed, in order to take an obligation from the defendant for the gaming debt aforesaid, &c. &c. setting out every thing, which the witness proved, in this way.

The only question, it seems to me, which the bill of exceptions before us, or one taken in the way last indicated, would present, is, whether, if the jury failed to draw the inference (which it would have been well warranted in doing) that the obligation sued on was given for a debt won at unlawful gaming, it was competent for the court, which heard the trial, to set aside the verdict as being contrary to evidence?

It is true, that this is a case, in which the jury must infer the fact, that this was a gaming debt, and it would be incompetent for a court to do so, on a special verdict finding these facts and circumstances: but I do not think it follows, that, if a jury improperly infer a fact from circumstances too weak to justify the inference, or fail or refuse to infer a fact, which, in many cases, they would be as correct in inferring, as to find the fact on positive proof, it is without the power of the court to correct such improper finding. Had the court granted a new trial in this case, and an exception had

been taken precisely on the words of this bill, and the verdict on the new trial had been for the defendant, could we have reversed the judgment, because, although we might agree with the court which granted the new trial, that the first verdict ought to have been the same with the last, yet the first verdict must stand, the court not having the power to set it aside? It seems to me not. Where the evidence is not contradictory, where there is no contest

352 about credibility, *the court and jury must each weigh the evidence, whether positive or circumstantial, and must each, within their respective spheres, pronounce upon it. If this be correct, then, either no appeal lies to correct an error in refusing or granting a new trial in such a case, or it must be done in the manner in which this case is brought before us.

I am of opinion, that the current of decisions in this court warrants the appellate tribunal, in a case properly made out as this is, in revising the decisions of inferior tribunals refusing to grant new trials. I am also of opinion, that the inference, from the facts proved, that this obligation was given for a gaming consideration, is too manifest and irresistible, to justify the verdict of the jury, and the refusal of the county court to set it aside. Both judgments must, therefore, be reversed, the verdict set aside, and the cause remanded for a new trial to be had.

353 *Lewis and Others v. Billips and Others.*

June, 1829.

Patents—Prior Equitable Right against Grantee—Jurisdiction of Equity.—Under what circumstances, a party shall be entertained in equity, to assert a prior equitable right against a grantee claiming under a patent, the claimant having never prosecuted a caveat against the patentee.

Same—Entry—Failure of Survey to Conform with—Effect—Case at Bar.—In the location of a land warrant, the entry calls to begin at three marked red-oaks, and to extend down for quantity: these three oaks are on the head waters of a stream called Poplar Fork: the survey does not extend down that stream for quantity, but leaving it intirely, extends down the general course of the country: and there is evidence, that the call of the entry to extend down for quantity, in the usual sense of that phrase in locations, required the locator to extend down Poplar Fork for quantity. **HELD.** the survey is naught for not conforming with the entry.

Same—Same—Sufficiency of Survey—Case at Bar.—An entry calls to begin one mile above a marked tree and a rock on Big-Hurricane creek, eight or nine miles above its mouth: the marked tree and rock are on the east side of the creek, 18 miles from its mouth by the meanders, and more than 9 miles in a straight line: the survey of this entry begins at a point on the west side of the creek, 65 poles from the stream, and one mile and 84 poles from the designated tree and rock. **HELD.** 1. The entry is special and precise enough: 2. The survey conforms with the entry with reasonable exactness, especially as a jury had so found shortly after the survey, upon a caveat to which though not all yet some of the parties, now contesting the right under this survey, were parties.

Edward Billips and others claiming under him, exhibited their bill in the superior court of chancery of Staunton, against Andrew Lewis and others devisees of Thomas Lewis deceased, and John Morris and others claiming under William Morris

deceased, Shadrach Harman deceased, Thomas Teas and William Neely, setting forth:

That Billips, in 1794, holding a land office treasury warrant, put the same in the hands of Thomas Lewis to locate for him. And Lewis, having indorsed on the warrant an assignment thereof from Billips to himself, on the 1st October 1794, made an entry thereon in his own name as assignee, for 1437 acres of land in Kanawha county, which was surveyed on the 1st October 1798, and on this survey a grant of the land was issued to Lewis, on the 26th January 1801. But Lewis acted throughout for the benefit of Billips, the owner of the warrant, and always declared, that the land was his property. Accordingly, Billips and

354 *those claiming under him had held the possession of a part of the tract. The whole of the land, however, was now claimed by the defendants, under grants thereof, issued to William Morris, Harman, Teas and Neely; and these patents were older than that granted to Lewis; and the surveys and entries on which they were founded were also older than the survey and entry on which the patent to Lewis was founded; yet the right of Billips under Lewis, was preferable in equity to the right of the defendants claiming under Morris, Harman, Teas and Neely, because their entries were not special and certain, because their entries in truth did not at all interfere with Lewis's entry, and because their surveys, which did interfere with Lewis's survey, were not conformable with their entries. The bill, therefore, prayed that Lewis's devisees might be decreed to convey his right in the land to Billips; that he and the other plaintiffs holding under him, might be quieted in the enjoyment thereof, against the other defendants claiming under the patents of Morris, Harman, Teas and Neely, and that these defendants might be decreed to convey the legal estate derived to them from the elder patents, to Billips; and general relief.

One of the devisees of Lewis answered the bill, and contested the equitable right asserted by the plaintiffs as well as the rights of the defendants claiming under the conflicting patents, and claimed the land for himself and his co-devisees. As against the other devisees, the bill was taken pro confesso.

Several of the defendants claiming under the elder patents, filed their answers, wherein they stated, that Morris and Harman, on the 15th April 1786, duly entered 2000 acres of land in Teas's Valley in Kanawha; and, at the same time, Morris, Harman, Teas and Neely duly entered 4000 acres adjoining the other entry; but owing to the hostility of the indians, and the unsettled state of the country, these entries were not surveyed till February 1795, when

the surveys were made and sent to the 355 land office; *and grants were issued upon them, the 28th November and 2d December 1799. They insisted, that their entries were special and certain, the surveys conformable with the entries, and the patents regular: and that, on the other hand, Lewis's entry was not special and certain, and his survey was not conformable

*The principal case is cited in *Handly v. Snodgrass*, 9 Leigh 408; also, *foot-note* to *Johnson v. Brown*, 3 Call 259.

with his entry. Therefore, they had not only the elder grants and the legal title, but a preferable right in equity to the land.

The plaintiffs afterwards exhibited a supplemental bill (suggested, no doubt, by the decision of this court in *Noland v. Cromwell*, 4 Munf. 155), in which they assigned as the reason why neither Lewis nor Billips had had recourse to a caveat, to prevent the grants to Morris, Harman, Teas and Neely, that Morris and one Milburn guardian of Harman's heir, in February 1799, entered a caveat in the county court of Kanawha, against a grant to Lewis upon his survey, and in September following, judgment was given therein, against them and for Lewis; and that it was pending this caveat, or shortly after the decision therein, that Morris and others obtained their grants.

The defendants, in their answers to the supplemental bill, insisted, that the caveat prosecuted by Morris and others against Lewis, to prevent the grant to him, afforded no excuse for the failure of Lewis or Billips to resort to that remedy to prevent the grants to Morris and others.

The allegations of the bill, that Lewis's entry was made by him for Billips, upon a warrant belonging to Billips; that the assignment of the warrant made by Lewis to himself, and the making of the entry in his own name, were not intended to appropriate the land to himself, and to defraud Billips, but only to serve him more effectually; and that he always declared that Lewis's land was located for Billips; and that it was in truth his property; were incontrovertibly proved.

Lewis's entry was in these words "October 1, 1794, Thomas Lewis lifts his entry of 1437 acres, made on Point creek near

Farley's Rooting camp, the 31st July 1787; *and enters the same to begin one mile above a tree marked D B. and a large rock standing about 20 poles above the said tree, on Big-Hurricane creek, a branch of Kanawha river, and eight or nine miles above the mouth of said creek; running from said beginning, a line N. 45 W. so far that double the distance S. W. and at right angles, will contain the above quantity of acres: warrant 1437 acres, No. 13700, dated 8th August 1782."

The tree D B. and the rock 20 poles above it, called for in the entry, were on the east side of Big-Hurricane. As to the distance of these objects from the mouth of that creek, there was some variance in the evidence: the distance following the general meanders of the stream, was about thirteen miles; in a straight line, it was something more than nine miles. The beginning point of the survey, which was made on this entry the 1st October 1798, and on which the grant to Lewis was founded, was at two white-oaks, on the west side of the creek, 65 poles from the stream, and a mile and eighty-four poles from the tree D B. and the rock on the east side, called for in the entry. From the two white-oaks, there was a line run N. 45 W. 340 poles, and upon that line a parallelogram extending to the south west was laid down containing an area of 1437 acres.

The entries made by Morris and others, were in these words: 1st. "April 15, 1786,

William Morris and Shadrach Harman, assignees of John Hawkins, on a land office treasury warrant, No. 1622, dated 8th May 1783, enter 2000 acres, to begin at three red-oak trees marked with three notches, joining the right of settlement of Jacob Rife, and to extend down for quantity:" 2nd. "April 15, 1786, William Morris, Shadrach Harman, Thomas Teas and William Neely, by virtue of the following land warrants, viz. 3000 acres from warrant No. 15901, 1000 acres from warrants Nos. 16989 and 1698, 1500 acres from warrant No. 20335 (lodged in the surveyor's office of Greenbrier), 706 acres from warrant No. 16035, enter part thereof, 4000 acres, joining the last entry of William Morris 357 *and Harman, so as to include the vacant land on both sides."

The three red-oak trees, called for in the first of these entries, were upon the head waters of a stream called Poplar Fork, a branch of Big-Hurricane creek, which runs thence a north-westward course to Big-Hurricane; and had the 2000 acres been surveyed beginning at the three red-oaks and extending in any way down Poplar Fork for quantity, the survey would not have interfered at all with the survey made on Lewis's entry. But the survey of the tract of 2000 acres, which was in fact made and returned to the land office, and on which Morris and Harman's patent was founded (dated February 15, 1795), began at the three red-oaks, and ran a short base line eastwardly, leaving the waters of Poplar Fork intirely, and crossing a ridge which divided the waters of that stream from those of Big-Hurricane; and upon this line, the area of the 2000 acres was laid off to the south of the beginning point, extending down for quantity, according to the general course of the country; and this survey included a part of Lewis's survey. If the phrase in the entry, "to extend down for quantity," was to be interpreted down Poplar Fork, the survey, so far from conforming to the entry, departed from it at the very beginning and throughout. If that phrase was to be interpreted down the general course of the country, the survey conformed to the entry. To ascertain the sense and acceptation of this phrase, as used and understood in locations, a great many depositions were taken on both sides; and there was some contrariety in the evidence; but the evidence, that the phrase required the locators to extend their survey down the Poplar Fork for quantity, preponderated.

The surveys, made the 20th and 21st February 1795, on the second entry (that, namely, of Morris, Harman, Teas and Neely) were not made so as to include the vacant land on both sides of Morris and Harman's entry, according to the call of his second entry, or indeed the land on both sides of Morris and Harman's 358 survey. The survey on the *second entry joined Morris and Harman's survey, on three short lines at the extreme southern point thereof, and extended southwardly from thence so as to include almost the whole of the land included in Lewis's survey. If Morris and Harman's survey did not conform with their entry, the sur-

veys made on the entry of Morris, Harman, Teas and Neely, were not in any way conformable with the entry.

The record of the caveat in the county of Kanawha, prosecuted by Morris and Harman's heir against Lewis, was exhibited with the supplemental bill. The caveat was filed in February 1799, to prevent the grant of the 1437 acres of land to Lewis, upon his survey thereof of the 1st October 1798, suggesting for cause, that the same was claimed by Morris and Harman, by prior entry and survey. It was tried in September 1799. The jury, sworn to inquire of facts between the parties litigant, found: 1. That Morris and Harman's survey of 2000 acres, did not conform with their entry, because they had not run down for quantity. 2. That their survey of 400 acres did not conform with the entry thereof, as the survey was made of land for which there was in fact no entry. 3. That Lewis's survey of 1437 acres did conform with his entry. And the parties agreed the dates of their respective entries and surveys, and the extent of the interference of the surveys of the caveators with the survey of the caveatee. Upon this state of facts, so found and agreed, the county court gave judgment for Lewis the caveatee. From this judgment the caveators prayed an appeal, which the court allowed them, without requiring an appeal bond with surety, nor was any given during the term; and the appeal was, therefore, dismissed by the district court held at The Sweet Springs, in October 1800. But, meanwhile, viz. in November and December 1799, Morris and his associates, contrary to the judgment upon the caveat, took out their patents for the lands in controversy. Lewis did not apply for this patent, till January 1801, after the district court had dismissed the appeal from the judgment on the caveat.

359 *The late chancellor Brown was of opinion, that Billips had shewn himself entitled, in equity, to the 1437 acres of land granted to Lewis, as against Lewis's devisees; and that, upon the facts proved in the cause, this equitable right of Billips was vested in him before the emanation of the patents to Morris and others; and, considering the circumstances and the manner in which these patents were obtained, the priority of them would not avail the patentees: therefore, he decreed, that the defendants, respectively should convey to Billips, all their right and title in the lands, or any part thereof, included within Lewis's survey of 1437 acres; and that the defendants in possession of the lands should render accounts of rents and profits, &c. The defendants appealed to this court.

Johnson for the appellants: Leigh for the appellees.

1. Johnson said, the chancellor certainly erred, in decreeing Lewis's devisees to convey the land to Billips, without requiring Billips to defray the expenses defrayed by Lewis, in having the entry and survey made, defending the right, and obtaining the patent, or any money otherwise disbursed by him. Leigh admitted, that the decree was erroneous in this particular: but the error was owing to mere inadvertence;

and, as the decree was interlocutory, the chancellor might, and doubtless would, have corrected it, whenever his attention was called to it.

II. Johnson, strenuously contended, that the decree was wrong in principle.

1st. He insisted, that Morris and Harman's entry of 2000 acres, was sufficiently special and certain, and that the survey thereof conformed with the entry; and, by consequence, the entry of 4000 acres by Morris, Harman, Teas and Neely, was also special and certain enough, and the survey of this too conformed with the entry, with as much precision as could reasonably be, or had ever been, required in such cases.

360 *This point presented the question, whether the call of Morris and Harman's entry of 2000 acres, required the locators to go from the beginning point on the head waters of Poplar Fork, down that stream for quantity, or justified them in leaving that stream altogether, and going down the general course of the country, for quantity? A question, which mainly depended on the evidence, as to the meaning of the language of the entry, as used and understood in locations.

2dly. He contended that Lewis's location of 1437 acres was naught, not having been made, in the language of the land law, so specially and precisely, as that others might be enabled, with certainty, to locate other warrants on the adjacent residuum (1 Rev. Code, ch. 86, § 17, p. 325); and that, if the entry were good, the survey was fatally vitious, for not conforming with the entry. 1. The location was not special enough. The entry called for a beginning one mile above a marked tree and a rock on Big-Hurricane, eight or nine miles above its mouth; without stating on which side of the creek those objects were; without stating, whether they were to be looked for, eight or nine miles from the mouth of the stream, measuring in a straight line, or by the meanders of the stream; and, above all, without stating, in what course or bearing from the designated objects, the beginning point should be looked for, thus leaving the locator at liberty to select any point he pleased, in an arc of ninety degrees of a circle whereof the radius was a mile, any such point being downward from the designated objects. The entry could be regarded as special enough, only by construing it to call for a beginning at a point on the stream, and on the same side of it with the designated objects, one mile below them. And then, 2. the survey far from conforming with the entry, was an intire departure from it: for the objects designated in the entry, were on the west side of the stream; and the beginning point of the survey, was on the east side, no less than 65 poles from the stream, and 84 poles more than a mile from the designated objects. The

361 *verdict of the jury which tried the caveat in 1799, could not conclude any point in the present controversy, for only part of the parties here were parties to that caveat, and the record was so imperfect, that it was impossible to say, whether or no, the judgment of the court was given upon the merits. Neither could that ver-

dict be regarded even as evidence, either that Morris and Harman's survey of 2000 acres did not conform with their entry, or that the survey of 4000 acres of Morris and his associates had no entry to support it, or that Lewis's survey conformed with his entry. For the record of the caveat was not exhibited as evidence touching those facts, or any facts in controversy in this case; it was only exhibited with the supplemental bill, as shewing an excuse for the neglect of Lewis or Billips to proceed by way of caveat, to prevent Morris and others from taking out their patents. And, as to the certainty and precision of Lewis's entry, the verdict on the caveat found nothing; and this was a main point in the present controversy.

Leigh said, that if the certainty and precision of location, required by the land law, were to be taken in the strict sense of those words, very few locations had ever been, or in the nature of things could be, made specially and precisely enough. To minds not versed in the subject, most of the locations which had stood the test of examination, had an air of vagueness. The requisition of the law had always been understood according to the subject matter. Certainty and precision of location, according to the general understanding of locators, was all that was requisite: they know, better than we possibly could, whether an entry be special and precise, as well as whether a survey conform with or depart from the entry. It was enough, if Lewis's entry was special and precise, and if his survey conformed with it with sufficient exactness, in the understanding of surveyors and other persons residing in this new country, and versed in such subjects. A jury of the country, trying the points in dispute shortly after they arose, had found,

that the surveys of Morris and his associates, were not founded on *their entries, and that Lewis's survey did conform with his entry. It could not be at all material, for what purpose the record of the caveat was originally exhibited. It was now a document in the cause. And, surely, it was evidence, that, when a locator establishes his beginning point on the waters of a stream, and calls to go down for quantity, the acceptance of the phrase is, that he is to go down the stream for quantity, not from it, in quite another direction, down the general course of the country; evidence also, as to the degree of certainty in a location sufficient, in general, to enable other locators to locate the adjacent land, and of the reasonable exactness with which a survey should conform with an entry.

III. Johnson said, that the case was not properly relievable in equity, because Lewis or Billips might, if he had right, have had remedy by caveat; nor did the caveat prosecuted by Morris and Harman against Lewis, furnish any reason why Lewis or Billips should not have resorted to a caveat against them.

Leigh adverted to the fact, that, after judgment given for Lewis against Morris and Harman, in September 1799, that Lewis was, and that Morris and Harman were not, entitled to a patent for the land com-

prised in Lewis's survey, and while Lewis had every reason to believe, that that controversy was carried to the district court by appeal, Morris and his associates had come to the land office, and taken out their patents. They had, at the time, actual notice of Lewis's prior equity. And thus, he said, these patents were obtained by surprise and fraud upon Lewis, such as gave ample ground for the jurisdiction of the chancellor.

In the argument, the former adjudications of this court, concerning this much litigated point, were cited; particularly, *Noland v. Cromwell*, 4 Munf. 155; *M'Clung v. Hughes*, 5 Rand. 453; *Jackson v. M'Gavock*, Id. 509.

CARR, J. I shall first consider the question, whether the appellee, having no good excuse for failing to caveat the appellants, *is precluded, by the decisions of this court, from looking behind their patent? The appellee in his supplemental bill, has assigned, in excuse for this failure, that the appellants, having entered a caveat against Lewis, took out their patents while it was pending. Our caveat law says, "if any person shall obtain a survey of land, to which another hath by law a better right, the person having such better right, may enter a caveat, to prevent his obtaining a grant, until the title can be determined, such caveat expressing the nature of the right on which the plaintiff claims the land." 1 Rev. Code, ch. 86, § 38, p. 330. In *Johnson v. Brown*, 3 Call 267, this court said, "It was foreseen by the legislature, that there would be interfering entries and surveys; and the caveat was the remedy for settling all those disputes prior to the patent, to avoid the inconvenience of that solemn instrument being involved in contests of that kind." Here, we see the nature and object of the caveat. In the case before us, Morris and Harman caveated Lewis, because "they claimed the land by prior entry and survey." This brought directly before the caveat court, the title of the caveator; and the judgment upon that caveat, was for the defendant. It was said, indeed, that it did not appear that this was a trial upon the merits, and if not, the judgment did not bind the rights of the parties: but the jury found, that the 2000 acre survey did not follow the entry; that the 400 acre survey was on land for which there was no entry; and that Lewis's survey was conformable with his entry. And, on this finding, the judgment is given; which, to my mind, is most clearly upon the merits. The caveators appealed, and thereby prevented the caveatee from getting his patent; and pending this appeal, took out their patents, and then abandoned their caveat. I consider this proceeding a fraud; and a fraud too of that sort, that furnished a good excuse to Lewis, for not proceeding to caveat the caveators. For, after a decision against their right, and an appeal indicating their intention to rest the contest on the caveat, Lewis had no rational ground to suspect the ap-
plication for their patents. *He, then, or (which is the same thing) Billips claiming under him, comes into equity, sanctioned by *Noland v. Cromwell*, even upon my understanding of that case,

as explained in *M'Clung v. Hughes*. And I consider this caveat such a notice to all, whose joint rights as associates with Morris were involved, as affected them with fraud in proceeding to take patents. The case, then, is properly in equity. And, without saying, that the verdict and judgment on the caveat, is decisive of the rights of the parties, I will say that it is, with me, most persuasive evidence. The trial was by a jury of the country, every man of whom was probably familiar with entries, surveys and patents: they had the advantage, too, of hearing the witnesses examined and cross-examined by counsel well acquainted with these subjects; and thus could have every thing which may puzzle us, explained to them, by men who had been upon the land, had traced the lines, and were well acquainted with all the localities. From a decision like this, I should dissent with great diffidence.

But the examination I have given the entries, surveys and evidence, induces me strongly to believe, that the jury was right. The 2000 acre survey does not follow the calls of the entry. The beginning corner is proved to be on the waters of the Poplar Fork; and the call is, down for quantity. That stream runs a north-west course, and the first course of the survey is eastward, up and across the ridge, to get upon other waters of Big-Hurricane creek. Six witnesses (two or three of them, surveyors) state, that the survey is off the entry. The 4000 acre entry is dependent on this, calling for the vacant land on both sides of it; and the error in this, of course renders that wholly erroneous, and throws the surveys, as the jury said, on land for which there was no entry.

With respect to the entry and survey of Lewis, though they might have been more precise and certain, I incline to think they ought to be supported, under the decisions both of this and the federal court.

365 *I think however, that the chancellor erred in decreeing a conveyance of Lewis's title, before compensation shall be made to his devisees, for his services and expenses, in entering, surveying and patenting the land for Billips. The decree should have directed an account of these, and made the payment thereof, a condition precedent to the conveyance of the legal title by Lewis's devisees to Billips. This, however, being an interlocutory order, the omission will not affect the costs. The decree should be corrected in this particular, and affirmed in all other respects.

GREEN, J. The questions are, whether Billips, the cestui que trust of Lewis, has a better right to the land in controversy than Morris and his associates? and whether he can assert that right in a court of equity?

Referring to *M'Clung v. Hughes*, for the outline of my opinions on questions of this sort, I consider that Morris and his associates taking out a patent for the land in controversy, after the decision in a regular proceeding, that they had no right to it as against Lewis, was such a fraud as might be corrected in a court of equity, upon its general principles; and that all his associates were affected by the notice of

this better right than Morris's, although they might not have had such notice themselves. And, without deciding whether the proceedings in the caveat, were or were not binding upon the rights of the parties to this cause, I think, that, upon the evidence in this case, independently of the verdict and judgment on the caveat, the surveys of Morris and his associates did not conform to their entries; that Lewis's survey did conform to his, with sufficient certainty, inasmuch as it covered the main body of the land, which it would have covered if it had been surveyed in the strictest conformity to the entry; and that no more latitude has been taken by him, in this case, than might reasonably be allowed in general; especially, as he comes in competition with one, who was not misled by the trivial irregularity in his survey. The verdict of the jury on the caveat, and 366 *judgment of the court, which were more familiarly acquainted with subjects of that sort than I am, I confess, weigh strongly with me, to fortify this opinion.

The decree is, however, erroneous, in decreeing a conveyance of Lewis's title, until his representatives be indemnified by Billips, for his expenses in procuring the title to the land, with such a compensation for his services in that respect, as may be found reasonable. With this correction, the decree is right.

COALTER, J., said, he concurred in the opinion of judge Green.

CABELL, J., said, generally, that he concurred in the proposed correction of the decree, and in the affirmance of it in all other respects.

BROOKE, P. I concur in the affirmance of the decree, with the correction proposed.

I do not think the judgment in the caveat case, can be relied on as an estoppel by the plaintiffs. A court of equity will not set aside a judgment for fraud, unless the party asking it to do so, will do complete justice: nor will it enforce a judgment, unless the party seeking relief, will submit himself to the justice of the court. But this is not material in this case, because the findings of the jury, on which the judgment on the caveat was rendered, are, I think, convincing evidence, that the judgment was right. The excuse assigned for the failure to file a cross caveat by the caveatee (if one was necessary) is, I think, sufficient, under the correct understanding of the decision in *Noland v. Cromwell*, without extending the construction so far, as to substitute the opinion of the minority for the opinion of the majority of the court; which, I think, is the effect of the decision of *M'Clung v. Hughes*. I deem the excuse, here, sufficient; for, though no fraud may have been intended by the caveator, in taking 367 out his patent pending the *appeal from the judgment against him on his caveat, especially, as the patent included other lands than those in controversy; yet it was a surprise on the caveatee, who could not have expected, that the caveator would take out his patent, pending the appeal, and before the controversy respecting a

portion of the land included in it, was terminated.

The decree was corrected in the particular mentioned by the judges, and affirmed in all other respects, with costs to the appellees, as the party substantially prevailing.

368 *Jiggetts and Wife v. Davis.

June, 1829.

(Absent BROOKE, P.)

Wills—Construction—Dying without Issue—Case at Bar.—Testator having realty of his own inheritance, and personally part acquired in his own right and part in right of his wife, devises all his worldly estate, in manner following: All the profits of my estate, after providing genteel support for my wife and daughter, to be applied to my debts; and, after debts paid, I wish my estate kept together for mutual benefit of my W' and D', till my D' attain full age or marry, or my W' wish a division or marry. After which, I wish my estate divided in the following manner: I leave my W' one half the land I live on, and one half of my estate, during her life. If my W' die without any more issue, the whole of my estate to revert to my D'; and if my D' die without issue, the whole of my estate to revert to my W'; and if they both die without issue, then that part of my estate which came by my W', to revert to her brothers and sisters that may be then living, and the balance of my estate to revert to my brother J. or to his heirs, if any, if none to be equally divided between my two half brothers. If my W' marry and again have issue, I wish her to have the disposal of the whole of the property that came by her. **Held,**

1. **Same—Same.**—The daughter took by the devise, the moiety of the land that was not devised to the wife.
2. **Same—Same—Dying without Issue—Estate Tail—Effect of Statute.***—The daughter took an implied estate tail in the moiety of the land devised to her; and the wife took an implied estate tail in the moiety devised to her expressly for life: each of which estates was converted into a fee-simple, by force of the statute abolishing estates tail: consequently.
3. **Same—Same—Same—Same—Same.**—The executory limitations were contingent remainders, and barred by the statute.

William Swepson Davis, late of Mecklenburg county, died in the year 1813, having duly made and published his last will and testament, all the disposing part of which was in the following words:

"And as touching such worldly estate, as it has pleased Almighty God to bless me with, I do leave it in manner and form following, viz. Item, my will and desire is, that all the money that can be raised from the profits of my estate, after supporting my wife Susanna and daughter Lucy in a genteel manner, be applied to the payment

of my just debts: And after all my debts are paid, I wish my estate kept together, for the mutual benefit of my wife and daughter, until my daughter arrives to lawful age or marries, or until *my wife wishes a division or marries; after which, I wish my estate divided, in the following manner: Item, in case my wife should marry or wish a division, or my daughter arrive to lawful age or marries, then I leave my wife one half of the tract of land on which I live, including the buildings, also one half of my estate, during her natural life: In case my wife should die without any more issue, my will and desire is, that the whole of my estate to revert to my daughter Lucy; and should my daughter Lucy die without issue, for the whole of my estate to revert to my wife Susanna: and, in case they should both die without issue, then for that part which came by my wife Susanna, to revert back to her brothers and sisters that may be then living, and for the balance of my estate to revert to my brother John Davis, or to his heirs, if any; if none, to be equally divided between my two half brothers. Item, in case my wife should marry and again have issue, I wish her to have the disposal of the whole of the property that have come by her." And the testator appointed his brother John Davis his executor.

In July 1823, John Davis exhibited his bill in the superior court of chancery of Richmond, against Davis Jiggetts and Susanna his wife, setting forth the will; and, that the testator's daughter Lucy, who was his only child, survived him, but died not very long after him, an infant, intestate and childless: that, after the daughter Lucy's death, the testator's widow Susanna intermarried with Jiggetts, by whom, at the time of filing the bill, she had several children: that, after the testator's death, his two half brothers also died, infants, intestate and childless: that John Davis is the sole heir of the testator's daughter Lucy, and of his two half brothers: that the testator's debts were trivial, and had long since been discharged: and that the land on which the testator lived, a valuable tract in Mecklenburg, had been ever since his death held by his widow, and was still in the possession of Jiggetts and wife, who claimed title to the whole property, real and personal. And the bill claimed, that in the events, that had actually occurred,

370 the testator's *widow was entitled, under his will, to a life estate only in a moiety of his real estate; that the testator's daughter Lucy took under the will, a fee tail, converted by the statute docking entails into a fee simple, or if not, that she took a fee simple by descent from her father, in the other moiety, and in the remainder or reversion in fee, expectant on the life estate of her mother in the moiety devised to her; and that, consequently, as this estate was derived by the daughter Lucy from her father, and as John Davis was her paternal uncle, and her sole heir ex parte paterna, as well as sole heir of her deceased uncles of the half blood, he was now entitled, by the law of descents, to one moiety of the testa-

***Wills—Dying without Issue—Estates Tail—Effect of Statute.**—In *Callis v. Kemp*, 11 Gratt. 86, it is said: "That the power of disposing to such of his issue as he should think fit would not operate to restrict the general words, is shown by the case of *Ball v. Payne*, 6 Rand. 73, where a similar power of disposing amongst or to either of the heirs of the body, was contained in the devise; but the tenant for life was held to take an estate tail which by our statute was converted into an estate in fee simple. Upon the whole, it seems to me that according to the cases of *Bells v. Gillespie*, 5 Rand. 273; *Broadbush v. Turner*, 5 Rand. 308; *Jiggetts v. Davis*, 1 Leigh 368, and the cases there referred to, the son in this case took an estate tail by implication, which by the statute was enlarged into a fee." To the same effect the principal case is also cited in *foot-note* to *Callis v. Kemp*: *foot-note* to *Carter v. Tyler*, 1 Call 165; *Bramble v. Billups*, 4 Leigh 97, 98; *Thomason v. Andersons*, 4 Leigh 124; *See v. Craigen*, 8 Leigh 452; *Tinsley v. Jones*, 13 Gratt. 208. See a discussion in 4 Va. Law Reg. citing the principal case at pages 650, 652, 655, 656, 809; 5 Va. Law Reg. 85. See monographic note on "Wills."

Same—Personal Property—Limitation Over.—The principal case is cited in *foot-note* to *Horde v. McRoberts*, 1 Call 337; *Callava v. Pope*, 3 Leigh 106; *Hinton v. Milburn*, 23 W. Va. 171.

tor's real estate in fee simple, presently, and to the remainder or reversion in fee, expectant on Mrs. Jiggetts's life estate in the other moiety. Therefore, the bill prayed partition of the land between John Davis and Mrs. Jiggetts; that 'the court might settle and declare his title to the remainder or reversion in fee, expectant on Mrs. Jiggetts's life estate, in the moiety which should be assigned to her; that an account might be taken of the profits &c.

Jiggetts and wife, in their answer, admitted all the allegations in the bill, except that they alleged, that the testator's debts, so far from being trivial, exhausted his whole personal estate, including what he acquired by his wife: and they insisted, that under the will of the testator, and according to his declared intention when he made it, his widow, Mrs. Jiggetts was entitled to his whole estate, real and personal, on the death of his daughter Lucy without issue.

In January 1827, the chancellor pronounced an interlocutory decree, declaring, that the testator's widow took under his will a life estate only in the moiety of the land which included the buildings; that his daughter Lucy took by descent from her father, a fee simple absolute in the other moiety, and in the reversion expectant on the life estate of her mother in the moiety devised to her; and that John Davis was now entitled to this her inheritance, by descent from her; directing an equal
371 partition of the land, and that 'the moiety thereof including the buildings, should be assigned to Mrs. Jiggetts to hold for life, and the other moiety to Davis: and directing accounts of his administration of the estate of his testator, and of the profits of his moiety of the land.

Jiggetts and wife appealed to this court. Stanard and Johnson, for the appellants. The provisions of the will plainly evince, that the testator's wife and daughter were equal objects of his favor.

The first disposition touching the principal of the estate: "after all my debts are paid, I wish my estate kept together &c. until my daughter arrives to full age or marries, or until my wife wishes a division or marries; after which, I wish my estate divided in the following manner; in case &c. then, I leave my wife one half of the tract of land on which I live, including the buildings, also one half of my estate, during her natural life;" only gave a life estate in a moiety to the wife, nothing to the daughter. As to all of the estate, besides what was given to the wife, the testator was intestate, for the will is silent: nor was there any occasion to provide by the will, that that should go to the daughter, which, without any testamentary provision, would pass to her by descent and succession. The words in the preamble, "as touching such worldly estate as it has pleased God to bless me with, I leave it in manner and form following;" cannot be connected with the subsequent devise, so as to extend it, beyond its import, to the whole subject which the testator had to dispose of. General words of that kind, in the preamble of a will, may be coupled with

subsequent devises of specified subjects, to supply the want of words of inheritance in the particular devises, and thus to give the devisees estates of inheritance, where they must take by devise or not take at all, and where the particular devises, taken alone, would give them only life estates. But the preamble cannot be resorted to, for the purpose of extending a subsequent devise to a subject not embraced by its
372 *words: it cannot be resorted to, merely to give the heir an estate by purchase, rather than by descent: it cannot have any influence in a case like this, where, without any devise of the subject in question, all of it will pass, by descent, in fee, to the very person, for whose sake the court is asked to have recourse to this principle of construction.

The daughter, then, took by descent all the estate not given to the wife by the will. This consideration will have a very material influence upon the construction and effect of the ulterior limitations, upon which the controversy turns. For, where an estate is first devised to one, and then limited over upon his dying without issue to another, all the authorities admit, that those words, in their natural sense and construction, would import a failure of issue at the death of the first taker; and the artificial construction, which prevails in the common cases of executory devises limited upon a dying without issue, and which holds those words to import a general indefinite failure of issue, has only been adopted, in order to give the first taker an estate tail, and thus to provide for his issue, according to the general intent of the testator. In this artificial construction of limitations of the kind, the words of the contingency upon which the estate is limited over, are considered in reference to the interest previously devised to the person, upon the failure of whose issue the executory limitation is made to depend: a technical meaning is imposed on the words dying without issue in the executory limitation, for the sake of the devisee of the preceding estate; to qualify, enlarge or reduce, his interest to an estate tail. The technical, is not the less contrary to the natural sense and acceptance of the words. And whenever the technical construction of the executory limitation, is not necessary in respect to any estate previously devised; where, as in our case, there is no previous devise of any estate in the subject, but the whole subject descends in fee simple to the heir, until the happening of the event on which the estate is limited to the executory devisee; the technical yields to
373 the natural construction *and common sense of the devise. Gardner v. Sheldon, Vaugh. 259. And see an opinion of Mr. Fearne, Butler's edi. of Fearne, app. iv. at least, the peculiar circumstance in this case, of the estate descending in fee to the daughter, to be held by her in fee until the event of her dying without issue, upon which the estate is limited over to the wife, should have the effect of making the common technical construction of those words, yield more readily to any expressions in the will, indicating that the testator used them in their common accep-

tation, and had in his mind a failure of issue of his daughter living at her death. And if this be ascertained to have been his meaning, the executory devise to the wife, of that part of the estate which the testator did not dispose of by his will, but left to descend to the daughter, was good in its creation, and in the event that has actually happened, took effect.

Now, there are expressions in this will, which, even if the daughter took by purchase under the will, all the subject not given to the wife for life, instead of taking it by descent, would suffice to shew, that the testator, in the limitation of that subject over to his wife, upon the failure of issue of his daughter, intended not an indefinite failure of her issue, but a failure of issue living at her death.

To understand the testator's meaning, the clauses of the will should be transposed, and read in this order: "(1) In case my wife should marry or wish a division, or my daughter arrives to lawful age or marries, then I leave my wife one half of the tract of land whereon I now live, including the buildings, also the one half of my estate, during her natural life. (2) In case my wife should marry and again have issue, I wish her to have the disposal of the whole of the property that has come by her. (3) In case my wife should die without any more issue, my will and desire is, that the whole of my estate revert to my daughter Lucy: (4) and should my daughter Lucy die without issue, for the whole of my estate to revert to my wife Susanna: (5) and

in case they both should die without issue, for that *part which came by my wife, to revert to her brothers and sisters that may be then living, and for the balance of my estate to revert to my brother John Davis, or to his heirs if any, if none, to be equally divided among my two half brothers." It is obvious, the testator intended to give his wife, in all events, a moiety of his estate, for life; and, in addition to that provision, to give her, in case she should marry another husband, and again have issue, the property he had acquired by her: therefore, the proposed transposition of the clauses of the will is manifestly proper. And, reading the clauses of the will in this order, it is plain, that, when the testator said (in the second clause, as here placed) in case his wife should marry and again have issue, he wished her to have the disposal of the property that came by her, he intended her this additional bounty, if she should have issue of another marriage, at any time, whether such issue should die before her, or should be left by her at her death. It follows, that when the testator said (in the third clause) in case his wife should die without any more issue, the whole of his estate should revert to his daughter, he intended it should so revert, in case his wife should die without having had any more issue. And having thus ascertained that he meant by dying without issue, in his first use of that phrase, a dying without having had issue, we must take it that he meant the same thing, by the same expression, wherever it occurs: he meant, then, in the fourth clause, that, in case his

daughter should die without having had issue, his whole estate should go to his wife; and, in the fifth clause, that in case both the wife and daughter should die without having had issue, the estate should go over as there provided. Let the limitation over to the wife, upon the dying of the daughter without issue, be understood in the sense in which this testator used the phrase; let it be understood, as if he had said in terms, what he plainly meant, "in case my daughter shall die without having had issue, I give the whole to my wife;" and then it cannot be doubted, that this executory devise to the wife was good in
375 *its creation, and has in the actual event taken effect. *Weakley v. Rugg*,
7 T. R. 322.

Again, the executory devise to the daughter, in case the wife should die without any more issue, or the executory devise to the wife in case the daughter should die without issue, was clearly intended to take effect before the ulterior devise over to the brothers and sisters of the wife, which is limited to them on the contingency of both the wife and daughter dying without issue. If this ulterior devise, limited upon the dying of both the wife and the daughter without issue, be good and valid, the preceding devises to the wife or the daughter, in the alternatives, upon the dying of the one or the other without issue, must also be good: if the contingency of a general indefinite failure of issue of both the wife and daughter, was not intended in the ulterior limitation, then neither was the indefinite failure of issue of the wife or of the daughter, intended in those that preceded it. Now, the ulterior limitation runs thus: "in case they (the wife and daughter) should both die without issue, then that part of my estate which came by my wife shall revert back to her brothers and sisters that may be then living &c." Here, obviously, the testator looked to a failure of issue of the wife and daughter, living some one or more of the wife's brothers and sisters; that is, not an indefinite failure of their issue, but a failure of issue within the compass of a life or lives in being. The question always, in cases of this kind, is, Whether the contingency intended by the donor, be a general indefinite failure of issue, or not? And if it be ascertained, that an indefinite failure of issue is not intended, the court has no alternative but to hold the failure of issue, really intended, to be a failure of issue of the first taker living at his death.

But, if these views be all wrong; if the daughter took the moiety which was not given to the wife, by purchase under the will, and not as heir by descent; if it can be held, that this moiety was devised to the daughter, and if she die without issue (generally), then over to the
376 wife; and that *such a devise gives the daughter an implied estate tail in her moiety: upon the same principle, the devise of the other moiety to the wife for life, and if she die without issue, then over to the daughter, gives the wife an implied estate tail also in her moiety. The executory limitations, in both cases, are contingent remainders, limited on estates tail previously devised; and those remainders

are both alike, if either be, destroyed by the statute abolishing entails.

Leigh, for the appellees. The testator's wife and daughter were certainly the principal objects of his bounty, but not objects of equal bounty.

The daughter took by purchase, under the will, all the subject and all the estate therein, which was not included in the provision carved out for the wife. The testator having, in the beginning of his will, declared his design to dispose of all the worldly estate he possessed, the court will not intend a partial intestacy, unless it be unavoidable. He intended to dispose of the whole subject, as well as his whole interest in it. First, in devoting the profits of his estate to the payment of debts, he intended to devote the profits of the whole subject to that object. Next, in directing that, after his debts should be paid, his estate should be kept together for the mutual benefit of his wife and daughter, he intended that the whole subject should thus be kept together: and the division, which he intended should be made, when a change of situation of the wife or daughter should require a severance of their interests, was a division of the whole subject. The words are, "I wish my estate kept together, for the mutual benefit &c. until my daughter arrives to lawful age or marries, or until my wife wishes a division or marries; after which, I wish my estate divided in the following manner. In case &c. then, I leave my wife one half of the tract of land on which I live, including the buildings, also the one half of my estate, during her natural life." No express devise is made of the residue. But the estate was to be divided, between whom? surely, between the wife

377 *and daughter. How could it be, in this manner, divided between them, unless the daughter took in the division, what was not included in the subject that was to be assigned to the wife in the division?

The daughter, by inevitable intendment, took by the devise, all that was not given to the wife; the remainder expectant on the life estate of the wife in the moiety devised as a provision for her, and the other moiety in possession. And, supposing the daughter took by the devise, the question will be, upon the construction of the whole will, whether, in the executory limitation over to the wife of the estate devised to the daughter, in the event of the daughter dying without issue, the indefinite failure of the issue of the daughter, be indicated as the contingency on which the wife shall take, or the failure of the issue of the daughter living at her death? And the appellants must maintain, that the contingency of the death of the daughter without issue, is clearly restrained to a failure of issue living at her death; that the daughter took by the devise an estate in fee simple, determinable by the event; that the limitation over to the wife, is an executory devise of the first sort, according to Mr. Fearne's classification (Butler's ed. 399,) and an executory devise well limited, within the principle of that class of cases of which the leading one is *Pells v. Brown*, Cro. Jac.

590. But the legal import of the words of the contingency in question, taken alone, is the indefinite failure of the issue of the daughter; and if there be nothing to indicate another meaning, the daughter took by the devise, an estate tail, the limitation over to the wife was a contingent remainder, and the estate tail of the daughter was converted into a pure and absolute fee, and the contingent remainder to the wife cut off and destroyed, by the statute of Virginia abolishing entails. *Carter v. Tyler*, 1 Call, 165; *Hill v. Burrow*, 3 Call, 342; *Tate v. Tally*, Md. 354; *Eldridge v. Fisher*, 1 Hen. & Munf. 559; *Sydnor v. Sydners*, 2 Munf. 263; *M'Clintic v. Manns*, 4 Munf. 328; *Tidball v. Lupton*, 1 378 Rand. 194; *Goodrich v. Harding*, *3 Rand. 280; *Bells v. Gillespie*, 5 Rand. 273; *Broadus v. Turner*, Id. 308; *Ball v. Payne*, 6 Rand. 73.

Supposing, as is contended for the appellants, that this will presents the case of a partial intestacy; and that the daughter took the subject not included in the provision made for the wife, by descent in fee from her father, and not an implied estate tail, according to the case of *Walter v. Drew*, Com. Rep. 372, *Butler's Fearné on Ex. Dev.* 387, then, the limitation of the estate over to the wife, upon the dying of the daughter without issue, is an executory devise of Mr. Fearne's second class (*Ibid.* p. 400,) in which the deviser, without departing with the fee immediately (which descends to the heir), gives a future estate, to arise upon a contingency. The contingency, in this will, upon which the executory devise is limited to the wife, is the dying of the daughter without issue. And the rule is general, that wherever any executory devise is limited to take effect after a dying without heirs or without issue, subject to no other restriction, the limitation is void, being limited on too remote a contingency. *Id.* ch. 4, p. 444. So the question will be still, in effect, the same: does the contingency of the daughter dying without issue, upon which the estate is limited to the wife, import an indefinite failure of the issue of the daughter, or is it restrained to a failure of issue living at her death?

Let the clauses of this will be transposed as counsel or as the court please; there is not a single expression in the will, applicable to the real estate, and referrible to the contingency of the daughter dying without issue, which narrows or in any manner qualifies the legal construction, import and effect of those words. Grant, that it is reasonable to understand the same expressions, used in several limitations, in the same will, and in reference to the same subject, in one and the same sense: it can never be admissible, to give the same sense to different expressions, applied to different subjects, in the several limitations. If it

be true, that, when the testator gave 379 his wife the property that came *by her, "in case she should marry and again have issue," he meant she should have this property, if she should have issue born of a second marriage, whether such issue should survive her or not; it does not follow, that when he said, "in case his

wife should die without any more issue," the whole estate should revert to his daughter, he meant, in case she should die without having had more issue born; much less, that, when he said, yet more generally, "in case his daughter should die without issue," the whole estate should revert to the wife, he meant, in case the daughter should die without having had issue born. On the contrary, the difference in the expressions used in the several limitations, indicates different meanings.

If these limitations could be fairly understood, as if they had been written thus: "in case my wife should die without having any more issue, the whole estate shall revert to my daughter; and in case my daughter should die without having issue, the whole shall revert to my wife:" the cases of *Tate v. Tally and Tidball v. Lupton* (before cited) and *Romilly v. James*, 6 Taunt. 263, are decisive, that such language, used in a limitation of real estate, imports an indefinite failure of issue. *Weakley v. Rugg* was a case of personal estate: we all know the difference.

The argument drawn from the language of the ulterior limitation of that part of the estate that came by the wife, to her brothers and sisters that may be then living, is wholly untenable. For, (even admitting that language, applied by the testator only to the estate which came by his wife, can be so applied by the court as to affect the limitation of the land which did not come by her) the argument would be refuted by the authority of *Carter v. Tyler and Broadbus v. Turner*.

I have thus far considered the will in the point of view in which the counsel for the appellants have chosen to present it. My own understanding of it is intirely different from theirs. The testator had first given his wife, a moiety of his land and of all his other estate, for life; and, 380 intending, "in the sequel of his will, to give her the property that came by her, absolutely, in case she should marry and again have issue, and having this additional bounty to her in his mind, he said, "in case my wife should die without any more issue (meaning of another marriage), my will is, that the whole of my estate revert to my daughter." The phrase, the whole of my estate, was used here, in reference to the different parts of his estate, that which he held in his own right, and that which he acquired by his wife: and the design of the provision was, that the whole, that is, even that part, which came by his wife, and which he intended to give her absolutely, if she married and had issue by another husband, should, in case she should die without any more issue of another marriage, go to his daughter. Thus, this limitation only affects the part of the estate which came by his wife, not the land which was his own inheritance. In like manner, when he said, "in case my daughter die without issue, the whole of my estate shall revert to my wife," he had reference to those different parts of his estate, and intended that on the failure of issue of his daughter, the whole, that is, even that part of the estate which he had acquired in his own right, should go to his

wife. Thus, this limitation affects only the estate which was of his own acquisition. In the ulterior limitation, the distinction existing in his mind, between the property acquired in his own right and that acquired in right of his wife, is plainly marked. The proposed transposition of the clauses of the will, renders this view of it yet more clear. The testator has obscured his meaning, by blending together and confounding limitations intended to affect the one, with limitations intended to affect the other, part of the subject: separate them, and then we shall have light and order. Then we shall see, that the interpolation of the words having had before the word issue, can only be proper in respect to the limitation of the property that came by the wife, and that the expressions in the ulterior limitation to the wife's brothers and sisters that may be then living, 381 can only affect the *limitation so far as it concerns the property acquired by her. Then we shall see, too, that the limitation over of the whole estate to the daughter, in case the wife should die without any more issue, does not at all affect the previous devise to the wife of an estate for life in a moiety of the land, which was the testator's own inheritance; that the next limitation over of the whole estate to the wife, in case the daughter should die without issue, does affect the previous devise to the daughter of one moiety of the land in possession, and of the remainder of the other moiety expectant on the life estate therein carved off as a provision for the wife; and that the last limitation is twofold, intended to give the property that came by the wife, in case she should die without more issue of another marriage, to her brothers and sisters then living, and the land to the testator's own family, in case his daughter should die without issue.

If this view of the case be correct, it not only refutes all the arguments adduced to support the claim of the wife, in the event that has happened of the daughter's death in infancy and without issue, to the whole of the land, by way of executory devise limited on the daughter's estate; but it serves to repel, conclusively, the claim last advanced for the wife; namely, that if the daughter should be held to have taken an implied estate tail in the moiety of the land previously devised to her, in general terms, the wife, upon the same principles, is entitled to an implied estate tail in the moiety previously devised to her for life, expressly.

But, apart from this consideration, the estate tail in a moiety, claimed for the wife, cannot be implied without violence to reason, and indeed to the express intent of the testator. He gave his wife a moiety of the land, as well as of his other estate, "during her natural life," only. If the court, connecting the subsequent limitation with the previous devise, shall adjudge to her an estate tail in that moiety by implication, it can only do so, upon the strange supposition, that the testator intended to devote one half of the land and one 382 half of all his estate of his own inheritance or acquisition, *to the purpose of making a provision for

the issue of his wife by a future husband, and, with respect to that moiety, to postpone his own child and her issue to the issue of another marriage: for (the statute docking entails apart) the effect of entailing the moiety upon the wife and her issue by a future husband, would be, that, though the daughter should survive the wife and leave numerous issue, yet neither she nor her issue would ever take this moiety, till the wife's issue by a future husband should be extinct. Nay, to allow this claim of the wife, to an estate tail by implication in the moiety expressly devised to her for life, the court must further suppose, that the testator intended to make a better provision for his wife and her issue by a future husband, than for his own child and her issue; to entail on his daughter and her issue, one moiety of the estate he had acquired in his own right, and to entail the other moiety thereof on his wife and her issue by a future husband, and, in addition to that equal share of his own acquisitions, to give his wife, if she should marry and again have issue, all that he had acquired by her, in absolute property.

But, it is quite plain, that the testator never intended, in case his daughter should live to have issue, to make any other provision for his wife, out of his own acquisitions, than a life estate in a moiety of them, and that the only other bounty he intended her, was, to give her back the portion he had received by her, in the event of her marrying again and having issue of such future marriage. And to enlarge the wife's estate for life into an estate tail, would be contrary to the express words of the will, contrary to the plain intent, and contrary to every natural motive of bounty that can be attributed to the testator. Never, under like circumstances, was a life estate, devised in express terms, enlarged into an estate tail, by implication.

Johnson, who replied, questioned the propriety of those former adjudications of the court, wherein since the statute abolishing entails, an estate tail had been raised by implication, and then the statute applied to convert it into a fee, and to defeat the limitations in remainder.

383 *He said: None of the cases, from that of *Hunter v. Haynes*, 1 Wash. 71, to *Broadbush v. Turner*, 5 Rand. 308, furnish a precedent for implying an estate tail in the heir at law, where no express estate had been given him by the will, or for raising an express estate for life into an estate tail. All the precedents of implied estates tail, are cases in which estates of inheritance have been given. Of these there are so many, that the wise judicial maxim, *stare decisis*, ought perhaps to forbid us from departing from them: yet, so ill have these precedents been received, so much complained of, so universally believed to have defeated, in almost every case, the clear and lawful intent of the testator, such are the perplexing questions to which they give rise, and so clear the policy of the law of 1819, furnishing a just and simple rule of interpretation, directly the reverse of that which those precedents afford, that it may be equally wise to restrain them rigidly to the class of cases to which they belong.

In every case in which the court has implied an estate tail created since the act of 1776, it has interpreted the deed or will in the same manner as if it had been made before that act; and this, without reference to the change of law introduced by the act itself. It has inferred, that a testator intended to create an estate tail, when by law he could not create it, and when such an inference would defeat the limitations of his will, from the same circumstances that justified such inference, when it was lawful to create such an estate, and when the inference was necessary to sustain the limitations of the will.

The question is, whether this principle of construction is warranted by the acts of 1776 and 1785?

That of 1776 enacted, that "any person, who now hath, or hereafter may have, any estate in fee-tail, general or special, in any lands or slaves, and whether such estate tail hath been or shall be created by deed, will, act of assembly, or by any other ways or means, shall from henceforth, or from the commencement of such estate tail, stand ipso facto seized, possessed or entitled, 384 of, in or to such lands or *slaves, in full and absolute fee simple, in like manner as if such deed, will &c. had conveyed the same to him in fee simple."

The single purpose of the act, was to abolish estates tail with all their incidents, and to unfetter them of those restraints upon alienation, peculiar to estates tail, by converting them into estates in fee simple. It was no wise intended to restrain the power of the donor or grantor, to limit the estate, by way of contingent remainder or executory devise, within those reasonable bounds which the law had prescribed, or to furnish any rule of interpretation whereby to ascertain what an estate tail was.

The english statute *de donis*, with the commentaries on it, is the guide in this inquiry; and ascertains, that an estate tail is an estate of inheritance, not descending to the heirs general, but limited to the heirs or issue of the body, in relation to which the donee's power of alienation is restrained by the will of the donor; and that no set form of words is necessary to create such an estate; that it may be created, by express words of limitation to the heirs of the body, or issue of the body, or by any other words necessarily implying that the issue of the body of the first taker, and they alone, are to inherit the estate from him. Whenever a question arises under the act of 1776, whether the donee hath an estate tail by implication, the true inquiry is, whether, taking the whole will together, and considering all circumstances, it be necessarily inferrible, that he intended to limit the inheritances to the issue of the donee.

The statute having given no new rule of interpretation, we must be governed by the rules the common law furnishes. There is no common law rule which authorises you to infer, that a testator meant to do what he had no right to do: on the contrary, as all men are presumed to know the law, so all are to be presumed to conform to it, till the contrary appears. No common law rule authorises you to infer, that the testator meant to defeat the express limitations of

his own will: on the contrary, you 385 are bound, if possible, so to *interpret the whole will, as to give effect to every part of it; and out of this rule have arisen those forced constructions of doubtful phrases, upon which almost every implied estate tail rests in England; constructions, the offspring of the statute de donis; made to raise and to sustain lawful and favoured inheritances, not to create and destroy unlawful and forbidden estates; to effectuate, not to defeat, the intent of the testator. No common law rule of interpretation fixes upon the words dying without issue, dying without heirs lawfully begotten, or any other such words, any technical meaning, necessarily implying an estate tail: on the contrary, in England, such words are invariably interpreted according to their context, and imply an estate tail or not, according as such implication is calculated to effectuate, or to defeat, the obvious intent. Why should he give a technical meaning to these words, and such as these, when by the common law they have none? Why interpret the words of the testator so as to defeat his will, when by the common law we are taught so to interpret them as to sustain it? Why infer an intention to violate the law, when the common law teaches us to infer an intent to obey it? The warrant is not found in the act of 1776, and it will be in vain looked for in that of 1785.

The provisions upon this subject were reported by the committee of revisors, and are found embodied in the act for regulating conveyances, 12 Hen. stat. at large, p. 156, 7. This act very properly changed the phraseology, but was never regarded as altering the substance of the enactments of 1776.

The act of 1776, had embraced in the same common provisions, estates in lands and estates in slaves. estates created before and after its passage; and was, therefore, obnoxious to the verbal criticism, that estates tail, both in lands and slaves, might still be created, although such estates, in the moment of their execution, became estates in fee. The act of 1785 removes this ground of cavil; and distinguishes estates in land,

from estates in slaves, and estates 386 created *before, from those created after, the act. It declares, that "every estate in lands or slaves, which on the 7th October 1776, was an estate in fee tail, shall be deemed an estate in fee simple; and that every estate in lands, which since hath been limited, or hereafter shall be limited, so that as the law aforesaid was, such estate would have been an estate in fee tail, shall also be deemed an estate in fee simple:" and it discharges all such estates from the conditions annexed thereto, by the common law, restraining alienations before the donee shall have issue.

This act is a plain legislative declaration, that the function of the act of 1776, was to abolish entails; since it regards no estate created since as being entails, and makes no provision respecting subsequent limitations of slaves. With this understanding of the act of 1776, the legislature of 1785 meant to declare, that entails existing in 1776, should be from thenceforth regarded as estates in fee simple; and that estates of

inheritance thereafter limited, to the issue of the body of the first taker, should also be held in fee simple; and, in as much, as all such estates and none other, according to the law as it was before October 1776, were estates tail, the legislature had reference to the law as it was before that time, as the standard of those subsequent limitations which should create a fee simple.

It is this reference to the law as it was aforesaid, that has been supposed to furnish a new rule of interpretation, and to warrant the construction I am controverting. But this cannot be; for it has been already shewn, that the only law known to us before the year 1776, instead of warranting any such construction, required one directly the reverse; and it would be most strange, if the reference to the law as it aforesaid was, should justify a new and unheard of rule of interpretation. The law as it aforesaid was, construed the same words, in one way, when applied to property which could not be entailed, and in another, when applied to that which could; and that, for the purpose, in each case, of effectuating the intent of the testator: the new rule maintains this diversity

387 *in the construction of the same words, though in each case they are applied to property which cannot be entailed; and this, for the purpose of defeating the intent of the testator. Thus, in limitations of personal property, which could not be entailed, the old law laid hold of the slightest circumstances, to restrain the generality of the testator's words, to save the limitation over, and to effectuate his intent; while, in limitations of real estate, which could be entailed, they disregarded the same circumstances, raised an estate tail by implication, and thus effectuated the testator's intent, without endangering the limitation over. The new rule follows the spirit of the old, in interpreting limitations of personal property, which cannot be entailed, but utterly abandons its spirit and perverts its purpose, when, in limitations of real estate which now also cannot be entailed, it disregards those circumstances, and raises estates tail by implication, not to effectuate but to defeat the intent of the testator, and destroy the limitation over.

The same act of 1785, which refers us to the law as it aforesaid was, for the interpretation of limitations in tail, makes a radical change in one rule of interpretation, which often bears directly on these questions of entail. In judging whether an entail is created or no, it is often of importance to ascertain, whether the estate limited over, be an estate of inheritance or a life estate. By the common law, an estate given without words of inheritance, is a mere life estate: by the act of 1785, an estate so given, is an estate of inheritance. By the common law rules of interpretation, if an estate be given by will, to A. and his heirs, but if he die without issue, remainder to B. and his heirs. A. takes an estate tail by implication, and B. a remainder in fee dependent thereon. But if the limitation over had been to B. without words of inheritance, A. would have taken a conditional fee, and B. a contingent remainder

for life. Suppose, since the act of 1785, the same limitation in Virginia, to A. and his heirs, and if he die without issue remainder to B. without words of inheritance: if 388 you construe *this limitation without reference to the provision of the act of 1785, which would give B. an inheritance, A.'s estate would be a fee conditional, and B.'s a contingent remainder but if you construe it with reference to this provision of the act of 1785, A.'s estate is an implied entail, and B.'s remainder defeated. Does the reference to the law as it aforesaid was, preclude all consideration of this change introduced by the act of 1785? This question was presented to this court, in *Goodrich v. Harding*, and in *Bells v. Gillespie*, cited by Mr. Leigh. One judge retreated from its difficulties in dismay; others have grappled with it; but the labour which it costs them, and the varying conclusions they have come to, only serve to shew how the natural strength of their minds has been subdued by the chains in which former adjudications have bound them. In truth, no question would have been more simple, if it had been *res integra*. No one could have doubted for a moment, that in ascertaining the intent of the testator, you must interpret his language, with reference to the law which explains it, if it had not been for the interpretation, which had already been put upon the reference to the law as it aforesaid was. And if you would refer to one part of the law of 1785, as explanatory of the testator's intent, why not consider the whole of it?

If we are at liberty to interpret the testator's intent with preference to laws passed since the year 1776, the statute of descents would be entitled to great weight. It might be quite reasonable to imply an intention to limit an estate, which should descend in a single line of succession from father to son forever; but it would require irresistible circumstances to justify an inference, that a man in his senses, meant to limit an estate to descend forever, from generation to generation, to and among all the descendants of his donee, male and female, when, in all probability, before the fifth generation, the inheritance would be sub-divided into as many parcels, as it contained acres.

I submit these views in the hope, that as the will now under consideration, is not directly within the precedents 389 *relied on for the appellee, the court will feel itself at liberty to interpret it by the well known rules of the common law, and common sense, and will find in it nothing to justify the implied estate tail, which is insisted on, and nothing to disappoint the remainders over.

CARR, J. This case turns wholly upon the construction of the will of W. S. Davis, who died in 1813. It brings again before the court, in a form a little varied, the question so often debated, so often decided, here: Whether a devise to A. and his heirs, or to A. for life, or to A. without words of inheritance, and if A. die without issue, to B. C. and D. or such of them as may then be living, gives an estate tail to the first taker? And if this were the only question in the case, I should content myself with referring to my former views on the subject

in the cases reported, and repeating my steady determination *stare decisis*. But there is another question which renders it necessary to go farther into the case.

It is evident that the will in question, drawn probably by the testator himself, is the production of a man ignorant of legal forms, and unused to express his ideas in writing. It is clumsily and obscurely written. That men should differ in the construction of such a will, is by no means wonderful. I will briefly offer my conjecture as to the testator's meaning.

I admit, that it is allowable to transpose the different clauses of a will, where that is clearly seen to be necessary to give distinctness and perspicuity to the ideas of a testator; but it is only in such cases, and then with much caution, that the practice should be indulged. Generally, I think, we are much more apt to attain to the meaning of a writer, by pursuing the order and current in which his thoughts flowed, than by reversing or deranging it. In the present case, it seems to me, that transposition would tend rather to confuse than explain, and is therefore improper.

In the first place, I will dispose of that clause, which in case of the wife's marrying and again having issue, gives 390 her *the disposal of all the property that came by her. This was personal property, none of which is the subject of contest between the parties; and the only remark which seems necessary, is, that I do not consider this clause as having the slightest influence on the meaning of any other clause in the will.

I believe, the testator intended to divide his estate equally between his wife and child: they were naturally nearest and dearest to him; all the provisions of the will look first to them; and it is evident, that he did not mean to extend his bounty to any other objects, so long as they, or the descendants of either of them, were in existence.

It was strongly contended, that the will contains no words of devise to the daughter, except of a remainder after the devise to the wife; and that, in the other half of the estate, the daughter took a fee by descent as heir of her father: and this was urged, as having an important influence on the construction of the words of the contingent limitation, "should my daughter Lucy die without issue." I cannot assent to the position, that Lucy took by descent. The heir, I know, will take by descent whatever is undevise by the will: and even where there is a devise to him of the same estate which he would take as heir, he is said to be in by descent: for Hobart says (*Counden v. Clarke*, Hob. 30,) "this is a positive rule, that a man cannot raise a fee simple to his own right heirs, by the name of heirs, as a purchase, neither by conveyance of land, nor by use, nor by devise:" "but the devise is void, and it works by descent:" But the same case and others lay it down, "that where another estate is created by the will, than would descend to the heir, or the quality of the estate is altered by the devise, then the will shall prevail though the devisee be heir at law." I consider it settled law, that in a will the es-

tate may be given by implication, even to the disinheriting of the heir, if such implication be necessary to effect the clear intent of the testator. This is laid down very strongly, in *Gardner v. Sheldon*, Vaughan's Rep. 259, and *Robinson v. Robinson*, 391 *1 Burr. 38, and, in 1 *Bridg. Ind.* 545, under head of Devise by implication, many cases to this point are stated. Every man has the option, either to make a will for himself, or to leave his property to be disposed of by the laws of the land. If, however, he undertake to make a will, it is always presumed, that he means to dispose of his whole estate, and not to die intestate as to any part of it; and, in the case before us, this conclusion is rendered clear by the words of the testator, "as touching such worldly estate as it has pleased God to bless me with, I do leave it in manner and form following;" not a part of it, but the whole.

Let us now look more closely at the will. The testator says, "My will is, that all the money that can be raised from the profits of my estate, after supporting my wife S. and my daughter L. in a genteel manner, be applied to the payment of my just debts; and after all my debts are paid, I wish my estate kept together for the mutual benefit of my wife and daughter, until my daughter arrives to full age or marries, or until my wife wishes a division or marries; after which, I wish my estate divided in the following manner: I leave my wife one half of the tract of land whereon I now live, including the buildings, also one half of my estate, during her natural life." Here we see the wife and daughter coupled together in all things, and forming the sole objects of the testator's bounty: they are to be genteelly supported: the estate is to be kept together for their mutual benefit, till the daughter comes of age or marries, or the wife wishes a division or marries. Why is the arrival at age or marriage of the daughter, marked as epochs at which a division should take place? because either of these events would make it necessary, that the daughter should have her portion in severalty: no other reason can be given. The estate was to be held for the mutual benefit of mother and daughter, until the daughter married or came to age, or the mother married, or wished a division, and then to be divided: between whom? The division, ex necessitate, supposes persons between whom it is to be made: who could they be

392 *here, but the wife and child? Is not this implication irresistible? The division is to be into two equal parts: if nothing more had been said, if there had been no other disposition of the estate, except limiting remainders after the death of the wife and child without issue; could we hesitate a moment to say, that they took the estate between them, subject to the effect of the limitations over? But the will goes on: "I leave my wife one half the tract of land I live on &c. and half my estate &c." What becomes of the other half? I answer, by strong and inevitable implication, it is given to the daughter; if not, we must say the father died intestate as to it. Neither does it weaken the force of this implication, that the daughter would have taken as heir. The testator took the disposition of his es-

tate into his own hands, and meant to leave nothing to the law, but to dispose of the whole himself. The half of the estate being previously given to the wife during her natural life, the testator adds, "in case my wife should die without any more issue, my will and desire is that the whole of my estate revert to my daughter Lucy." Now, he had given his wife but half, and it is most evident, that this limitation was meant to operate upon that half only; yet he says, if his wife die without more issue, the whole shall pass to Lucy. How can we make sense of this, but on the ground, that the testator, supposing the one half already in Lucy, considered that the half given to his wife, when it should pass to Lucy, would vest the whole in her. The will proceeds, "and should my daughter Lucy die without issue, for the whole of my estate to revert, to my wife Susanna; and in case they both die without issue, then &c." I consider this a clear estate tail in Lucy. The case of *Walter v. Drew*, seems to me stronger than this. *Richard Weeks*, having two sons, William his elder and Richard his younger, devised as follows: "It is my will, that if William Weeks, my son, shall happen to die and leave no issue of his body lawfully begotten, that then, in that case and not otherwise, after the death of

the said William, my son, I give and 393 bequeath all my lands *of inheritance in L. unto the said Richard, my son, to have and to hold the same, after the death of the said William, to him and his heirs." This case was much canvassed before baron Price, and many authorities cited, among others, *Gardner v. Sheldon*. The question was, whether the heir at law took an estate tail by implication, and Richard a remainder, or whether the heir took a fee by descent, and Richard by way of executory devise? After time for consideration, the judge gave his opinion, "that William took an estate tail by this will; for the words shall not be construed to give an estate by way of executory devise, but where the devisee cannot take any other way; but here William took by the will, for it is a necessary implication, that he shall have it to him and the heirs of his body; for the heir shall take by the will, though he is not expressly named, or there be no devise to him by express words."

I am of opinion, then, that Lucy took by devise, and that the estate taken was a fee tail, the limitation over being on her death without issue. And I have no doubt, that though Lucy had taken by descent, the result would have been the same: this is a point, however, which I have not well examined. The view taken of it by my brother Green, seems clear and sound; and to that I refer, as also particularly, to his strong and satisfactory remarks and authorities, in support of the law, so often sanctioned by this court, under which the devise to Lucy has been held to be an estate tail. But there is one point in this cause, in which I must differ from him: I mean as to the estate which the mother took in the land devised to her.

I think that she also took an estate tail, enlarged into a fee by the statute abolishing entails. I cannot agree to the reading which

connects the last clause in the will with the devise of the land to the wife, and makes the words "if she should die without any more issue," refer exclusively to the personal estate that came by her, so as to prevent their enlarging the express estate for life given her in the land, into an estate tail.

I do not believe the testator ever
394 dreamed *of such connection. It is

clear to me, that he held his wife and child in equal scales, and meant to divide his estate between them. The whole face of the will convinces me of this. Immediately after the devise to her of his land and half of his estate, and indeed forming a part of that devise, follows, the limitation, "if she die without more issue, then to my daughter:" shewing that it was not till failure of that issue, that the daughter would take, and that until such failure, that issue would itself take: this constitutes an estate tail. Observe the exact equality in these devises, between the wife and daughter: if my wife die without more issue, then the whole of my estate to my daughter; if my daughter die without issue, then the whole to my wife; and if they both die without issue then over. I cannot make a distinction between these devises, and say that the mother took but an estate for life, and the daughter a fee tail enlarged into a fee. I think the same words, and the same reasoning, and the same settled law, carry an estate tail to both, in the half given to them; and consequently, that the appellants are entitled to that portion given to the wife, her estate in it being enlarged into a fee.

GREEN, J. The appellants' counsel was right in saying, that the construction should be made upon the whole of the will in question, and all the provisions made in favour of the testator's wife brought together. And then the will, with all its provisions taken in their natural order, would read thus: "I leave my wife one half of the tract of land whereon I now live including the buildings, also one half of my estate, during her natural life: In case my wife should marry and again have issue, I wish her to have the disposal of the whole of the property that came by her: In case my wife should die without any more issue, my will and desire is, that my whole estate to revert to my daughter L.: And should my daughter L. die without issue, for the whole of my estate to revert to my wife S.: And in case

they both should die without issue,
395 then for that part that came by *my wife S. to revert back to her brothers and sisters that may be then living, and for the balance of my estate to revert to my brother J. D. and his heirs, if any, if none to be equally divided between my two half brothers." I think too with him, that the devise to the wife of all the property which came by her, in case she should marry and again have issue, taken by itself, would have the effect of giving her an absolute estate in that property, if she should marry and again have issue, even if that issue died in her life-time, the hour after its birth; and this upon the plainly expressed intention of the testator. But I do not think, that the inference he insists on is just; namely, that the testator, having given her that

property upon that condition, did not intend that it should go over to his daughter, unless that condition failed, and that the daughter and wife being equal objects of his bounty, (as is inferred from the provisions of the will) neither did he intend, that the property given to or devolving on the former, should, if she had any issue, go over to the latter, or that any of the property should go over to his and his wife's relations, if his daughter had any issue, or his wife any more issue, at any time; and that, therefore, the words "having had" should be interpolated before the word issue, wherever it occurs. In every instance, in which the expression "die without issue" occurs, it is used indefinitely: and the words "without any more issue" applied to the wife, have the same effect as "die without issue" applied to the daughter; "any more" referring to the future issue of the wife, since she could not die without issue generally, as long as the daughter or any of her issue existed. Accordingly, those words are dropped in the ultimate limitation, where that discrimination was neither necessary nor proper, as the event upon which that was to take effect, was the death of both without issue.

This then presents no more than the common case, of a devise in fee or for life, or without the designation of any estate, with a limitation over upon the failure of the issue of the first taker. Whether, in
396 this case, that was to be, after *an indefinite failure of issue, or otherwise, is a different question, depending upon other provisions of the will, to be hereafter examined: these are the conditional limitation over to the brothers and sisters of the wife living at the death of the survivor of the wife and daughter, and to the half brothers of the testator, without words of perpetuity.

Whatever may be the effect of these provisions, it is clear, from the limitation over to the wife upon the death of the daughter without issue, and to the daughter upon the death of the wife without any more issue, that the testator intended, that the daughter should take such an estate in the property given her by the will, or devolving upon her by law, and the wife such an estate in a part or the whole of the property given to her, for life in the first instance, or in absolute property upon a condition, as would be transmissible to their respective issues. And there is nothing in those ultimate provisions of the bill, before alluded to, which can possibly controul this intention, and reduce the daughter's interest to a life estate only, or the wife's in that part of the property, which was intended to be transmissible to her issue other than Lucy. These transmissible interests were, of necessity, estates in fee simple or estates tail, as the law was before the 7th October 1776.

As to the property, which came by the wife, and which was given to her upon a condition which has been performed, that being personal, it is unnecessary to make any further inquiry, as a devise which will give a fee tail in real, gives an absolute property in personal, estate. The only question is, whether the life estate

given to her in a moiety of the testator's land, and the residue of his personal property, was enlarged into an estate tail by the limitation over upon her dying without any more issue. And that depends upon the question, whether that limitation related to the property so given to her for life, in which case it might have that effect, or only to the property which she had a contingent right to take absolutely?

397 *Much of the difficulty in the construction of this will, arises from the circumstance, that the testator, having in his mind two classes of his property, that which came by his wife and that which was of his own acquisition, and intending to dispose of these alike in some events, and differently in others, has confounded them together, and in terms made the same dispositions as to both. But, in respect to this subject also, by reading the will altogether, and giving effect to all its provisions, without allowing one to contradict or controul another, unless it be unavoidable, we shall be enabled to solve the difficulties. With a view, then, to these two descriptions of property, the provisions of the will may be arranged and paraphrased thus: "I give to my wife, in all events, during her natural life, one half of my estate which came by her; and if she marry and again have issue, I wish her to have the disposal of the whole of it; and if she die without any more issue, the whole of it is to revert to my daughter; and if both my wife and daughter die without issue, it is to revert to my wife's brothers and sisters then living. I also give to my wife, during her natural life, half of the residue of my estate; and if my daughter die without issue, the whole of my estate, including that which came by my wife, is to revert to her, whether she marry and again have issue or not; and if both die without issue, that part of my estate which did not come by my wife, is to revert to my brother J. D. and his heirs, if any; if none, to my two half brothers." Thus, *reddendo singula singulis*, all the provisions of the will are rendered consistent. The expression die without any more issue finds a fit subject to operate upon, without any necessity to enlarge or affect the estate expressly given for life; which ought not to be done by any implication, unless it be such as is necessary. Indeed, a little more than one hundred years since, it was held, that no estate expressly given could be enlarged by any implication. *Bamfield v. Popham*, 1 P. Wms. 54, (1702); *Idle v. Cook*, Id. 78, (1705); *Tomlinson v. Dighton*, Id. 154, (1721);

398 *Humberston v. Humberston*, *Id. 333, (1716.) This, however, was soon exploded, as a general and inflexible rule, in *Blackborn v. Edgley*, Id. 605, (1719), although it was in that case, as it has ever since been admitted, that it only yielded to a necessary implication, and where the words die without issue, would otherwise have no operation. And, in that case, there was no such necessary implication. But, in *Langley v. Baldwin*, decided in 1707 (cited in the Attorney General v. Sutton, Id. 759), and in the last mentioned case, decided in 1737, the implication was thought necessary, because otherwise some

of the issue of the person to whom the life estate was given in terms, might be excluded. And in *Robinson v. Robinson*, 1 Burr. 38, 2 Ves. 225, (1750, 1758), such a necessary implication arose from the same cause. There would be the like necessity here, if all that part of the estate of the testator given to his wife, had been given only for her life; in which case the expression, "dying without any more issue, then the whole of my estate to revert to my daughter," must have applied to all given to the wife for life, without discrimination, and the intention would have been thus manifested, that all so given to her should go to her issue other than Lucy, if she left any such. But, as there was a part given to her absolutely, upon the contingency of her having more issue, there is no such necessity; and the expression "the whole of my estate to revert to my daughter," applies, naturally and emphatically, to that part of the estate, and in respect to that only was there any occasion to provide for its returning to the daughter, upon the wife's dying without any more issue. The rest given only for her life, would have returned of course, without any such provision. This is, I think, the only true construction of that part of the will; and the wife's estate expressly given for life, was not enlarged into an estate tail, according to the law as it was before the 7th October 1776. That part of the estate devolved on the daughter, in the same way as did the residue of the estate not given to the wife in any form. And the question is,

399 *whether she took a fee simple by descent or a fee tail by the will.

It is perfectly clear, that if the testator had given that part of the estate to his daughter and her heirs, and if she died without issue, to his wife, and if his wife died without issue, then over; the daughter would have taken an estate tail, with remainder in tail to the wife. But, it was argued, that an estate in fee descending upon the daughter, and she taking nothing by the will, that estate cannot be restrained to a fee tail by implication; and the case of *Gardner v. Sheldon*, decided in 1671, was cited as establishing that proposition. There, the devise in effect was, "if my son George (the heir at law) and my daughters M. and C. die without issue, then all my lands shall remain to my nephew W. George entered, and died seised, leaving two daughters, his heirs; M. died; and C. brought ejectment against the daughters of the son. Vaughn, C. J., and two others held against Terryle, that neither the daughters nor the son took any thing by the will, but the estate descended upon the son in fee, upon the ground, that an heir could not be disinherited by any but a necessary implication. And to obviate the objection to that construction, that the testator manifestly intended that his nephew should succeed to the estate, upon the failure of the issue of the son and daughters, an intention which would be frustrated, unless the son and daughters were held to take estates tail under the will, because a fee could not be limited after a fee; they determined, that the limitation to the nephew after the indefinite failure of issue of the sons and

daughters, was good as an executory devise; and cited for that, *Pells v. Brown*, and the cases there cited: a proposition which I cannot ascertain to have been ever asserted in Westminster hall, either before or since. This case, however, is not like that of a limitation over upon the failure of the issue of the heir only, as in the case before us; for construing that to give a fee tail to the heir by implication, does not disinherit him, as would have been the effect in *Gardner v. Sheldon*, if it had been held there that the daughters and the son had a joint estate tail, or a joint estate for their lives, with remainder in tail. And that case is entitled to the less weight, because the decision was founded, in part, upon a legal proposition unquestionably erroneous. Upon principle and reason, I can see no greater objection to reducing an estate in fee by descent to a fee tail by implication, than to do so in respect to an estate explicitly given: indeed, there would seem to be a greater difficulty in so doing in the latter case, against the expressed will of the testator, than in the former, where there is no such expressed intention. Accordingly, whenever the naked case under consideration has occurred, the estate in fee which would otherwise have descended to the heir, has been restrained to an estate tail, and he has been held to take under the will. Thus, in *Newtons v. Barnardines*, Mo. 127, (27 Eliz.) A. having three sons, T. R. and G. devised twenty nobles to the child of T. (he being dead, and his wife enstent) for twenty years; and if my son R. die before he hath any issue, so that my land descend to G. before he comes to twenty-one, my executors shall occupy it till he comes to that age, then &c." held that R. by implication of the will, had an estate in tail, as well by the words "if he die before he hath issue," as if it had been if he die without issue, they being tantamount.

Cozen's case, Owen, 29, (which seems to be the same as the foregoing); *Devise*, "if it shall please God to take my son R. before he hath issue of his body, so that my land descend to C. his brother, then &c." All the justices agreed, that this was plain to make an estate tail in R. by implication.

Counden v. Clarke, Hob. 29; Mo. 860, (10 Jac. 1); *Devise*, "Touching my land which of right will, and (my intent and meaning is) shall, descend and come to my son J. C. (his heir), after my decease, this is my devise;" and then the will appointed certain friends to take the profits, until his son attained the age of twenty-four, accounting therefor to him; and added, "Provided always, that if my son J. shall happen to decease without issue of his body lawfully begotten, that then I will, shall go unto my right heirs males, and posterity of me and my name forever, equally to be divided amongst them:" held, that "declaring that the land should descend to his son, is just the same that the law speaks; it is utterly void and idle; and then, the rest of the devise must proceed, as if that had not been spoken at all:" that the limitation to his right heirs &c. was void, or if not void, it was a devise to the son himself, who was right heir male: and

that he took in tail by the will, and the reversion by descent.

Walter v. Drew, Com. 372, (1723.) A. having two sons, W. the eldest, and R., devised, that if W. should die without issue, R. should have all his lands in fee: held by baron Price, that W. took a fee tail under the will.

Goodright v. Goodridge, Willes, 369, (1742); *Devise* to testator's wife for life, "and my will is, that if my son R. do happen to die without heirs, then my son J. shall enjoy my lands:" held, an estate tail by implication to R. the eldest son, with remainder to J. the youngest, they being brothers of the whole blood, and therefore heirs meant issue.

In the case of *Newton v. Barnardine*, the question arose between the posthumous daughter of the eldest son and the testator's second son R. And the heir was disinherited by an implication arising from the limitation over upon the failure of the issue of R. probably strengthened (though it is not noticed in the report) by the pecuniary bequest to the expected child of the eldest son. And in *Counden v. Clarke*, the construction was made upon the intent of the testator (implied from the words, "decease without issue of his body") to provide for that issue, without deriving any aid from a necessity by that construction to give effect to the limitation over, since the son himself would have had the fee, whether the construction were one way or the other, and whether the limitation were valid or void. Indeed, it has been a settled rule for ages, that the effect of every limitation over, upon the indefinite failure of the issue of the first taker, whether he took by

the will or deed, or by descent, *was to convert an estate which would otherwise have been a fee into a fee tail, and even although the limitation over was to the right heirs of the donor, and therefore void. Of this, the cases of *Nottingham v. Jennings*, (1700); 1 Ld. Raym. 568, and *Lee v. Brace*, (1696); Id. 101, and 3 Salk. 337, (the first in case of a devise, the last of a feoffment) are striking examples.

But, suppose it to be doubtful, whether the daughter's estate was in this case a fee tail or fee simple, or capable of being considered as one or the other, indifferently. Then the question would arise, whether it ought to be construed as a fee, and so the limitation over incapable of being barred or destroyed by any means? or as a fee tail, and the limitation over a remainder destroyed ipso facto by our statute, and capable of being destroyed, at the pleasure of the tenant in tail, by docking the estate tail, as the law was before the act of 1776? This question is answered by the rule laid down in *Purefoy v. Rogers*, (1671); 2 Saund. 330, as there fully established, and never since departed from, that "when a contingency is limited upon an estate of freehold, capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only." Such are the words in which the rule is laid down, in reference to the particular circumstances of that case: but its principle, and the reason on which it is founded, make it in truth much more general and compre-

hensive, and in effect this, that "no limitation shall be construed as an executory devise, if it may be construed to be a remainder," (as it was expressed by Lord Hardwicke in *Wealthy v. Bosville*, Rep. K. B. Temp. Hardw. 258; *Butler's Fearne*, 387, in which that rule was assigned as one of the reasons for restraining an express estate in fee to a fee tail, by force of the limitation over); or, that "no words shall be construed to give an estate by way of executory devise, but when the devisee cannot take any other way," (as laid down by baron Price, in *Walter v. Drew*, and assigned as one reason for holding, that an estate in fee descending was restrained to an estate tail, by the force of the limitation over).

403 *This rule was founded in the best reasons. Before the introduction of executory devises, (which are comparatively of modern date,) every limitation over was void, unless it could be construed to operate as a remainder, either vested or contingent. The court, therefore, in order to give effect to the intention of the donor, laboured to give such a construction, as would in that way make the limitation over valid: and this is one of the reasons given in some of the early cases, for reducing an express estate in fee to an estate tail by force of the subsequent limitation. And the only ground, on which executory devises were originally admitted, was "an indulgence to a man's last will and testament, when otherwise the words of the will would be void," and the devisee could not take any other way. *Reeve v. Long*, 4 Mod. 259. They were, however, admitted with great reluctance, since they established perpetuities to the extent within which they were allowed to be valid, as they were incapable of being defeated in any way, contrary to the former principles of the common law, according to which no future or contingent interests could be limited with effect, otherwise than in the form of remainders, which if depending upon a precedent estate tail, could be barred at the will of the tenant in tail, or if upon an estate for life and the remainder was contingent, by the destruction of the precedent estates by any means, as by forfeiture, merger, surrender, or the feoffment of the tenant for life, before the contingency happened. It was not, therefore, to be expected, that the courts should have abandoned the settled construction, by which limitations might take effect as remainders before the introduction of executory devises, for the purpose of allowing them afterwards to operate by way of executory devises.

This principle of construction, with all others touching the creation of estates tail, were left untouched and unaffected by our statute of 1776 docking entails, and are prescribed to the courts of justice for their guidance, by our subsequent legislation.

This is the literal effect of our statutes, and repeatedly *decided to be their true construction, and I think rightly. The purpose of the act of 1776 was to unfetter estates, upon principles of public policy. The means adopted for effecting this object, was, to do by the statute, in respect to all entails, then exist-

ing or afterwards to be made, that and no more than that, which every tenant in tail could do at his pleasure; dock the entail, and thereby bar all remainders and the reversion. It would have been wholly inconsistent with this purpose, to have introduced new fetters, by allowing limitations, before operating as remainders, and so liable to be barred by the act of the tenant in tail, to take the new form of executory devises, not capable of being barred in that way, and not barred by the statute; and to apply the same rule to all limitations of estates afterwards made, as was applied to those already existing, was perfectly consistent with and prescribed by the policy of the statute, that of unfettering estates, by destroying all contingent limitations afterwards made, which might have been destroyed by the tenant in possession, if that act had not been passed. The act of 1819, in respect to contingent limitations, in its very terms, declares a change of policy in this respect, and cannot be considered as declaratory of the former laws, or as influencing their construction.

But supposing the daughter's estate to have been a fee simple; then the question would still remain, whether the limitation over to the wife, upon the daughter's dying without issue, is good as an executory devise? and it is insisted, that the ultimate limitation over of the property, which came by the wife, in case of the death of the wife and daughter without issue, to the brothers and sisters of the wife then living, is good, and controuls all the other limitations, as well those between the wife and daughter, as that to the testator's brothers; that the limitation over to the testator's half brothers, without words of perpetuity, has the same effect; and that the testator did not intend, that if his daughter died without issue, his wife should take under that limitation, or that, if his wife

405 should die without any more issue,*his daughter should take under that limitation, or that, if his wife and daughter should both die without issue, his brothers should take under the limitation to them, unless, in each of those cases, some one or more of the wife's brothers and sisters was alive when the issue failed. This construction must be maintained, in order to make the limitation over to the wife good as an executory devise. For the rule on that subject requires, not only that the testator contemplated the possibility that the limitation over might take effect within the period allowed by law, but it must appear to be his will, that unless it takes effect within that period it shall not take effect at all. It is impossible to look at this will, and suppose that the testator intended, that the contingent interests given to others, should depend upon the circumstance, whether one or more of his wife's brothers or sisters was alive when the contingency happened, as they might all die in the life-time of the wife and daughter. And so the counsel of the defendant thought; for it is not alleged, that any of the brothers or sisters of the testator's wife, were living at the time of his daughter's death. But, even if that could be supposed, in respect to the property

which came by the wife, it would not apply to that given ultimately to the testator's brothers: As to that the limitation over was clearly after an indefinite failure of issue: for they took estates in fee, not only by force of the preamble of the will, but of our act of assembly dispensing with words of perpetuity in the creation of estates in fee, the effect of which, in cases like this, I have already considered in another case. *Bells v. Gillespie*, 5 Rand. 286.

COALTER, J. It seems to me, that the intention of the testator was this: In the first place, until his daughter came of age, if neither she nor her mother married before that time (unless the mother before that de- sired a division), that the estate should be kept together for their mutual benefit: but that, so soon as the daughter came of age, or if before that time she married, or if
406 before that time the mother *married or wished a division, then the mother should have one half of the whole estate during her life. The consequence of such division would necessarily have been, that, as the estate was no longer kept together for mutual benefit, the other half would go to the daughter, immediately, in possession; and she would also be entitled, in fee, to the other moiety on the death of the mother. Had nothing more been said, and had they both lived unmarried until the daughter came of age, no division being called for by the mother, the estate must then have been divided, and the daughter (it seems to me) would have taken, by descent, and distribution, one moiety in fee and absolute right, in possession, and the other moiety in reversion; and the mother her moiety for life. I say, had this been the whole will, the estate, subject to the wife's life-interest in one moiety, would have gone to the daughter, under the statutes of descent and distribution: whether the descent has been broken by the after clauses, may be another question.

But the testator had looked to the future marriage of his wife, and also to the event that there might be issue of that marriage. He had certain property (slaves, I presume), which he held in right of his wife; and his intention was, in case she married and had issue by that marriage, that she should have the disposal of this portion of the estate. Her marriage alone was not to give her this right; she must again have issue; and then the question is, whether such issue must be alive at her death, in order to vest that property in her, so as to give her the disposal of it? The plain meaning of that part of the will, I think, is to give her the absolute disposal of that property, upon her marriage and having issue, without any view to the death of that issue before her or otherwise. In those events, that property would pass to her absolutely; in which case, although she might die afterwards, leaving no such issue behind her, the other clauses in relation to that portion of his estate, would not operate upon it: they would merely operate, in case she should die without hav- ing had such issue. For this event,
407 *and in relation to this part of his estate, he provides in a two-fold way: first, "in case my wife should die without

any more issue, (that is to say, without having had any more issue,) my will and desire is, that the whole of my estate is to revert to my daughter Lucy." He doubt- less calculated, that, if a division was made, this property would form a portion of his wife's share, as it was to be abso- lutely her's, in the event so looked to. She would feel a greater interest in it than in his other property; but if that event did not happen, this property is to revert. That is his meaning by the expression, "the whole is to revert." He had carved out this portion, which might thus go in- tirely from his daughter; but if it does not, then it is to revert to her. Thus, the use of this word may perhaps have some bear- ing on the construction I have above given; though, I think, the intention plain enough without it. Generally, when that word is used it means simply, "go to."

Secondly, he looked to the event, not only that his wife might die without hav- ing had more issue, but that his daughter might also die without issue; and then he intended this part of his estate to go to the brothers and sisters of his wife, that might then be living. The words of the will are, "and should my daughter Lucy die without issue, for the whole of my estate to revert to my wife Susanna; and in case they both shall die without issue, then for that part that came by my wife, to revert back to her brothers and sisters that may then be living." We are now consid- ering what he intended, as to this portion of his estate that came by his wife. "Brothers and sisters living:" when liv- ing? When his wife should die without having had more issue, and his daughter should also die without issue, and should so die during the life of the wife, or of some one or more of her brothers and sis- ters, who, surviving these events, were to take the property.

But it cannot go over, until the mother is dead without having had more issue, and the daughter is also dead without issue.

Does this, as to the daughter, mean
408 dead without *having had issue? I think not. Does it mean, that, though she may die leaving issue alive, yet as that issue may ultimately fail, possibly in the life of the mother, and if not, pos- sibly in the life of her brothers and sisters, possibly not until long after the death of them all, in either of which cases, however, it is to go over? To whom is it to go over? First, to the mother: but it could only go over to the mother, in case she survived the daughter dying without issue, and had had no more issue herself; for if she had had such issue, it never would have gone to the daughter, so as to come from her to the mother. But on the death of the daugh- ter without issue, it is to go to the mother first, if she be in esse. The testator, then, as to this portion of his estate, looked to the mother's surviving the daughter who should be dead without issue, and taking it subject to be absolutely her's, should she have more issue, and if not, that she should have it for her life. He could not calculate on the mother taking it in tail, so that her issue, surviving the issue of the daughter, might, in the long course of time, take

it: for the very fact of her having issue born, even after the death of the daughter, leaving issue, would cut out the issue of the daughter, and put an end to all questions. As to this portion of the estate, he did not intend to provide for the issue of the mother by a future marriage: he intended the mother, on that event, to take it absolutely, as her dowry, as if it never had ceased to be her property. A dying then, without issue in the life of the mother, and at most within the life of some brother or sister of the mother, was clearly intended as to this part of the estate. If the mother was alive on this event, and died afterwards without having had more issue, then it was to go to the survivors of the brothers and sisters.

This too must be ascertained at the death of the mother; for she could not have more issue after her death. But she may be dead without having had more issue, before the death of her daughter, and she may then die without issue: Without issue, when?

In the long course of time when that *issue, after her death, may become extinct? Is this property, then, to go over to surviving brothers and sisters? when too, other events looked to, tied it down to the death of the daughter without issue during the life of the mother! And this as to a personal subject, which could not be so limited on an indefinite failure of issue! Surely, it seems to me, this would not be a sound construction of the will, as to this part of the estate.

Had the mother died without having had more issue, and had the daughter died without ever having had issue, and that in the life-time of the mother, could it be said, that this limitation over of this portion of the estate was void, as being limited on an event too remote? On an indefinite failure of issue? It seems to me not.

Suppose the mother to have married, and to have had more issue, this part of the estate, in that event, if in possession, would have become absolute in her, and would have belonged to her husband. The daughter, though she might have survived her mother, and died leaving issue, and though the issue of the mother by the after marriage had also died before that time, would have had no interest in this portion of the estate. Nor would the issue of the mother, if alive at her death, take it under the will. It would be the property of the husband, if in possession, or go to him, if he survived, as his wife's administrator. Nor would it go to the brothers and sisters of the wife, although her daughter Lucy had died in her life, without having had issue, and the issue by the second marriage had also been dead at the death of the mother. But it might and would have gone over, had she never had such issue, and any brother or sister had survived her to take it.

Now, though it has happened, that the testator's daughter Lucy died soon after him, without having had issue, and though the mother again intermarried with the appellant Jiggetts, and is now alive, having had issue by him, so that no question remains as to this part of the estate; yet, as the provisions and limitations as to

it, had these events not happened, 410 *are connected with the provisions and limitations in relation to the residue of the estate, which was to go over on the same events (as it seems to me), I have thought it expedient thus to inquire, whether this would have been a good executory limitation over, of this portion of the estate, in the events that might have happened.

John Davis, the testator's brother and devisee, mentioned in the will, is constituted one of the executors thereof, and qualified as such. It is said, in the answer, that the debts exhausted the personal estate, except that part of it which came by the wife. John Davis brings this suit for the real estate only. He says, and it is admitted in the answer, that his half brothers died infants, intestate and without issue; that he is their heir at law; that the testator's daughter Lucy also died an infant, intestate and without having had issue, before the marriage of her mother to the appellant Jiggetts; and that he is her only paternal uncle, and heir at law. He claims the estate by descent from her, one moiety to be decreed to him presently, and a declaration of his right to the other moiety on the death of Mrs. Jiggetts.

The defendants insist, that, on the death of Lucy, the daughter, without issue, the whole estate was to go by the will to her mother in fee.

It seems to me, that, as to the residue of the estate, the precise events which the testator looked to, and on which the estate was to go to his wife, have happened. It was quite natural and reasonable that he should have looked to the possible, if not probable, event of the death of his infant daughter without leaving issue; in which event, if her mother survived her, he wished her to take the estate; and if she died also without leaving issue by an after marriage, that it should go over to his own family, the estate being of his own acquisition. Should his wife die before his daughter, without more issue, the whole estate would of course belong to his daughter; but she might die afterwards without leaving issue, in which case he wished that portion of it acquired by her, to go to her brothers.

411 If the mother had *other issue at her death, and the daughter died leaving issue also, the estate which came by the mother, being thus absolute in her, would go as her property, to whoever might be entitled to it. If, at the death of his daughter without leaving issue (in which case, she could not have disposed of her estate), his wife had been also dead, but had left issue, the estate would not have gone to that issue by the will, nor would it have gone to the uncles under the will; for the events, on which it was to pass, either to his wife or his brothers, had not taken place. Suppose that situation of affairs had been suggested to the testator, and he had been asked, "do you wish the estate, in this case, to go out of your family to the children of your wife by a second marriage?" Is it not reasonable to suppose, he would have answered, "should my wife survive my daughter, as I have the greatest affection for her, next to that I feel for my child, I wish her to

have all, if my daughter leaves no issue: but if I cannot benefit her, I surely can have no such feeling for her children, or her husband, that would induce me, in this event, to prefer them to my own blood: I therefore mean, that she is to survive the death of my daughter, without leaving issue, so as on that event, to take a personal benefit from me: if it does not so happen, I leave the law to dispose of it." Suppose all this had been explicitly stated in the will, what objection could there be to it? But if we can collect this to have been his real intention, and these to have been the events plainly and naturally looked to, why shall we impute to the testator an intention to intermeddle with the abstruse doctrine of implied estates tail, which we have to study anew, as every case arises? Why shall we suppose, that he was looking to events, which might not happen for an hundred years; and that he was seeking to create perpetuities in his family, of which he certainly never dreamt? To consider him as doing this, is to suppose he thought he had the power to create an estate tail; and was ignorant of the law, which would in fact obliterate and change his whole will the moment he made it, in case 412 he did so; would make *it read, either as giving his whole estate, at once, in fee, to his daughter, which, consequently, in no event, could go to his wife, or to any one else ultimately in his view; or would give one half of his own acquired estate to his wife in fee, on his death, and possibly also the whole of the property which came by her, and to his daughter only the other half of his own acquisition, so as in fact to give her a less share than her mother! This will was made in 1813, so long since the act for destroying entails, that the testator may not have been born under that system of laws: could he have been ignorant of the existing system? If he was not, he could only have created estates tail by his will, through sheer mistake, or slip of the pen: he could not have intended it: and if there be circumstances in the will, to satisfy us that he intended what I have supposed, we ought not, if we can avoid it, to violate this intention. As to our duty in this respect, I have expressed my opinion pretty fully in the case of *Bells v. Gillespie*.

The mother has survived the daughter, who died without ever having had issue. Since that, the mother has again married, and has a family of children. On this death of the daughter, the whole estate went to her mother, at least during her life. Her taking husband, and having issue, has given her the estate that came by her, in absolute right, and it now belongs to her husband. The other estate will be absolutely her's too, if she leave issue at her death; if not, it will either pass, under the will, by way of executory devise, the event on which it is to pass or not, being to happen at that time, or it will descend to the testator's heirs at law. We have nothing to do with that question, at present.

But let us further inquire, whether we are bound to imply estates tail in this case: First, as to the wife.

The first clause gives to the wife, a life

estate, expressly, in one moiety of the testator's estate. The next provides thus: in case my wife should die without any more issue, the whole to revert to my daughter: and should my daughter die without issue, the whole of my estate to revert 413 to *my wife: and, in case they both should die without issue, then that part that came by my wife to revert back to her brothers and sisters then living, and for the balance of my estate to revert to my brother John Davis and his heirs, if any; if none, to be equally divided between my half brothers.

"In case my wife should die without any more issue &c." The issue supposed to be here intended to be provided for by the will, is her issue by a future husband. The estate for life in the wife is then to be raised into a fee tail, that her issue by another husband may take one moiety of the estate, as her heirs in tail, so as to defeat, quoad that moiety, his own daughter and her issue, although she and they may endure for generations, at the same time, that his wife, by having this very issue, gets back absolutely the estate which came by her; and thus, she and her issue are to take a much larger portion of his whole estate, than his own child and her issue! This is on the supposition, that the testator supposed he could make an estate tail, and thus provide for the future issue of his wife by another husband, and intended to provide, in this way, for such issue. Is it possible to suppose he ever dreamed of such a thing? It would be just as reasonable to suppose, that he intended that which, under the act of 1776, would be the effect of such a disposition, to give to his wife, at once, a fee in a moiety of his estate, which she might sell the next day after his death, and thus disinherit his child.

But that clause of the will, as I have before shewn, had no other object but to bring back to his daughter, that portion of the estate, which might become the absolute property of the wife, in a certain event: this is manifest, if we suppose he had that disposition of the estate that came by his wife, then in his mind. And though, when that part of the will now under consideration was written, he had not put into writing the clause which was thus to give that portion of his estate absolutely to his wife, yet the words "more issue" shew, that he was looking to that very 414 event, which *was to give it absolutely to her, and that he was providing for what was to be done, if that event did not happen; as he also provided for it, in the other clause, which, in certain events, gives that portion of his estate to his wife's brothers and sisters; which clause was also penned before he made the provision, giving it absolutely to his wife on her having more issue. That disposition was as much in his mind and will, when those clauses were written, as if it had actually been reduced to writing before them, as part of his testament. And it is therefore perfectly fair to read it as the first written. These clauses never contemplated creating an estate of any kind in the wife: they were designed to dispose of the property which came by

her, and that only. As to the other property, any interest she was to take in it, depended on the first clause giving a moiety for life, and on the clause giving her the whole of the estate on the death of the daughter without issue, which she was to take absolutely.

Next, did he intend by that clause, to create an estate tail in the whole property in his daughter.

He certainly did not intend to create an estate tail in his daughter, in that portion of his property which came by his wife, as I have before shewn. He had taken it from her already, and given it absolutely to his wife, on an event that has happened. As to it, then, he did not mean to provide for the issue of his daughter out of it.

He had not thought it necessary to give to this, his only child, any thing, not even a life estate in a moiety: nothing but a support until a division, which might have been called for the day after his death. Why? Because, with the interruption of the life estate of his wife in a moiety, the whole would go to her and her heirs; and, had he not looked to her possible death, (she being an infant probably of tender years), without children, in which case he intended to provide more amply for his wife, and should she die also without issue, to discriminate between his brothers, the

will would have gone no farther than
415 to give the life estate to the *wife, and to make the provisions which he did make, as to the estate that came by her. Suppose he had, in no event, intended any thing more for his wife, and had intended to give no preference to his brother John Davis, the clause, under which this question arises, would have been unnecessary, to effect anything else in the mind of the testator, and never would have been found in his will. He would simply have permitted the estate to go by descent to his daughter, and afterwards in due course of descents, should she not attain her age so as to dispose of it, or never have issue to take it from her. He did not mean, by this clause, to give to his daughter a less estate, than that fee which he knew would descend to her.

But, it is said, he intended to provide for her issue, by this clause, so as to perpetuate the estate in them as heirs in tail.

I have already shewn, that he did not intend this, as to one portion of the estate, although included by the word whole; and I cannot think, that he was so intirely ignorant of his want of power to do this, or of the fact that the consequences of an attempt to do so, would have been a felo de se of every other intention expressed in his will, in relation to the other part of his estate, as that, he could have intended any such thing as to it. Had the idea crossed his mind, that if his daughter should live to mature years, marry, and have a family, she was not to take an absolute estate as his heir, he would probably have shewn this in the usual way in which unlearned testators do, by giving her only a life estate. That would have been his intention: he would have intended her to enjoy it, at least during her life, and that it should then go to her issue. But such an idea never pre-

sented itself. He looked to her death without issue in the life-time of her mother, and intended to provide for that event. And he also looked to the death of that mother without more issue; and as his whole estate, as well that acquired by him, as that which came by his wife, would thus have centered in the mother, he intended the *one to go to her brothers and sisters, and the other to his own brothers. He never looked to these ulterior provisions taking effect after a long lapse of time, when the issue of his daughter might become extinct. I think, taking all the provisions of the will together, he has plainly enough tied it down to a definite failure of issue, so as to enable us to give effect to his real intentions.

He did not intend by this clause (as I have before said) to create any estate in his daughter; but merely to provide for such an event as has happened. It seems to me, therefore, to be a stronger case than the case of Pells v. Brown. We have seen, that the same words were not intended to give an estate tail to the wife, and why should they have a different meaning when applied to the daughter?

The circumstance that the wife's brothers and sisters might all be dead before the wife and daughter, is nothing more than what often happens, that the person or persons intended to be benefited, have died before the happening of the event on which the benefit was to accrue: it does not shew, that the event looked to was one not expected to happen in time to give a personal bounty to the party. How numerous they were, and the probability of their surviving is not known. They may now be alive; but, having no connexion with, or interest in, the matter in hand, no mention is made of them.

But if there be any thing strange in the supposition, that the testator looked to their being alive, or some of them being alive, at the death of both the wife and child; I think it is not so strange, as to suppose, he really did intend to create an estate tail. If we can see, from the whole will, that he did not intend it, we cannot (it seems to me) with any reason say that he did it by accident.

Where from the whole will, it is probable, that he intended to tie it down to a dying without issue, living his wife, surely the change in our system ought to turn the scale in favour of the intention. In England, in relation to real estates, if the matter was doubtful, as the issue could
417 *thus be provided for, perhaps the courts would permit the power to do so to incline the scales that way: but even if that were so there, are we to be so hampered, as that, in a doubtful case here, the change in our situation, the absence of this power, may not turn the scale the other way? Are we to be told, that some speculator has purchased an estate, hanging thus in doubt and equal balance, and that the rules of property will be invaded if the scales are not to be turned by a circumstance, which, in England, would turn them in his favour, but which here ought to belong to the other scale? Let him forbear his speculation, until he who offers to

sell, and who is a volunteer, has ascertained his rights. Surely, if the case would be a doubtful one, under the whole will, according to english decisions, (and I think we are entitled here, to the benefit of the most liberal english decision) we ought not to doubt here.

This testator undoubtedly intended a benefit to his wife. But it may be well doubted, whether, taking all his will together, he intended, by this clause, to provide for the issue of his daughter, and to prevent her, if she had such issue at her death, from disposing of this estate as she pleased. If this intention is doubtful, why shall we presume it existed, in order to defeat intirely the clearly expressed intention in favour of his wife, and of those in remainder after her, should she leave no issue at her death?

I think the decree is erroneous, and that the wife, in the events that have actually happened, is entitled by the executory limitations of the will, to the whole estate.

CABELL, J. This case presents a contest about real estate, involving the question, so often raised in this court, as to the effect of a limitation over after a dying without issue. And before I proceed to the examination of the particular case, the course of the argument at the bar, renders it proper, that I should state the principles, which seem to me to be applicable to questions of this nature.

418 *By the common law, it was not allowed to limit a fee upon a fee. But it is natural to the possessor of property, to desire absolute dominion over it during his own life, and to render it inalienable afterwards, except on the terms which he himself may prescribe; and after the statute of wills, this disposition was so far indulged, as to allow a man, contrary to the principles of the common law, to limit a fee upon a fee, by his last will and testament. *Pells v. Brown*, Cro. Jac. 590. These limitations were called executory devises. But, as it was seen that they tended to a perpetuity, (for the estate was inalienable during the term allowed for the contingency, on which the limitation over was to take effect), no executory devise was tolerated, except where the contingency must happen, if at all, within a limited and reasonable period. And it became an inflexible rule also, that whenever a future interest was so limited by devise, as to fall within the rules laid down for the limitation of contingent remainders, such an interest is not an executory devise, but a contingent remainder. *Carth. 310; Reeve v. Long*, 4 Mod. 259; *Purefoy v. Rogers*, 2 Saund. 380; *Butler's Fearn*, 386. The consequence of this rule is, that every limitation after a fee tail, must take effect, if at all, as a contingent remainder, and not as an executory devise, and will be barred by whatever bars the entail.

As estates tail and all remainders thereon may be barred, in England, by fine and recovery, and are, in all cases, barred ipso facto by our statute, the first inquiry, as to all limitations of a future interest after a failure of issue, is, generally, whether the first estate be an estate in fee or in tail.

An estate tail is an estate limited to the

issue of the donee. And as wills are to be construed according to the intention of the testator, it follows, that whenever it shall appear, from the whole will, to have been the testator's intention to give an estate descendible exclusively to the issue of the devisee, such estate will be deemed to be a fee tail, whatever be the words or form used by the testator. Thus, if the

devise be to A. and his heirs, but if he die without issue then to B. and his heirs; the devise to A. and his heirs, taken separately, would give him an estate in fee simple; but the subsequent words shew, that he intended to give an estate to B. also, and that that estate was made to depend on A.'s dying without issue. The question naturally arises, why was the interest of B. made to depend on A.'s dying without issue? Was it, that the testator intended it as a mere contingency, on which the estate of A. was to be intirely defeated? or was it, that he intended that if A. died leaving issue, that issue should have the estate, so long as there should be any issue? The courts, whose province it is to expound wills, have, from the beginning, uniformly and invariably, considered that it proceeded from an intention in the testator, to provide for the issue of the first taker, which intention could not be effected without holding that he took an estate tail, and not a fee simple. Therefore, the words "if A. should die without issue," were held to controul the previous words "A. and his heirs," so as to give him a fee tail and not a fee simple. So, likewise, even where the devise is expressly to A. for life, but if he should die without issue, then to B. and his heirs, the courts, upon the same principles and reasoning, have uniformly considered it as indicating an intention in the testator, to provide for the issue of A. and, as that intention could not be effected, without holding that A. took an estate transmissible to his issue, they have uniformly and invariably held, that the words "if A. should die without issue," controul the operation of the previous words, "to A. for life," so as to enlarge his estate from an estate for life, to an estate tail. It is in vain to inquire now, whether this construction was originally right or wrong, as conforming to, or departing from, the testator's intention. It soon became an established rule of construction, that a limitation over after a general dying without issue, was as indicative of an intention to give the first devisee an estate tail, as if the estate had been given expressly to him and the heirs of his body. And this rule has never been departed from in a single instance.

420 If, however, there be any words in the will which clearly shew an intention in the testator, not to postpone the limitation over until an indefinite failure of the issue of the first devisee, but to confine it to a failure of issue at the time of his death; as, for example, where an estate is given to A. for life, or to A. and his heirs, but if he die without issue living at his death, then over; in such case, none of the preceding reasoning applies; for it is then manifest, that the testator did not intend, by the words dying without issue,

to provide indefinitely for the issue of A. but merely to limit a contingency, on which the estate of A. was to be defeated, or that of B. to take effect. In such case, therefore, the previous words are left to their natural operation, unaffected by those that follow. Consequently, A. takes, in the first instance, an estate for life only, and in the second, a fee simple, which, however, will be defeated intirely by his dying without issue living at the time of his death. But unless there be some circumstances in the will, indicating a restrictive intention, the words "die without issue" are always considered as referring not to a failure of issue at the death, but to an indefinite failure of issue; and, thus, to create an estate tail for the benefit of the issue; and, consequently, to exclude the idea of an executory devise. And, as before observed, this rule has never been departed from. It is unnecessary to refer to authorities to establish a position, to which every lawyer will yield his assent.

Such is the law of England as to executory limitations, where the subject of the devise is real estate. Personal property cannot be entailed. But if it be granted or bequeathed in such a manner as that if it were real estate, the grantee or devisee would take an estate tail, in such case, the full and intire interest passes to the grantee or legatee, as it would have done if the grant or bequest had been in the most absolute forms known to the law. Nor can there be, in personal property, a remainder in the strict sense of that word; and, therefore, every future bequest of personal property, whether preceded or not by a
421 prior bequest, or *limited on a certain or uncertain event, is an executory devise or bequest, and falls under the rules by which that mode of limitation is regulated. Butler's Fearnie, 401. One of the most important of these rules is, that the contingency on which an executory devise or bequest is to take effect, must be such, that it must happen, if at all, within the compass of a life or lives in being, and twenty-one years and some months thereafter. And it matters not whether a term or other personal property be limited to the first devisee or legatee, indefinitely, or for life expressly, or to him and his heirs, or the heirs of his body, or to his issue or children; for the limitation over will be equally valid, under any of these circumstances; provided the contingency on which the limitation over is to take effect, be restricted to the period aforesaid. Id. 478.

In deciding, whether this rule, as to the restriction of the contingency, has been observed or not, it frequently becomes important to ascertain the meaning of the words, die without issue. I have before observed, that where real property is the subject of a devise, these words have been uniformly and invariably held to refer to an indefinite failure of issue, and not to a failure of issue at the death, unless there were circumstances in the will indicating a restrictive intention. The same rule of construction has been uniformly and invariably applied to limitations over of personal property, after a dying without issue; with this difference only, that, in cases

of personal property, slighter circumstances will be regarded as evidence of a restrictive intention, than would be admitted in cases of real estate; such as the words, leaving, then, after, &c. &c. There must, however, be some evidence of restrictive intention, even in cases of personal property, other than that arising from the consideration, that the property is personal, and that it cannot be entailed: otherwise, the words dying without issue, are always held to refer to an indefinite failure of issue. And there is no difference, in this respect, between limitations of personal property, by such words as in the case of real
422 estate would give *an express estate tail, and limitations of the same by such words as in the case of real estate, would give an estate tail by implication only.

That our statute of 1776, turning estates tail into estates in fee simple, did not convert into executory devises, any remainders limited on estates tail created before the passage of that act, but utterly extinguished the interest of the persons in remainder, was most solemnly decided in the case of Carter v. Tyler. As the statute makes no difference between estates tail created before, and those created since, (the same words being applied to both,) the construction, as to the effect of the statute, must be the same as to both.

But an important question here presents itself: by what laws are we to be governed in deciding what is, or what is not, an estate tail? The answer to this question will depend, I think, on the date of the deed or will by which the estate may have been created. Deeds or wills made before the 1st January 1778, the date at which the revised act of 1785 was to take effect, will be construed according to the laws and rules of construction which prevailed on the 7th October 1776, the date of the act converting estates tail into estates in fee simple: and deeds or wills made since the 1st January 1787, will be construed in the same way, as if they had been made before; with the exception, however, of that change produced by the clause, in the act of 1785, dispensing with words of perpetuity.

As this question was discussed with much earnestness in the argument in this case, and as it has been frequently the subject of controversy before, I may be excused for a particular examination of it.

1st. As to deeds and wills made before the act of 1785. The terms of the act of 1776, are, that "any person who now hath, or hereafter may have any estate in fee tail &c. in any lands &c. whether such estate tail hath been, or hereafter shall be, created by deed, will &c. shall from henceforth, or from the commencement of such estate tail, stand ipso facto seized &c. of such lands &c. in full and absolute
423 fee simple, *in like manner as if such deed, will &c. had conveyed the same in fee simple &c." It was, undoubtedly, competent to the legislature of 1776, to define a fee tail, and to prescribe the rules of construction, by which to determine when a fee tail had been, or should

be afterwards, created. But no such definition is made, and no rules of construction are given. The conclusion is inevitable, that the legislature of 1776 intended, that the courts should be guided by the former laws and rules of construction upon this subject. And this was the construction put upon the act of 1776, by the legislature of 1785. For the revised act of that session, in speaking of estates tail, created before its passage, declares, "that every estate in lands or slaves, which on the 7th October 1776, was an estate in fee tail, shall be deemed from that time to have been, and from thenceforward to continue, an estate in fee simple; and every estate in lands, which since hath been limited, or hereafter shall be limited, so that, as the law aforesaid was, such estate would have been an estate tail, shall also be deemed to have been and to continue an estate in fee simple:" thus adopting, in express terms, the law, as it aforesaid was, for the construction of deeds and wills made since the original act declaring that there should no longer be estates tail in Virginia.

But this question has been judicially decided also. It formally presented itself in the case of Tate v. Tally, on a will made since the act of 1776, and which if it gave an estate tail, at all, gave it by implication only. It was strongly contended, that those rules of construction by which estates tail were implied, were originally founded on a regard to the benefit of the issue in tail, and that, as estates tail were not now tolerated in this country, the reason of those rules no longer existed, and the rules themselves had become inapplicable, and that, therefore, no estate tail ought to be considered as having been created, since the year 1776, unless it be expressly created. But the court clearly established the principle, that in construing a will made since the act of 1776, we are not to be influenced by the *consideration, that estates tail cannot now exist in Virginia, but are to be governed by the rules of construction which prevailed before that act, notwithstanding the reason, on which some of those rules were founded, was done away by the abolition of estates tail. This principle has since been recognized and acted upon, in the case of Eskridge v. Fisher, and other cases cited at the bar. Nor is there, in my opinion, any decision of this court, that militates against the doctrine established by these cases. It is true, that the cases of Dunn v. Bray, 1 Call, 338, and Smith and wife v. Chapman, 1 Hen. & Munf. 240, have been sometimes referred to as opposing decisions.

Dunn v. Bray relates intirely to personal estate, and of course is not applicable to a case of real estate; for every body must admit, that there is a difference between real and personal estate, in respect to these executory limitations; slighter circumstances being relied upon as evidence of restrictive intention, in cases of personal estate, than would be allowed in cases of real estate. The case of Dunn v. Bray itself affords an instance of this difference; for the limitation over of slaves, in that case, was supported on the strength of the words leaving and then, which would have

been insufficient in a case of real estate. It is true, that, in Dunn v. Bray, judge Pendleton adverts to a diversity that was formerly insisted on by some of the english judges, particularly by lord Talbot, in Atkinson v. Hutchinson, 3 P. Wms. 258, between a limitation over of personal property, by such words as in the case of real estate would give an express estate tail, and a limitation of the same, by such words as in the case of real estate would give an estate tail by implication only; and judge Pendleton seems to admit the distinction. But I have not found, that it has been recognized by this court in any subsequent decision; and it is certain that it has been long exploded in England. Butler's Fearn, 478-486.

As to Smith and wife v. Chapman: in that case, a testator devised, by express words, an estate for life, in lands 425 "and negroes, to each of his three children, with remainders to the children of each; and in case of the death of either without children, remainder over to the survivor or survivors of his said three children. The great question in the cause, was, whether the children of the testator, (the first devisees,) took estates for life only, or estates tail by implication? The court decided that, independently of the act of 1776 docking entails, and of the act of 1785 dispensing with words of inheritance or perpetuity, the children of the testator took, according to the doctrines of english law, an estate for life only, and not an estate tail. It is true, that three of the judges, Roane, Fleming and Lyons, speak of not implying an estate tail for the benefit of the issue, since the act of 1776. But the expressions of judges must always be understood in reference to the cases before them. It will be seen, that the case of Smith v. Chapman was one, in which it was perfectly clear, in the estimation of all the judges deciding it, that an estate tail would not be implied, even in England. The expressions of the judges, fairly construed, amount to no more than this, that, in a case where an estate tail would not be implied, even according to the principles of construction which prevailed before 1776, they would not now imply one, on the pretence of benefiting the issue. It is impossible to put any other construction on the opinion, even of judge Roane, who used the strong expression, that the act of 1776 had "cut up by the roots the pretence of implying an estate tail for the benefit of the issue;" for he afterwards, in the same opinion, refers expressly to Tate v. Tally, as having established, that, in construing what is or is not an estate tail, we should refer to the former laws; and he quotes, with approbation, the expression of Judge Fleming, in Tate v. Tally, "that the intention of the act of 1776 was not to alter the established rules of construction." He, moreover, expressly justifies the implication of estates tail, according to the former rules of construction, notwithstanding the reason of those rules has ceased.

And that this was what he really 426 intended, is *clearly proved by the opinion which he delivered in the subsequent case of Tidball v. Lupton.

It cannot be admitted, that a law ceases to exist, merely because the reason which gave rise to its adoption has ceased. If this were admitted, we should demolish at once, much of the venerable fabrick of the common law. Rules of construction of wills even become, when long established, indicia of intention, and rules of property; and, like other rules of law, should be permitted to survive the state of things which gave them birth.

It may not be unworthy of remark, as connected with this branch of the subject, that personal property is as incapable of being entailed in England, as real property is in Virginia; and that, in England, if such an interest is given in personal property, as would amount to a fee tail if the property were real, the grantee or devisee will take the intire interest, in the same manner as if had been given in the fullest manner known to the law. It becomes, therefore, frequently necessary to decide, whether the legatee of personal property takes such an interest in it, as would be a fee tail, if the property had been real: And it is very remarkable, that the rules for the construction of wills, by which estates tail are implied in real estate, have been applied by the english courts to wills of personal property, for inferring an intention in the testator to give such an interest therein, as would, if the property were real, amount to an estate tail. Thus, if personal property be given to one for life, but if he die without issue, remainder over, the legatee takes, not an estate for life, but the intire interest, merely because such a devise of real property would give an estate tail: and yet the reason for implying an estate greater than a life estate, is wholly inapplicable to personal property. *Love v. Windham*, 1 Vent. 79; *Butler's* *Ferne*, 486.

2dly. As to deeds and wills made since the act of 1785. That act, in the first part of its provisions on this subject, puts them on the same footing with deeds and
427 wills made before *the passage of the act, by declaring "that every estate in lands, which since [the 7th October 1776] hath been limited, or hereafter shall be limited, so that, as the law aforesaid was, such estate would have been an estate tail, shall be deemed to have been, and to continue, an estate in fee simple." This part of the act makes the same rules of construction common to estates created before and to those created since the act; namely, the rules of construction recognized by the law, as it aforesaid was. But it was surely competent to the legislature of 1785, to make any exceptions to or changes in those rules, that it thought proper: and it did make an exception, as to deeds and wills to be made after the passage of that act, by declaring in the sentence almost immediately succeeding, that "every estate in lands, which shall hereafter be granted, conveyed or devised to one, although other words heretofore necessary to transfer an estate of inheritance, be not added, shall be deemed a fee simple, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised, by construction or opera-

tion of law." It must be admitted, that this section makes a most important change in one of the former rules of construction; and it is imperative on the courts. As to estates created since the act of 1785, the expression, "as the law aforesaid was," must, therefore, be understood as controlled by the clause just referred to. But, with this exception, there is no difference between the construction of deeds and wills made before the statute of 1785, and those made since.

As to the construction of the will in the case now before us: although it is some times permitted to transpose the different parts of a will, I concur with judge Carr in thinking, that it ought to be done with great caution, and that, in general, we are much more likely to arrive at the real meaning of a testator, by pursuing the order in which he has expressed his thoughts and intentions, than by inverting or changing that order. The testator, in this case, had a wife and a daughter, his only child. He seems to have regarded
428 *them as equal objects of his bounty.

From the first part of the will, it is perfectly manifest, that each, during her life, was to have an equal participation in his estate; and that, in case the wife should die without any more issue, the whole estate was to go to the daughter, and in case the daughter should die without any issue, the whole was to go to the wife. If there had been nothing more in the will, I think it could not be questioned, but that each of them would have taken by the will a fee tail in a moiety of the land, and an absolute interest in a moiety of the personalty. I do not think the last clause in the will, can have any influence in changing the construction of it, as to any part of the property, other than the particular property to which it professes to relate. That clause relates exclusively to the property which came by the wife; and as to that, the testator says his wife is to have the disposal of it, in case she "should marry and again have issue." The testator thought (whatever may be the legal construction) that the former part of the will would not give to his wife the disposal of any part of the property, before the death of his daughter without issue. But thinking it proper to give her greater powers, as to that portion of it which came by her, he declares, in the last clause of his will, that his wife shall have the disposal of it, in case she "should marry and again have issue." This clause was introduced, I think, for the sole purpose of placing the property that came by the wife, on a footing different from that on which, he thought, it stood under the former part of the will. He intended by the latter clause, to give to the wife, over the property that came by her, a power which he did not intend her to have over the rest of his estate. He intended to give her this power, in the event that she "should marry and again have issue." These last words, therefore, being used for a different purpose, can afford no criterion for construing the words in the first clause, "in case my wife should die without any more issue." Nor do I think that the generality of the expressions "die with-

out any more issue," can be affected, 429 as to "the land, by the subsequent limitation over, on the death of both wife and daughter without issue, of the property that came by the wife, "to her brothers and sisters that may be then living," even if it would be so as to any of the personal property; as to which however I give no opinion. I therefore think, that the wife took a fee tail in a moiety of the land; and I concur in the opinion, that the daughter took a fee tail in the other moiety; both of which were converted into estates in fee by the act docking entails.

GREEN, J., being of opinion, that the daughter was entitled to a fee in one moiety of the land, and to the remainder in fee expectant on the wife's life estate in the other moiety; and Coalter, J., being of opinion, that the wife, in the events that have actually happened, was entitled to the whole; and Cabell and Carr, J., holding, that, by joint force of the will and of the statute abolishing entails, the daughter was entitled to one moiety in fee, and the wife to the other moiety in fee; the decree was in conformity with this last opinion.

430 *Dunlop & Co. v. Keith and Others.

June, 1829.

[19 Am. Dec. 755.]

(Absent BROOKE, P., and CARR, J.*)

Foreign Attachment—Absent Defendants—Case at Bar.—A claim arising out of the official neglect of the clerk of a county court in Virginia, against the officer a non-resident of Virginia at the time the claim is asserted, is not a claim for debt, for which a foreign attachment in chancery lies. **Same—Same—Same.**—Neither is the non-resident officer, in such case, amenable to jurisdiction of the court of chancery as an absent defendant.

Dunlop & Co. alleged, that they had sustained heavy loss, by the official negligence or fault, either of Keith, clerk of the county court of Frederick, or of Stephenson, late sheriff of Berkeley. Keith, the clerk, had never given any official bond for the faithful discharge of the duties of his office; and he was now residing in the town of Alexandria in the district of Columbia. Dunlop & Co. proceeded by way of foreign attachment; exhibiting their bill in the superior court of chancery of Winchester, against Keith, as an absent debtor, against Tidball, his agent having money in his hands belonging to him, as garnishee, and against the representatives of Stephenson, the sheriff; setting forth the amount of loss they had sustained, and the official misconduct to which they imputed it; charging, that, though it might be disputed in actions at law, whether the loss were properly imputable to the official misconduct of the clerk, or to that of the sheriff, yet Keith the clerk appeared to be

the officer really chargeable; and praying a decree against Keith for the amount of the loss, and the attachment and application of the moneys belonging to him, in the hands of the garnishee, to the satisfaction thereof.

Keith, and the representatives of Stephenson, in their respective answers, denied the official misconduct imputed to them. And Keith insisted, that he was not amenable, in such a case, to the jurisdiction of the court of chancery.

431 *The chancellor seemed somewhat inclined to sustain the jurisdiction; but he did not decide the point; for, finding it impossible, upon the proofs, to fix the imputed misconduct upon either officer, he for this reason dismissed the bill.

Dunlop & Co. appealed to this court.

Johnson, for the appellants, and Leigh, for the appellees, argued the cause upon the merits, as well as the question of jurisdiction. But, in the event, it turned wholly on the point of jurisdiction; and this depended on the construction and effect of the statute concerning proceedings in chancery against absent debtors and other absent defendants, 1 Rev. Code, ch. 123, p. 474.

CABELL, J., delivered the resolution of the court. If the chancellor had not jurisdiction of the case stated in the bill, it will be unnecessary to look farther.

As early as the year 1744, an act passed (5 Hen. stat. at large, p. 220), authorising a suit in chancery against persons out of the country, and others within the country having in their hands effects belonging to the absent defendants. But that act was intended to apply to those cases only, in which the plaintiffs and the absent defendants stood, towards each other, in the relation of creditor and debtor; for the act recites, as the motive for its adoption, the great difficulties that had arisen in the recovery of debts due to the inhabitants of this country, from persons residing out of it. At a long subsequent period, in the year 1787, (12 Id. 466, 7,) the legislature authorised proceedings against other absent defendants, similar to those which the preceding law had given against absent debtors. The provisions of both these laws, with some others on the same subject, are brought together in the Revised Code.

The bill of Dunlop & Co. states the case of a misfeasance of Keith in office; a mere tort, the action for which dies with the person. It is similar, in this respect, to

432 the case of an escape of a person in execution, by negligence of a *sheriff or jailor, which makes him personally responsible for the amount of the debt; but he was answerable at the common law, not as a debtor, but as a tortfeasor; and the action died with the person, upon the maxim *actio personalis moritur cum persona*. 11 Vin. Abr. 244, 5; Executors, H. a. pl. 1.

Is the case, as stated in the bill, within either that branch of the statute which gives relief against absent debtors, or that which gives against other absent defendants, relief similar to that which is given against absent debtors? The court thinks it comes within neither. Not within the first: for, although the term debtor should

*CARR, J., did not sit, because he had decided the case in the court of chancery.

*Debt—Claim Arising Out of Official Neglect of Clerk—Attachment.—In *Maysville, etc., Co. v. Marvin*, 59 Fed. Rep. 93, it is said, a claim arising out of the official neglect of a county court clerk was held not to be a "debt," within the meaning of the statute authorizing an attachment for "debt." Citing *Dunlop v. Keith*, 1 Leigh 430. See monographic notes on "Debt. The Action of" appended to *Davis v. Mead*, 13 Gratt. 118; "Attachments" appended to *Lancaster v. Wilson*, 27 Gratt. 624.

in the construction of this statute, be taken in its largest sense, as embracing every person against whom another has a claim for breach of contract, even where the compensation sounds in damages;* yet Keith cannot be embraced by it, since his case is that of a mere tortfeasor. If he had given an official bond, that would have varied the case. But it does not appear that he gave any. Nor can it come within that branch of the statute, which authorizes the same proceedings against other absent defendants, that are allowed against absent debtors. This part of the statute was not intended to extend the jurisdiction of equity to subjects over which it had not jurisdiction before; but, to enable the court of chancery to exercise over persons abroad a jurisdiction to which they would, if they were here, be jointly amenable with the home defendants, in cases in their nature proper for the jurisdiction of equity, such as partners, legatees, joint contractors, &c. Nobody would contend, that Keith, if in Virginia, would be liable to be sued in equity, on the case stated in the bill, either separately, or jointly with the other defendants. And the same remark applies to the representatives of the sheriff.

On this ground, the decree is affirmed.

433 *Cooke v. The Patriotic Bank of Washington.

October, 1829.

(Absent GREEN, J.)

Forthcoming Bonds—Notice—Variance in Name of Party—Effect.—In a notice of a motion to be made on a forthcoming bond the bond is described by mistake as executed by John when it was in fact executed by George M. Cooke: HELD, variance material, and notice insufficient.

A *fiat facias*, sued out of the circuit court of Stafford, by the appellees against George M. Cooke, having been levied on his property, he together with John Cooke, his surety, gave bond for the forthcoming of the property at the day of sale, in the usual form; which was forfeited. A notice was given to the true obligors, of a motion to be made for award of execution on the bond: but it was addressed to John M. Cooke (instead of George M. Cooke) and John Cooke; and it described the bond as the bond of John M. Cooke (instead of George M.), and John Cooke. It was objected at the hearing of the motion, that the notice did not truly describe the bond on which the motion was made, but on the contrary described a bond which did not exist; but, notwithstanding this variance, the circuit court awarded execution on the bond.

*See Peter v. Butler, ante, p. 285.

He was absent during the whole of this term, being a member of the convention, (which sat from the first Monday in October 1829, till the 15th January 1830) and constantly attending his duty there.

Forthcoming Bonds—Notice—Sufficiency of.—If the notice descends to particulars as to dates, sums and names, the documents referred to, when produced, must correspond with the notice or no judgment can be given. Board, etc. v. Parsons, 22 W. Va. 311, citing 1 Rob. Pr. (1st Ed.) 590; Drew v. Anderson, 1 Call 51; *Cooke v. Patriotic Bank*, 1 Leigh 433. See also, citing the principal case for this proposition, Shepherd v. Brown, 30 W. Va. 20, 3 S. E. Rep. 190; *foot-note* to Monteith v. Com., 15 Gratt. 172. See monographic note on "Statutory Bonds" appended to Goolsby v. Grother, 21 Gratt. 107.

The defendants applied to this court for a supersedeas, which was allowed.

Green for the plaintiffs in error, and Briggs for the defendants.

The only point was the misnomer in the notice, of the principal obligor—John M. instead of George M. Cooke; the effect of which was, that the notice described a different forthcoming bond from that on which the motion was in fact made.

This court held the variance material and fatal, and reversed the judgment of the circuit court.

434 *M'Kenny's Ex'ors v. Waller.

October, 1829.

(Absent GREEN, J.)

Sureties—Mere Indulgence to Debtor—Effect.—A mere indulgence given by a creditor to a principal debtor, the creditor not binding himself to suspend his proceedings against the principal for any time, though such indulgence be given at the very time the sheriff is about to levy the execution on the principal's property, and though in consequence of that indulgence the principal is enabled to remove his property out of the reach of future process, does not, even in equity, discharge the surety.

M'Kenny's executors having obtained judgment and award of execution, in the county court of Spottsylvania, on three several forfeited forthcoming bonds, against Joseph Waller the principal, and Curtis Waller the surety, therein bound, sued out thereupon three writs of *fiat facias*, dated in April 1822, and returnable to the June term following. These executions were put

***Principal and Surety—Mere Indulgence Given Debtor—Effect as to Surety.**—Mere indulgence, given by the creditor to the principal debtor, such as suspending the proceeding against the principal by withdrawing the execution from the hands of sheriff before levy, does not discharge the surety. For this proposition the principal case is cited in Alcock v. Hill, 4 Leigh 625; *foot-note* to Harnsberger v. Geiger, 3 Gratt. 144; Humphrey v. Hitt, 6 Gratt. 528, and note; Walker v. Com., 18 Gratt. 48, and note; *foot-note* to Shannon v. M'Mullin, 25 Gratt. 211; Armistead v. Ward, 2 Pat. & H. 512; Coleman v. Stone, 85 Va. 388, 7 S. E. Rep. 241; Ambler v. Leach, 15 W. Va. 607; Knight v. Charter, 22 W. Va. 429.

In *Chichester v. Mason*, 7 Leigh 262, in which case the court was equally divided as to whether the surety was discharged by the withdrawal of the execution it is said, by CABELL J., with whom BROOKE J. concurred: "I have carefully examined every case that has ever been decided by this court, having, as I supposed, any reference to the exoneration of sureties, from Croughton v. Duval, to *M'Kenny's Ex'ors v. Waller*; and I think I shall not be found to be mistaken, when I say, that there will not be found in any one of them, any allusion to the question, whether the release or withdrawing of an execution put into the hands of the sheriff, is or is not a discharge of the surety. Croughton v. Duval, 3 Call 69; Ward v. Johnson, 6 Munf. 6; Hill v. Bull, Gilm. 149; Bennett v. Maule, Gilm. 328; Norris v. Crumme, 2 Rand. 328, and Hunter's Adm'r v. Jett, 4 Rand. 104. In the first of these cases the question was as to the effect of the neglect or refusal of the creditor to sue the principal; and in all the others the question was, whether the surety was discharged by the creditor having given time, and thereby tied up his hands, so as to impair the remedies of the surety. When, therefore, the court in *M'Kenny's Ex'ors v. Waller*, refer to the principles heretofore decided by this court, as decisive of that case, the inevitable inference (as I conceive) is, that the attention of the court was directed solely to the question, whether the creditor had so indulged the debtor, as to tie up his hands, and thereby injure or impair the remedies of the surety. If this inference be correct, that case will be stript of much of its force as authority even in cases whether the circumstances may be precisely the same." The principal case is also cited in the same case at pages 261, 263, 264, 265, 266.

And in *Asbby v. Smith*, 9 Leigh 164, where the attachment which had been *levied* on the goods of

into the hands of the sheriff of the county. Joseph Waller, the principal, had, at the time, personal property in his possession, amply sufficient to satisfy the whole amount of debt. And the sheriff went to his house, three days before the return day, for the purpose of levying the executions on his property then and there, with the avowed design to take it into his own keeping, when Joseph Waller prevailed on the creditors to give him a short indulgence; and they, at his instance, without the consent or knowledge of Curtis Waller, the surety, gave written instructions to the sheriff, not to levy the executions till they should see him. These were the terms of the instructions; the creditors not binding themselves to suspend proceedings for any time, but giving a mere indulgence to be determined at their own pleasure. In consequence of the instructions thus given him, the sheriff forbore to levy the executions, and made return on them, Not executed by order of the plaintiffs. Very shortly afterwards, June 7th 1822, M'Kenny's executors sued out new writs of fieri facias; but, after these new executions were put into the sheriff's hands, Joseph Waller removed the greater part of his effects out of

435 "the county and beyond the reach of the process; so that the sheriff could not find enough of his property, to satisfy the amount of the three executions. What he could find of it, he took; and then, for the residue of the debt, he levied the process on the property of Curtis Waller, the surety.

Upon this state of facts, Curtis Waller insisted, that he was, in equity, discharged from his liability for the debts, by reason of the indulgence given by the creditors to his principal, without his consent or knowl-

the principal debtor was released, which was held to discharge the surety in equity, the court said, at page 172, that the cases of *M'Kenny v. Waller*, and *Alcock v. Hill* were rendered of doubtful authority by the opinions of BROOKE and CABELL, in *Chester v. Mason*. But in *Humphrey v. Hitt*, 6 Gratt. 528, BALDWIN, J., says: "I am for adhering to the decisions of this court in *M'Kenny v. Waller*, 1 Leigh 434, and *Alcock v. Hill*, 4 Leigh 622: which have not been shaken by any subsequent adjudication; and which establish a principal that furnishes a safe and certain guide. To overrule them would give rise to much litigation: and the present case is a strong illustration of the evil. Here a surety, though cut off from no remedy, is seeking to be discharged from his obligation, by speculative opinions of witnesses as to the probability that the principal had property sufficient to discharge the debt in part. If the *f. fa.* had been levied, without any specification or description of the property, or any information in regard to the validity of the title."

In *Coffman v. Moore*, 29 Gratt. 248, it is said: "The surety has a right to stand in the shoes of the creditor in the enforcement of such securities; and the creditor, as to such securities in his hands and under his power, is considered as trustee for the surety, and if he is unfaithful, he not only fails in his duty as trustee, but violates the rights of the surety, as against his principal, and is liable for the loss which the surety thereby sustains. These principles are firmly established by repeated decisions of this court. I need only refer to the following cases: *Ward v. Johnson*, 6 Munf. 6; *M'Kenny v. Waller*, 1 Leigh 434; *Alcock v. Hill*, 4 Leigh 622; *Humphrey v. Hitt*, 6 Gratt. *supra*, in which JUDGE BALDWIN, with the unanimous concurrence of the other judges sitting, gives a clear and forcible exposition of the doctrines on this subject. Then follows *Harnsbarger v. Kinney*, 18 Gratt. 511; and the recent cases of *Shannon v. McMullin*, 25 Gratt. 211; *Harrison v. Price*, *Ibid.* 553." 84 S. E. Rep. 686, upon the question of the sufficiency of an officer's return of process.

edge, at a time when the principal's property was, in effect, as he alleged, in the sheriff's hands, and could not have been exempted from the executions then in force, or withdrawn beyond the reach of future process, without the voluntary permission and order of the creditors to the sheriff. And he presented his bill to the court of chancery of Fredericksburg, setting forth this equity, and praying, that M'Kenny's executors should be enjoined from further proceedings on their executions against him.

The chancellor granted the injunction: the executors of M'Kenny answered the bill: depositions were taken by both parties, and the circumstances of the case, as above stated, were clearly proved: and, upon the final hearing, the chancellor decreed that the injunction should be made perpetual. M'Kenny's executors appealed to this court.

Harrison, for the appellants, cited *Norris v. Crummey*, 2 Rand. 328, and *Hunter's adm'rs v. Jett*, 4 Rand. 104.

Briggs, for the appellee, said, that this was a peculiar case, and ought to be decided upon its own circumstances. Here, the property of the principal, and that amply sufficient to satisfy the whole debt, was, in effect, in the sheriff's hands: and he was only prevented from taking it into his own keeping, by the express instructions of the creditors; who, of their own accord, relinquished their hold upon it, and thus gave the principal debtor the opportunity, of which he availed himself, to put that very property beyond the reach of future process. It surely could not be said,

436 in this case, as was said in *Peel v.*

Tatlock, 1 Bos. & Pul. 422, that the favor shewn by the creditor to the principal, did not work an injury to the surety. The injury was palpable and certain.

COALTER, J., delivered the resolution of the court, that, according to the principles of the cases decided by this court on this subject, there was no ground whatever on which the decree could be supported.

The decree was reversed, the injunction dissolved, and the bill dismissed.

Tolson v. Elwes.

October, 1829.

Executions—Assignment—Right of Assignee to Bring Motion in His Own Name against Sheriff.*—Execution sued out in the name of W. indorsed for benefit of E—held that E. cannot maintain a motion in his own name against the sheriff for amount levied on the execution or for his default in service and return of the writ.

A writ of fieri facias, sued out of the circuit court of Stafford, dated the 23d October 1823, and returnable the second Monday in January following, in the name of Wallack, but indorsed "for the benefit of

***Executions—Assignment—Right of Assignee to Sue in His Own Name.**—In the principal case it is held that a person for whose benefit an execution is indorsed cannot maintain a motion in his own name against the sheriff for the amount levied on the execution.

In *Burnett v. Harwell*, 3 Leigh 89, the principal case is cited at page 92, and it is held that an action cannot be maintained on an executor's bond, at the relation of an assignee of a legatee of a decree for a legacy, such action can only be maintained at the relation of the person who has the legal right to the debt. Also, in *Poage v. Bell*, 8 Leigh 604, citing

Elwes," against Simms and Flournoy, for debt, interest and costs, for which Wallack had recovered judgment against them, was delivered to Beatty deputy of Tolson late sheriff of Stafford, who made the following return upon it—"By virtue of this execution, I levied, and advertised according to law, the following property, to wit, Stock of horses, cows &c. household furniture, and plantation utensils; the sale of which was prevented for want of bidders. (Signed) R. Beatty deputy for B. Tolson sheriff &c."

Upon this, a writ of venditioni exponas, dated the 18th April 1825, and returnable the first day of May term following, was sued out, and delivered to the same deputy.

This process also ran in the name of 437 Wallack, but was indorsed "for the benefit of Elwes." The deputy made the following return upon it—"Levied this execution, together with two others which had previously come to hand, on the following property, subject to sundry taxes and levies due to me, to wit, One bureau &c." (enumerating divers articles of household furniture, and one cow and nine hogs); "all of which I sold according to law, to the highest bidder, the 16th May 1825, for 130 dollars 92 cents; which sum was applied to the discharge of two executions which came to hand previously to this, namely, one in favor of the representatives of John Bronaugh, and the other in favor of Ephraim Brent; and the balance of the amount of sales is retained to satisfy in part taxes and levies due me. This execution was also levied on the following property, which could not be found on the day of sale of the above-mentioned property, to wit, Two horses &c.") enumerating a few cattle and hogs, and some farming utensils; "which, when sold, shall be applied in part thereof. I had also levied on the following, to aid in discharge of this execution, to wit, One round tea table &c." (enumerating sundry articles of furniture and plate, a few cattle, mules and sheep, and some farming utensils); "which last mentioned property I am advised has been enjoined by Mr. Brent and others, as not being liable to the discharge of the debts of the said Simms, and which I cannot sell, unless I am indemnified in the sale thereof. (Signed) R. Beatty deputy for B. Tolson sheriff &c."

Hereupon, Elwes, for whose benefit these two writs had been sued out, gave a notice, in his own name, to Mr. Tolson the sheriff, that he would move the circuit court for judgment against him, for the full amount of the debt, interest and costs, mentioned

in the venditioni exponas, with 15 per cent. per ann. interest thereon from the return day thereof until paid, according to the provisions of the statute, 1 Rev. Code, ch. 134, § 48, p. 542.* And upon the 438 motion *made by Elwes pursuant to this notice, the circuit court gave him judgment, for 180 dollars 83 cents (the amount due on the venditioni exponas) with 15 per cent. per ann. interest thereon from the return day of the writ, and the costs of the motion. From which judgment Tolson appealed to this court.

The cause was argued here, by Harrison for the appellant, and Patton for the appellee.

Several points were discussed at the bar, which the court did not find it necessary to consider or decide. Among these was the question, Whether, as the statute gives this summary remedy by motion, only in case of such returns made by the officer, as entitle the plaintiff to recover against him, in an action of debt, the debt, damages or costs, mentioned in the execution, an action of debt might have been maintained against the officer upon the returns made on the executions in this case? And Carr, J., intimated an impression, but not a decided opinion, that debt would not lie: but the point was not decided, nor did the other judges give any opinion concerning it. The case eventually turned on the question,

Whether Elwes, for whose benefit the 439 execution *was sued out, as appeared by the indorsement upon it, could maintain the motion, in his own name?

Harrison insisted, that, as the statute giving this summary remedy, at once dispenses with the ordinary course of the common law, and inflicts a heavy penalty in the form of interest allowed on the debt, it ought to be construed strictly. The statute gives the motion to the creditor at whose suit the execution shall issue. Now, Wallack, not Elwes, was that creditor. He alone was the plaintiff on the record: he alone could maintain debt or scire facias on the judgment: and if a forthcoming bond had been taken, it must have been made payable to him; and he alone could have moved for an award of execution upon

the principal case at page 607, it is held that the *creditor qui trust* cannot maintain an action at law, in his own name against a party converting the property, but the action will lie only at the suit of the trustee.

Upon the authority of the principal case it is held in *Leightons v. Hinchman*, 1 Gratt. 157, that an action against a high sheriff and his sureties, upon his official bond, for the misconduct of his deputy in his proceedings on an execution in his hands, must be at the relation of the plaintiff in the execution: and cannot be sustained, at the relation of the parties for whose benefit the execution is issued. The principal case is also cited in *note* to the same case. See monographic *note* on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 409.

*The statute provides, that "If any sheriff, under sheriff or other officer, shall make return upon any writ of fieri facias or venditioni exponas, that he hath levied the debt, damages and costs, as in such writ required, or any part thereof, and shall not immediately pay the same to the party to whom the same is payable—or shall make any other return upon any such execution, as will shew that such sheriff, under sheriff or other officer, hath voluntarily and without authority omitted to levy the same, or as would entitle the plaintiff to recover from such sheriff or other officer, by action of debt, the debt, damages or costs, in such execution mentioned, and such sheriff or other officer shall not immediately pay the same to the party to whom it is payable or to his attorney—then, or in either of the said cases, it shall and may be lawful for the creditor, at whose suit such writ of fieri facias, venditioni exponas, &c. shall issue, upon a motion made in the next succeeding general court, or other court from whence such writ shall issue, to demand judgment against such sheriff, under sheriff or other officer, or the securities of either of them, or their legal representatives, jointly, for the money or tobacco mentioned in such writ, or so much as shall be returned levied on such writs of fieri facias or venditioni exponas, with interest thereon, at the rate of 15 per cent. per ann. from the return day of the execution, until the judgment shall be discharged &c."—Note in Original Edition.

it. That the execution was indorsed "for the benefit of Elwes," could not help the case. It did not appear, that that indorsement was made by Wallack or by his direction, and it might have been the act of Elwes himself; and if it was the act of Wallack, it was not an assignment of the judgment or of the execution to Elwes; and indeed, neither of them was by law assignable, nor could a court of law take any notice of such an assignment. If the return afforded any foundation at all for such a motion, there could be no doubt, that Wallack might have made it; and if so, the judgment for Elwes could present no bar to a future motion by Wallack.

Patton said, that though originally choses in action were held not assignable either in law or equity, yet the broad ground was soon taken, that all such assignments were good in equity; and then it was held at law, that though such assignments do not transfer the legal title, they transfer every thing else; that they authorise the assignee to sue in the name of the assignor, and the assignor cannot control the proceeding; that the assignor's legal right is merely subservient to the equitable right of the assignee. *Garland v. Richeson*, 4 Rand. 268. Our statute gives the assignee of a bond or note a right to sue in his own name, but

it does not change the nature of his title, for his title is still *not a legal but only an equitable one. *Ibid.* In the present case, the court must intend, that the indorsement on the execution, that it was for Elwes's benefit, was made by the clerk; and that, in making it, he was governed by the record, which shewed that the suit had been prosecuted for his benefit; for such is the constant practice and course of business. And then, as Elwes was the creditor in fact, at whose suit the original writ was purchased, so he was the creditor at whose suit the executions issued. Certainly, the sheriff was bound to take notice of the indorsement, and to account to Elwes for the money. If Wallack had a right to control the execution, or to receive the money made upon it, the right of an assignee to proceed in the name of the assignor to recover the debt assigned, is reduced to nothing. Elwes was "the party to whom the money was payable," in the strictest sense of the statute in question; the party to whom the injury accrued by the failure of the sheriff to make the payment, for which the statute gives the summary remedy. Could the statute have been intended to give the remedy, not to the party injured, but to the plaintiff on the record who is not injured? The statute does not give the motion to the plaintiff on the record, but to the creditor at whose suit the execution issues. Let its language be scanned: whenever the return is such as to entitle the plaintiff to an action of debt, then, not the plaintiff, but the creditor at whose suit the execution issues, whoever he may be, may move against the delinquent officer. This motion was not a proceeding to enforce the execution of Wallack's judgment; the execution was consummated; and the motion was made to recover the money of the sheriff, for his default, by the party to whom the injury accrued.

CARR, J. At common law, we know, choses in action were not assignable; nor could courts of law formerly take any notice of the equitable where it was distinct from the legal right. Courts of equity, however, held those assignments good, and enforced them; and, in later times, courts of law have so far relaxed, as, in some instances, to notice the equitable right. Thus, they will not suffer the assignor, whose name is used by the assignee in suing, to dismiss or in any way control the suit. Again, if the real owner of the debt, though not plaintiff on the record, be indebted to the defendant, the court will allow the defendant to set-off this debt against that for which he is sued. Thus the law stands in England, where there is no law permitting the assignment of choses in action. But the courts of law have never gone so far as to suffer the assignee to institute a suit in his own name. (I am not speaking of bills of exchange assignable by the law merchant, or of promissory notes made so by the statute of Anne, but of mere choses in action as contradistinguished from commercial paper.) Our statute declares "assignments of bonds, bills and promissory notes, and other writings obligatory whatsoever, valid, and that the assignee may sue in his own name" &c. 1 Rev. Code, ch. 125, § 5, p. 484. It will be seen at once, that judgments and executions are not embraced by this statute: they, therefore, remain as at common law. And it may be laid down, as a general proposition, that in no proceeding to carry a judgment or execution into effect, can the name of the transferee be substituted for that of the plaintiff upon the record. But this proposition, deduced from the general principles of law, is still more clearly and strongly established by the particular statute under which this motion is made; by the words of which, the motion is given to the creditor at whose suit the execution shall issue. This, it seems to me, can mean no other than the plaintiff on the record. I think, therefore, this motion could not be maintained in the name of Elwes.

This point being sufficient for the reversal of the judgment, it is not necessary to give an opinion on the other points discussed at the bar.

The other judges concurred, and the judgment was reversed.

442

*Meze v. Howver.

October, 1829.

(Absent GREEN. J.)

Executions—Assignment—Forthcoming Bond Taken in Favor of Assignee—Validity.—A. f. fa. is sued out by M. & M. on judgment recovered by them: they indorse on the writ, that it is for benefit of H.: the sheriff levies it, and takes forthcoming bond payable to H.: HELD, the bond is naught.

Mays & M'Clung recovered judgment against Meze, in the circuit court of Greenbrier, and thereupon sued out a fieri facias, on which they indorsed, that the judgment

*Executions—Assignment—Right of Assignee to Sue in His Own Name.—On this question, see *Foot-note* to *Tolson v. Elwes*, 1 Leigh 436. The principal case is cited in *Burnett v. Harwell*, 3 Leigh 92; *Leightons v. Hinchman*, 1 Gratt. 157, and *note*; *Hall v. Wadsworth*, 35 W. Va. 379, 14 S. E. Rep. 6.

and execution were for the benefit of Howver. The sheriff levied the execution on the defendant's property, and took a forthcoming bond from him, payable, not to the plaintiffs Mays & M'Clung, but to Howver. The bond was forfeited: and Howver moved the circuit court, in his own name, for judgment and award of execution upon it; and the court awarded execution accordingly. Meze applied to this court for a supersedeas, which was allowed.

Daniel, for the plaintiff in error. The bond is naught. The statute requiring forthcoming bonds to be taken payable to the creditor, intends, that they shall be made payable to the plaintiff on the record; 1 Rev. Code, ch. 134, § 1, 15, 16, p. 524, 530. The bond must pursue the judgment and execution, otherwise it has no foundation to support it: it is, in truth, a part of the process of execution.

No counsel for the defendant in error.

PER CURIAM. The statute first provides, that all persons who recover judgment in any court of record, may, at their election, prosecute writs of fieri facias &c. and then, that if the owner of the goods (taken on a fi. fa.) shall give sufficient security to the sheriff to have the goods forthcoming at the day of sale, it shall be lawful for the sheriff to take a bond from the debtor and sureties, payable to the creditor, reciting &c. The

creditor to whom the bond is to be made *payable, is the person entitled to sue out the execution; the plaintiff on the record. No other person can be known to the officer, or to the court itself, as the creditor. To no other person, then, can the bond be taken. In *Downman v. Chinn*, 2 Wash. 189, a forthcoming bond made payable to the sheriff, was given up, on all hands, as faulty. The judgment of the circuit court must be reversed, and the forthcoming bond quashed.

Hughes v. Pledge and Others.*

Same v. Shippard.

October, 1820.

Marriage Settlement—Mortgage of Slaves Conveyed in Settlement—Statute.—Deed of marriage settlement of slaves then in Hanover, where deed was made and duly recorded: husband, entitled to and holding possession under settlement, removes with the slaves to Richmond, and there mortgages them for debt of his own, contrary to terms of the settlement, within 12 months after his removal of them: the trustee of the subject under the settlement, fails to have it recorded in Richmond, within 12 months after removal of the slaves: but within the twelve months, he files a bill in chancery against the husband and mortgagee, asserting his legal title to the slaves and the trusts of the settlement: *H&Ld.* the mortgagee is a purchaser with notice of settlement within 12 months after removal of slaves to Richmond, and as to him, the failure of the trustee in the deed of marriage settlement, to have it recorded in Richmond, does not make the settlement void, under statute 1 Rev. Code, ch. 99, § 11, p. 364.

Same—To Husband and Wife during Life—Condition That Shall Not Be Liable to Husband's Debts—Case at Bar.—Marriage settlement of slaves to use of husband and wife during their joint lives; remainder to wife, if she survive: remainder to whomsoever the wife shall appoint, if she die before husband; remainder, in default of such appointment, to husband for life, and after, to offspring of the marriage: to the intent, that the property shall not be subject to disposal, debts, contracts or engagements of husband: *H&Ld.* during wife's life, the property cannot be disposed of by husband, or applied to satisfaction of his debts.

By deed of marriage settlement, between Francis Pledge and Christian Hughes, made before the marriage, and bearing date the 18th July 1820, Christian Hughes, the intended wife, conveyed to William H.

444 Hughes, five slaves, her own *property, in trust, that he should permit the said Francis and Christian, after the marriage should be solemnized, to take and enjoy all the profits and use of the property, during their joint lives; and from and after the death of the said Francis, if he should die first, then upon trust, that the said William should assign the whole property to the said Christian; and if the said Christian should die before the said Francis, then in trust for such person or persons, as she should, by will or otherwise, direct and appoint; to the intent, that the subject should not be at the disposal, or subject to the control, debts, forfeitures or engagements, of the said Francis, the intended husband; and, in default of such appointment by the wife, at her death, then in trust for the said Francis, during his life, and after his death, for their offspring. The marriage took place. The deed was duly recorded in the county court of Hanover, on the 27th July 1820, the property being at the time in that county. Pledge the husband, within two months after, removed, and brought the slaves with him, to the city of Richmond; but the deed of marriage settlement, was not recorded, either in the hustings court of Richmond or in the county court of Henrico. And by indenture, dated the 22d January 1821, and duly recorded the same day in the hustings court, Pledge, the husband, conveyed them to Riddle, in trust, to secure a debt he owed to Shippard.

Riddle being about to sell these slaves, under this deed of trust, to satisfy the debt due to Shippard, and having actually advertised them for sale, Hughes, the trustee in the marriage settlement, exhibited his bill in the superiour court of chancery of Richmond, against Pledge the husband, and the trustee Riddle, setting forth the marriage settlement, and the other facts above stated, and praying, that Riddle, the trustee for Shippard, should be enjoined from selling or otherwise interfering with the property. This bill was filed, and an injunction awarded according to the prayer of it, June 12th, 1821. And on the 22d February 1822, an amended bill was filed, making Shippard a party defendant.

445 *Shippard, in his answer, insisted, 1st, that, though the deed of marriage settlement was duly recorded in the county court of Hanover, in which county the property was at the time, yet Pledge, the husband, having the possession of it, removed, and brought it with him, to Richmond, within less than two months afterwards, and the deed was never recorded there; and, therefore, was void as to him, a purchaser for valuable consideration without notice, according to the provisions of the statute, 1 Rev. Code, ch. 99, § 11, p. 364. And,

*The principal case is cited in *Armstrong v. Pits*, 13 Gratt. 243; *Dowell v. Anderson*, 1 Pat. & H. 194; *fool-note* to *Mundy v. Vawter*, 3 Gratt. 518. See monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 169.

2ndly, that, at least, the interest which Pledge had, or had a right to dispose of, in the property, under the marriage settlement itself, was subject to Shippard's claim, and ought to be applied toward the satisfaction of it; namely, the use of the property during the joint lives of the husband and wife, and the contingent interest limited to the husband after the wife's death without making any appointment.

Pending this suit, Shippard on his part exhibited a bill, complaining, that Hughes and Pledge had evinced a design to remove the subject beyond the jurisdiction of the court, and praying an injunction to restrain them from doing so; which was allowed.

The two causes came on together for a final hearing, in June 1826. The chancellor held, that the case stated in Hughes's bill was not proper for relief in equity, because if he had right, he had a complete remedy at law; founding this opinion against the jurisdiction of the court, upon his understanding of the authority of the case of *Bowyer v. Creigh*, 3 Rand. 25. And, therefore, he dismissed that bill with costs. As to Shippard's suit, he held, that the deed of marriage settlement, not having been recorded in Richmond or Henrico, whither the slaves had been brought soon after the marriage, and where they had ever since remained, was void as against Shippard; and, therefore, he perpetuated the injunction he had granted to Shippard, and decreed a sale of the slaves to satisfy the debt for which they were mortgaged to him.

Hughes appealed to this court.

446 *Scott, for the appellant, upon the question of jurisdiction, raised in the first suit, cited *Allen v. Freeland*, 3 Rand. 170, *Randolph v. Randolph*, 6 Rand. 194, *Harrison v. Sims*, Id. 506, directly in point to sustain the jurisdiction.

As to the omission to have the marriage settlement recorded in Richmond or Henrico, after the subject had been brought there, he said, 1st, That this deed was a conveyance by the wife of her own property only; and whether it had been recorded at all or not, it was good against the creditors of, or purchasers from, the husband, as he was not the grantor. *Pierce v. Turner*, 5 Cranch 154; *Land v. Jeffries*, 5 Rand. 211. 2ndly, That, supposing this the case of a deed respecting the title of personal chattels, which by law ought to be recorded, yet the statute only provided, that in case the person claiming title under the deed, should permit the person in possession of the subject, to remove with it to another county, and should not within 12 months after the removal, have the deed recorded there also, the deed should be void, so long as it should not be so recorded, as to all purchasers without notice and all creditors. Now, Shippard had full notice of this marriage settlement, within the twelve months allowed for recording it in Richmond or Henrico; for the bill of Hughes, the trustee, was exhibited, and the injunction to restrain Shippard's trustee, Riddle, from selling the property, was awarded, within nine months after it was brought to Richmond.*

*There are two provisions affecting this point, in

447 *Shippard, in his answer, insists, that Pledge, the husband was entitled to an interest in the subject, under the deed of marriage settlement; and that his interest in it, at least, ought to be held liable to his debts, and subject to his disposition. But, to allow any sale or disposition of his interest to interfere with or affect the trust for the joint use of the husband and wife, during their joint lives, would be to defeat the purposes, as well as the express intent, of the settlement. *Scott and wife v. Gibson & Co.*, 5 Munf. 86.

No counsel for the appellees.

CABELL, J., delivered the opinion of the court. The question as to the inefficacy of the deed, depends on the construction of the 11th section of the statute of conveyances. That section allows to the person claiming title under the deed, the term of twelve months, to have the deed recorded in the court of that county or corporation, to which the property may be removed. If, therefore, the deed be recorded there, at any time within the twelve months, it will defeat any previous sale which may have been made of the property. And as the main object of recording such deeds, is to afford the means of obtaining information as to the title of the property, it would seem that, as to that object, actual notice of the deed would be as effectual as if it

448 were recorded. *Accordingly, this section of the statute, so far as relates to purchasers, makes notice of the deed equivalent to recording it; for it vacates an unrecorded deed as to such purchasers only, as are purchasers without notice. In the cases before us, it is evident, that Shippard had notice of the deed within twelve months. On this ground alone—independently of any influence which the case of *Land v. Jeffries* may have on this; and admitting that the deed of 18th July 1820, in order to be effectual against the creditors of the husband, ought to have been duly recorded, (as it really was) in the county

the statute of conveyances; 1 Rev. Code, ch. 99, § 4, li. p. 362, 364.

§ 4 provides, inter alia, that "all deeds of settlement upon marriage, wherein either lands, slaves, money or other personal thing, shall be settled or covenanted to be left or paid, at the death of the party or otherwise—shall be void, as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged or proved, and lodged with the clerk to be recorded, according to the directions of the act."

§ 11 provides, that "every deed respecting the title of personal chattels, which by law ought to be recorded, shall be recorded in the court of that county or corporation, in which such property shall remain; and if afterwards, the person claiming title under such deed, shall permit any other person in whose possession such property shall be, to remove with the same, or any part thereof, out of the county or corporation in which such deed shall be recorded, and shall not, within twelve months after such removal, cause the deed aforesaid to be certified to the court of that county or corporation, into which such other person shall have so removed, and to be delivered to the clerk to be their recorded, such deed, for so long as it shall not be recorded in such last mentioned county or corporation court, and for so much of the property aforesaid as shall have been so removed, shall be void in law, as to all purchasers thereof for valuable consideration without notice, and as to all creditors."

This last section seems intended to protect from the claim of the grantee in the deed, the creditor of, or subsequent purchasers without notice from, the person in whose possession the chattels may be, and who is permitted to remove with it into another county or corporation.—Note in Original Edition.

court of Hanover; and without considering or deciding, whether, if the husband and wife were justly entitled to the possession and use of the slaves in the deed mentioned, and removed and held possession of them in the county of Henrico and city of Richmond, the case can come within that clause of the law, which speaks of the person claiming title permitting "any other person in whose possession such property may be, to remove the same," &c. or whether, if the wife, for her sole and separate use, was entitled to the possession of the slaves, and her husband had removed them, she could be considered as permitting their removal within the meaning and intention of the act—without considering any of these points, the court is of opinion to reverse the decrees in both cases; to perpetuate the injunction in the first case, and to dissolve the injunction and dismiss the bill in the second.

449 *Grayson and Wife v. Moncure.*

October, 1829.

(Absent BROOKE, P.)

Dower—Right of Widow to Enjoy Mansion House—
Quære.—As to the extent of a widow's rights to enjoy the mansion house, messuage and plantation, free of rent till dower assigned, under the Virginia Statute of Dower, I. R. C. ch. 107, § 2, p. 403.
Same—Same—Case at Bar.—But, where a widow obtain a decree against an infant heir, directing commissioners to assign dower, which she might have had executed immediately, but did not for a year, during which she remained in the mansion house, and consented to the cultivation of the land by the agent of the heir; and after her dower was assigned, received one-third of the rents of the messuage and plantation thereto belonging, accrued before dower assigned, claiming no more at the time; and subsequently brought her action to recover the other two-thirds of the rents: **HELD**, she was not entitled to recover them.

Grayson and wife brought assumpsit against Moncure, in the circuit court of Stafford for money had and received by him to the use of the wife when sole. Moncure pleaded the general issue. The parties agreed the facts of the case.

Mrs. Grayson's first husband, Cary Selden, late of Stafford, died late in 1822, intestate, leaving an infant daughter (about a month old) his sole heir, and seized and possessed of a tract of 2123 acres of land, on which his dwelling or mansion house stood, and that tract of land was the plantation belonging to the mansion. Administration of Selden's estate was granted to Moncure, who, in that character, took possession of all the personal property. At the time of Selden's death, there was growing on the land a crop of wheat and hay, which was reaped in the summer of 1823; and in the spring of 1823 there was a crop of oats sown, which was also reaped in the summer of that year. These crops were made and gathered by the united force of the slaves, horses &c. of the estate, under the direction of the administrator; and he sold the crops, and accounted for and paid the widow one-third of the nett proceeds before her second marriage. The widow exhibited her bill against the infant heir, in the county court of Stafford, in chancery,

at March term 1823, praying a decree for her dower; the infant *defendant by a guardian ad litem appointed by the court, immediately put in her answer; and the court forthwith made a decree, directing commissioners to lay off and assign to the widow her dower, and to take an account of the rents and profits of the land since the husband's death, one-third of which the decree adjudged to the widow. But the widow's dower was not assigned to her, in pursuance of the decree, till March 1824. Meanwhile, she continued to reside at the mansion house. In maturing, reaping and carrying the crops to market, and disposing of them, Moncure acted as administrator of Selden, and agent of his infant heir, and with the assent of the widow previously given. She now contended, that she was entitled to all the profits of the land accruing in the year 1823 previous to the actual assignment of her dower to her. Moncure, on behalf of the infant, insisted, that she was entitled to only the third part thereof, which she had received in full.

The jury found a verdict for Grayson and wife for 814 dollars, subject to the opinion of the court upon the case agreed. The court held, that the law upon the case agreed was for the defendant, and gave judgment for him; from which Grayson and wife appealed to this court.

The cause was argued here, by Harrison for the appellants, and Conway Robinson for the appellee.

The argument turned chiefly on the general question, whether a widow is entitled not only to occupy in the mansion house, but to take all the rents of the messuage or plantation thereto belonging, until her dower be in fact assigned to her, by force of the provision in the Virginia statute of dower, 1 Rev. Code, ch. 107, § 2, p. 451.

403.* But, *in the view of the court, it was not necessary to decide that point; the case, in its judgment, turning on the peculiar circumstances of it; namely, the tender infancy of the heir; the assent of the widow to the employment by the administrator of the slaves &c. of the estate, in finishing the crops; and, especially, the fact that the widow as early as March 1823 had obtained a regular decree for her dower, which it was in her power to have carried into immediate execution.

Robinson insisted, that it was the widow's own fault, that her dower was not assigned to her till March 1824; that she could not complain of the infant heir failing to do that which she had the power to have had done when she pleased; and that this was conclusive against the claim of the widow in the present case.

Harrison, on the other hand, contended that it was the duty of the heir, to assign the widow's dower, in all events: the widow has a right to remain passive; the intermediate profits are given by the statute, to

*The first section of the statute provides that the widow shall be endowed of one third of her deceased husband's lands. The second section is in these words: "And till such dower shall be assigned, it shall be lawful for her to remain and continue in the mansion house, and the messuage or plantation thereto belonging, without being chargeable to pay the heir any rent for the same: any law, usage, or custom to the contrary in any wise notwithstanding."—Note in Original Edition.

*The principal case is cited in *Simmons v. Lyles*, 32 Gratt. 759. See monographic note on "Dower" appended to *Davis v. Davis*, 25 Gratt. 587.

quicken the heir in discharge of the duty he owes the widow; and its provisions are plain and general, that till dower be assigned her, the widow may occupy the messuage and plantation belonging to the mansion house, without being chargeable to pay the heir any rent for the same.

CARR, J. The general question, whether a widow is entitled to all the rents, issues and profits of the mansion house and plantation thereto belonging, from the death of her husband, until dower shall be assigned to her, is a very important one, and with us, so far as I can find, new. I should, therefore, if it were necessary to decide it in this cause, regret that we have but a bare court. But I do not think such necessity exists. The parties themselves have settled the matter; and upon principles which, under the peculiar circumstances of this case, seem so just, that I feel no disposition to disturb them.

The heir, it will be remembered, was only a month old when her father died.

Her mother was her natural guardian:

452 *no other has been appointed. How, then, could dower be assigned her?

The infant could not do it: and her mother must either, as guardian, have assigned dower to herself (of which the books shew us instances) or she must have applied to a court of equity to have it assigned. She chose the latter course. Her bill was filed three or four months after her husband's death, and might have been filed at the first court of the county; and when filed, the whole business might have been done at once. It was all matter of consent: the bill, answer and decree, were all entered at the same court. The commissioners might have assigned the dower the next day. In that decretal order, made at her instance, the court directs the commissioners to ascertain the issues and profits of the land, and decide that a third shall be paid to her in respect of her dower. But this trouble she saved the commissioners, by arranging the whole matter of profits with the administrator, Moncure. To this conduct in regard to the employment of the slaves &c. on the land, in making and perfecting the crops, and carrying them to market, she gave her assent; and this agreement between them was made early in the year 1823, probably at the commencement of it. She remained in the mansion house. The crops were, under the agreement, disposed of in the latter part of that year: she was paid her share: and thus the whole contract executed. It was probably a very judicious and convenient arrangement for her: at any rate it was one which she had a right to make. It was the settlement of a doubtful claim, which is a good consideration. She got a third, which was all she would have gotten, if dower had been assigned her the day after her husband's death, and it might have been so assigned her if she had chosen. She was the natural guardian of her child; and was the only person who could move in the business. She managed it all her own way, and seems to have been well content until after her second marriage, when this suit was brought. I think the judgment must be affirmed.

The other judges concurred.

453

*Fulcher v. Baker & al.

November, 1829.

Usury*—Rate Charged—Case at Bar.—In a bill for relief against usury, plaintiff charges usury exacted at rate of two and a half or three per cent. per month; defendant, in his answer, admits he exacted usury, but says he does not remember the rate; and there is no proof to ascertain the rate: *Held*, that in this state of case, the court should consider the rate of usury two and a half per cent. per month.

Alexander Fulcher exhibited his bill in the superiour court of chancery of Richmond, against Baker and Bell, setting forth, that he had given his note for 200 dollars to Baker, and that the note was tainted with exorbitant usury, Baker having extorted from him, from time to time, on successive renewals of the note, a premium for forbearance, at the rate of "two and a half or three per cent. per month, he did not recollect which;" and that Baker had assigned this usurious note to Bell, who had instituted a suit upon it, which he had prosecuted to a judgment on a forthcoming bond. The bill prayed an injunction to stay proceedings on the judgment at law, and relief from the usury.

The injunction was awarded.

Baker, in his answer, said, that the debt was originally due to him from Joseph Fulcher, who had put the amount into the plaintiff Alexander's hands, to be paid over to him; that the plaintiff applied this money to his own use; and that the defendant, upon the plaintiff's own voluntary proposition, did, upon some (but not upon all) renewals of the note, which the plaintiff gave him for the debt, receive more than the legal rate of interest for forbearance; but he did not disclose the precise rate of the usury.

Bell, the assignee, denied all notice of the usury; and stated, that the note was transferred to him for a valuable consideration; and that after it came into his hands, he had given Fulcher a long indulgence for the debt, at his request, and upon his promise, if he failed to pay it before a time agreed upon, to confess judgment; that Fulcher had accordingly confessed the judgment at law; and, therefore,

454 *Bell insisted, that Fulcher had no claim to relief in equity as against him.

Chancellor Taylor directed a commissioner to ascertain, if practicable, the balance of principal due on the note; that is, in effect, to ascertain what usury had been paid to Baker; and to ascertain also, what consideration Bell had given Baker for the note; for which purposes, he directed that the parties should be examined, by the commissioner, in solemn form.

The commissioner reported, that both defendants had attended him; that Bell gave Baker 150 dollars for the note; but that he could get no information, by which he could ascertain the balance of principal due thereon, or the rate of usury that had been stipulated or paid.

Hereupon, the chancellor, finding he could get no certain information, upon which to adjust the rights of the parties, dissolved

*See monographic note on "Usury" appended to Coffman v. Miller, 26 Gratt. 698.

the injunction, and dismissed the bill. And Fulcher appealed to this court.

Lyons for the appellant; R. C. Nicholas for the appellees.

PER CURIAM. Decree reversed, and cause remanded to the court of chancery for further proceedings to be had therein, in which the appellant Fulcher, in the absence of other proof than that now in the record, should be credited with two and a half per cent. per month (alleged in his bill to have been paid by him, on the renewal of the notes) from the date of the first note to the date of the note on which the judgment enjoined was rendered, and that the injunction should be made perpetual as to that sum, and dissolved as to the balance if any balance should remain.

455 *Howle's Adm'r v. Dunn & Co.

November, 1829.

Verdict—Separation of Jury before Rendering—Effect.*

—In assumpsit against an administrator issues are joined upon pleas of non assumpsit and fully administered; the jury, after retiring from the bar, without leave of court or consent of parties, separated and dispersed, and afterwards rendered verdict for defendant: **HOLD**, verdict ought for that cause to be set aside.

In an action of assumpsit, in the county court of Hanover, brought by Dunn & Co. against Anderson administrator of Howle, upon the assumpsit of the intestate, wherein issues were made up upon the pleas of non assumpsit and fully administered, the jury found a verdict for the defendant. The plaintiffs moved the court to set the verdict aside, and direct a new trial, upon the ground, "that, after the jury had retired from the bar, and before they rendered their verdict, they had left the jury room and dispersed over the court-yard, during a temporary recess of the court: but the court overruled the motion, and gave judgment for the defendant. The plaintiffs took the exceptions; and prayed and obtained a supersedeas from the circuit court of the county; which reversed the judgment, set aside the verdict, and remanded the cause to the county court, for a new trial to be had therein. And then Anderson appealed to this court.

Daniel, for the appellant, remarked that the bill of exceptions did not state, whether the jury had separated before or after they had agreed on a verdict: for aught that appeared, they might not have separated till after the verdict was agreed on. The court ought to take the case most strongly against

the party who took the exception. The rules touching the conduct of juries, were formerly very strict; but they are now so modified, that the ease and comfort of the jury may be favoured, so far as indulgence is not dangerous to the fair administration of justice; and there are cases of acknowledged misbehaviour in the jury, for which they are liable to be fined, that will not vitiate their verdict, the party for whom it is given not being guilty of

456 *any misbehaviour himself. The mere separation of the jury, in a civil case like this, ought not to affect the verdict, especially as it does not appear, that the separation took place before the verdict was agreed on. He cited *Cq. Litt.* 227, b.; 3 *Com. Dig. Enquest*; *F. pp.* 563, 4; 6 *Id.* *Pleader, Verdict*; *S.* 45, 46, pp. 259, 261; *Lester v. Stanley*, 3 *Day* 287, and *Howard v. Cobb*, *Id.* 310, cases in which the verdict was set aside because of the separation of the jury, but it was separation before the verdict. *State v. Babcock*, 1 *Conn. Rep.* 401; *Branden v. Grannis*, *Id.* 402, in note; *Brown v. M'Connel*, 1 *Bibb* 265; 7 *Bac. Abr. Verdict*, *H.* pp. 10, 12, and the case there cited of *Ld. St. John v. Abbot*, *Barnes* 441.

Lyons, for the appellee, said it was misbehaviour in the jury to separate without leave of the court or consent of the parties, before verdict rendered; and, obviously, misbehaviour of a kind to expose a jury to improper influence. The only way to correct the evil of such misbehaviour, and to preserve the purity of jury trial, was to set aside the verdict. He cited *Pleasants v. Ross*, 1 *Wash.* 156; *Hale v. Cove*, 1 *Str.* 642; *Metcalfe v. Deane*, *Cro. Eliz.* 189; *Id.* 411; *Baine v. Chambers*, 1 *Serg. & Rawle* 169. He observed, that the law of Virginia was so jealous of the undue influence of conversations between the jury and others, that it expressly prohibited the sheriff from conversing with any juror, but by order of the court, after the jury have retired from the bar; 1 *Rev. Code*, ch. 75, § 16, p. 267.

PER CURIAM. The judgment of the circuit court is affirmed.

457 *Todd and Wife v. Moore's Adm'r &c.

November, 1829.

Executors and Administrators—Bill for Account—Stale Demand—Dismissal*—Case at Bar.—Upon a fa. against M. adm'r of L. a female slave of L.'s estate is taken and sold by sheriff in 1797, at which sale M. the adm'r himself, is purchaser: in 1801, the adm'r settles his account of administration before county court commissioners, whereby it appears, that at a time of sheriff's sale in 1797, he had no funds of L.'s estate, besides this slave, to satisfy the execution, and he accounts for the price of the slave: L.'s daughter and sole distributee, while yet an infant, in 1810, marries T. who is soon after informed of every fact concerning

***Verdict—Separation of Jury before Rendering.**—In *Ragland v. Wills*, 6 *Leigh* 6, it is said, there remains to be noticed one case in this court, *Howle v. Dunn*, 1 *Leigh* 455. There, a motion was made for a new trial, on the ground, that after the jury had retired from the bar, and before they had rendered their verdict, they had left the jury room and dispersed from the court yard. The county court overruled a motion for a new trial and upon appeal to the circuit court the judgment was reversed, and the verdict set aside, which judgment was affirmed by this court. That case differed from the case at bar, inasmuch as, there, it did not appear whether the jury had agreed on their verdict, before their dispersion: here it was agreed on, written and signed. The present case, therefore, and the decision here made, will not, of necessity, overrule that. And on page 7 of the same case, *TUCKER, P.*, says that the case at bar is clearly distinguishable from *Howle v. Dunn*, on the grounds aforesaid. On the same question the principal case is cited in *Thompson v. Com.*, 8 *Gratt.* 648.

***Executors and Administrators—Bill for Account—Laches.**—In *Hillis v. Hamilton*, 10 *Gratt.* 304, it is said by *SAMUELS, J.*, adhering to the decisions of this court and approving of the reasons upon which they are founded in the cases of *Todd v. Moore*, 1 *Leigh* 457, and *Carr v. Chapman*, 5 *Leigh* 164. I am of opinion to reverse the decree and dismiss the bill because of the staleness of the demand asserted. If anything else were needed to justify this conclusion it would be founded in the presumption that the claimants' demand has already been paid. See also, citing the principal case on this point *Castleman v. Dorsey*, 78 *Va.* 342. See monographic note on "Executors and Administrators" appended *Rosser v. Depriest*, 5 *Gratt.* 6.

the sale and purchase of the slave: the adm'r M. lives till 1822: and after his death T. and wife exhibit a bill against his representative, praying a settlement of M.'s administration account, in chancery, impeaching the sale and purchase of the slave in 1797, as irregular and illegal, and praying decree for the slave and her increase and for profits: HELD, this bill was rightly dismissed by the chancellor.

This was a bill exhibited by Todd and wife against Avery the administrator of Moore, in the superiour court of chancery of Richmond, setting forth, That Mrs. Todd was the only child of J. T. Lee, who died in 1795. That in the same year, administration of Lee's estate was granted to Moore, by the county court of Prince George. That he returned an inventory and appraisement of his intestate's chattels, but never settled his accounts of administration; and that he was indebted to the estate. That he permitted the sheriff to sell a female slave, named Eve, under execution for a debt due from the estate, at a time when he was himself indebted to the estate, on his account of administration, to a greater amount than would have satisfied the execution; and purchased the slave himself at the sheriff's sale, and continued, ever afterwards, to hold her and her increase now thirteen in number. The bill prayed, an account of Moore's administration of Lee's estate, and a decree for the balance which should appear due; that the sale of Eve should be set aside; that that slave and her increase should be decreed to Todd and wife, and that an account should be taken of their profits, and the amount thereof also decreed to them.

458 *Avery answered, that his intestate Moore had early settled his accounts of administration of Lee's estate, before commissioners of the county court of Prince George, and the account had been reported to the county court; but owing (as he believed) to the negligence of the clerk, it has never been recorded, and was now lost or mislaid. That his account was fair and just; and Moore had paid the balance to Mrs. Todd, or her guardian. That at the time of the sale of Eve, under execution, the administrator Moore had no other assets of his testator's estate applicable to the debt; that the sale of Eve was therefore unavoidable; and that the purchase by Moore was perfectly fair, and the proceeds all accounted for.

Chancellor Taylor ordered Avery to render an account before a commissioner of the court, of his intestate Moore's administration of Lee's estate.

Avery appearing before the commissioner to render an account, produced an office copy of the account, which had been taken before the commissioners of the county court, and which was supposed to have been lost or mislaid in the clerk's office of Prince George, but had been recently found on record there. This account had been audited and returned as early as the year 1801, and it fully sustained Avery's answer. But the commissioner, by restating the account, and charging interest from the proper dates, (as he supposed) which were anterior to those from which the county commissioners had computed it,

shewed, that, at the date of the sale of the slave Eve, there was a balance due from Moore the administrator, very nearly though not quite equal to the debts for which that slave was taken in execution and sold. The commissioner reported, that Moore had paid the guardian of Mrs. Todd, the full balance reported by the county commissioners.

The sheriff's sale of the slave Eve, and Moore's purchase of her, took place in 1797. There was nothing unfair in the sale itself. But, according to the depositions of two witnesses, Moore acknowledged 459 at the time that he was *indebted to his intestate's estate, and said, that he permitted the sale, and made the purchase, to save the property for the infant distributee, Mrs. Todd, who was his niece; and that when she should attain to full age or marry, it would be delivered to her. She married Todd in 1810, while she was yet an infant; and Todd was very soon afterwards informed of every fact concerning Moore's purchase of Eve and advised to bring a suit; but, though Moore lived till 1822, Todd and wife never asserted any claim against him in his lifetime: the bill in this case, was exhibited against his administrator, soon after his death, viz. in 1823.

The chancellor, upon the final hearing, dismissed the bill, with costs: and Todd and wife appealed to this court.

Spooner, for the appellants, endeavoured to shew, from the state of the accounts, that Moore was indebted to his intestate Lee's estate, in a balance sufficient to pay the debts for which the slave Eve was sold under execution in 1797, and ought to have paid those debts, and prevented the sale: and for that reason, if for no other, he ought to be regarded as a trustee of this property for the distributee. He was an administrator too, purchasing at a sheriff's sale, property belonging to his intestate's estate; and could not, any more than any other trustee, or in any other mode of sale, purchase the trust subject for his own benefit: in this view also, he ought to be regarded as a trustee for the distributee. Finally, Moore himself understood the transaction in the same light, and declared that he purchased for the benefit of the distributee. His subsequent assertion of a right to hold the property for himself, was a breach of trust, and a fraud. No lapse of time could give sanction to such a right, or bar the just claims of the cestui que trust; especially, as she had been, all the time, under the disability first of infancy, and then of coverture. He cited *Redwood v. Riddick*, 4 Munf. 222; *Hunter's ex'ors v. Spotswood*, 1 Wash. 145.

460 *Shanda, for the appellee, insisted, that the administration account, regularly audited and settled by the commissioners of the county court in 1801, ought not, at this late day, and under the circumstances of the case, to be opened; and that, if it were proper to open it, it was correctly stated: And this account shewed the perfect fairness of Moore's conduct. He examined the evidence; and controverted the proof of Moore's declaration that

he purchased the slave Eve for the benefit of the distributee; but, it was in proof, that Todd was informed of the evidence now adduced of this declaration of Moore, and of every other fact of the transaction, soon after his marriage in 1810, and yet he never asserted this claim during the twelve years that Moore lived; a plain proof, that he himself had no confidence in its justice. To shew the impropriety of opening the accounts, he cited *Hudson & al. v. Hudson's ex'or*, 3 Rand. 117. As to the purchase by the administrator himself, of the property of his intestate, fairly made, at a sheriff's sale, at a time when there was no money in his hands to pay the debts for which such property was taken in execution; he cited *Anderson & al. v. Fox*, 2 Hen. & Munf. 245, to shew that such purchase could not be impeached. And, surely, after the long acquiescence of the appellants in these transactions, and that with full knowledge of every fact on which they now rely; coming at this late day, into a court of equity, to assert a claim against Moore's administrator, which they never ventured to assert against him in his lifetime; they could have no right to the relief they ask. See *Sugd. law of Vend. ch. 14, § 2, III.*, pp. 483, 4.*

CARR, J., recapitulated the facts, and said, he was of opinion, that the decree dismissing the bill was right. It is due to the quiet of families, and to justice, that the old settlements should be suffered to sleep in their graves, and not be dug up, to frighten and disturb the descendants 461 of *those who were parties. Lee died in 1795. In the same year, Moore qualified as his administrator: and he lived till 1822. Mrs. Todd married in 1810; and in that year, her husband was told all the facts concerning the sale of Eve, and that he ought then to sue; yet this suit was not brought till late in 1823, thirteen years after, and after Moore the administrator had died. He could probably have explained many things which now have a bad appearance. The slave Eve was bought in 1797. Ever since that time, she and her increase have been at the risk of the purchaser: if all of them had died, his would have been the loss. He had them twenty-six years, before this suit was brought, and thirteen years after the present plaintiff knew the facts, and ought to have sued: all this time, he has been the insurer of their lives. And now it is asked, of equity, that he shall restore the slave and her thirteen children and pay hires for them. I am against the whole bill; and think (as lord Hardwicke said, in a case not stronger) that it would be setting the worst example, that could be set, for the disturbance of families, to encourage such attempts.

The other judges concurred, and the decree was affirmed.

462 *Anderson v. Leitch & Co.

November, 1829.

Forthcoming Bond—Motion for Award of Execution on Particular Ground Overruled—Reversal of Judgment.—Where county court overrules motion for award of execution on forthcoming bond, on par-

ticular ground, which renders all other defence unnecessary, and this judgment is reversed by circuit court for error in the particular point: **HOLD.** circuit court ought not to proceed to award of execution immediately, without giving defendant opportunity to make other defence, unless it appear from record he had no other defence to make.

Same—Same—Appeal.—Where county court overrules motion for award of execution on forthcoming bond, and circuit court reverses this judgment and awards execution, an appeal lies from such judgment of circuit court, as of right; aliter, where circuit court affirms judgment of county court awarding execution, or itself gives original judgment awarding execution, on such bond.

A *fieri facias*, dated November 18th 1826, and returnable the second Monday in January following, was sued out by Leitch & Co. against Anderson, upon a judgment of the county court of Buckingham, and delivered to the sheriff of the county; who returned it with the following indorsement and return thereon, viz. "Came to hand November 20, 1826"—"January 6th 1827, levied on two negro men Edmund and Spencer, the property of Anderson; forthcoming bond taken and forfeited." The forthcoming bond was dated January 6th, and the day appointed in the condition for the delivery of the property for sale, was February 14th 1827; and it was returned with the execution, indorsed "February 14th 1827, forfeited." Leitch & Co. gave a regular notice to Anderson and his sureties in the forthcoming bond of a motion to be made at the ensuing April term of county court, for an award of execution thereupon, upon the trial of which, the sheriff was allowed to amend his return on the *fieri facias*, by striking out the last two words "and forfeited," upon condition that such amendment should not affect the motion then pending. The county court overruled the motion for award of execution on the bond. Leitch & Co. appealed to the circuit court of Buckingham; which reversed the judgment of the county court, and proceeded 463 itself to give judgment awarding execution *on the bond. Anderson prayed the circuit court to allow him an appeal from its judgment; which that court, considering that it could not allow an appeal in such a case, § refused to allow. And then Anderson applied to this court for a supersedeas, which was granted.

Booker, for the plaintiff in error; Michie, for the defendant.

CABELL, J., delivered the resolution of the court. The record shews, plainly enough, the grounds of the judgment of the county court, viz. that according to the original return of the sheriff on the execution, it appeared that the forthcoming bond, taken under that execution, was forfeited on the 6th January 1827, whereas the bond on which the motion was made, could not have been forfeited sooner than the 14th February 1827, that being the day on which the property was to be delivered to the sheriff; and, consequently, it did not appear, that there was any execution to justify the taking of the bond on which the motion was made. And although the court, before it pronounced judgment in the case, permitted

"Statutory Bonds" appended to *Goolsby v. Strother*, 31 Gratt. 407.

*Appeal.—See monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., Turnpike Co., 1 Rob. 268.

§ See 1 Rev. Code, ch. 64, § 12, p. 193.

*Ingraham's Ed. Philadelphia. 1820.

†Forthcoming Bonds.—See monographic note on

the sheriff to amend his return on the execution, by striking from it the words "and forfeited;" yet it considered, that that amendment, not having been made until after notice given and proved on the motion, ought not to affect the judgment to be given under a notice.

If the return of the sheriff were susceptible of the construction put upon it by the county court, the judgment of that court would be correct. But it cannot admit of that construction. The date mentioned in the return (January 6th 1827) refers to the time when the execution was levied, and when the bond was taken; and not to the time when the bond was forfeited. The forfeiture of the bond was, of necessity, posterior in point of time. The return was correct and required no amendment.

464 The county court ought, *therefore, to have awarded an execution on the bond, unless the defendants had shewn some valid objection thereto.

But the circuit court, although it correctly reversed the judgment of the county court, committed an error in the judgment which it proceeded to render. The cases of *Irrin, Galt & Co. v. Eldridge*, 1 Wash. 162, and *Lewis v. Thompson*, 2 Hen. & Munf. 104, shew, that a superior court in reversing a judgment of an inferior court which overruled a motion for award of execution on a forthcoming bond, ought not to give final judgment for award of execution, where the motion had been overruled by the inferior court, on a ground, which rendered it unnecessary for the defendant, in the inferior court, to give evidence of payments, or make any other objections than those involved in the opinion of the inferior court; unless, indeed, the record shews that the defendants had no such evidence, and no such objections. In the case before us, it is possible that the defendants may have made payments, or may have had other objections than those founded on the sheriff's first return on the execution.

The plaintiff in error was also entitled to an appeal, as a matter of right; for the inhibition of arbitrary appeals from judgments of the circuit courts, applies only to original judgments rendered by those courts awarding executions on forthcoming bonds, or to judgments affirming judgments of inferior courts that had awarded such executions, not to a judgment like the present, by which a judgment of the county court, overruling a motion for award of execution, is reversed by the circuit court, and award of execution is then adjudged by the circuit court.

The judgment of the circuit court is therefore reversed, with costs; and the cause is remanded to the circuit court for that court to proceed to judgment on the bond, when the plaintiff in error and his sureties are to be at liberty to oppose the same by proof of payment, or by other legal objections than those founded on the sheriff's original return on the execution.

465 *Dunn v. Amey and Others.

November, 1829.

Wills—Direction That Executor Sell Real Estate—Effect.—Testator, in first clause of his will, ap-

points his ex'or and provides that no security shall be required of him, except such as shall be necessary for his just debts; and then adds, "the residue of my estate I confide in him to dispose of as I shall hereafter direct;" and then directs him to sell all his real estate, except a very small part: **Held**, the real estate is charged with debts.

Same—Direction That Executor Emancipate Slaves.

—Testator directs that his ex'or shall emancipate his four slaves, A. J. P. and N. and by his will gives them legacies: **Held**, the slaves are manumitted by the will, not by the ex'or's deeds of emancipation.

Same—What Execution and Proof Sufficient to Emancipate Slaves.—Testator emancipates slaves, by will written all with his own hand, proved to be so by two witnesses, and recorded, but the will is not sealed, nor attested by two subscribing witnesses: **Held**, this will is duly executed and proved to emancipate slaves:

Slaves—Emancipation—Liability for Testator's Debts.

—But slaves, so emancipated are still subject to testator's debts, and shall be sold for such term as will yield enough to pay debts:

Court of Chancery—Jurisdiction to Adjust Right between Creditors of Testator and Emancipated Slaves.

—And the court of chancery has jurisdiction, to adjust the rights of the creditors and of the freedmen, and to protect the freedmen from absolute sale under the creditor's execution, or from any sale, if the other estate of testator be sufficient to pay his debts.

John Campbell died in 1819, having first made his last will and testament, dated July 5, 1818, whereby he devised and bequeathed as follows:

"I appoint James Shipherd, sadler of this said city my sole executor; no security to be required of him without so much as will justify all my just debts. The residue I confide in him to dispose of as I shall hereafter direct. I wish him to dispose of all my real estate, except as much as he may think to reserve for a house and a proportionable small garden for my slave Amy. I wish Mr. Shipherd to emancipate the above named Amy, and her child James, as also her sister Polly, and her brother Ned, and all their offsprings, should they have any; and, if possible, to have leave granted them to remain in the state; if that cannot be granted, I wish them (I mean Amy, the principal) to have the sum of 1000 dollars as soon as it can be made after my just debts are paid. My other slaves I wish as soon as they may earn the amount of their first purchase, and paying Mr. Shipherd ten per cent. commis-

466 sion for his trouble: I *wish Mr. Shipherd to have the same commission upon all monies collected by him or paid out to my legatees. I wish my cousin John M'Shane the price of his passage, if he is disposed to go to Ireland. I wish it paid to the captain of the vessel who takes him. I wish him or any of my relations, to have any benefit from my estate, real or personal, after all is settled in the way before directed. The residue of the money to be converted into United States' bank stock, the dividend to the use of Amy and her child James, until James arrives at the age of twenty-one years; at which time I wish them equal in the stock until her death;

principal case is cited in *note* to *Black v. Scott*, 3 Fed. Cas. 516.

***Chancery Jurisdiction—Emancipation of Slaves—Right of Creditors.**—See on this question, the principle cited in *foot-note* to *Woodley v. Abby*, 5 Call 336; *foot-note* to *Ruddle v. Ben*, 10 Leigh 467; *Manns v. Givens*, 7 Leigh 714; *Jincey v. Winfield*, 9 Gratt. 718; *Reid v. Blackstone*, 14 Gratt. 366; *Wilcocks v. Phillips*, 20 Fed. Cas. 1201; *Nicholas v. Burricks*, 4 Leigh 297, 298; *foot-note* to *Ellis v. Jenny*, 2 Rob. 597; *foot-note* to *Peterv v. Hargrave*, 5 Gratt. 12. See monographic *note* on "Wills."

***Wills—Real Estate Charged with Debts.**—The prin-

at which period, I wish James to have all the stock, and Polly the house that is to be left to Amy her life. If Amy and James should die I wish Polly and Ned to have the stock and house."

The will was signed but not sealed by the testator; and was proved by four witnesses to be wholly in his handwriting, and was thereupon recorded, in the hustings court of Richmond, at October term 1819; and Shiphard, the executor therein named, duly qualified as such, according to law.

By deed, dated January 4, 1820, Shiphard, the executor, in pursuance of "the especial desire and direction of his testator, in his will expressed, emancipated and set free the woman Amy, free from the claims of any and all persons whatever claiming by through or under him as executor &c." By another deed of the same date, he emancipated and set free James, the child of Amey. And by another deed, dated January 6, 1820, he emancipated and set free Ned the brother of Amey. Neither of these deeds of the executor was recorded, according to the provisions of the statute.*

467 "At May term 1821, of the hustings court of Richmond, one Mitchell recovered a judgment against Shiphard the executor of Campbell for 575 dollars, with interest and costs, to be levied of assets quando acciderint; and this judgment was assigned to the appellant Dunn. At November term 1822, upon a scire facias suggesting assets, judgment was recovered for the debt, interest and costs, to be levied de bonis testatoris. In December 1822, May 1823, and June 1824, writs of fieri facias were sued out in Mitchell's name, without effect: the last of them was returned nulla bona. In May 1826, another writ of fieri facias was sued out, and levied on the appellees, Amey, James and Ned, as goods of the testator liable to be taken to satisfy his debts.

Hereupon, Amey, James and Ned, exhibited their bill in the superiour court of chancery of Richmond, setting forth the facts above stated; and alleging, that personal and real estate of the testator had come to the hands of the executor, amply sufficient to pay all his debts, without touching the slaves which he bequeathed to be emancipated; that the executor, sensible of this, had early assented to this legacy of freedom, by his deeds of emancipation, and they had enjoyed their freedom for more than six years, unmolested; that all the other estate of the testator, real and

personal, should be exhausted, before they should be sold into slavery to pay the debts. The judgment creditors, Mitchell, and Dunn, the assignee of the judgment, and Shiphard, the executor, were made parties defendants; and the bill prayed that Shiphard should be ordered to render an 468 account of *his administration; that the real estate remaining unsold, should be sold, and that the proceeds of the real, as well as of the personal estate, should be applied to the satisfaction of the debt, for their relief; that meantime, the creditors should be enjoined from proceeding to make sale of the plaintiffs as slaves; and general relief.

The injunction was awarded May 23, 1826, upon condition that the plaintiffs should remain in custody of the officer, till otherwise ordered by the chancellor.

Dunn, in his answer, insisted, that the plaintiffs, if they had right, had a complete remedy at law, and therefore the case was not properly relievable in equity: and, further, that the will of Campbell did not emancipate the slaves in question; that the deeds of the executor were ineffectual to emancipate them, because they were not recorded according to the statute; and that if they were emancipated, they were yet subject to the testator Campbell's debts by the express provisions of the statute: that, as to the six years' freedom they had enjoyed, they claimed that state under unrecorded deeds which could not confer freedom; and, by failing to record the deeds, had contrived to remain in Virginia, unquestioned, contrary to the laws which forbid any slaves emancipated to remain here more than a year; their residence was a fraud upon the law; and if they were emancipated, they were for this cause liable to be sold by the officers of the commonwealth, for the benefit of the literary fund: Nevertheless, if there was any other property of the testator Campbell, applicable to this debt, and sufficient for the payment of it, the defendant would gladly take his satisfaction out of that; but he knew of none.

Mitchell answered, that the judgment had been assigned to Dunn for valuable consideration; and insisted on the legal rights of the creditors of Campbell, to demand satisfaction out of his property, whatever disposition he might make of it by his will.

At June term 1826, before the executor, Shiphard, had answered, the other defendants moved the court to dissolve 469 *the injunction. Chancellor Taylor

was of opinion, that the plaintiffs were emancipated by Campbell's will, which was duly recorded: that the executor's deed of emancipation were only evidence of his solemn assent to this legacy of freedom: that the first judgment of Mitchell against the executor, was recovered in May 1821, after the actual emancipation, and was a judgment of assets quando acciderint; so that the creditors, as well as executor, then considered the plaintiffs free; that the creditors had allowed them to enjoy their freedom undisturbed for five years; and the time which had thus elapsed, if it was not in itself a complete bar to the proceeding of the defendants, yet taken in

*The statutory provisions affecting this case, are the 53d and 54th sections of the statute concerning slaves, free negroes and mulattoes (1 Rev. Code. ch. 111, pp. 433, 4), which are as follows:

"§ 53. It shall be lawful for any person, by his or his last will and testament, or by any other instrument in writing, under his or her hand and seal, attested and proved, in the county or corporation court, by two witnesses, or acknowledged by the party in the court of the county where he or she resides, to emancipate and set free his or her slaves, or any of them, who shall thereupon be entirely and fully discharged from the performance of any contract entered into during servitude, and enjoy as full freedom as if they had been particularly named and freed by this act."

"§ 54. Provided, nevertheless, That all slaves so emancipated shall be liable to be taken by execution, to satisfy any debt contracted by the person emancipating them, before such emancipation is made."—Note in Original Edition.

connexion with the statutes on the subject, and in aid of the other circumstances of the case, was a protection to the plaintiffs: and that the plaintiffs would have had a right to be discharged upon habeas corpus. Therefore, he overruled the motion to dissolve the injunction, declared the plaintiffs free, and ordered, that they should be discharged; and, being under an impression that they had not been properly advised as to their duty to remove from the state, he gave them six months from the date of the decree, to remove &c.

Dunn prayed an appeal from the decree, which the chancellor refused to allow; but on his petition, an appeal was allowed him by a judge of this court.

Daniel, for the appellant, contended, 1. That if the appellees claimed freedom under Campbell's will taken alone, the will was not so made or so proved as to confer freedom, since the statute required, that such a will, in like manner as any other instrument of emancipation, should be sealed and proved by two witnesses, meaning attesting witnesses. 2. That if the will was duly made and recorded, yet it did not of itself emancipate the slaves; it only directed the executor to emancipate them; and rightly left the act to be done by him, for it depended on the situation of the estate with respect to creditors to be as-
470 certain by the executor, *whether any act of emancipation could avail.

3. That the appellees must claim under the deeds of the executor; and these deeds not being recorded, were wholly nugatory; *Givens v. Manns*, 6 Munf. 191; *Lewis v. Fullerton*, 1 Rand. 15. But, 4. Whether they were emancipated or not, and if emancipated, whether by the testator's will, or by the executor's deeds, they were, by the express provision of the 54th section of the statute, liable for the testator's debts, and liable too, to be taken in execution to satisfy them; which differed this case from the common case of a specific legacy assented to by an executor and in the legatee's hands, which creditors could only reach with the aid of a court of chancery. 5. That, as to the lapse of time, that could not affect the case; there was no such lapse of time as barred the creditor's remedy against Campbell's estate, and these appellees were, so far as creditors are concerned, part of his estate, and liable for any claim for which any other part of it was liable. 6. He questioned the jurisdiction of the chancellor to interpose in such a case as this, where there was a plain remedy at law; since, if the appellees were emancipated, at all, whether by the will or by the executor's deeds, their right to freedom was a legal right, which required no assistance from equity.

Scott, for the appellees, said, that though a will emancipating slaves ought to be duly made and duly proved and recorded, yet it was to be made and proved like other wills; and, in Virginia, even a will of lands need not be attested by subscribing witnesses, if proved to be wholly in the testator's hand-writing, as was the case here: the sealing of the act of emancipation, and the proof by two witnesses is only required where the emancipation is by deed. He

insisted, that the appellees were emancipated by the will; for the will contained devises and bequests to them as free persons. The executor was only to give them the formal instrument, which should signify his assent to the legacy; and, as he ought to have had this instrument recorded,

471 that *very defect was properly relievable in equity, and was enough of itself to give the court of chancery jurisdiction. But there could be no question as to the jurisdiction: the chancellor may interfere to prevent a sale of slaves under execution, at the instance of the owner complaining that they are not liable for the debt; much more may he interfere to prevent the sale of persons claiming to be free. But these people, though completely and regularly emancipated, were yet liable to the claim of the appellant against their testator, unless by his own conduct he had lost his right to hold them subject to the claim. He first took a judgment against the executor when assets, in May 1821. Upon a sci. fa. suggesting assets, he recovered judgment *de bonis testatoris*, in November 1822; and, instead of diligently pursuing the executor, and charging him and his sureties with a *devastavit*, he waited till June 1826, and then levied his execution on these persons, who had been actually free ever since January 1820. Meantime, the executor, who ought to pay the debt, may have become insolvent; and the appellant who ought to have anticipated such insolvency by the diligence of his proceedings, ought to bear the loss of his debt, rather than that the appellees, who could take no steps against the executor, should sustain the loss of their freedom.

CABELL, J., delivered the opinion of the court. It was, unquestionably, the intention of the testator Campbell to emancipate the appellees; and his will is sufficient for that purpose, although it is not sealed. It is not important to inquire, whether the will, *ipso facto*, emancipated the appellees, or whether that object remained to be accomplished by formal deeds to be executed by the executor. For the mere intention of the testator that the executor should emancipate them, conferred a right to freedom, which, though it could not be asserted in a court of law, ought to be enforced in a court of equity. *Dempsey v. Lawrence*, Gilm. 333.

472 *But the right to emancipate slaves is subordinate to the obligation to pay debts previously contracted, by the express provisions of the statute. Admitting, therefore, that the will, in this case, conferred as perfect an emancipation as any known to our laws, still the appellees remained liable to the payment of Campbell's debts; and although the assent of the executor to their emancipation, might possibly protect them from an execution at law (a point which need not be decided) in like manner as his assent to the bequest of a personal chattel, would exempt that chattel from a similar execution, yet the assent of an executor to any legacy, can never defeat the right of a creditor to pursue, in a court of equity, the assets of a testator, in the hands of the legatee, if necessary for the payment of his debts.

In this case, therefore, an account ought to be taken of the assets, both real and personal, of Campbell, (for we are of opinion, that the will subjected the real estate to the payment of his debts,) and of the administration thereof by the executor; and if it shall appear that the debts of the testator can be satisfied without resort to the value of the appellees, then the appellees should be considered and declared free; but if that cannot be wholly accomplished, then the appellees should be sold for such term of years as may be sufficient to raise the adequate fund; as was directed in the case of *Patty v. Colin*, 1 Hen. & Munf. 519.

The decree of the chancellor is therefore reversed, and the cause remanded to be proceeded in according to the principles here declared.

473 *Wyatt's Ex'or v. Woodlief.*

November, 1829.

Pleading—Pleas—Rejected When Object Is Delay—Case at Bar.—In debt against an ex'or after judgment by default duly entered, at the next term, defendant tenders four good pleas in bar, to all which plaintiff instanter puts in proper replications tendering issues; but defendant refuses to join the issues, or to rejoin, or to demur; whereupon the court rejects defendant's pleas and proceeds to judgment: **Held**, under the circumstances, the pleas were rightly rejected.

Same—Same—Issuable—Case at Bar.—In debt against an ex'or defendant pleads that his testator was in his lifetime guardian of an infant, that accounts of the guardianship had been settled by county court commissioners, which shewed a large balance due to the ward, and that this was a debt of higher dignity than that claimed by plaintiff: **Held**, this was not an issuable plea.

Debt on bond, for 6000 dollars, by Woodlief against Cocke executor of Wyatt, in the circuit court of Prince George. Judgment by default having been regularly entered and confirmed at the rules, Cocke at the next term, demurred to the declaration generally, and tendered five special pleas. 1st, One plea was, that his testator Wyatt, in his lifetime, qualified as guardian of one G. W. Wyatt in Dinwiddie county court, and that since his death, the accounts of the guardianship had been sent to a commissioner in chancery to be examined and audited, and that the commissioner had reported a balance due from the testator to his ward, of 8000 dollars which was a debt of superiour dignity to that claimed by Woodlief. This plea was rejected by the court, as not being an issuable plea. 2dly, He tendered a plea of payment: 3dly, No assets: 4thly, Fully administered: 5thly, A judgment debt of superiour dignity, and no assets beyond what was required to discharge it. The four last pleas were regular, and concluded with a verification. Woodlief replied to each, severally, denying the matters pleaded, and concluding to the country. But Cocke refused either to make up issues, by adding the similitur to the replications, or to demur; and thereupon the court refused to allow the pleas to be put in; and, overruling the demurrer to the declaration, proceeded to give judgment for the plaintiff for the debt &c. Cocke appealed to this court.

474 *Allison, for the appellant, made a faint effort to sustain the plea, which was rejected by the circuit court, as not being issuable. And, as to the rest, he said, that Woodlief having tendered issues, in all the replications, he might himself have added the mere form of the similitur, and thus have made up the issues, or he might have gone to trial, and if he obtained a verdict, that would have cured the want of the similitur. *Brewer v. Tarpley*, 1 Wash. 363. The court ought not, therefore, on account of the obstinacy of the defendant or of his counsel, which produced no hindrance or delay of justice, and not the least inconvenience to the plaintiff, to have deprived the party of the benefit of pleas, acknowledgedly good in form and substance.

Spooner, for the appellee, said that the plea rejected by the court, was rightly rejected: it was not an issuable plea: it did not aver, either that there had been any judgment or decree for the debt therein mentioned, or that it had been paid, or that it was in fact due, or that there were no assets beyond what was necessary to satisfy it. *Wyche v. Macklin*, 2 Rand. 426; 1 Chitt. Plead. 485; 2 Id. 454-8; 1 Wms. Saund. 333, n. 7. In respect to the other point, he said the object of the defendant in refusing to make up the issues, most plainly, was delay; and his conduct could not be countenanced by the court. He cited *Nadenbousch v. M'Rea*, Gilm. 228; *Petrie v. Fitzroy*, 5 T. R. 152; 1 Sellon's Prac. 345.

The demurrer to the declaration was not mentioned in the argument: the declaration was clearly good.

PER CURIAM. The appellant's object in the court below, and his only object, was, unquestionably, delay; his conduct can be ascribed to no other motive. And, considering the time at which he tendered his pleas, when it was in the sound discretion of the court, to admit them, if necessary to the justice of the case, or to reject them if they were not issuable, or if they were

475 obviously designed to produce embarrassment *or delay, the court, under the circumstances, by which delay manifestly appeared to be intended, did right to resort to the rigour of the rule, and to reject them all. *Downman v. Downman*, 1 Wash. 27. It is clear from *Nadenbousch v. M'Rea*, that the replications did not of themselves make up the issue. In *Petrie v. Fitzroy*, which was an action of debt on a bond, there was a plea and replication, and there being no rejoinder, the plaintiff took judgment by default, as for want of a plea, not of a rejoinder: And the question, in effect, was, whether upon the failure of the defendant to rejoin, the plaintiff had a right to strike out the proceedings already entered, and to sign judgment. It was argued, that here was a plea, and then a replication, and that a subsequent default in not answering the replication, could not destroy the plea so previously put in. But the court said, "The master says, that, in such cases, it is the practice to strike out all the pleadings; and, in truth, if the defendant do not rejoin, it is considered as an abandonment of the plea." And so the practice is now settled:

*The principal case is cited in foot-notes to *Downman v. Downman*, 1 Wash. 27; *Nadenbousch v. M'Rea*, Gilm. 228.

Bury v. Bishop, 1 Wms. Saund. 318; Tidd's Prac. 439; Archibold's Prac. 126. In the case before us, the court advised the party either to make up the issues by adding the similiter to the replications, or to demur to them; he would do neither. The judgment is to be affirmed.

476

***Hawkins v. Gibson.**

November, 1829.

Affidavits—Bail—Whether Should Be in Writing.—Semble an affidavit before a justice to found an order requiring bail ought to be in writing.
Same—Same—Filing with Process—Quere. Whether such affidavit ought to be filed with the process.
Bail—When Motion to Discharge Is Too Late.—After judgment by default and writ of inquiry awarded, and after the defendant has left the state: HELD, a motion to discharge the bail comes too late.
Same—Proper Proceeding to Discharge.—To obtain an order to discharge bail, the proper course of proceeding is by rule to show cause why the bail should not be discharged.

Gibson brought assumpsit against Homer in the hustings court of Richmond. And, on the *capias ad respondendum*, which was dated the 5th June 1822, and returnable to the ensuing August term, an alderman of the city indorsed an order requiring appearance bail, in the following words: "June 6th 1822. Upon proper affidavit made before me, the sergeant will hold the within named M. Homer to bail, in the sum of 150 dollars." Homer was arrested, and Hawkins became bound as his appearance bail. The process was duly returned. But the affidavit, upon which the order of the alderman requiring bail, was founded, was not returned or filed; nor did it appear whether the affidavit was in writing or not. Gibson filed his declaration at the October rules 1822; and the defendant failing to appear, judgment by default was entered at the rules, against him and Hawkins as his appearance bail; which, at the November rules, was confirmed, and a writ of inquiry awarded. At the November term ensuing, Homer, without setting aside this office judgment, applied for and obtained a continuance; and the case was continued from term to term, till July term 1824; when Hawkins moved the court to discharge him from his obligation as appearance bail, on the ground, that no sufficient affidavit had been filed in the cause to justify the order requiring bail (Homer being now, not an inhabitant of Virginia). The court refused to discharge the bail. Then Hawkins being allowed to defend the suit for the principal, pleaded the general issue. The jury found a verdict for Gibson, for 112 dollars; where-
 477 upon the court gave *judgment against Homer and Hawkins his appearance bail. And Hawkins appealed to the circuit court of Henrico.

The circuit court adjourned the following questions to the general court: 1. Whether, under the statute authorising a judge of the general court, or a justice of the peace, to require bail in actions wherein appearance bail is not demandable of right, it is necessary that the judge or justice should return the affidavit required by the statute, to the court from which the process issues? 2. Whether, if it be necessary to return it, and it be not so returned, the appearance bail can in such case be relieved, and if so, whether he can be discharged on

motion? 3. Ought the bail to be discharged, in this case, upon the whole matter appearing in the record?*

478

*The general court certified its opinion to the circuit court (not deciding the first two questions adjourned) that "the bail ought not in this case to be discharged." Whereupon the circuit court affirmed the judgment: and Hawkins appealed to this court.

Bacchus, for the appellant. The statute giving a special authority to a judge or justice in vacation, upon proper affidavit, to require bail, it ought to appear that that authority was exactly pursued. 2 Salk. 475, pl. 14; 3 Stark. on Ev. part iv. pp. 1197, 8. The affidavit ought then to be in writing (indeed, the word affidavit imports a written oath) and it ought to be filed; since, unless it be in writing and filed, it cannot be inspected by the court, to ascertain, whether it is a proper affidavit or not; whether it verifies the justice of the action, and shews probable cause to apprehend that the defendant will depart from the jurisdiction of the court, so as to avoid process of execution. Neither is there any alternative but either to require that the affidavit shall be in writing and filed, or to hold that the single justice, who makes the order, is the absolute judge of the propriety of the affidavit on which he founds it, subject to no controul or supervision, and that if a perjury be committed in such an affidavit, however palpable, the offender shall be exempt from prosecution. Our statute does not, indeed, in express terms, require, that the affidavit shall be in writing and filed; yet the very particularity with which the statute prescribes what the affidavit shall contain, in order to justify the justice in ordering bail, evinces, that it was the plain intent of the statute to require both.

Lyons, for the appellee. The english

*See 1 Rev. Code, ch. 128, § 42, 43, 44, 45, 50, pp. 499, 501. § 42 provides, that "in all such actions wherein bail may not lawfully be demanded, the plaintiff, or his attorney, shall, on pain of having his suit dismissed with costs, indorse, on the original writ or subsequent process, the true species of action, and that bail is not required in order that the sheriff may be informed how to govern himself in the execution thereof."

§ 43 provides, in what actions bail may be demanded by the plaintiff of right: assumpsit is not one of them.

§ 44 provides, that "in all other personal actions, it shall be lawful for any judge of the general court, or any justice of the peace for any county or corporation, upon proper affidavit, verifying the justice of the plaintiff's action, and shewing probable cause to apprehend that the defendant will depart from the jurisdiction of the court so that process of execution cannot be served upon him, to direct bail to be taken, by indorsement on the original writ, or subsequent process, and the sheriff shall govern himself accordingly."

§ 45 provides, that "in all cases, where bail shall so have been required, by the indorsement of the plaintiff or his attorney, or of a judge or justice, the sheriff shall return on the writ, the names of the bail by him taken, and shall return the bail bond or a copy thereof, to the clerk's office, on the day of appearance."

§ 50 provides, that "in any personal action, in which bail shall not have been required, the court may at any time before final judgment, for good cause shewn, rule the defendant to give special bail, and, on his failure to do so, may refuse him permission to plead, or may set aside any plea already pleaded by him, and award a writ of inquiry, or otherwise proceed to judgment according to law, or may cause him to be arrested and committed to prison."—Note in Original Edition.

statutes expressly require, that the affidavit on which bail is ordered, shall be returned and filed, and prescribe when this shall be done, by whom, and to whom. 1 Tidd's Prac. ch. 8. Our statute is silent as to all these particulars; it requires only,

that there shall be proper affidavit
479 made to authorise a justice to *order bail, and that when bail has been required by order of a justice, as well as when required by the plaintiff, the sheriff shall return on the writ, the name of the bail by him taken, and the bail bond or a copy of it, to the clerk's office, on the day of appearance. If the court shall hold it necessary to return and file the affidavit, it must go farther, and prescribe when, by whom, and to whom, it shall be returned; which were not to interpret but to make law. But suppose the affidavit ought to be filed: the bail could not be discharged, on motion made at the calling of the cause for trial, without even a notice of the motion: this motion was a surprise on the plaintiff: the proper course was, to have asked a rule on the plaintiff to shew cause why the bail should not be discharged, and thus to have given him an opportunity to produce the affidavit, or shew other cause. Again, the application to discharge the bail in this case, came too late; two years after bail required and entered, after judgment by default and writ of inquiry awarded, and after the defendant was gone, so that if the court discharged the appearance bail, it could not have made any effectual order requiring special bail. *Desborough v. Copinger*, 8 T. R. 77; 2 Com. Dig. Bail, K. 3, pp. 22-6.

Bacchus, in reply. In our practice, the plaintiff is always in court: wherefore, then, require notice of the motion, or a rule to shew cause? If the motion was unexpected, the court might have obviated the surprise, by giving time to the plaintiff, if he had asked time, to produce the affidavit, or to shew that it was lost, and to prove its contents. This is an objection to form, not to substance. But, in truth, if it was necessary that a proper affidavit should not only be made, but returned and filed, then, no proper affidavit being returned and filed, the case was the same, as if there had been no affidavit; as if, in short, bail had been taken, when it had not been required, or had been unlawfully required. And, in such cases, the bail is taken at the plaintiff's peril; he is bound to proceed regularly, and not to require bail
480 *without lawful authority to do so, upon pain of having his suit dismissed with costs, at any time when the fact is shewn to the court.

BROOKE, P. This case turns on the question, whether the hustings court erred in refusing to discharge Hawkins, the appearance bail? The motion was put, in that court, on the ground, that no sufficient affidavit had been filed in the case, to authorise the alderman's order requiring bail. It is not necessary to decide, whether the justice must have a written affidavit to justify his requiring bail? nor, whether that affidavit must be filed? The term affidavit in the statute, imports an oath in writing; but the statute is silent as to the filing.

There are two other grounds, on which, I think, the judgment must be affirmed.

1. The objection could not be taken on motion; since it involved matters aliunde and not on the face of the record. It could only be made on a rule to shew cause why the bail should not be discharged, on the return of which the other party might be prepared to shew the affidavit, and that it was a proper one, in the terms of the statute.

2. The objection came too late; being made two years after the writ of inquiry, and (it appears) after the defendant had left the state. In *Desborough v. Copinger*, the objection to the affidavit was held to be too late after the writ of inquiry.

On these grounds the judgment is to be affirmed.

481 *Sturdivant's Adm'r v. Raines's Ex'or.

November, 1839.

Administrators—When Verdict Insufficient to Found Judgment De Bonis Testatoris.—Debt on bond against an adm'r: issues joined on pleas of payment and fully administered; verdict for plaintiff on first issue, and on the last, "that assets more than sufficient to pay the debt &c. came to defendant's hands to be administered:" HELD, verdict on last issue insufficient to found judgment de bonis testatoris.

Debt on bond, by the executor of Raines against the administrator of Sturdivant, in the circuit court of Prince George. Pleas, payment and fully administered; on which issues were made up. The jury found the following verdict: "We of the jury find for the plaintiff the debt in the declaration mentioned, to be discharged by the payment of £18. 16. 8. with interest from the 4th January 1806 till paid &c. And we further find that assets more than sufficient to pay the debt, interest and costs came to the hands of the defendant to be administered." Whereupon the court gave judgment against the defendant, for the debt, interest and costs, to be levied de bonis testatoris. The defendant appealed to this court.

Allison, for the appellant, objected, that the verdict of the jury was insufficient to sustain the judgment; because it did not find assets in the hands of the administrator, unadministered by him, sufficient to pay the debt; but only that assets enough came to his hands; which might be true, and yet the administrator might have fully and duly administered all the assets. He cited *Booth's ex'or v. Armstrong*, 2 Wash. 301; *Rogers's adm'r v. Chandler's adm'r*, 3 Munf. 65; *Eppes's adm'r v. Smith, adm'r of Bagley &c.*, 4 Munf. 466; *Gardner's adm'r v. Vidal*, 6 Rand. 106.

The Attorney General, for the appellee.

***Executors and Administrators—When Verdict Insufficient to Found Judgment De Bonis Testatoris.**—In an action of debt on bond against an administratrix, the plea was fully administered, and the verdict was in general terms that the defendant had not fully administered: upon which verdict judgment was rendered for the debt demanded, to be levied de bonis testatoris, and it was held that such verdict was insufficient to warrant the judgment. *Brizendine v. Tisdale*, 1 Leigh 481. *Gardner v. Vidal*, 6 Rand. 106. To the same effect the principal case is cited in *foot-note* to *Booth v. Armstrong*, 2 Wash. 301, by TUCKER, P. in *Burnett v. Harwell*, 3 Leigh 96. See also *Rogers v. Chandler*, 3 Munf. 65; *Eppes v. Smith*, 4 Munf. 466. See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

In the cases cited for the appellant, the finding was assets equal to the debt, or assets sufficient to pay the debt: here the finding is that assets more than sufficient to pay the debt, came to the administrator's hands; inferring, that, in law and in 482 fact, *there were ample assets. *Gardner v. Vidal* goes a step beyond the other cases; for it is there held, that the jury must find assets sufficient at the time of the plea pleaded.

Allison. The case of *Booth's ex'or v. Armstrong*, is decisive against the distinction now suggested, founded on the finding that more than sufficient assets to pay the debt came to the hands of the administrator.

CARR, J., reviewed the cases cited at the bar, and then added—Without stopping to inquire whether this court went too far in *Gardner v. Vidal*, in requiring that the verdict should find the amount of assets, at the time of plea pleaded, it seems clear to me, from the whole tenour of these decisions, and the reason on which they stand, that the verdict before us must be pronounced insufficient. All the cases decide, substantially, I think, that it must appear from the verdict, that at the institution of the action, there were in the hands of the representative, assets not bound by superior claims, sufficient to discharge the debt due the plaintiff; or if not sufficient, that the amount of such assets must be found. Here it is found, that assets more than enough to pay the debt came to the defendant's hands; but whether he had them at the institution of this suit; whether before that he had not properly disbursed them; or whether, if he still held them, they were not bound by prior judgments &c. does not appear at all. There is, therefore, all that uncertainty and insufficiency, for which, in the other cases, the verdicts were set aside; and I think this must share the same fate.

The other judges concurred, and the judgment was reversed.

483 **Raines v. Philips' Ex'or &c.*

November, 1839.

Written Instruments—Proof—When Evidence of Party's Handwriting Admissible.—Where the subscribing witness to an instrument is dead, and it is shewn to be impracticable to prove his hand writing, evidence of the hand writing of the party himself is admissible.

Bills of Exception—Uncertain—Cause Sent Back.—Where a bill of exceptions is uncertain, so that the true state of the case and question in the court below, cannot be gathered from it, this court will for that cause reverse the judgment, and send the cause back for new trial.

Debt on bond, by Raines against Philips executor of Philips, in the circuit court of Prince George. Philips pleaded that the bond was not the deed of his tes-

tator. At the trial, the counsel for Raines proved, "that the subscribing witness to the bond was dead, and then stated to the court that every inquiry had been made in the neighbourhood where he resided, to ascertain whether any person was acquainted with his hand writing, but after the most diligent search, no person who knew it could be found: and then he offered testimony to prove the hand writing of the obligor: but the court decided, that under this statement, Raines could not be allowed to go into evidence of the hand writing of the supposed obligor." To this opinion Raines excepted. Verdict and judgment for Philips. Raines appealed to this court.

The cause was argued here, by Allison for the appellant, and the Attorney General for the appellee. They differed as to the meaning of that part of the bill of exceptions, in which it was stated, that "under this statement" the court refused to admit evidence of the hand writing of the obligor: Allison contending, that the words "under this statement," imported that taking the statement to be true, the evidence was inadmissible: and the Attorney General insisting, that those words imported, that upon the statement made by the counsel at the bar, verified by no evidence of any kind, not even by the oath of the party, the secondary evidence was inadmissible. 484 *Stark. on Ev. *part II. § 144, 147; Ben v. Peete, 2 Rand. 539; Gilliam's adm'r v. Perkinson's adm'r, 4 Rand. 325, were cited at the bar.*

BROOKE, P., delivered the resolution of the court. It is now the settled rule, where the witness to an instrument is dead, and it is impracticable, after all possible diligence has been used, to prove his hand writing, to admit proof of the hand writing of the party himself. (See *Gilliam's adm'r v. Perkinson's adm'r* and the cases there cited.) But upon this bill of exceptions, it is difficult to say on what ground the evidence was rejected by the court. There is a great want of precision in its language. The judge said, that under the statement

cannot ascertain the exact state of the case, nor consequently the import and effect of the instruction, it is a settled practice, to reverse the judgment, to set aside the verdict, and remand the cause for a new trial. *Bowyer v. Chestnut, 4 Leigh 4, citing Raines v. Philips, 1 Leigh 483; Thompson v. Cumming, 2 Leigh 321.*

In *McDowell v. Crawford, 11 Gratt. 398*, it is said by MONCURE, J.: "That when an opinion of an inferior court admitting or excluding evidence, or giving or refusing an instruction, is excepted to, the court must take care so to state the case in the bill of exceptions as that the appellate court may supervise the opinion, and determine whether it is right or wrong: otherwise, the judgment must be reversed in order that the case may be correctly stated. Therefore, the judgment must always be reversed where the bill of exceptions to an opinion of the court, admitting or excluding evidence, is defective in not setting out the evidence admitted or excluded. The cases of *Fowler v. Lee, 4 Munf. 373; Hairston v. Cole, 1 Rand. 461; Raines v. Philips, 1 Leigh 483; Bowyer v. Chestnut, 4 Leigh 1*, are cases in which exceptions were taken to the admission or exclusion of evidence. *Barrett v. Tazewell, 1 Call 215; Beattie v. Tabb, 2 Munf. 254; Brooke v. Young, 3 Rand. 106*, are cases in which exceptions were taken to instructions given or refused by the court. In all these cases the judgments were reversed on the ground that the statement of facts in the bill of exceptions was too imperfect to enable the appellate court to determine the question." See monographic note on "Bills of Exception" appended to *Stoneman v. Com., 25 Gratt. 887*.

***Written Instrument—Proof—When Evidence of Party's Handwriting Admissible.**—It is a general rule that the evidence of a subscribing witness to an instrument is the best, and must be adduced, if it can be had; and if it cannot, proof of the handwriting will be required: but, if the subscribing witness merely makes his mark, if he is dead, proof of the handwriting of the party executing the instrument, will be proper. *Gilliam v. Perkinson, 4 Rand. 325*. See monographic notes on "Wills," and "Evidence" appended to *Lee v. Tapscott, 2 Wash. 276*.

***Bills of Exception—Certainty.**—Whenever a bill of exceptions to an instruction of the court to a jury, is so vague and imperfect, that the appellate court

made by the counsel for Raines (who, it seems, had proved, that the witness was dead) he could not be allowed to go into evidence to prove the hand writing of the supposed obligor. If we are to understand, that he admitted the truth of the statement, if it is to be inferred, from the circumstance that the counsel had proved the death of the witness (it is to be presumed on oath), that he made the statement in question, in like manner (that is, on oath); then the judge might be understood as denying the rule before stated. On the contrary, if the fact was, that it was a mere statement not on oath, his objection was, that the facts necessary to entitle the plaintiff to go into evidence of the hand writing of the obligor, were not proved. But, whether he considered the statement as proved, and denied the rule, or admitted the rule, and objected to the statement because it was not proved, is so doubtful, that we think the safest course will be to reverse the judgment, as the court has often done for uncertainty in a bill of exceptions, and send the cause back for a new trial, in which, if the question again occurs, the objection to the admission of proof of the hand writing of the obligor, may be more precisely stated.

Judgment reversed.

485 ***Commonwealth v. Jackson's Ex'or & al.**

November, 1829.

Bond Taken by Court without Authority of Law—Effect as to Surety.—Hustings court of Williamsburg, without any authority of law for the act, appoints a collector of the public taxes, for the city, and takes his bond with surety for due collection &c. payable to the governor and his successors: *Held*, such bond is not valid and obligatory on the surety.

The hustings court of the city of Williamsburg, in August 1816, appointed Jackson to collect all public taxes imposed by law on the city; and took a bond from him with Browne as his surety, in the penalty of 30,000 dollars, payable to Wilson Cary Nicholas, then governor, and his successors, with condition that Jackson should well and truly collect, account for and pay the taxes &c. Jackson failed to pay the amount of taxes, by him collected, into the treasury, and the commonwealth recovered a judgment for the same against him in the general court, and sued out execution without effect.

Upon a bill exhibited in the superior court of chancery of Richmond, by the attorney general and auditor, against Browne as the executor of Jackson and as his surety in the bond, and several others, the case turned eventually on the single question, Whether the bond was valid and obligatory upon the surety?

The chancellor held that it was not, and dismissed the bill; and from that decree an appeal was taken for the commonwealth to this court.

***Bond Taken by Court without Authority of Law—Effect as to Surety.**—For the proposition, that a bond taken without authority of law and also against the policy of the law is not valid and obligatory on the surety, the principal case is cited in *Monteith v. Com.* 15 Gratt. 186; *Gibson v. Beckham*, 16 Gratt. 224; *Morgan v. Hale*, 12 W. Va. 726; *Porter v. Daniels*, 11 W. Va. 255. See monographic note on "Statutory Bonds" appended to *Goolaby v. Strother*, 21 Gratt. 107.

The Attorney General, for the commonwealth, said, that the first question was, Whether the hustings court had authority to appoint a collector of public taxes for the city, and to take bond and surety for the due collection, accounting for and paying them into the treasury? And he referred to the acts of May 1778, ch. 17; 9 Hen. Stat. at Large, p. 468; May 1779, ch. 20; October 1781, ch. 40; 10 Id. pp. 85, 501, 6; May 1782, ch. 30, § 3, 11; 11 Id. pp. 66, 8, which statutes, he said, gave this power to the 486 hustings *court; and these acts had never been repealed. But, supposing that the bond was not good as a statutory bond, another question would still remain, whether it was not a good and obligatory bond by the common law, as well to the surety as the principal? The surety ought not to be allowed to deny the obligation of the bond, since, by joining in it, he had enabled his principal to get the public money in hands and convert it to his own use. There were many cases, in which bonds taken as statutory bonds, had been held not to be good as such, and yet good and obligatory by the common law both upon principal and surety. *Johnstons v. Meriwether*, 3 Call 523.

B. Browne, contra, submitted that the statutes referred to by the attorney general were not permanent laws, being enacted for the particular occasion. And, he said, as there was no existing law at the time this bond was executed, authorising the sergeant of the hustings court to collect public taxes, or the court to appoint a public collector for the city, or to take a bond from him, the bond was null and void as to the surety at least. *Branch v. Commonwealth*, 2 Call 510; *Stuart v. Lee*, 3 Call 421; *U. States v. Morgan*, 3 Wash. Circ. Court Rep. 10. Then, supposing the bond in question not good as a statutory bond, how could it be good under the common law? The bond is taken to the governor and his successors: if not put in suit during the term of office of the governor to whom it was made payable, no suit could ever be brought on it; for, surely, the governor's successors could not maintain the action without express authority of law. This alone was conclusive. But as the collector was appointed, so the bond was taken, by the hustings court, contrary to the policy of the law; which has ever been to confine the collection of the public revenue, to officers appointed by the law itself; sheriffs, or coroners, or collectors appointed under special circumstances in the manner prescribed by law. This was an unauthorised interference of the hustings court in the collection of 487 the public *revenue; and it would be of mischievous consequence to give any countenance to such a practice.

This court concurred with the chancellor, and affirmed the decree.

Clarke and Wife v. Buck.

November, 1829.

Wills—Construction—Legacy and Debts Charged on Real Estate—Case at Bar.—B. owning real and personal estate, makes his will, beginning "It is my

***Wills—Construction—Charge upon Real Estate.**—In *Thompsons v. Meek*, 7 Leigh 432, it is said by CARR. J., the first clause in the will is, "I desire that my

will and desire that all my just debts be paid; after that, I wish that C. have 1000 dollars, provided my estate will admit of it;" then he bequeaths to the same C. the greater part of his personal chattels, specifically, making no mention of his real estate, which descends to his heir at law: the whole personal estate proves insufficient to pay debts and the legacy of 1000 dollars: *Held*, that both the testator's debts, and C.'s legacy, are charged by the will on the real estate descended.

James U. Blair made his last will and testament in these words: "It is my will and desire, that all my just debts be paid—After that I wish that Miss Lucy Collins have 1000 dollars, provided my estate will admit of it. I also leave and bequeath to her one tea caddy, one bed and such clothes to the bed as she may think proper to take. I also, in addition, leave her what bank stock I may die possessed of, also what turnpike stock in the same manner; one bible in the name of my sister Glassel—I also leave to Lucy, all the plate left in the house—I also leave one set of elegant china and tea board, to Lucy Collins—I wish that Miss Collins to provide for Diana and make her comfortable—I leave one chest of drawers, which my mother always deposited her clothes in, to Miss Collins—I also leave to Miss Collins, the china dishes and plates left at my death, the large looking glass in the drawing room, and one of the round ones in the chamber, and one salver."

Administration with the will annexed was granted to Buck, the appellee.

488 *The testator had real estate, which not being disposed of by his will, descended to his heir at law, who was the same Buck, the administrator.

Miss Collins, the legatee, married Charles Stewart; and Stewart and wife first exhibited, in the superior court of chancery of Fredericksburg, a bill against Buck, in his character of administrator with the will annexed, praying an account of the personal estate of the testator and of the administration thereof, and a decree for the legacy of 1000 dollars. The administrator answered, that the personal estate had been applied to the payment of debts, and that a very trivial balance if any would remain to be paid to the legatee. And this, upon an account of the administration ordered by the chancellor, and reported, was found to be true: it appearing, by the report, that the value of the whole personal estate, including the articles specifically bequeathed to Miss Collins, did not amount to 1000 dollars; and that the balance, after paying debts, was only 123 dollars.

Stewart having died pending the suit, Mrs. Stewart, the legatee exhibited a supplemental bill against Buck, as the heir of the testator, praying to charge the legacy on the testator's lands descended to him. To this bill, Buck demurred; and thus presented to the court the question, whether the legacy could in any way be charged on the real estate descended?

Chancellor Browne held that it could not, and dismissed the supplemental bill. And

funeral expenses, and all my just debts be paid." This in the commencement of a will, has often been decided to be a charge upon the realty. *Trent v. Trent*, Gilin. 174; *Clarke v. Buck*, 1 Leigh 487. On this question, the principal case is cited in *Read v. Cather*, 18 W. Va. 207; note to *Black v. Scott*, 3 Fed. Cas. 516. See monographic note on "Wills."

Mrs. Stewart having since the decree married Clarke, Clarke and wife applied to this court for an appeal from the decree; which was allowed them.

Harrison, for the appellants, contended—1st, That the will charged the testator's real estate with the legacy. It directs, that his debts shall be paid, and after that, that Miss Collins shall have the legacy of 1000 dollars, provided his estate will admit of it; meaning his whole estate, real and personal; for, as it appeared, that almost 489 his whole personal *estate was specifically bequeathed to the same legatee, in the sequel of the will, it could not be imagined, that he intended the legacy of 1000 dollars to be satisfied out of that. *Kightley v. Kightley*, 2 Ves. jun. 328; *Williams v. Chitty*, 3 Ves. 551; *Shallcross v. Finden*, Id. 738; *Keeling v. Brown*, 5 Ves. 359. 2dly, If the will should not be construed to charge the legacy on the testator's real estate, it certainly charged the real with his debts; and then the debts ought to have been thrown on the real, and the personal estate left to discharge the legacy. *Foster v. Cook*, 3 Bro. C. C. 347; *Aldrich v. Cooper*, 8 Ves. 382; *Trimmer v. Bayne*, 9 Ves. 209. And this even though the bill had not been framed with that view. *Gibbs v. Ougier*, 12 Ves. 413. 3dly, In all events, the specialty debts which bound the real, in the hands of the heir, ought to have been thrown on it, and the legatee let in for satisfaction out of the real, at least to the extent to which the personal had been applied to such debts.

Patton, for the appellee, argued, that the will did not charge the legacy on the real estate of the testator, which he did not mention in his will, but left to descend to the heir at law: that the testator having only the personal estate in his mind, and meaning to dispose of that alone, referred to the adequacy of the personal estate, when he said that the legatee should have the legacy, "provided his estate would admit of it." He might have had a larger personal estate when he made the will, than he left at his death: he might then have had ample personal estate, besides that specifically bequeathed, to pay his debts and this legacy too: he might have underrated his debts, and overrated his wealth; a very common case.

He said the real question was, whether the will charged the real estate descended, with the testator's debts, so that the personal assets being exhausted in the payment of the debts, the legacy ought to be charged on the land, on the principle of substitution? The will contained only 490 a simple *direction that the debts should be paid, without any indication that the real estate was intended as a fund for the payment of them. That was not devised or even mentioned in the will. Now, he said, there was no case, in which lands descended, had been charged in the hands of the heir, with the debts of the ancestor, by a mere direction in his will, to pay his debts; and he examined the cases cited by Harrison, to shew, that they did not support any such proposition. He cited *Powell v. Robins*, 7 Ves. 209; *Davis v. Gardiner*, 2 Cox's P. Wms. 187.

As to the claim to marshal the assets, and charge the specialty debts on the real estate, and to relieve the legatee pro tanto, he said that claim was asserted here for the first time: there was no suggestion of the kind in the bill.

CABELL, J. The court is of opinion, that, by the will of J. U. Blair, his real estate was charged with the payment of all his debts; *Trent v. Trent's ex'x &c.*, Gilm. 174. And as it would be against equity, that those who have the choice of two funds, should defeat the just claims of others, by selecting that which is the only fund accessible to others, the appellant, Mrs. Clarke, (formerly Lucy Collins) ought, on the principle of marshaling the assets, to be let in to have satisfaction out of the real estate of the testator, for her general and specific legacies, so far as the same have been broken in upon, or interfered with, by the application of the personal estate to the payment of any of the testator's debts. *Aldrich v. Cooper*, 8 Ves. 382; 1 Madd. Chan. 615, and seq. and the cases there collected.

But this is not all; for the court is also of opinion, that, by the testator's will, the pecuniary legacy of 1000 dollars to Miss Collins, now Mrs. Clarke, is a direct and absolute charge upon his real estate, not indeed by the express terms of the will, but by strong and necessary implication. It appears from the commissioner's report, that the whole of the personal estate did not amount to 1000 dollars; and the will shews

that much of this was specifically
491 bequeathed to Miss *Collins. The

testator surely intended that she should have that. The whole of the personal estate was not much more than sufficient for the payment of the debts of the testator. Yet it was certainly his intention that Miss Collins, the sole object of his bounty, should have, in addition to the specific legacies, the sum of 1000 dollars, after the payment of all his debts. This object could not be accomplished but by resort to the real estate. Such must have been the intention of the testator; and that intention ought to be carried into effect. The case of *Trent v. Trent's ex'x* is a strong authority on this point also; for, in that case, the legacy or annuity to Mrs. Trent was not expressly charged on the real estate; yet this court held it to be charged thereon, by the intention of the testator implied from the known insufficiency of the personal estate.

On these grounds, the decree of the chancellor is reversed, and the cause remanded, to be finally proceeded in, according to the principles now declared.

Armstrong v. Armstrongs.

November, 1829.

Covenant—Oyer of Covenant—When Variance Cannot Be Taken Advantage of.—In covenant, defendant takes oyer of the covenant, and afterwards pleads covenants performed: HELD, that defendant by oyer has made the covenant itself a part of

*Debt on Single Bill—Oyer—Waiver of Objection for Variance.—In *Thompson v. Boggs*, 8 W. Va. 70, it is said: "If the defendant in debt on single bill or single bills, craves oyer of the same, and afterwards pleads to issue, he by oyer, has made the single bill,

the record, and cannot at trial of the issue, object to the covenant as evidence, on the ground of variance between it and the covenant set forth in the declaration.

Award—Presumption in Favor of.—All fair presumptions shall be made in favour of an award; and if on any fair presumption the award may be brought within the submission, it shall be sustained.

This was an action of covenant brought by Archibald Armstrong against Richard and Archibald Armstrong, in the hustings court of Richmond. The declaration set forth a covenant between the plaintiff and the defendants, for submitting all matters in dispute between them, to O. Manson and F. A. Mayo, whose award the parties
492 covenanted to "submit to and abide by; the actual arbitration of the matters in dispute; an award by the arbitrators, that the defendants should pay the plaintiff 127 dollars, subject to a deduction of 16 dollars, and half the costs of a suit, then pending in the name of Richard Armstrong; and notice to the defendants of the award; and then the declaration alleged as a breach of the covenant, that the defendants had not paid the plaintiff the sum so awarded to him.

The defendants took oyer of the covenant, the substantial part whereof was thus: "Whereas a certain dispute has taken place between the parties, in relation to killing a parcel of hogs, the parties, being desirous of settling the matter of difference between them, have chosen O. M. and F. A. M. to settle, arbitrate and determine all difference between them, and to fix the amount to be paid by either party; and in case they may not agree, then they shall call in a third person as umpire; and their award shall be binding between the parties." And then the defendants pleaded, that the arbitrators "made no award of and concerning the

or single bills, a part of the pleadings and record; and, if, after oyer is taken and granted, he pleads payment, he cannot, at the trial of the issue, object to the single bill or single bills as evidence, on the ground of variance between the single bill or bills and the single bill or bills set forth in the declaration.—*Armstrong v. Armstrongs*, 1 Leigh 491."

And in *Bennett v. Loyd*, 6 Leigh 818, it is said: "The bond declared on, is recited as bearing date in 1811; that produced, and made part of the declaration upon oyer, is dated in 1810. That the variance is matter of substance, and fatal, appears by the case of *Cooke v. Graham's Adm'r* (3 Cranch 229). It appears by that case, too, that the error is not cured by pleading oyer: for the defendant there, pleaded conditions performed, as the defendant did here; the plaintiff replied, and assigned a breach, and the defendant rejoined a bad rejoinder, to which the plaintiff demurred: the court went back to the first fault, and entered judgment on the demurrer for the defendant. The case of *Armstrong v. Armstrongs*, 1 Leigh 491, is not in conflict with this opinion; in that case, the question was upon the trial of the issue before the jury; here, it is upon demurrer; and upon demurrer, where the defendant has taken oyer, he may take advantage of the variance. *Macon v. Crump*, 1 Call 575." See also, citing the principal case, *foot-note* to *Sterrett v. Teaford*, 4 Gratt. 84. See monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.

*Awards—Presumption.—In *Fluharty v. Beatty*, 22 W. Va. 705, it is said, presumptions are not to be raised for the purpose of overthrowing an award; but they are to be liberally construed so as to give effect and operation to the intent of the arbitrators, where it can be done, and every reasonable intention is to be made in their support. *Smith v. Smith*, 4 Rand. 95; *Gas Co. v. Wheeling*, 8 W. Va. 321; *Richards v. Brockenbrough*, 1 Rand. 449; *Armstrong v. Armstrongs*, 1 Leigh 491. To the same effect the principal case is cited in *Pollock v. Sutherland*, 25 Gratt. 95. See monographic note on "Arbitration and Award" appended to *Bassett v. Cunningham*, 9 Gratt. 664.

premises in the covenant mentioned and to them referred."

The plaintiff in his replication set forth the award in *hæc verba*, and averred that the defendants had not paid the sum of money awarded to him. The award was in these words: "On settlement of accounts between Archibald Armstrong & Co. as per bond &c." (describing the instrument of submission to arbitration) "it appears, that A. Armstrong junior" (one of the defendants) "is indebted to A. Armstrong senior, 127 dollars; that is to say, allowing A. A. junior all the lard taken or made by the said firm—and whereas Richard Armstrong" (the other defendant) "one of the parties to the said bond" (the submission) "has sued A. Armstrong senior, on his own account, now pending in the mayor's court of Richmond, we hereby award, that 16 dollars, and one half the costs shall be deducted from the balance due A. A. senior above stated—and the balance shall be paid over to A. A. senior, by the above parties—and the said R. A. shall withdraw

493 his suit above mentioned." *This award was signed by the two arbitrators; and then signed and sealed by all the parties to the submission, and to this act of the parties both the arbitrators were attesting witnesses; but the fact of the parties having signed the award, was not specifically pleaded or relied on in the replication.

To this replication the defendants demurred generally. The court overruled the demurrer. And then the defendants were allowed to put in the plea of covenants performed, on which an issue was made up.

At the trial, the defendants objected to the admission of the arbitration bond in evidence, on the ground of variance between the instrument itself and the covenant described in the declaration. But the court overruled the objection; and the defendant excepted.

There was a verdict and judgment for the plaintiff for 109 dollars with interest &c. The defendant appealed to the circuit court of Henrico; which held that the replication to the first plea of No award, was not sufficient in law to maintain the action; and therefore reversed the judgment. And then the plaintiff appealed to this court.

Lyons, for the appellant, said, that there was, in truth, no variance between the covenant as set out in the declaration, and the instrument of submission offered in evidence; for, though the covenant recites, that the dispute in relation to killing a parcel of hogs was the cause or motive of the reference, yet the arbitrators are appointed to determine all difference between the parties. But if there was a variance, it was an immaterial one. *Wroe v. Washington*, 1 Wash. 357; *M'Williams v. Willis*, Id. 199; *Peter v. Cocke*, Id. 257; *Hammitt v. Bullett's ex'ors*, 1 Call 567. Or, at any rate, after oyer prayed by the defendants the covenant was made part of the record, and after in reference to that very covenant they had pleaded that there was no award made in pursuance of the same, they cannot object to the paper as evidence: they cured the defect of the declaration, if

494 *any there was: they made the deed

itself a part of the declaration. 1 Chitt. Plead. 644; *Macon v. Crump*, 1 Call 575. Surely, the court could not exclude a paper which was already part of the record. On this point, then, there was no error in the judgment of the hustings court.

Was this a good award? There are three requisites to a good award: that it be mutual, that it be certain, that it be within the submission. As to mutuality, properly understood, he said, there was no want of it in this award; and if there was, the old doctrine on this point may be regarded as exploded; *Kyd on Awards*, 147, 153; 1 Com. Dig. Arbitrament, Award, E. 14, p. 672, and the notes; *Horrel v. M'Alexander*, 3 Rand. 94. That this award was not certain enough could hardly be pretended. Then, was it within the submission? The court will not presume that an award is without the terms of the submission; it must clearly appear to be so; all presumptions are to be made in favor of the award. What is conclusive of this point, is, that the parties to the submission have signed and sealed the award, and thereby shewn that it was within the submission as they themselves understood and intended it. But the point of the objection was, that the arbitrators awarded the 16 dollars due from A. A. senior to R. A. to be discounted from the debt due by A. A. junior & Co. to A. A. senior, and that R. A. should pay A. A.'s separate debt. Now, admit that, in this particular, the arbitrators went beyond the submission, and that the award was so far bad; it was still good in other respects as to which it was within the submission. 1 Com. Dig. Arbitrament, E. 8, p. 668; 2 Wms. Saund. 293, note 1; *Richards v. Brockenbrough's adm'r*, 1 Rand. 449. And, on the plea of No award, the defendant was bound to shew, that the award was wholly bad; for if there was an award in fact, and that good in part, the plea was falsified. 1 Chitt. Plead. 545. But, in truth, the arbitrators were right in awarding that R. A. as well as A. A. should pay the debt; for if he was not originally bound as principal or as surety, he was

495 bound by the very terms of *the submission bond, as a surety at least; and then the case of *Richards v. Brockenbrough* sustains the award. J. S. Myers, for the appellee, premising that the plea of no award, in effect, denied that there was a good award, objected, 1. that this award was neither mutual nor final; and 2. that it was not within the terms of the submission. As to the mutuality requisite in awards, so much of that doctrine as was merely technical had indeed been exploded; but not the doctrine itself: the modern cases had only explained it, and made it reasonable. In this controversy between A. A. of the one part, and R. and A. A. (who were joint parties) of the other part, the arbitrators ascertained what one of these joint parties owed to A. A. and what A. A. owed to the other of them. How could the money so awarded satisfy A. A.'s demands against R. and A. A. jointly, or satisfy R. and A. A.'s joint demands against A. A.? But he relied chiefly on the second objection, that the award was not within the submission. He

thought it impossible to doubt, that the only matter of difference referred to the arbitrators, was that which grew out of the contract about the killing of the hogs; the recital explaining the general words used in the sequel. Com. Dig. Obligation, p. 194; Hassell & al. v. Long's ex'ors, 2 Mau. & Selw. 363. And, most certainly, the submission was only of matters in difference between the plaintiff and the defendants jointly, not the defendants severally, or either of them. Now, the award does not ascertain what the defendants jointly owed the plaintiff, or that they owed him any thing; it does not ascertain what the plaintiff owed the defendants jointly, or that he owed them any thing. It ascertains, that one of the defendants owed the plaintiff 127 dollars, and that he owed the other defendant 16 dollars; and then, it not only applied this money due to R. A. alone to the satisfaction in part of the joint debt of R. and A. A. but it directed that R. and A. A. jointly, should pay the plaintiff the debt which A. A. alone owed him. Therefore,

the departure from the submission, 496 *was entire and obvious. He said, the court could only judge by the submission and award themselves, taken alone; the question being presented by a demurrer to the replication, nothing could be intended but what was averred in the replication. It appeared, indeed, that the parties put their signatures to the award; but this only appeared by the award being set forth in hæc verba; and those signatures were not averred in the replication, or in any way relied on to sustain the plaintiff's case; neither could this matter have been replied to sustain the claim asserted in the declaration.

CARR, J. The declaration describes the covenant, as submitting all matters in difference between the parties, to the arbitrators. Upon oyer prayed, the bond of submission is set out in hæc verba, and it appears to be a bond for the submission, not of all matters in difference generally, but of the matters of difference arising out of the killing a parcel of hogs. If the defendants had intended to take advantage of this variance, the proper mode, as prescribed by the books on pleading, would have been, after oyer, to have demurred for the difference between the covenant described, and that set out. 1 Chitt. Plead. 415. Instead of this course the defendants after oyer, pleaded that the arbitrators made no award of and concerning the premises in the covenant mentioned. The plaintiff replied setting out the award and charging the non-performance of the award as a breach of the covenant. To this there was a general demurrer, which being overruled, the defendants pleaded covenants performed; and on the trial of that issue, moved to exclude the bond. The court overruled the motion: and, without touching the general question whether the variance was material, I think the court was right, upon the ground, that the defendants by their oyer, made the bond a part of the record, indeed, (the books say) a part of the declaration; and could not afterwards object to its going to the jury. It was to the bond set out that they pleaded.

1 Chitt. Plead. 420; 1 Wms. Saund. 316; 497 Jeffery v. White, 2 Doug. 476; * Ld. Raym. 1541; Cro. Car. 209. Therefore, upon the first point, I think there was no error in the hustings court.

This, indeed, was not the point on which the superior court reversed the judgment. It says, "it seems to the court here that the said judgment is erroneous in this, that the appellee's replication to the appellants' plea, and the matters therein contained, are not sufficient in law, for the appellee to have and maintain his action." &c. in other words, that there was no good award. This is the serious question in the cause.

Two objections were taken to the award; 1. that it was not mutual; 2. that it was of matters not submitted, and so beyond the authority of the arbitrators. This last I think is the only question which need be considered: for the only object of the mutuality here spoken of, is, that by a compliance with the award, both parties shall be discharged, and all matters settled; and, in the case before us, if the arbitrators had power to award that the defendants should pay the money to the plaintiff, a payment under the award would discharge the bond of submission, and clear them forever of the demand.

The question then is, did the arbitrators overstep the limits of their power? Our cases as well as the English say, that awards are to be literally and favourably construed; that all the provisions of the statutes of jeofails apply strongly to these judgments given by this domestic forum, these judges of the parties own choosing. Thus in Richards v. Brockenbrough, this court said "Every thing is to be presumed in favour of awards." Let us look at the submission. Who are the parties submitting? "Archibald Armstrong of the one part, and Richard and Archibald Armstrong of the second part." They say "a dispute has taken place between the said parties in relation to killing a parcel of hogs in Richmond, and the parties being desirous of settling the matter of difference between them &c. have chosen O. M. and F. A. M. to settle all difference between the said parties, and fix the amount to be paid to 498 either party," &c. To be *paid to either party, by whom? by the other party, of necessity—there are but two parties; A. A. the one; R. and A. A. the other. The arbitrators say, "On settlement of accounts, between A. Armstrong & Co. as per bond &c. it appears that A. Armstrong junior is indebted to A. Armstrong senior, 127 dollars, that is, allowing said A. A. junior, all the lard taken or made by said firm—And whereas R. A. one of the parties to the said bond, has sued A. A. senior on his own account &c. we do order and award, that 16 dollars and half the costs, shall be deducted out of the balance due A. A. senior, and the balance to be paid over to him by the above parties," &c. The objection (as I understood it) is, that the arbitrators, after finding that A. A. junior owed this money, have awarded, that he and R. A. shall pay it—and also have undertaken to arbitrate concerning a demand of R. A. in his own right, against A. A. senior. As to the first, I did not un-

derstand it to be charged as misbehaviour, or partially in the arbitrators, to direct R. A. to pay the debt of A. A. junior: and how could it be going out of the submission? Richard and Archibald junior make but one party: and they bind themselves to pay whatever shall be adjudged to the other party; not that Archibald junior shall pay what he may owe, and Richard what he may owe, but that they two, as one party, shall pay—Why did Richard join with Archibald junior? Surely, either as a part of the firm, on which Archibald senior had this demand, or as surety for Archibald junior. In either capacity, it was proper that the award should bind him to pay as this court said in *Richards v. Brockenbrough*. We are also to make all fair presumptions in favour of the award. Must we not then presume, that the arbitrators had before them unquestionable evidence, that R. A. was bound (either as principal or surety) for this debt? Can we presume, that they would say A. A. junior alone owes this debt, yet we will make R. A. jointly liable with him? This would be to presume against, instead of in favour of, their award. Again; is not this presumption assisted by the fact, that after

499 "the award was rendered, the parties all signed and sealed it, and the arbitrators attested this. Was not this a sort of assent to the award? If Richard had been unjustly and contrary to his submission, awarded to pay the debt of A. A. junior, would he not at once have revolted? As to the 16 dollars private debt of Richard, if we say he was bound for the whole 127 dollars to Archibald senior, this part of the award is wholly in his favour, and he cannot object; in his favour, because it gives him a judgment for his whole demand, and makes it a discount from the 127 dollars, which he is awarded to pay.

The other judges concurring, the judgment of the circuit court was reversed, and that of the hustings court affirmed.

Martin v. Lindsay's Adm'rs.

November, 1829.

Usurious Debt—Secured by Deed of Trust.—M. borrows money of L. on usury, and by deed of trust conveys land to a trustee, with power to sell the subject, when required after debt should fall due, and raise money to pay it; the lender dies; his adm'rs require trustee to sell trust subject; the borrower exhibits a bill in chancery, charging the usury, requiring defendants to answer the charge, insisting that the deed of trust is null and void, and praying injunction to restrain trustee from

***Usurious Debt—Deed of Trust to Secure.**—The principal case follows (*CARR, J.* dissenting) *Marks v. Morris*, 2 Munf. 407, which case holds that, where a bill in equity is filed to stay proceedings upon a usurious deed of trust, on the ground that the complainant had no opportunity at law to plead the usury, and prays for no discovery, but on the contrary, is ready to prove the fact, the court ought not to grant him relief against the usury, upon the condition of his paying the principal sum of money (without interest), but should altogether enjoin the trustee from selling, until, by some proper proceeding to be instituted by the *cestui que trust*, he establishes the validity of his contract: in which case, the injunction should be dissolved; and, in the contrary event, perpetuated.

In *Fitzhugh v. Gordon*, 2 Leigh 627, 629, the principle of the principal case and *Marks v. Morris* is reviewed, and the court was divided. The principal case is cited and approved in *Turpin v. Povall*, 8 Leigh 97, 100, 108. It is also approved by *Brooke, J.* in *Bank of Washington v. Arthur*, 3 Gratt. 186. The

selling; the adm'rs of the lender and the trustee disclaim all knowledge of the usury; but the usury is proved by one witness: *HELD*, that in such a case, the court of chancery should enjoin the trustee from selling the trust subject, till the creditors claiming under it should establish its legal validity in some proper forum where the debtor may have opportunity to contest it—*dissentiente CARR, J.*

This was a bill in the county court of Orange, in chancery, exhibited by Martin against the administrators of Lindsay and Sale—setting forth, That on the 6th October 1818, he borrowed of Lindsay, in his lifetime, 320 dollars, upon usury at the rate of twelve per cent. per annum; and conveyed a tract of land to Sale, in trust to secure the payment to Lindsay of 358 dollars and 40 cents (being the sum borrowed with one year's interest at twelve per cent.)

500 *On the 6th October 1819. That Lindsay being dead, his administrators had required the trustee, Sale, to sell the land, under the deed of trust, to satisfy the debt; and he had advertised it for sale accordingly. And that the deed of trusts being usurious, was therefore null and void. The bill called on the defendants to answer its allegations on oath; and prayed, that the trustee might be enjoined from proceeding to sell the trust subject; and general relief.

The injunction was awarded.

The administrators of Lindsay, in their answers, disclaimed all knowledge of the usury; and declared, that they asked and wished no more than the principal and such legal interest as was justly due. The trustee, Sale, (though he wrote the deed of trust) also answered, that he had no knowledge of any usury.

The usury was explicitly proved, as charged in the bill, by one witness.

The county court decreed, that the injunction should be so far dissolved, as to allow the defendants to raise, by sale of the trust subject, the principal sum borrowed, viz. 320 dollars, without interest; and they gave the plaintiff the costs of this suit, to be set-off against the debt.

From this decree, Martin appealed to the superiour court of chancery of Fredericksburg; which corrected the details of the decree in some particulars, but approved and affirmed the principle of it. And then Martin appealed to this court.

The case was argued here by Michie for the appellant; there was no counsel for the appellee. The question presented by the case was as to the mode and measure of relief; and it brought in review, the cases of *Marks v. Morris*, 2 Munf. 407; *Stone v. Ware*, 6 Munf. 541; *McPherrin v. King*, 1 Rand. 172; *Young v. Scott*, 4 Rand. 415.

CARR, J. This case is exactly that of *Marks and Morris*, and brings under review the correctness of that decision.

501 *It is there decided, that the third section of our statute against usury, is limited to the case of bills of discov-

principal case is discussed in *Davis v. Demming*, 12 W. Va. 265, 266, 267, 274, 275, 276, 280, where it is held that, the 10th section of chapter 141, Code of Va. of 1860 is applicable only to bills to prevent the sale of property conveyed by a deed of trust to secure a usurious debt. The principal case is also cited in *Spengler v. Snapp*, 5 Leigh 499, 508. See monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 698.

ery, where, from defect of evidence, the plaintiff is compelled to resort to the conscience of the defendant; that the bill there, was not of that class, because it did not offer to return the principal, nor pray that the usurious notes, might be given up; and so far from a defect of evidence, averred, that the plaintiff could prove the usury, by a witness whom he names: and the court decided, that, as the case was not within the statute, as the plaintiff wanted no discovery, but only that the trustee should be stayed from selling, till the usury could be inquired into at law, the chancellor ought not to have imposed on him the loss of the principal sum, but should have enjoined the sale, until the defendant should before some competent tribunal, establish the validity of his contract; in which case, the injunction should be dissolved; and, in the contrary event, perpetuated. This case was decided in November 1812, by three judges, who were unanimous. In March 1820, the case of *Stone v. Ware and Smith* was decided by four judges, unanimously. Ware owed Smith a debt: Stone the younger owed Ware a debt: Ware (by the terror of an execution) obliged Stone to agree to give him fifteen per cent. for a forbearance of twelve months—and to procure his father to execute as principal (with Stone the son, and Ware, as sureties) a bond to Smith (who was ignorant of the usury) for the debt with the fifteen per cent. included. Smith got a judgment on the bond; and the Stones filed a bill injoining it on the ground of the usury. The cause was argued in this court twice, very elaborately; the second argument was by direction of the court on two points, 1. Was the contract usurious? 2. If so, must there be a forfeiture of the whole debt, or only of the usurious interest? In the last argument Marks and Morris was expressly brought to the view of the court. The decision was, that the bond to Smith, being taken to secure a just debt, without any knowledge of the usury, was not affected by it: but that as to Ware 502 *the usury being proved upon him, the Stones must be relieved, upon the terms, however, of their paying to Ware "the principal justly due him with legal interest." This case I know, was considered by some of the profession at the time (and I think justly considered) as shaking Marks and Morris, in a material point. That case had decided that where the borrower wants no discovery, but from the form of the contract has no day in court, equity will give him a day, without making him pay the principal sum. In *Stone and Ware*, the borrower had no day in court, for it was decided that the usury could not avail against Smith. Yet equity, (as the price of its aid) made him pay the principal sum with interest.

Next came *McPherrin v. King*, heard April 1822, by three judges. This was in all its material features like *Marks and Morris*. The loan was secured by deed of trust, and the bill stated that the usury could be proved by disinterested testimony. The opinions of the judges, (each differing from the others) shew how unsettled the law of the subject was: and they all declare, that the great question discussed could not be

decided by a bare court, but would be held open for future consideration: and judge Roane remarked, that "the question was very important, and its importance enhanced by the circumstance, that the counsel have arrayed two of the decisions of this court against each other." (These were *Marks and Morris* and *Stone and Ware*.) The publication of this case, tended still further to impeach the authority of *Marks and Morris*.

In 1826, the case of *Young v. Scott* was decided. There were only three judges. Two were of opinion that "in all cases, where a party applies to equity for relief against usury, whether he calls for a discovery, or avers his ability to prove the usury, he can only be relieved on the terms prescribed by the third section of the statute."

I have stated these cases to shew the exact situation of the subject. They clearly evince, that *Marks and Morris* has long been considered an open case, and the 503 measure of *relief in cases of usury, a question wholly unsettled. And this being so, I sincerely lament, that the point has again come before us, when one of our brethren, and all the elder members of our bar, are attending a higher duty in another place. I shall however, give, as briefly as I can, my view of the case of *Marks and Morris*.

The opinion of the court represents the bill in that case, as seeking no relief from the usury, by the decree of the court of equity, but merely that equity would injoin the sale, till the fact of usury should be tried in some proceeding at law. It struck me, as strange that a bill should be thus framed by counsel; for so far as my researches have gone, the annals of jurisprudence furnish no precedent for it. I was therefore induced to examine the original record; and it is now before me. After stating the case, with the facts constituting usury, the bill proceeded thus: "And your orator is advised, that by the laws of the land, the aforesaid deeds of trust, being conveyances and assurances for the payment of money loaned, on which a higher interest is reserved, than six dollars for the forbearance of a hundred dollars, and after that rate; such deeds are not merely voidable, but are ipso facto utterly and absolutely void; and, consequently, that any sale under them, would be of no effect in law or equity." And the prayer was, "that the sale of property might be forthwith stopped; that all proceedings under the said deeds of trust might be enjoined, and the trustee inhibited from selling, and the same by a decree of this court declared null and void." General relief is then prayed. This seems to me, not an application merely to stay the trustee, till another forum could decide on the usury; but a direct appeal to equity for ultimate and final relief.

But, upon the supposition that in this I am wrong and the court right, I will proceed to examine the reasons of their opinion.

The court lays it down, 1. That, in a bill to perpetuate testimony touching a ques-

tion of usury, equity will not impose
504 *conditions on the plaintiff, and cites, in support of this position, *Suffolk v. Green*, 1 Atk. 450. It is very true, that in that case lord Hardwicke overruled a demurrer to a bill to perpetuate testimony as to a bond charged to be usurious. The demurrer was on the ground, "that the bill sought to subject the defendant to a penalty and though, on the plaintiff's own shewing, there was a large sum lent, he does not offer to pay what was really due." The demurrer was overruled, because it went too far, and being bad in part, was void in toto. But is there any resemblance between a bill to perpetuate evidence, and the bill in *Marks and Morris*? To my understanding, they are wholly different. That is a proceeding merely to enable a party to examine a witness *de bene esse*; to guard against the accident of death, in a case where he cannot immediately have an investigation in a court of law. The only reason why the bill need state the subject, and the facts to which the witness is to be examined, is, to shew the plaintiff's interest, and therefore his right, to perpetuate the evidence, and also to shew, that he who is made defendant is interested in the subject matter. But the defendant is not called on to answer: if he be, he may demur. Thus in the case of *Suffolk v. Green*, lord Hardwicke says, "so far as the present bill, prays the defendants to put in an answer, so far it is a bill of discovery, for the answer must necessarily go to the usury charged in the bill. The defendants (he adds) have demurred to so much of the bill as seeks any discovery, and to perpetuate the testimony. As to the first part, that it would subject the defendants to a penalty, the demurrer is proper, and if it had gone no farther, must have been allowed as an usual case." Now, in *Marks and Morris*, the bill, after setting out the usurious contract, and making defendants, prayed, "that they on their corporal oaths, might full, true and perfect answer make. to the premises, as fully as if the same, were therein again, particularly set forth and expressed;" thus directly demanding an answer to the very fact of usury.

(And the bill in the case be-
505 fore us has the *same demand.)

It is possible, then, to bend the case of *Suffolk and Green*, into an authority supporting *Marks and Morris*? On the contrary, does it not shew, that *Marks and Morris*, demanding an answer to the usury, without waiving the penalties, was demurrable; unless you could bring the case within the third section of our statute, where the law waves the penalties, and thereby, perhaps, dispenses with the necessity of a waiver in the bill; but the court went upon the express ground, that *Marks and Morris* was not within the third section.

2. The next position of the court was, that on a bill for a new trial, where the judgment has been obtained, by surprise or accident in a case of usury, equity will impose no conditions, but simply grant the new trial, in which the whole contract may be vacated, if the usury be proved. I understand the court here to mean, that upon the new trial, if the jury find the usury, the

court of law will render judgment for the defendant, and make an end of the cause, without certifying the verdict to the court of chancery, to be proceeded on there. This is new doctrine to me; and seems to violate both principle, and practice. I find it laid down in many books, that equity cannot set aside a judgment at law: it can on a final hearing order a plaintiff to enter satisfaction; but this is not acting on the judgment directly. It is a power which equity exercises over the person, and evil conscience of the party: but the party may refuse, and stand out in contempt. So, equity may decree a perpetual injunction; but this operates in the same way; not touching at all the jurisdiction of the common law courts, or assuming appellate power. Thus in *Barnes v. Powell*, 1 Ves. sen. 284, lord Hardwicke says, "though this court cannot set aside a judgment of a common law tribunal, obtained against conscience, yet it will decree the party to acknowledge satisfaction on the judgment though he has received nothing." Every new trial which is granted, is of necessity preceded by setting aside the judgment (if one has been rendered) and verdict, and reinstating
506 the cause. The court of law, *without these steps, cannot have possession of the cause, as it had before. But as equity cannot set aside the judgment, how can it replace the cause on the law docket, and enable the law court to render another judgment on it? It has not the power (as I conceive) nor can I find, that it has ever attempted to exercise it. What it does in such cases, is, to entertain the bill, injoin the judgment at law, till further order, and if a proper case is made, direct a new trial of the issue. This it may do, either in the same or a varied form, and in the same or any other court: in all such cases, the law court has nothing to do, but preside over the trial of the issue, and certify it to the chancery court; which, on the final hearing, administers relief (if at all) on its own principles. *Wilson v. Rucker*, 1 Call 500; *Ross v. Pynes*, 3 Call 568. Thus, if judgment be recovered on a bond given on a usurious contract, and the obligor files a bill, stating the usury, and that he had summoned a witness who would have proved it, but he fell sick on his way to court, which, not being known to him, a judgment was obtained on the bonds &c. equity will award an injunction. If the defendant by his answer, confesses the usury, an end will be made of the case at once: if the answer denies the usury, the court will order a new trial of the issues; and if usury be found, will (as I suppose) dissolve the injunction, except as to the usury, interest on the principal sum, and the costs in equity. Or, perhaps, the more correct practice would be, to grant the injunction at first, only for the usurious excess, the interest, and such a sum as would probably cover costs. But, in no such case, could the court of law, or would equity "vacate the whole contract." This would violate two of the fixed and fundamental maxims of equity: that he who asks equity shall do it to the same person; and, that equity will never lend its aid to enforce a penalty. It is

under this second head, that unless the bill waves all penalties, a demurrer will hold. Under the first, it is the uniform, unvarying practice of courts of equity, never to relieve against judgments, no matter
507 how gross the fraud *by which they were obtained, but upon the terms of the defendant paying what is justly due; and the same rule applies to any other security binding at law: he who asks equity must do it. It is scarcely worth while to quote cases to prove this: it is laid down in *Smith v. Burroughs*, 2 Vern. 346, and many other books. Nor does the measure of this relief depend at all on any appeal to the defendant's conscience, or discovery made by him: the rule is precisely the same, whether the case be made out by the discovery of the defendant, or by evidence aliunde. These are mere modes of arriving at truth, and do not affect the principle on which the court proceeds. In all cases, the plaintiff has a right to compel a disclosure from the defendant, provided he does not thereby subject himself to fines, forfeitures, pains or penalties. These are the only grounds of exception; and his confession entitles him to no advantage, save this, that to overweigh his answer (where in his own favour) there must be two witnesses or one with circumstances. These principles are general, and apply as well to cases of usury as others. A defendant, therefore, by confessing the usury, gains nothing, nor can a plaintiff by proving it aliunde, absolve himself from the necessity of doing equity when he asks it.

That this rule* requires of a borrower to return the principal sum, courts of law, so far as their forms will permit, and courts of equity throughout, have proclaimed. We know, that there are actions at law, which are called equitable actions: assumpsit for money had and received, is of that class, and has been likened to a bill in equity. The case of *Tomkins v. Bernet*, 1 Salk. 22, was an action of assumpsit for money paid on an usurious contract: and lord Mansfield, speaking of it (in *Jones v. Barkley*, 2 Doug. 697,) says, "the case must have been to recover back what had been paid in part of principal and legal interest upon an usurious contract; and, therefore, the action would not lie; for so far as principal, and legal interest went, the debtor was obliged, in natural justice, to
508 pay; therefore, *he could not recover it back. But for all above legal interest, equity will assist the debtor to retain, if not paid, or an action will lie to recover back the surplus if the whole has been paid." Again; in *Fitzroy v. Gwillim*, 1 T. R. 153, goods were pawned as a security upon an usurious contract: the borrower brought trover for the goods: lord Mansfield said, "This is an equitable action brought by the plaintiff, in order to be relieved from an usurious contract. She must come, therefore, with clean hands, according to the principle laid down in *Bosanquet v. Dashwood*, that those who seek equity, must do equity. It was there determined that a court of equity would afford relief in such cases upon payment of principal and interest. A lender upon an usurious contract, is precluded from recovering any

thing upon such contract; but if a borrower seek relief, he must first do what is right as between the parties. Here the plaintiff did not tender what had been actually advanced, and cannot therefore have the benefit of this equitable action." Buller and the court agreed with him. This is the language of the court of law.

Turning now to the cases in equity, I shall cite a few to shew that they have been uniform and decisive to the same point. And here the difficulty is, which to select among the multitude that offer. In *Henkle v. Royal Exchange Co.*, 1 Ves. sen. 317, lord Hardwicke lays it down as a general rule, that neither law nor equity will relieve a party to an illicit contract: "But (he says) one exception occurs, in which equity differs from the common law; and that is the case of usury, in which equity suffers the party to the illicit contract to have relief. But that depends on a distinct reason; that whoever brings a bill in a case of usury, must submit to pay principal and interest due, on which the court lays hold, and will relieve; with this further reason, that this court considers usurious contracts, in somewhat a different light from what a court of law does; which considers them upon the foot of the statutes, but this court, as a fraud and advantage taken of necessitous persons." In
509 **Brownword v. Edwards*, 2 Ves. sen. 246, and *Pit v. Cholmondeley*, Id. 567, lord Hardwicke speaks the same language. In *Scott v. Nesbit*, 2 Bro. C. C. 649, and 2 Cox. 183, there was a judgment at law, and application to equity to set it aside for usury: and lord Thurlow said, "I take it to be a universal rule, that if it be necessary for you to come into this court, to displace a judgment, you must do it upon the equitable terms of paying the principal money really due, with lawful interest; and upon the best consideration I have been able to give the case, I have no idea of doing it upon any other terms." After a few other remarks he concludes thus: "But at any rate, I consider it as a universal rule, that you shall not, in this court, set aside a judgment at law, without offering complete equitable terms, that is to pay principal, with legal interest." In *ex parte Scrivener*, 3 Ves. & Beam. 14, lord Eldon holds the same language: "at law (he says) you must make out the charge of usury; and in equity, you cannot come for relief, without offering to pay what is really due; and must either prove the usury by legal evidence, or have the confession of the party."

With respect to the case of *Cook v. Jones*, 2 Cowp. 727, relied on by this court in *Marks v. Morris*, it is one of a class of cases, of which the books furnish us with some six or seven, viz. *Middleton v. Hill*, Cro. Eliz. 588; *Bush v. Gower*, Ca. Temp. Hardw. 233, 2 Stra. 1043; *Machin v. Delaval*, Barnes's notes 52, 277; *Mathews v. Lewis*, 1 Anstr. 7; *Edmondson v. Popkin*, 1 Bos. & Pull. 270; *Hindie v. O'Brien*, 1 Taunt. 413. These were judgments confessed on warrants of attorney; and an examination of them will shew, how fluctuating and unsteady the practice of the common law courts has been with respect to them. In

one, after the jury had found the usury, they ordered the power of attorney and bond to be delivered up: in another, they refused to interfere, saying it was usurping equity jurisdiction: in *Hindle v. O'Brien*, on a motion to set aside the judgment and direct an issue to try the usury, the
510 other *party admitted the usury; and this rendering an issue useless, the court granted relief upon the principles of a court of equity, compelling the defendant to pay what was really due with legal interest. In *Cook v. Jones*, the issue was directed; but we have no farther report of the case, and therefore do not know what was the result, whether the usury was proved, and if so, what relief the court of K. B. gave; but when we remember the opinions of lord Mansfield and the court, in the two cases above quoted, we may presume, that they would give none but equitable relief. But, whatever may be the course of the law courts, it is surely no precedent to regulate courts of equity, which administer relief upon their own principles. This very case of *Cook and Jones*, was cited in the argument of Scott and Nesbit, before lord Thurlow: in his opinion, he merely mentioned the case, and remarked, that there were several cases, where, upon judgments, the courts of law had directed issues to try the question of usury; and then he went on to lay down the universal rule in equity, in the strong language above quoted.

The case of *Fanning v. Dunham*, 5 Johns. Ch. Rep. 122, was precisely like *Marks and Morris*; the usurious debt was secured by a mortgage having a power of sale, by which it could be executed without coming into equity; the sale was advertised, and the borrower filed his bill for relief: chancellor Kent reviewed all the cases both at law and in equity, and concluded that there is no relief in equity but upon paying principal and interest. "It is perfectly immaterial (he says) in respect to the application of the principle to the case of the debtor who sues here, whether the usury be confessed by the defendant in his answer, or be made out by proof. The plaintiff must still consent to do what is just and equitable on his part, or the court will not assist him, but leave him to make his defence at law as well as he can."

3. It is laid down by the court in *Marks and Morris*, that, from the power of the trustee to sell, the borrower is deprived of the possibility of defending himself at law by proving the usury, and the statute
511 repealed as to deeds of *trust, unless equity will, without imposing conditions, stop the trustee, until a court of law can try the usury. But is it true, that the borrower has no mode of defending himself, and pleading the usury without this interposition? I think not. He has given a deed of trust on his land; but he retains possession; that is never taken from him till the sale. Let him hold on still, and forbid the sale; and if the trustee sells, the vendee must bring ejectment, and on the trial of that, I hold that the defendant may shew the usury and defeat the deed, and the whole proceeding under it. This cannot be denied. But it is said, this course would

subject the borrower to the hazard of great loss; because the sale of the land, under such a cloud, would be at far less than its value, and then he might fail in the proof of the usury, and the vendee recover in the ejectment. But, how can we suppose he could fail in the proof, when it is a part of his case that he is full handed, and therefore wishes no discovery; and when it is solely because he wants no discovery, that his case is attempted to be taken out of the third section of the statute? And suppose it conceded, that deeds of trust do deprive the borrower of all chance of shewing the usury at law, and do so far elude the statute as to ensure to the usurer his principal, in all cases where these securities are given: would this authorise the court to remove the great land marks, to reverse the fundamental principles of equity? to make it the instrument of enforcing penalties, instead of relieving against them? I trust, that in the appropriate forum, none are prepared to go further than I, in enforcing the statute of usury to its full extent; and I may refer to the case of *Whitworth and Adams* and others, as evidence of this: but even to effect this important end, I cannot consent to violate principles, which chancellors hold sacred, and to transfer to equity the functions of the law courts. If this is to be done we must call in the legislature. It is the folly of the party to execute such a deed as places him beyond the reach of the law courts. He is just in the same situa-

tion, as if he had paid the usurious
512 *claim instead of resisting it; in which case, he can recover back only the usurious excess. The law has put it in the power of every one, who has not deprived himself of the means, to plead the usury, and avoid the whole contract: but if by his own act, or by accident, he has lost these means, he has still the power, by the aid of equity, and under our statute, to procure relief from the usurious exaction, by the payment of the principal received, clear of all interest and costs. In this situation of things, though anxious for the suppression of usury, I am still more anxious to restrain equity within those limits, and to preserve to her those attributes, which have been consecrated by the wisdom of ages.

I have proved (if authority can prove any thing) that, in England, where there is no statute law to that effect, the courts of equity had, before the passing of our statute, established the rule, that a borrower at usury, may be relieved, on the terms of doing equity; that is, paying principal and interest. Can it be doubted, then, that this rule, this practice, of the english courts, was meant to be made law by the third section of our statute? I cannot doubt it. The law in my opinion is as broad as the practice, taking in every case, where the aid of equity is asked, whether from defect of evidence, or any other cause.

But, if it were admitted, that the third section of our statute was restricted to bills of discovery, the conclusion would by no means follow, that in every other case the plaintiff would be absolved from paying the principal borrowed: on the contrary, the equity rule being that in all ap-

plications to that tribunal for relief from usury, the borrower must pay principal and interest; if our statute takes bills of discovery only out of that rule, it follows that in all other cases, both principal and interest must be paid. But my opinion is that our act takes in all cases.

Upon the whole, I am firmly convinced, that Marks and Morris is not law, either taken generally, or restricted in its application to deeds of trust. In the case before us, I think the decree ought to be affirmed.

513 *BROOKE, P. The facts of this case bring it within the principle on which the case of Marks and Morris was decided. After the lapse of seventeen years, during which that case has been considered as settling the principle in all similar cases, it was to be expected, that it would not be disturbed, especially as it has been indirectly sanctioned by the omission of the legislature to interfere, a great portion of the members of which have been conversant with it.

It is of more importance to decide the causes in this court, than to settle or unsettle the law: therefore, I shall review the case of Marks and Morris, very briefly.

I cannot think, that that case violated any of the principles of equity, which have been so much insisted on. The court that decided it, were not unmindful of those principles; and its capacity to distinguish and apply them, will best be tested by a short examination of the case itself.

It did not (as I understand it) violate the principle, that a court of equity will not lend its aid to enforce a penalty. In the cases to which that principle is applicable, equity refuses its aid, because it is the peculiar province of the courts of law to enforce penalties; and there has been no necessity, in any of the cases which have been determined on that principle, for equity to open the door of the courts of law, to the party asking its aid. The principle, that he who seeks equity must do equity, had as little application to the case of Marks and Morris; for, there, no relief was to be granted on the merits, though prayed for in the bill. Neither did the case touch any principle applicable to bills for discovery of usury, or to bills to perpetuate testimony: the aid afforded by the court, was not at all of the nature of the aid prayed in a bill to perpetuate testimony; and the bill was not framed on the third section of our statute against usury, relating to bills for discovery of usury. The court only gave its aid, to prevent a sale of the plaintiff's property, under a deed of trust charged to be usurious, until that controversy could be tried in a court of law, or until the defendant should himself

514 resort to the court of equity, *to ask its aid to sell the trust subject under the deed of trust, as in the case of a mortgage, and thus present the question in controversy to the chancellor for adjudication. The court said to the defendant, You shall not execute your deed of trust, by a sale of the plaintiff's property, before he has had an opportunity to contest the validity of the contract, before some competent tribunal; which, but for the contract being in the form of a deed of trust, you could

not deprive him of; and you shall not avail yourself of the mere form of the contract, to deprive him of the opportunity to contest the validity of it. Acting diverso intuitu, the court would not, and it did not, forestall the merits of the controversy: it would not look to the consequences of a trial of them: it only held, that there ought to be some opportunity afforded for a fair trial of them. It would not subject the plaintiff, complaining of the usury, to the alternative, of submitting, in silence, to the sale of this property under an illegal contract, before he had had any opportunity of controverting it, or of contributing to that sacrifice of his property, which would result from giving notice of the usury, in the event that he should not be able, after the sale, to prove the usury in a court of law. To impose the first alternative on the plaintiff, would have been to subject him to a penalty, for not paying the money secured by the deed of trust; that is, to a sale of the trust subject, before the validity of the contract was tried in some competent court, as in the case of a mortgage; and the latter alternative would have exposed him to a controversy with the purchasers under the deed of trust, which ought not to have preceded the controversy concerning the validity of the contract; and would have exposed the purchasers to danger, in the event that the usury charged should have been afterwards proved.

The deed of trust, in short, presented a new case, that was to be met by a principle, which, violating none of the established rules of a court of equity, was essential, as well to the policy of the law, as to the justice of the particular case; the principle, namely, that a party shall not, 515 by the *form of his contract, evade a controversy concerning its legal validity, and thereby subject his adversary to consequences from which the law intended to protect him. The interference of the court in Marks and Morris, was, then, clearly within the province of a court of equity; which, though it would not, in such a case, enter into the merits of the controversy, would so far aid the plaintiff, as to send or leave the case to the proper forum.

CABELL and COALTER, J., concurred in the opinion of the president: and the decree of this court reversed the decrees both of the chancellor and of the county court, remanded the cause, and ordered, that the injunction should be reinstated, until the appellees should establish the validity of the contract in some proper tribunal; and in that event, that the injunction should be dissolved, and in the contrary event perpetuated.

516 *Markham's Adm'r v. The Commonwealth.†

April, 1830.

Officers of State Navy.—Half Pay.*—An officer of the state navy during the war of the revolution, who was taken prisoner in April 1781, and remained

*Officers of State Navy.—Half Pay.—The principal case is cited in Lilly v. Com., 1 Leigh 585. Com. v. Marston, 9 Leigh 39, and Tatum v. Com., 9 Leigh 58, by PARKER, J., and approved.

†The reporter hesitated, whether this and Lilly's case (which follows it) were proper to be reported: since they depend on laws and on circumstances

prisoner of war unexchanged till end of war, entitled to half pay for life, under act of May session 1779.

Same—Same—Interest.—Officers of state navy entitled to half pay for life, not to be allowed interest on the same.

Same—Same—Full Pay for Five Years in Lieu of.—Officers of state navy not entitled to the commutation of five years full pay with interest thereon, in lieu of half pay for life.

William Duval administrator of James Markham deceased, who was a captain in the state navy of Virginia during the war of the revolution, presented a claim against the commonwealth, to the auditor of public accounts, for the amount of the decedent's half pay for life, under the acts of assembly of May session 1779, ch. 6, and May 1780, ch. 27 (10 Hen. stat. at large, pp. 25, 298,) or for the commutation of five years full pay. The auditor rejected the claim. Markham's administrator appealed from his decision, to the circuit court of Henrico, by which it was approved and affirmed; and from this judgment he appealed to this court.

The case was argued here, by Stanard, J. M'C. Wickham and Leigh, for the appellant, and the Attorney General, for the commonwealth. The state of the case, the several acts of the legislature, and of the executive, on which it depended, and the points of argument, are very fully stated in the opinion of the court, which was delivered by

517 **GREEN, J.** The facts of this case appear to be these: *James Markham was a captain in the Virginia navy as early as 1779, and continued in actual service until April 1781, when commanding the Tempest, lying in James river, not far below Richmond, his ship was captured, and he taken prisoner, by a detachment of the british army, under the command of general Philips; and he, together with some officers of the Chesterfield militia, and one of his lieutenants, taken prisoners at or about the same time, were paroled on the 28th April 1781. He continued an unexchanged prisoner of war, until the return of peace. The copy of the instrument of parol in the record is dated Camp Osborne's, April 28, 1780. But this is an obvious mistake in the year: for the instrument states, that the prisoner was made so by the british troops under the command of major general Philips, and that Markham was a captain of the navy, commanding the Tempest. The certificate of major Harris, one of the prisoners, states, that he and Markham, with several others, were made prisoners by a detachment of general Philips's army, under the command of general Arnold, and paroled on the 27th April 1781. It is too, an historical fact, that Arnold invaded Virginia late in December 1780, and was in Richmond early in

peculiar and local, and therefore involve no general principle: but having observed, that the want of reports of former cases of the kind, had proved very inconvenient and troublesome, both to bench and bar, he thought it best to report them. They are reported here, earlier than in the chronological series of decisions they should be, in order to give early, general and accurate information, to persons having like claims, dispersed over this and many other states of the union.—Note in Original Edition.

*Claims against Commonwealth—Interest.—The principal case is cited in Auditor v. Dugger. 8 Leigh 248.

January 1781, when he returned to Hampton, where he remained until the arrival of general Philips in April; when the whole force under the command of general Philips moved up James river. And the particular engagement, in which several vessels were destroyed, and these prisoners were taken, is noticed in the histories of the war. Besides, it appears, from the cotemporary acts of the government, that in June 1780, the Tempest was not in a condition for service, and with other ships was then ordered to be repaired, manned, and made ready for the defence of the bay and sea coast, against the apprehended invasion which afterwards took place.

The act of May 1779, ch. 6, "concerning officers, soldiers, sailors and marines," provided, that the officers of the army, both in the state and continental lines, who should serve until the end of the war, 518 and also supernumerary officers, *under certain circumstances, should be entitled to half pay during life, to commence from the termination of their command or service. This act did not extend to the officers of the navy. But, in the session of May 1780, an act passed (ch. 27,) founded upon a series of resolutions, reported by a committee; two of which were in these words: "Resolved, that there be a reform in the navy officers, retaining in the service as many as shall be necessary to command the armed vessels belonging to the commonwealth, of such as are most able and best qualified for the navy service; and that, for the purpose of making this reform, a board shall be constituted, to consist of the commissioner of the navy, and six navy captains, the most approved for their ability, which six captains, shall previous to their appointment to this board, be fixed in their command by the governor with the advice of council"—And, "resolved, that all commissioned officers, the master surgeon and surgeon's mate, in the service of the navy, be entitled to half pay during life, under the same restrictions and limitations as are included in the act of assembly 'concerning officers, soldiers, sailors and marines.'" The act founded upon the string of resolutions, of which the foregoing are a part, followed them, in the main, literally; and, in those respects in which it departed from the phraseology of the resolutions, were indistinct as to the particulars, in which the resolutions were distinct. It seems indeed as if it had been framed under the mouths of the enemy's cannon. Thus, the matter of the two resolutions above quoted, are framed in the act, in this form: "And whereas it is necessary, that no officer should be retained in the marine department, but such as are properly qualified, in order, therefore, to produce this reform, Be it enacted, that a board shall be appointed by the governor with the advice of council, to consist of the commissioner of the navy, and of six of the captains the most approved for their ability, any four of whom, together with the said commissioner of the navy, shall be sufficient to constitute the said board, having 519 been first fixed *in their command in the navy, by the governor with the advice of council; and which said six cap-

tains, previous to their appointments to the said board, and before they proceed to business, shall take the following oath: I, A. B. do swear, that I will well and truly discharge the trust in me reposed, for the purpose of producing a reform in the navy, agreeable to the intention of this act, and that I will do the same to the best of my skill and judgment, without favour, affection or partiality." And this is every word in the act touching this subject of reform in the navy. The act proceeds (pursuant to another of the aforesaid series of resolutions) to authorise the appointment of captains and other officers and the enlistment of marines; and then proceeds: "And be it further enacted, that the said captains, together with the subalterns, and all other commissioned officers of the navy, the master surgeon and surgeon's mates, shall be entitled to the same pay and rations, the same privileges and emoluments, and rank in the same degree with the officers of the like rank belonging to the regiments heretofore raised for the internal defence of this state." What was done under the provisions of this act in respect to reforming the officers of the navy, does not appear, the journals of the executive council, from about the time of the passing this act, until January 1781, being lost or destroyed. But it is clear, from the subsequent act of November 1781, ch. 19, (10 Hen. stat. at large, pp. 462, 7,) that it was executed: for the 14th section of that act provides, "that the officers and seamen of the navy of this state, as they stand arranged by a late regulation, shall be entitled to the same advantages, as the officers belonging to this state in the land service agreeable to their respective ranks." The late regulation here referred to, could be no other than that made under the act of May 1780, for the reform of the naval officers. And the above recited clauses of the acts of May 1780 and November 1781, and one found in the act of October 1782, ch. 35, § 3 (11 Hen. stat. at large, p. 161,) providing, that "all officers, seamen, marines, or their representa-

520 tives, *shall be entitled to the same bounty in lands, and other emoluments, as the officers and soldiers of the Virginia line on continental establishment," are the only legislative provisions, under which the officers of the navy could claim to be entitled to half pay for life, under any circumstances. And if any were entitled thereto, it could be only such as were selected and remained in service, according to the regulation made by the board organized under the act of May 1780.

If, therefore, captain Markham was taken prisoner and paroled in April 1780, he could not be so entitled without proof, that he had been so selected; for it cannot be presumed, that in selecting officers for immediate and active service, one in his situation, a prisoner on parole, would have been preferred. But if, as I think was clearly the fact, he was taken prisoner commanding the *Tempest* in April 1781, he was one of those so selected, and entitled to every right conferred on the officers of the navy by the before recited clauses of the acts of 1780, 1781 and 1782.

Was one of those rights that of receiving

half pay for life, upon the conditions prescribed by the act of 1779?

It was insisted, that the legislature had recognized this right as existing in favour of the officers of the navy, in the instance, in which; by a joint resolution of November 31, 1782, they allowed half pay to commodore Taylor for life. That case is however open to this remark, that it appears from the recitals of the resolution, that this was a bounty in consideration of his having received a severe wound in battle, and not as the concession of a right; for he had, in consequence of that wound, retired from the service as early as 1778, and could claim half pay under no construction of the laws whatever. The legislature, however, seemed to admit this right by the act of May 1738, ch. 22 (11 Hen. stat. at large, p. 265,) which directed, "that the auditors should yearly issue to such of the officers of the state line and navy, as are by law entitled to half pay, their warrants for 521 the same." And *the executive have made the same admission, repeatedly; as, by the order in council of January 17, 1782, directing the organization of a board of officers, for the purpose of discriminating such officers, both of the army and navy, as by unworthy conduct or otherwise, be thought unfit to be considered as entitled to half pay, in pursuance of the act of November 1781, ch. 19, § 10, although the act, by its terms, confined such inquiry and discrimination to the officers of the army only: and again, by an order of council of May 13, 1784, organizing a board of officers, for making such a discrimination between officers of the navy only, in respect to whom the former order had not been executed by the former board.

Under this last order of May 1784, the board of officers acted, and made a report, which the executive approved, and transmitted to "the auditors, as their guide in granting half pay to the officers of the navy."

In the mean time, the legislature, by a joint resolution of both houses, having the form of a law, on the 22d December 1783, directed "the auditors not to issue any more warrants for the half pay of the officers of the state line, until the further order of the general assembly." And no further order has since been given by the assembly upon the subject, except that, by the act of October 1790, ch. 21 (13 Hen. stat. at large, p. 131,) it was provided, that, "whereas doubts have arisen whether certain officers hereinafter described, have a right to the compensation of half pay; for the removal of such doubts," it was enacted, "that the same compensation of half pay should be extended to those officers of the state line, who continued in actual service to the end of the war, as was allowed to the officers of the continental line; and also to those who became supernumerary and being afterwards required did again enter into actual service and continue therein to the end of the war; any act or acts to the contrary notwithstanding." The act of May 1783 authorised warrants for half pay to issue to officers of the state line and navy. The resolution of December 522 1783, *prohibited their issuing to

officers of the state line only; not in terms embracing those of the navy: a distinction for which I can conceive no possible reason. The order in council of May 13th 1784, before mentioned, and another of May 27th, transmitting the report of the board of officers to the auditors, as their guide in allowing half pay to the officers of the navy, indicate, that the executive did not consider the resolution of December 1783, as extending to the officers of the navy, nor in respect to them, as suspending the execution of the act of May 1783. But it seems to me, that the case of the officers of the navy came within the reason of that resolution, and was consequently embraced in it; and if so, that resolution being revoked by the act of 1790, as to such officers of the state line as came within the description of that act, was also, upon an equitable construction, revoked as to the officers of the navy of the same description, the revocation being in the same terms as the prohibition—officers of the state line. The only difference between holding that the officers of the navy were, or were not, embraced in that prohibition and revocation, is, that, if not embraced in it, they might claim under the act of May 1779 (if they could claim at all) when they had served to the end of the war, from that time or from the date of their commissions, or being supernumerary, again entered into the service, if required so to do, and continued therein until the end of the war: but if embraced in it, then they could claim (if at all) only under the act of 1790, by shewing that they continued in actual service to the end of the war, or being supernumerary did again enter into actual service, and continue therein to the end of the war—the difference between the two acts, so far as related to an officer who was a prisoner upon parole, being that arising from the difference between the expressions “in service,” and “in actual service.” This difference in the phraseology of the two acts, does not, I think, vary their construction, in respect to the case of a prisoner of war upon parole, who, as was held by the court of appeals in Nelson's case, decided in 1791, was in actual *service,

within the spirit of the act of 1790. Neither the resolutions of December 1873, nor the last mentioned act, presented any impediment to Markham's claim to his warrant for half pay during his life, under the act of May 1783, if he was an officer legally entitled thereto. And being an officer of the navy, selected and retained under the act of May 1780, and having served thenceforth to the end of the war, he was entitled, if any officer of the navy could be entitled, under any circumstances.

I have already noticed that there is no act, which in terms allowed half pay in any case to any officers of the navy. They were allowed the same privileges, emoluments and advantages, as the officers of the army. And but for the cotemporary construction given to those terms by the act of May 1783, and the proceedings of the executive before noticed, I should have thought it extremely doubtful, whether

those expressions included the contingent half pay, as there were many privileges (such as an exemption from taxes during service) emoluments (such as the right to a supply of necessaries of all sorts, at prime cost, through the agency of public functionaries &c.) and advantages (such as having their pay made good from the 1st January 1777, according to the scale of depreciation) to which those expressions might be applied, without embracing the contingent bounty of half pay. And there are other circumstances which seem to indicate, that half pay was not contemplated by the provisions. Yet, upon the whole, the question, as an original one, is so doubtful, that I think the cotemporary interpretation adopted by the legislature and executive, ought now to prevail; and that captain Markham should be declared to have been entitled to half pay during his life, to commence from the time of the general exchange of prisoners, which was the 1st May 1783. Consequently, that the first half pay was due May 1, 1784, the act of May 1783, directing the warrants for half pay to be issued yearly.

After this opinion was announced, two other questions arose, and were argued at the bar: 1. Whether captain 524 *Markham's representative was entitled to half pay for his life, or to the commutation of five years' full pay? 2. Whether he was entitled to interest?

GREEN, J. In all the cases, in which, after the passage of the act of 1790, the district court gave judgment in favor of officers claiming half pay, they were allowed the commutation of five years' full pay, with interest, from the date of the proclamation of peace, at the rate of six per cent. in lieu of half pay. This was founded upon the idea, that the expression in the act of 1790, “as was allowed to the officers of the continental line,” was intended to give those of the state line, the same commutation, which had been given by congress, to the officers of the continental line. And the court of appeals sanctioned this construction; for whilst they reversed almost all the judgments of the general court upon the ground that the officers in question, had not served until the end of the war, and were, therefore, not entitled under the act of 1790, or the previous laws, yet they affirmed the judgments in three cases, in which they held that the parties had served to the end of the war. One of these, was that of Churchill Gibbs, who was taken prisoner in May 1781, and continued a prisoner of war from that time till the end of the war. It was only by force of the provisions of the act of 1790, that commutation and interest, in lieu of half pay for life, could be allowed. That act was confined, in its terms, to officers of the state line, not extending to those of the navy, and the former laws, putting the officers of the navy upon the footing of those of the army, in respect to all privileges, emoluments and advantages, referred only to such as were then allowed them, and not to such as might thereafter be allowed; consequently, officers of the navy could not claim commutation under the act of 1790, and Markham was

entitled to half pay from the 1st May 1783, when he was exchanged, until his death, according to the opinion originally given in this case; but without interest, for the reasons assigned in Lilly's case.

525 *Commonwealth v. Lilly's Adm'r.

April, 1830.

(Absent CABELL, J.)*

Officers of State Navy—Half Pay.—An officer of the state navy of Virginia during the war of the revolution, who became supernumerary before and so continued till the end of the war, entitled to half pay for life, under the act of May 1779.

Same—Same—Limitations.—The act of limitations does not apply to such a claim: nor does the lapse of time, from 1783 when the claim accrued till 1826 when it was asserted, under the circumstances of the case, afford any presumption of payment or of abandonment of the claim.

By the act of assembly of May session 1779, ch. 6, (10 Hen. stat. at large, p. 25,) it was among other things enacted, that "all general officers of the army, being citizens of this commonwealth, and all field officers, captains and subalterns commanding or who shall command, in the battalions raised for the immediate defence of this state, or for the defence of the U. States, and all chaplains, physicians, surgeons and surgeons' mates, appointed to the said battalions, or any of them, being citizens of this commonwealth, and not being in the service of Georgia, or of any other state, (provided congress do not make tantamount provision for them) who shall serve from henceforward, or from the time of their being commissioned, to the end of the war—and all such officers, who have or shall become supernumerary on the reduction of any of the said battalions, and shall again enter into the said service, if required so to do, in the same or any higher rank, and continue therein until the end of the war—shall be entitled to half pay during life, to commence from the determination of their command or service."

And by the act of May 1780, ch. 27, (Id. p. 298,) it was provided, that "the captains, together with the subalterns and all other commissioned officers in the service of the navy [of the state], the master surgeon and surgeon's mates, shall be entitled to the same pay and rations, the same

526 *privileges and emoluments, and rank in the same degree with officers of the like rank belonging to regiments heretofore raised for the internal defence of the state."†

*He was nearly related to persons deeply interested in the question.

†**State Army Officers—Half Pay.**—The principal case is cited in *foot-note* to *Innis v. Roane*, 4 Call 879: *Com. v. Marston*, 9 Leigh 38, 42, 43, 44: *Slaughter v. Com.*, 2 Gratt. 392, and *note*; *Williams v. United States*, 11 Sup. Ct. Rep. 50, 137 U. S. 113. The principal case is overruled in *Tatum v. Com.*, 9 Leigh 56. It is cited at pages 58, 59, 60, 61, 62, 69, 70, 73, 75, 76, 77.

‡**Statute of Limitations.**—See *monographic note* on "Limitation of Actions" appended to *Herrington v. Harkins*, 1 Rob. 591.

§The words of the two acts of May 1779 and May 1780, are here quoted, because much of the argument at the bar, and of the reasoning of the judges, depended on a critical examination of them. There are various other acts, both of the legislature and of the executive, that relate to the subject: laws, resolutions, and proceedings of the assembly, and orders of council: but these are referred to in the opinion of the court in the preceding case of *Markham*, and in the following opinions of the judges in this case; and, therefore, it is unnecessary to recite them in this place.—*Note in Original Edition.*

Thomas Lilly was a captain in the state navy, and was commissioned as early as August 1776, and served, if not to the end of the war, at least as long as there was any naval service, in which he could be employed. He certainly retained his commission till the war was ended. He died in 1798.

In 1826, John Chowning his administrator presented a claim against the commonwealth, for captain Lilly's half pay for life, or for the commutation of five years' full pay, to the auditor, who rejected it. The claimant appealed to the circuit court of Henrico, which reversed the auditor's decision, and ordered him to issue a warrant on the treasury, for the amount of five years' full pay, with interest from the 22d April 1783. From this judgment, the attorney general took an appeal, for the commonwealth, to this court.

The case was argued here, by the Attorney General, for the commonwealth, and by Stanard, J. M'C. Wickham, and Leigh, for the appellee.

I. The attorney general insisted, that the claim was barred by the statute of limitations, as the auditor alleged in assigning his reasons for rejecting the claim; and if that statute did not present a positive bar, the lapse of forty-three years (from 1783 to 1826) was a sufficient reason, in the absence

of any positive limitation, for rejecting 527 ing the claim. The *counsel for the appellee answered, that there was not a single provision of the statute of limitations, that could, by any violence of construction, be held applicable to this claim; and that as that statute could never be pleaded against, so neither could it be pleaded for, the commonwealth. And as to the lapse of time affording a reason for rejecting the claim, that could only have such an effect, by affording a presumption of payment; and this presumption was not merely rebutted by the evidence: there was conclusive proof that the debt had never been paid. Neither had it been abandoned: the courts of justice had repelled the claim of some of Lilly's brother officers, and he remained silent in despair.

II. The question of fact was discussed upon the evidence, whether captain Lilly continued in actual service, till the end of the war, or ceased to be employed in actual service before the end of the war, in consequence of the reduction of the naval establishment? And upon this question, two of the judges inclined to the opinion, that he continued in actual service till the end of the war, and that he became a supernumerary, before, and so continued till, the end of the war. So that

III. The principal questions remained, and were very earnestly contested: Whether, supposing him a supernumerary, he was entitled to half pay for life? or to commutation of five years' full pay? and if to either, whether his representative was entitled to interest?

CARR, J. This is the case of a naval officer of the revolution, suing for his half pay. I shall take it for granted, that he stands on the same ground with an officer of the state line.

Two questions were presented, and were

most ably and elaborately argued: 1st, Did Lilly serve to the end of the war? 2nd, If he did not, is he entitled to Half pay, under the act of 1779, as a supernumerary officer?

Upon the first question, taking all the circumstances into view; the high reputation of Lilly for zeal and activity; 528 *his appointment as one of the board of officers; the report of that board in his favour; the application of himself with others, at an early day, when every thing was fresh, to be permitted to establish his claim, professing to be then ready to do so; the long lapse of time since; and the testimony of five witnesses, that they believed he served to the end of the war: taking all these things into view, I feel much inclined to think, that the safest conclusion would be, to say, that he did serve to the end of the war: but, though inclined to this conclusion, I cannot rest upon it, with the confidence necessary to make it the ground of my decision. I am, therefore, reluctantly driven to the examination of the second question—I say reluctantly—for I believe there are few men, less disposed than myself, to disturb the decisions of this court, made by the enlightened judges who have gone before us. Cases, however, do sometimes arise, in which our respect for their decisions must yield to a more imperious duty. It is under a strong feeling of this duty, and a due sense of the responsibility of this step, that I proceed to the discussion of this question.

Let us advert to the words of the act of 1779. (Here the judge quoted the act verbatim.) It is clear to me, that it was not the effect or intention of the act of 1790 to repeal this act of 1779; and this was properly admitted by the attorney general (whose zeal and ability in the discharge of his duties, deserve all praise). It is by this act then, that the claim of the supernumerary must stand or fall.

Before we come to a strict analysis of the words of this law, let us advert for a moment, to the situation of the country at its passage. We were in the fourth year of the revolutionary war; a gloomy period, strongly marked with danger, difficulty, and depression: Virginia, without money, except a paper currency fast hastening to its dissolution, had to raise and keep on foot troops, for continental service and state defence: her armies and navy had been in the service several years, almost without pay or clothing, and their situation was wretched indeed. What was the

529 *state to do? She had but one resource; to draw largely on the future; to promise liberality; to hold out alluring prospects. The numerous expedients she resorted to for that purpose, may be seen by all who will turn to the laws of that day. To retain in the service experienced officers, was a most important object; nor was it found easy to effect this, after the first fire of enthusiasm had been cooled by three years' suffering, while their present pay was almost nothing, and the ability of the state to make good its promises, was a problem only to be solved by the event of the struggle. Hence, we find various laws adding new inducements as the difficulty increased; promising additional bounties,

and lands, and half pay for life, and other advantages. To this class, the law before us belongs. It promises half pay for life: let us inquire to whom, and on what terms? First, to officers in service, who shall serve to the end of the war. If the law had stopped here, there could have been no doubt. All officers found in service at the close of the war would have been clearly entitled. But there was another class, for whom the assembly felt it to be just and thought it important to provide, "all such officers, who have, or shall become supernumerary," &c. What is a supernumerary? He is just as much an officer as any other: but his battalion, or corps has been reduced or disbanded, or so arranged in some way, as to leave him, for the present, no command; and the state, to save the expence of full pay and subsistence, discharges him from actual service. This is no reproach to the officer, and does not in the slightest degree affect his standing: he is supernumerary to-day, because it suited the purposes, or was compelled by the necessities of the state: to-morrow she calls him to the camp, and he is an officer in actual service. At the passage of this act, the history, and the laws of the period tell us, there were a great number of supernumeraries; men inferior to none; men to whom the state was as deeply indebted for past service, and whose future services she deemed it as important to retain, as those of the officers in actual service:

530 *for these men, under the name of supernumeraries, in contradistinction to officers in actual service, the law meant to provide: "all such officers, who have, or shall become supernumerary on the reduction of any of the said battalions, and shall again enter the said service, if required so to do, in the same or any higher rank, and continue therein until the end of the war, shall be entitled to half pay during life," &c. Now, I ask, how does this sentence strike the plain common sense of every man? And we must not forget, that it was to the common sense of the country this law was addressed; and that an important object of it was, to hold out inducements to those in the service, to continue there, and to others to enter into it. Did the assembly mean to say to the supernumeraries, we have put you out of actual service to suit our convenience: we hold you bound to return the moment we call you, and if we should choose to call you into service again, and you continue in it to the end of the war, you shall have the half pay; but if we do not recall you, you shall have nothing? Would this have been just? Would it have had the effect intended, to induce the supernumeraries to hold their commissions? Or can the words be tortured into such a meaning? If it had not been intended to provide for supernumeraries, not again called into service, why mention them at all by that name? When they enter the service again, they cease to be supernumeraries: they are officers in service, and if serving at the end of the war, they come directly within the first clause of the law, which says, "that all officers who shall continue to serve to the end of the war, shall be entitled to half pay." But let us

look again at the law. "All officers who are now supernumerary, and shall again enter the service if required so to do." What do these words "if required so to do" mean? Are they surplusage? If not, they must operate as a condition, limiting the effect of the preceding words: for example, strike out the words "if required so to do," and the sentence is, "all supernumeraries, who shall again enter the service &c.

shall be entitled to half pay"—making 531 ing *the re-entering into service, an absolute, unqualified prerequisite to the claim of half pay. Insert the words, and it is "all supernumeraries if required so to do," &c. shall have half pay—making requisition a preliminary, a condition precedent, that without which the failure to re-enter the service, should present no objection to the claim of half pay. Is not this the plain vernacular, as well as legal meaning? Does not the conjunction if, always import a condition? The plain meaning of the sentence, then, (to my understanding) is this: Supernumeraries, if never again called into service, are entitled to half pay, to commence from the determination of their command; but, if again called, they forfeit their claim, unless they enter again into the service, and continue therein to the end of the war. And was it not just in the legislature, to place supernumerary officers on this footing? To hold out to them this inducement to retain their commissions? To say to them, "you have served us faithfully, until we put you out of actual service, for no fault of yours, but for our convenience. This, however, shall do you no injury: We do not know how soon we may want your services again; we, therefore, retain the power of re-calling you into service; if we do so, you will then stand on the ground of all other officers: so that, either as supernumeraries, not again called on, or as officers serving to the end of the war, you shall have a right to claim half pay." Ought we to put such a construction on this law, as would give the right, after all actual hostility was over, to reduce her armies to a regiment or a company, discharge the great mass of her officers as supernumerary, and then repel their claim to half pay, by telling them, you are supernumeraries, never called again into service; and, therefore, not within the law. To me it seems, that to suppose the legislature meant, under the cover of the words used, to conceal such a power, would be to dishonour them, by a charge of premeditated deception. I beg to be distinctly understood: I mean to express simply what I should feel, understanding the words of the law, to hold out the meaning, 532 *which to me they seem to do. I have (and I trust I need hardly say so), the highest possible respect, both for those judges who heretofore have, and for my brethren who now hold opinions opposite to my own, on this subject. We differ as to the meaning of the law; that is all.

But, it is said, a supernumerary could not again enter the service, without being required, nor refuse to enter, if required; and that, therefore, the words, "if required so to do," are mere surplusage. It is clear, that a supernumerary could not re-enter the

service, without being again called to it; and this, under the construction against which I contend, would make his case the harder. Whether, being required to re-enter, he could refuse, I shall not stop to inquire; remarking only, that if the ordinance of 1775, under which the power of coercion is claimed, was still in force, it could apply only to troops raised, and officers commissioned, under later laws. But suppose I admit the premises, does the conclusion (that the words are surplusage) follow? Say, that a supernumerary could not re-enter the service, without being required, and could not disobey a requisition, is it impossible that the assembly might mean to pass a law, giving him a right to half pay, if never again called into service? And are we at liberty, upon the assumption of this impossibility, to strike out of the law the words, "if required to do so?" Words so significant, that it is impossible to suppose, they were used through inadvertence; so clear, that it seems difficult to mistake them; and so operative, that they change the whole effect of the law. It is also said, that if my construction be given to the law, a supernumerary re-called into service, and again becoming supernumerary, and then, not serving to the end of the war, would still be entitled to half pay; and thus the emphatic words of the law, "and continue therein to the end of the war," would be rendered superfluous and useless. I cannot conceive the correctness of this conclusion. My construction is this: that a supernumerary, if never required to re-enter the

service, is entitled to half pay; if re- 533 quired, that *he must re-enter: then, he is an officer in service, and like all others in service, he must continue therein to the end of the war, unless he is again put out of service; in that case he is again a supernumerary; standing precisely on the ground occupied by every other supernumerary; subject to be re-called, and if re-called, bound to serve through the war; but if never re-called, entitled to half pay. In this, there seems to me, nothing inconsistent with the words or spirit of the law or the justice of the case; but every thing in harmony with them all.

Let us now look to the contemporaneous exposition of this statute, for this is said to be fortissima in lege. In December 1781, a memorial of the officers, was referred by the legislature, to a committee of their body, of which Patrick Henry was chairman. Among many resolutions reported by the chairman in favour of the memorialists, was the following: "that they are entitled to half pay, commencing from the termination of their command, on their becoming supernumerary from the reduction of the battalions or corps to which they belonged; subject, however, to be called upon, to take command in the same, or higher rank; and to forfeiture of their pay, on refusing to take command when thereto required." Here we have an exposition of the act, by men who assisted most probably in forming it; an exposition given but little better than two years after its passage. Did the legislature disapprove of this construction? No! for upon the subject of these very resolutions, at the same

session, it passed a law, in which it recognized the right of supernumeraries to half pay: I mean the 10th section of the act to be found in 10 Hen. stat. at large, 466. "Whereas by the reduction of battalions and corps in the state service, a considerable number of officers have become supernumerary: Be it enacted, that a return of all the state officers shall be made to the next assembly, wherein the corps, the rank of each officer, the date of his commission, the number of men at first raised in each corps, number of men when reduced, 534 and time when reduced, *shall be particularly specified by the executive; and the executive are hereby empowered and required, to set on foot proper inquiries, to discriminate such officers as by unworthy conduct, or by any means whatever, may be thought unfit, to be entitled to half pay." Thus explicitly recognizing the right of supernumeraries to half pay, unless forfeited by unworthy conduct, or some other means, which, in the opinion of the executive, might render them unfit to be considered as entitled; treating it as a right, then vested, and existing, where not affected by some extrinsic circumstance: and this, be it remembered, was in 1781; more than twelve months before the close of the war. In consequence of this law, a board was formed, who reported to the executive a list of the officers, as entitled to half pay; and the executive approved of it, and sent it to the auditors for their guide in issuing warrants. This, also, was before the close of the war, and shews that the executive of that day thought with the legislature, that the supernumerary was entitled to half pay, without being re-called, and serving to the end of the war. In May 1783, just after the peace, the assembly passed an act (11 Hen. stat. at large, p. 265), directing the auditors to issue to such officers of the state line and navy, as by law are entitled to half pay, their warrants for the same, and to return the amount of said warrants to the next assembly, that adequate funds might be provided for the discharge of the same. This act is unquestionably based upon the idea, that there were supernumerary officers entitled to half pay at a period prior to the end of the war. And under this act, warrants were issued to supernumeraries not again called into service. In December 1783, the auditors addressed a note to the attorney general (Edmund Randolph) requesting his opinion, whether the act of 1779 gave half pay to supernumeraries, though not called again into service: he answered, "I never doubted, that the just construction of the act warrants the claim of supernumerary officers to half pay, though they never returned to service, provided they never refused 535 to *do so." Here is the law officer of the commonwealth, specially appointed to watch over and protect her rights, declaring that he never had a doubt of the right of supernumeraries to half pay. This is a mass of contemporaneous exposition of the highest and most imposing character; it is *ex visceribus temporis*. Coming to the judiciary, the whole general court were in favour of the right, and so was the venerable chancellor Wythe, whose

argument on the subject, seems to me irresistibly strong. On the other side, are the decisions of this court clearly given against the right. If these opposing decisions and opinions have no other effect, I think they may at least be said to leave the subject open; and this has reconciled me the more to taking it up and forming an opinion for myself upon it. This I have done to the best of my ability, and am in favour of affirming the judgment.

GREEN, J. I have, from time to time, since this case was last argued, devoted all my faculties to its examination, not only on account of the intrinsic difficulties of the question which it presents, and of the important interest involved in the decision of it, but on account of the remarkable difference of opinion respecting it, existing for more than forty years in the legislative and judicial departments of the government. The question is, whether the supernumerary officers of the state line and navy of Virginia, (who were put upon the same footing, in that respect, as was decided in Markham's case) are entitled to half pay for life, although not serving to the end of the war, if not required to do so. For, captain Lilly did not serve to the end of the war, in the sense of the act of 1779, even if the war were to be considered as ending with the capture of lord Cornwallis's army.

I thought, until very recently, that there were strong motives to influence the legislature in making a discrimination between those who served to the end of the war, and supernumeraries, (especially the great 536 number becoming so, by *the reduction of fourteen regiments or battalions, in 1777, from ten to eight companies, and never again called into the service,) and that such a discrimination had been made: That neither the words "command or service," nor the provision for supernumeraries, in the act of 1779, were rendered nugatory by that construction; because the words, "command or service" might well be applied distributively, to officers, who, when in actual service, had a command, and such as had no command, as chaplains, physicians, &c. and because a special provision was necessary for supernumeraries, if they were intended to be provided for in any case whatever; since none such, whether then being or thereafter becoming supernumerary, could claim under the former part of the provision, as they could not claim as having served 'henceforth [from the passing of the act] or from the time of their being commissioned, until the end of the war.' That no subsequent act of legislation, had varied or settled the construction of the act of 1779: and that no construction could be put upon the words of the act of 1779, which would not have the effect of rendering nugatory, or superfluous and unmeaning, either the expression, "if required so to do," or the expression to serve to "the end of the war;" to secure which service, seemed to be the whole object and policy of the statute. And if one or the other of those expressions were to be rejected as mere surplusage, I could not hesitate between them. This would be the necessary consequence, if the expression, "if required

so to do," referred to and qualified only the preceding expression, "and shall again enter into the said service," and not the subsequent expression also, "and continue therein until the end of the war;" in which case, the last expression would impose an absolute condition, not qualified by the expression, "if required so to do." And this was the natural effect of the words in the context in which they stood.

Subsequent reflection has satisfied me, that I was mistaken in this last particular. It does much less violence to the language of the statute, to consider the expression,

537 "if required *so to do," as prevailing and qualifying the whole sentence, than to reject it as mere surplusage; to make it read, in effect, as if those words were transposed to the beginning or end of the sentence, thus: "and shall, if required so to do, again enter into the said service, in the same or any higher rank, and continue therein until the end of the war;" or, "and shall again enter into the said service, in the same or any higher rank, and continue therein until the end of the war, if required so to do." The expression, "in the same or any higher rank," fortifies this construction: it seems to have been inserted for the purpose of preventing the government from requiring an officer to enter the service again, in a rank inferior to that in which he had before served, and thus, if he refused, to impose upon him the forfeiture of his right to half pay. These words, taken in connexion with the words, "if required so to do," and treated in the same way, would give a meaning to the whole sentence, as if it were written, "and shall again enter into the said service, and continue therein until the end of the war, if required so to do, in the same or a higher rank:" and this, I think, is the true construction of the statute. Captain Lilly was, therefore, entitled to half pay for life.

Has any thing occurred to impair that right? The statute of limitations does not; this is not any action, or in the nature of any action, limited by that act: it is a claim, founded upon legislative acts, presented in the peculiar form prescribed by law. Nor does the question arise, whether the joint resolution of the two houses of the general assembly of December 1783, prohibiting the issuing of warrants or certificates, for half pay, until the further order of the general assembly, and which was repealed by the act of 1790, only so far as related to the officers of the state line, who had served to the end of the war, is an impediment to the claim of Lilly's representatives; for that resolution did not embrace the officers of the navy. The warrant ought, in point of law, to have been issued when applied for.

538 *The only question which remains is, whether interest ought to be allowed upon the arrears of half pay? I do not think it should. The real and intrinsic difficulty in these questions, in respect to the half pay of officers of the state line and navy, not serving to the end of the war; the conflicting opinions, in the judiciary and legislative departments, on that subject; and the final decision of the court of

appeals, against those claims; excuse the government from the imputation of any wrongful delay in satisfying them; and the laches is on the part of the claimants, or at least on the part of such of them as might, without impediment, have resorted to the courts of justice.*

539 *COALTER, J. This is a case of great consequence to the state, as well as to the individual who is the appellee in the case, inasmuch as it involves the interesting and much agitated question, whether a supernumerary officer of the revolutionary army, in the state line, who was never called into service, after he became supernumerary, is entitled to half pay, under the act of 1779?

Lilly, the intestate of the appellee, was a captain in the navy, commissioned before the adoption of the constitution, in January 1776, and also by the governor afterwards, in August 1776. He died in 1798, and administration was granted to John Chowning (who intermarried with his daughter) in February 1826, who soon thereafter exhibited his claim to the auditor.

The attorney for the commonwealth, has pleaded the statute of limitations, as a bar to the claim; and has also relied on the lapse of time, as evidence of payment or abandonment of claim.

As to the former; as the claim rests upon the laws of the land, and the commission under the seal of the commonwealth, without examining the other objections taken to the plea, I think it cannot be pleaded as an absolute bar to the claim. As to the presumption of payment, I think the detail which will be given hereafter, of the resistance of the state, for a long time, to all claims for half pay, even in case of service during the war, will furnish conclusive proof that he could not have been paid. And as to abandonment of his claim, he

*Original form of the bill of May 1779.

"All general officers of the line in the continental army, being citizens of this commonwealth, and all field officers, captains, and subalterns commanding the troops of this commonwealth on continental establishment, and accounted a part of the quota of this commonwealth, who shall serve henceforward, or from the time of their being commissioned until the end of the war, shall be entitled to half pay during life, to commence from the determination of their command."

1. Amended by striking out "line in the continental," by inserting "in," after "commanding," and inserting "battalions" in lieu of "troops."

2. By striking out "and accounted a part of the quota of this commonwealth," and inserting in lieu thereof "or serving in the battalions raised for the immediate defence of this state," and by adding afterwards, and after "defence of this state," the words "or for the defence of the United States, being citizens of this commonwealth, and not being in the service of Georgia or of any other state: provided congress do not make some tantamount provision for them."

3. And by inserting after "end of the war," the words "and all such officers as have or shall become supernumerary on the reduction of any of the said battalions, and shall again enter into the said service, whenever required so to do, in the same or any higher rank, and continue therein until the end of the war."

Amendments in the senate.

1. By striking out in the last amendment above mentioned, "whenever," and inserting in lieu thereof, "if."

2. By inserting after the word in the original bill "commanding," the words, "or shall command."

The other amendments cannot be traced: but those above noticed fortify the construction in favour of supernumeraries not again called into service.—Note in Original Edition.

may have done so, in despair of obtaining it; but there is no evidence that he ever doubted of its justice. In May 1784, he joined with the other officers of the army and navy, in a strong memorial and remonstrance to the legislature, against the resolution of December preceding, which inhibited the auditors from issuing warrants for half pay, according to the lists certified to them by the executive, as their guide in issuing such warrants; but without success. He witnessed the struggle carried on by many of those officers, before the courts of justice, in the years 1791, 1792, *and 1793, (as will hereafter be in some measure detailed); and soon after sunk into his grave, unrewarded, if he was entitled to it, for those meritorious services, which the witnesses concur in saying he rendered during the war.

I am strongly inclined to think, that captain Lilly served from 1776, until after the 31st March 1783; on which day, the governor having laid before the council, information from our own delegates in congress, that news of a general peace had been received, and that congress had recalled her armed naval commissions, he is advised to discontinue the armaments for bay defence, and dismiss the navy. I shall not, however, go into the examination of those circumstances, which satisfy me of the great probability of this fact. Nor will I demonstrate, as I think I could, that he served at least until the navy was nearly demolished, being reduced to a single vessel, the look-out boat Liberty, by the act of November session 1781. And although, after that, it was somewhat increased for bay defence, and so continued until April 1783, yet I am now going on the admission that Lilly did not serve after the great reduction above spoken of.

After the reduction of York, the enemy were shut up in their strongholds, in New York and Charleston: so that, with the exception of a contemptible naval force, which occasionally infested our waters, we had nothing to fear, until Great Britain should fit out a new armament against us. This was not expected; inasmuch as sir Guy Carleton, very soon after that event, notified us, that a commissioner had gone to Paris, authorized to negotiate a general peace on the basis of american independence. Until this should take place, however, it was important to keep on foot the continental troops, and, indeed, to fill up the quotas of the states in that line, at the same time that prudence required a diminution of our corps for state defence, in order to economize our means for a future struggle, should that become necessary; the probability of which, however, was daily diminishing. In pursuance of this policy, the legislature, at the November session 1781, (10 Hen. stat. at large, 499,) di-

rected *a reduction of the officers of the state line, and a consolidation of the troops into one corps, &c. which being effected, many officers were rendered supernumerary; and this course was ordered to be pursued, from time to time, as the time of service of the troops expired, which were not to be recruited by new levies; but, on the contrary, laws were passed, author-

izing enlistments to be made from the state line into the continental; and, finally, such of the cavalry as had not re-enlisted, were ordered to be discharged: so that, on the last arrangement of the troops by colonel Dabney, in February 1783, very few officers remained in his legion, who could serve, literally, to the end of the war. As to the navy, the act above referred to, reciting that it was necessary to husband the resources of the state, with the utmost economy, and since our finances did not admit of putting the navy on a footing, productive of any public benefit, adequate to its expenditure, directs the officers of every denomination to be reduced, except so many as might be necessary for the command of the look-out boat Liberty.

This act had been preceded by one of May 1780, (10 Hen. stat. at large, 297,) which recites, that whereas it is necessary that no officers should be retained in the marine department, but such as are properly qualified; to effect which reform, the governor is directed to constitute a board to consist of the commissioners of the navy, and six of the captains, the most approved for their ability, who, having been first fixed in their command, should perform that duty. The executive was to select these, and fix them in their command, that they might, with impartiality, proceed to the delicate duties of their appointment. This board was constituted, and made its report; and I have no doubt but that captain Lilly, who was not only one of the oldest, but, as all the testimony establishes, among the most meritorious of the corps, was a member of this board.

The legislature furthermore, during the same session of 1781, and after the act reducing the army and navy as aforesaid, passed the act (10 Hen. stat. at large, 542 462), for adjusting *the pay and accounts of the officers and soldiers of the Virginia line on continental establishment, and also of the officers, soldiers, sailors and marines in the service of this state; in which, amongst other things, it is provided, that whereas by the reduction of battalions and corps in the state service, a considerable number of officers have become supernumerary, a return of all the state officers shall be made; and the executive was thereby empowered and required to set on foot proper inquiries to discriminate such officers, as by unworthy conduct, or by any means whatever, be though unfit to be considered as entitled to half pay. This discrimination was made, in part, early in 1782. That which sifted the navy had already been made, as above stated. The legislature, therefore, when they come to speak of the navy, in this act, say, that the officers of the navy as they stand arranged by a late regulation, shall be entitled to the same advantages as the officers belonging to this state in the land service.

The act of 1779, it is admitted on all hands, promises half pay to the officers, as well of the continental as state line, who continued in service to the end of the war. It is true, the officers of the navy are not expressly mentioned in this act; but many subsequent acts, either to be taken as explanatory of this act, or as substantive pro-

visions, extend the same benefit to the navy, as has been decided by us in Markham's case; so that officers of the navy are equally entitled with officers of the state line. The supernumeraries contemplated by the act of 1779, were such as were unavoidably thrown out of service, by the necessary reduction of the corps, until they could be reinstated by new levies; not such, as became so in consequence of a great victory, changing the whole face of affairs, and, in fact, putting an end to the war, as the capture of York did; after which new levies were not desirable, but the reverse.

What is meant by service to the end of the war? In the case of privates, it is often said, if you serve to the end of the war, unless sooner discharged. This form

543 of expression *is also sometimes used as applicable to officers. Thus the resolution of congress of the 16th September 1776, gave a land bounty to the officers and soldiers who shall engage in the service, and continue therein to the close of the war, or until discharged by congress. Supposing this to be a contract between the state and her citizens, the law of contracts is, that if there is a precedent condition to be performed by the plaintiff to entitle him to his reward, and the defendant pleads that he has not performed it, it is a good replication to say, I was ready and offered to perform, but you prevented the performance. But it has been argued, that there was no contract, because there was no mutuality; the officer not being obliged to serve, but at liberty to resign: and that half pay was a mere gratuity, in which case, a man, to entitle himself to a gratuity, must shew strict performance, substantial performance not being enough. The doctrine on this last point is this: if A. owes B. 100 dollars, and B. says to him, if you will pay me 90 dollars on or before a given day, I will release you from the debt, and A. pays him on that day, 89 dollars only, he cannot claim to be released: but suppose B. had dispensed with the payment of the one dollar for his own convenience, or obstructs the payment of it, or refuses to receive any more than the 89 dollars, although the party is ready and offers to pay the whole. But I deny that half pay was a gratuity. The government had failed to pay its officers, according to original stipulation. The paper money had depreciated, long before the act of 1779, to such a degree that it did not afford the officer the necessities of life, so far from being a compensation for toil and peril. This is a matter of history, and is also proved by the legislation of the country. Something was due injustice, on this account, to those who had thus sustained loss. Besides, if something is not done to place them on a better footing in future, the veteran officer must retire, and new ones cannot be procured. Amongst other things, therefore, the offer of half pay was made. It was mainly intended, as all

544 knew, to keep the veteran officer in the field. The case, then, stands thus: A. contracts to pay B. so much per day, to reap for him until the end of his harvest, and it is agreed or not, that B. may quit when he pleases; but, if he continues to the end, he is to receive five dollars

extra. The evening of the last day arrives, when A. for his own convenience, tells B. he will excuse him from reaping the last handful, and binding up the last sheaf; it is for my interest, says he, that you should now quit my service, and depart from the field, and B. does so quit: Has he served to the end of the harvest, within the true meaning of the contract, and is he, or is he not, entitled to the five dollars? Such, it seems to me, is the true question between the state, and such of her officers, especially the navy, and the corps at York, who served as long as the state wished their services; with this difference, that, at the very time of these transactions, this ulterior reward of half pay, was recognized and acknowledged to be just by the government, as well legislative as executive, as will hereafter be more fully seen.

But it has been said, (and this court, in their decisions hereafter noticed, puts it on that ground,) that the war did not end until the proclamation of peace, and that this alone was the end of the war, as meant by the act of 1779. It is true, that between nations, and according to the laws of nations, as I understand, war ends at different times and places, according to notice &c., after which, acts of war are criminal. Thus, I presume, on the signature of the preliminary articles at Paris, and when that was made known in England and France, (as it must have been long before it was made known here) acts of war would have been as criminal there, as they would have been here, after the same event was made known here. All this is very well, between the belligerents and their respective subjects and citizens; but I am greatly mistaken, if it has any thing to do with the true construction of the contract between the state and her citizens, and the questions of law arising under it, as be-

545 tween those parties. Can it be supposed that the law intended to *reserve to the state the power, as soon as it was believed, from the course of events, that the war was substantially at an end, nay, after it was known to be so, and within a few day before it is proclaimed, to discharge the army, leave the officers without a command, and direct them to retire from the field, and then say to them you have not served to the end of the war? Surely, this was not the understanding of either party to this contract. The fair, natural, equitable, and legal understanding of it, is, to the end of the war, unless sooner discharged; discharged, not for your crime or fault, but because it is our interest to discharge you. We wish to save expence to the state, being now satisfied that your services are no longer wanted. Of this we are the proper judges, you have nothing to do with it, and cannot resist it, without a violation of law, discipline, and good order.

This principle will be shewn hereafter to be at the foundation of the claims of the supernumeraries, under the act of 1779: at present, I am considering it in relation to those, and especially, the navy, whose services were dispensed with, as no longer wanted, and to save expence to the state. But the officers of the navy stand even on

a higher ground, it seems to me, than this argument places them. They had been put under the ordeal, sifted and cleansed, before the act of 1781, above noticed, and those who remained, purged from the chaff, were recognized, as it were by name, in the act of 1781. It was supposed, that that arrangement was then extant; but it turned out that it had been lost or destroyed, during the invasions of Arnold or Philips in 1781: when the executive, therefore, came to carry that act into effect, as to the state line, in order to purge and purify it also, this loss was doubtless discovered; and, in order that there should be a proper list to guide the auditors in issuing warrants to the navy also, it was ordered, that the two senior officers of the navy should unite with the field officers, in order to make out these lists. The officers of the navy did not attend, no doubt under the idea that the 546 previous arrangement, *expressly recognized in the act, rendered it unnecessary, and not knowing of the loss of that list. Afterwards, however, in May 1784, another board was formed, consisting of two field officers, and of commodore Barron and captain Lilly, to perform this duty as to the navy. The executive surely would not have appointed them, had there been a doubt as to the justice of their claims to half pay. It was probably known, that Lilly was one of the original six captains, who were fixed in command by the executive, on the former occasion. This board did not go into an original scrutiny as to the officers of the navy, but reported a list, which they say, according to the best evidence they could procure, is agreeable to the arrangement of the officers of the navy next preceding the fall session of assembly in 1781, and that the officers named in that list, have always behaved themselves in such a manner, as to be justly entitled to all the emoluments given by law to the officers of the state navy; except one officer (lieutenant Gray) who, they say they are informed, has since (viz. in 1783) misbehaved &c. Thus they not only furnish the substance of the original arrangement, but shew that no subsequent misconduct, except as above, had occurred to deprive the parties of their claim to half pay. It was, of course, certified to the auditors as their guide in issuing certificates for half pay; there being no doubt in the minds of the executive, at that day, but that they were entitled to half pay. On this list are, James Barron, commodore—Richard Barron, captain, commissioned January 6, 1776—Thomas Lilly, captain, commissioned January 14, 1776—and others. In all, only one commodore, eleven captains, four of whom were then dead, and five lieutenants, of whom one (Gray) was dead, including, I presume, the marines and all.

But, if I am wrong in supposing that captain Lilly had served to the end of the war, within the true meaning of the act of 1779; and also wrong in the opinion, that he is to be considered as entitled to half pay under the act of 1781, he being one of those officers in the list or arrangement 547 *lately made, and provided for, as it were personally, and by name, in that act; then, he must at least be a su-

pernumery officer of the navy; and if the supernumery officer of the state line is entitled to half pay, he must be also.

It is alleged, that this question is closed and shut up by two decisions of this court, on the very point. It will be recollected, that in May 1783, the legislature directed the auditors to issue warrants for half pay to the officers, both of the state line and of the navy, and make a return to the next legislature, that funds may be provided &c. At the December session of 1783, however, the legislature, no doubt finding that funds had not been provided, and that they had been unable by any means then in their power, to support the credit of the warrants they had already issued to the officers, for their pay and depreciation, as settled under the above act of 1781, and which had got almost to as low an ebb as paper money itself, and possibly wishing to see whether congress would not take on itself the pay of the state line as well as the continental line; the further issue of certificates for half pay was suspended until the future order of the legislature. This suspension was revoked by the act of 1790, as to those serving to the end of the war only. After this, viz. in 1791, a great number of officers came forward and demanded warrants for half pay; some of these were supernumeraries before the order to consolidate the troops at York, after the surrender of that place; some of them had become so on that occasion, and many of them as late as February 1783, after their troops had been enlisted from them, as before stated, when the last reduction of the legion took place. These latter claimed as having served to the end of the war; as did others, who remained with Dabney until the proclamation of peace. It may be proper here to remark, that, when the last reduction was made by colonel Dabney in 1783, and this new arrangement was made known to the executive, the council advised the governor to write to colonel Dabney, directing 548 that the *supernumery officers retire on half pay; and this was much relied on by those who were thus discharged, under a special order of the executive, saying to them that they were to have half pay.

The auditor, on the applications above mentioned, however, refused to issue the warrants, and appeals were taken to the district court of Richmond. That court adjourned the questions arising, to the general court for its opinion; which court decided, that, under the act of 1779, the officers both of the continental and state lines were entitled to half pay, unless they failed to serve to the end of the war, or, being supernumery, refused again to enter into the service on a command to that effect; and that the troops being disbanded in February 1783, and the preliminary articles of peace being signed before that time, the officers ought to be considered as having served to the end of the war. Judgments were accordingly entered up in the district court for the appellants; and appeals were taken, on behalf of the commonwealth, to this court. The opinion pronounced in this court, in May 1792, was to this effect (confining the opinion to the officers of the state line): that such of the officers, and only

such of them, as actually served to the end of the war, unless restrained, by being prisoners on parole or otherwise, and such of them who, becoming supernumerary, again actually entered into service, and continued therein to the end of the war, are entitled to half pay for life, to commence from the determination of their command or service, when the same was duly signified to them by the governor, and their regiments disbanded in pursuance thereof, which, it appears, was on the 19th and 22d April 1783. This decision, being contrary to that of the general court, not only as to the claim of the supernumerary, but as to what is to be intended by the terms, end of the war; being contrary, in these respects, to the understanding of the contract by the officers both of the continental and state lines; to the understanding of congress, when it undertook the discharge of those obligations, originally com-

549 mencing with the act of *1779, as to the continental line, and our state line, who had occasionally supplied our quota in the continental line; believing that no such ingenious or disparaging distinction, between the state and continental lines, was ever contemplated by the act itself, or by any subsequent act of the government, but that the reverse was clearly manifested, both by the state government and congress, in all their acts and resolutions, during the war, and for sometime after its termination; that decision, I say, could not be expected to be, nor was it satisfactory. There was attached to each case a reservation, that the decision should not prejudice the party, in any future claim, on fuller proof. Under this reservation, a number of officers, belonging to Dabney's legion, being the corps consolidated at York as aforesaid, and who had been deranged and became supernumerary under the last arrangement of that corps, in February 1783, again applied for warrants. Their application was again rejected, and they appealed to chancellor Wythe. He decided, (as will be seen in his volume of Reports, 62.) in the same way that the general court did in the cases above mentioned. An appeal was taken from this decision to this court; when three judges, one of whom came into the court after the former decision, reversed the decree of the chancellor on these grounds: 1st, that there was no new ground of evidence, whereon to found a distinction between the cases; and 2nd, that the former decision had correctly decided that the end of the war, within the meaning of the act of 1779, was the proclamation of peace by the governor of Virginia. On this point they say, that the bounty of half pay given, by the act of 1779, to the officers of the state line, in the said act described, was an extra reward or bounty for their services to the end of the war, if they should serve so long &c. This case was argued entirely on the ground, that these parties had served to the end of the war, on which ground alone they put their case. Chancellor Wythe had also put it on the same ground, though he enters into an argument, (which strongly marks the

550 ability of that *judge) to prove, that supernumeraries were entitled to half

pay under the act of 1779. The decision of the general court, as to supernumeraries, being thus fortified by the able argument of chancellor Wythe, the officers, as may well be supposed, were still far from being satisfied with the result. Their next course was to present petitions, individually, to the legislature, though it was long before they mustered resolution to do this; finally, however, many of them prevailed in that way, and succeeded with that body; and, amongst them, every one of the claimants in his case, (except Quarles, who it does not appear ever applied) and many of the other applicants in the first case, have also succeeded, some of whom were supernumerary as early as 1780, and some became so on the first consolidation of the troops under colonel Dabney, after the capture of York; besides others, who were not parties to either of these controversies. Thus every species of supernumerary has been recognized, as having a just claim to half pay, by successive legislatures; which is an evidence, that these decisions of this court were not satisfactory to that body, or to the country; and are sufficient, at least, to remove any weight which may have been given to the act of 1790, as a legislative interpretation of the act of 1779.

I have further reasons also for inducing me to believe that we are at liberty to reconsider those decisions. We have now a compilation of our laws, and of the journals and resolutions of the legislature, which, as to the army, in many respects, operated as laws; and which give us a ready reference to all the lights, which can hence be thrown on this subject, and without which, I confess, I should have been in great darkness as to points, which a laborious investigation has cleared up to my satisfaction. Besides this, many important documents, lost or mislaid at the time those cases were before this court, have been discovered; some of them between the first and second arguments of this case, and some of them even since the last argument. Indeed, I have been forcibly struck with the circumstances and manner under *which

551 these documents have, from time to time, as it were by accident, been brought to light. They are all submitted to us as though they had been before the court below, and are thus made part of the record before us. I think those documents would, probably, have had an important bearing on the question, had they been before this court formerly. They have, certainly, explained things to me, without which I would have been intirely in the dark, as will, presently, be seen. One of them, the list of navy officers, which has been discovered since the last argument, I consider of very great consequence in this particular case, as the former part of this opinion will shew.

We have been also favoured by Mr. Call, with his manuscript report of the arguments of counsel, and two of the judges, in the last case. We there see on what grounds that case was put by the counsel on both sides, and what considerations weighed with the court; and I think it manifest from this report, that the case was misunderstood in an important matter, and

which had great weight with at least one of the judges who delivered an opinion. It was an error, into which I myself was nearly falling, and from which I escaped, by the aid of one of the documents which has lately been discovered. This, by the way, is one strong proof to me, amongst others which have occurred since I have been in this court, of the importance to the public of Call's manuscript reports; calling for their publication, so as to complete the series of our decisions. I take this occasion to tender him my thanks, for the opportunity he has given me of seeing the report of this case. It seems to me probable, that the court, as well as the reporter, fell into an error in that case, in supposing we had no troops for state defence, in the strict sense of the term, except mere temporary corps, such as were raised under the act of May 1779 (10 Hen. stat. at large, 18,) and the legions, raised under the act of March 1781; or, at least, that the officers then and formerly before the court, were officers of corps of this description, and so were never contemplated by the act of 1779. They were, probably, under the belief, that the officers of our regular state line, had been provided for by congress. This I am inclined to infer, from the circumstance, that the reporter, in speaking of the troops that had been raised for state defence, says, that, of this kind, a body was raised under the act of May 1779, (above referred to) and another under the act of March 1781, to raise two legions &c. These are the only acts, for raising troops for state defence, to which he refers. Now, the first of these acts provided for raising a body of volunteers merely, for a temporary purpose, during an invasion; the latter is an act to raise two legions of horse and foot, for the defence of the state, to serve during the war, but not to take the field, or do duty, except in case of actual or threatened invasion, during which they are to continue in the field, if the executive shall think proper. They are to be exempt from militia duty, and all manner of drafts; to be paid whilst in service, or under discipline, and half pay at all other times, during the existence of said legions; the commissioned officers, though, to receive pay, rations, and forage, only whilst in service &c. This, also, was, as a mere temporary corps, little above the militia; and who, though they may have served under Dabney, of which, however, I see no evidence, never had the shadow of right to half pay for life; and not a man of them has ever claimed it, or ever can. Yet, strange to tell, chancellor Wythe says, that Christopher Roane and others, (who were complainants in that case) were officers of one of the legions, raised under the act of March 1781. Mr. Call, the reporter, also shews, that this court fell into the same mistake; for, he says, that the appellees were officers in colonel Dabney's legion, raised under the act of 1781. The arguments of both bench and bar shew, that they were clearly under this impression. Brooke, the attorney general, insisted, that from the nature of the levy, these officers were at the disposal of the government, and could be retained or disbanded at

pleasure; their pay was during the existence of the legions only. However great their merits, they were not to be compared with those of the regular armies; great part of their time was to be spent at home, and their actual service occasional only. The officers were not entitled to the provisions of the act of 1779; for that act relates to troops on general establishment, without particular stipulation. Besides, their compensation is prescribed in precise words; and only while in service. No fair construction, he says, can place such limited service, on a level with the general services or rewards of the veterans. He next contends, that if they could be brought within the act, they did not serve to the end of the war &c. On the side of the officers, it was insisted, that the discharge was not absolute, but in the nature of a furlough, they being liable to be called again into service, according to the original organization of the legion; which, from its commencement, was subject to partial duties. It was never necessary, that all should be called at once into service; but the detail was in proportion to the exigency of the occasion &c. They then argue the point, when the war ended &c. within the meaning of the act of 1779. My object, at present, is merely to extract so much of the report, as to shew, that these parties were treated, considered, and their cases adjudged, as though they belonged to one of the legions, raised under the act of March 1781; and, I think, so far, the description of them, on both sides, brings them precisely within the terms of that act. The argument of the attorney general, has no bearing on the permanent regular state line, if such an one existed, except impliedly to admit, that such a corps would fall within the act of 1779. Let us see in what light the judges looked upon them: judge Roane says: to put men, whose duties were occasional only, and who were often not employed for the public at all, upon the same footing with the veteran, whose services were constant, continually exposed to the hardships and dangers of war, would have violated every principle of propriety. He then contrasts the services of one with those of the other; for the one, he says, express remuneration, during life, is made; for the other, no such provision is made, and they claim it by equitable construction only. But, what equity have they? By the terms of their organization, they were subject to less duty &c. Carrington, concurred. Judge Lyons, first, objects to the contract, if it is to be so considered, for want of mutuality; the officer not having stipulated to serve, and not being bound to do so; 2nd, that it was a gratuitous bounty, offered for services when performed, and not before; 3rd, that there was not actual service during the war, and that a man, to entitle himself to a gratuity, must shew strict performance &c.

I confess, that when I compared this case with the act of March 1781, and considered, as I then did, the claimants as officers belonging to one of those legions, I was astonished to find that any doubt could have existed as to the propriety of

that decision as applicable to such a corps. The return of the state legion, under colonel Dabney, as made out and returned by him, was before that court; but the return of the field officers of the state line was not: it had then been mislaid, and is one of the documents discovered (as by accident) since this case was first argued in this court. That return contains a report of the officers of the various corps for state defence, except the navy and Crockett's regiment, viz. the first and second state regiments, the artillery and garrison corps, the state cavalry, and the Illinois troops; and Dabney's legion was composed of the remnants of these (except the last) remaining after the capture of York. I found that these corps had been raised, many of them at an early day, and especially the first and second regiments, which were raised under the ordinance of convention of July 1775. That one of them, with pretty full ranks, had marched to the north, as early as 1777, to supply our quota in the continental line, until it could be recruited, and had returned in 1779, with not one-third of the original force. And that another of them, I think the artillery, of which Christopher Roane was a captain, met the enemy under Gates at Camden; and retired afterwards, so much cut up as that there was not more
555 than one captain's *command, which fell to him. And what was my surprise, when I came to compare Dabney's list of his legion, with that returned by the field officers, to find that, instead of his legion being one of the legions raised under the act of 1781, they were the very veteran officers, spoken of by the attorney general and judge Roane, as alone coming within the meaning of the act of 1779!

The officers, of course, were not present at the argument in this court, so as to correct the error which their counsel, as well as the attorney general and court, fell into, in this respect, and which error has remained unknown to them, and uncorrected, until I have had an opportunity, in consequence of the recovery of these papers, now to correct it. Whatever the formal decision of this case, as entered of record, may be, therefore, it is impossible to read the argument, both of the attorney general and judge Roane, without applying them favourably to the officers of the regular state line. They could not have argued as they did, had they known that the appellees were veteran officers.

I have been thus minute in the statement of this case, because it is not in print; and because I not only wish to take from its weight all that ought not to weigh against these officers, but to transfer to the opposite scale whatever of it belongs to that side of the question.

But to proceed, as briefly as possible, to the consideration of the act of 1779. Suppose congress had never taken upon itself the pay of the continental line, and they, i. e. the supernumeraries of that line, were now looking to us for their half pay, under the act of 1779; could we say no to them? Could we have amended the act, during the war, so as to make it mean, that the supernumerary officer, never called on to re-enter the service, should not be entitled to half

pay? No one will pretend to deny, but that such an act of the legislature, at that time, would have disbanded the army. Why? Because no officer knew when he would become supernumerary; and it was the full understanding of all parties, that, however this may happen, it shall not
556 *prejudice you, if you hold yourself ready, and re-enter, as many did, when called on. But congress have since agreed to redeem this pledge, and to pay the supernumeraries of the continental line; having recognized their right as originating under this act of 1779, and to which they would have been entitled, as all admit, had congress permitted it to remain entirely on this act. But the words in this, and all the other acts, where the two lines are provided for in the same law, are precisely the same, as to each, in all important particulars; and in the section now under consideration, are precisely the same. They must, of course, have the same interpretation, as to both. Had any discrimination or difference been attempted, by law, during the war, a dissolution of the state line, and total destruction to our cause, would have been the result. But if there was then no doubt about it, that was the time to explain it: on the contrary, the right was then admitted, in the clearest and most explicit terms by every branch of the government; committees, with Patrick Henry at their head, reporting resolutions and laws, full to the point; and the executive, aided by Edmund Randolph, the attorney general, as their law adviser, admitting that the construction of the officers was the correct one. In addition to all which, in my humble opinion, the act itself will admit of no other sensible construction.

Strike from the act the clause respecting supernumeraries, and then it will be, simply, a promise of half pay for life to the officers who serve to the end of the war; similar to the resolution of congress of May 1778, giving half pay for seven years to the officers of the congress troops, who serve to the end of the war. If this were all, the officer who has fought his battle and lost his men, or if their time of service is out, and he is without a command, has done no wrong; he cannot be cashiered for this; he remains in camp until his corps is replaced, or until he gets a furlough: you cannot dismiss him, especially if his ulterior emoluments, in land or half pay
557 &c. depend on his service to the end of the *war (and the supernumerary has as regularly got his land, as any other). But it was necessary to promise half pay, in order to keep our armies in the field: but the government wants it so arranged, that the officers, when without command in the field, may be directed to retire, without forfeiting their land bounty, or half pay, as it were under a law furlough, if I may use the expression. This is an arrangement beneficial to the state, inasmuch as it saves pay and subsistence, and, at the same time, enables the state to recall the officer, if wanted. This is the true history of the case, according to my understanding of the act, and the motives which gave rise to it; and it was so understood by the officers, and

was acted under by them; and this construction was recognized, both before and since the war, by the legislative and executive branches. This construction, too, alone, in my opinion, gives sense to those words in the act, "to commence from the determination of their command or service," or to the words, "from the time of their reduction," in the resolution of congress of October 1780, which declares, that the officers, who shall continue in service to the end of the war, shall be entitled to half pay for life, to commence from the time of their reduction, not from the end of the war. Indeed, if half pay depended on actual service in the field to the end of the war, in any sense of those terms, why say any thing about supernumeraries? If, so soon as they became such, they were to have no more claim than any one else who might thereafter enter the service, and continue therein, why say any thing further, than that the government reserves a right to discharge them, and deprive them of this ulterior reward? This would not have prevented their again entering the service, and finally obtaining their reward. We well know, that such a provision would have disbanded the army. Had it been left, as congress at first put it, as to their troops, on service to the end of the war, then a discharge before that, must either have produced the effect that I before stated, that the officer being thus prevented from
558 serving without his fault, was entitled to the *reward; or he would have a right to remain in the field, or on furlough, until wanted, and get full pay &c.

I have looked into the journals of the day, when the act was passed for adjusting the pay of the army, and directing discriminations, to be made, to see if any doubt was then entertained on this subject; but so far from this, I find the reverse was the case. Reduced officers, then entitled to half pay, were recognized as belonging to both lines: but as many officers in the state service may never have been in the field; may have been mere recruiting officers &c.; may never have enlisted their men so as to take the field; or for many other causes, could not have been within the true meaning of the act; it was but justice to the state that all such should be excluded. The executive so understood it; and they certified the list to the auditors for their guide in issuing warrants: not warrants for service to the end of the war, for it had not been ended; and, until it was ended, no one could claim on that score. Nor was it for them to hold up the list of supernumeraries, to see who would re-enter, and serve to the end of the war; for there was surely no necessity for it on that score; if he was then found in service, it could not have been objected that he had been a supernumerary for a time. On the construction contended for by the commonwealth, the whole clause is senseless and useless.

Justice to myself, and to the country, has compelled me to give, thus minutely and at large, my views on the subject. this question being one not less important to the character than to the treasury of the state.

I believe the supernumerary officers have law and justice on their side; and, so believing, I cannot refuse to say, both in my character of a judge of this court, and of an individual who will have to pay my proportion, that justice ought to be done to them.

I am, therefore, for affirming the judgment.

BROOKE, P. The great difficulty in deciding these cases, is to keep within the line of judicial duty. If we pass that
559 *line, and estimate the claims of the officers of the army of the revolution by their peril and their blood, we enter a field which ought to be explored by the legislature and not by the courts. The obligations of national gratitude for services generally very great, and, in particular instances, almost without example, can only be weighed by the representatives of the nation. The claim, therefore, before us must be decided on the legal obligations of the government, as in other cases, and not on the obligations of national gratitude. This is not the first case in which, while the feelings of the court revolted against its duty, yet, it was so firmly bound by that duty, that it was compelled to pronounce a decision which has been scandalized as unfeeling and unjust. It is impossible to read the opinions delivered in the case of the Commonwealth v. Roane and others, without sympathizing with the judges who pronounced those opinions; and well may it be feared, that the opinion now to be delivered will not be better treated; however that may be, I ought not to turn to the right or the left to inquire.

I think it impossible, on the testimony before us, to come to the conclusion, that captain Lilly continued in service to the end of the war, that is, to the proclamation of peace by the governor of the state. I entirely concur with judge Green, in the view he has taken of it; his claim to a land bounty for three years service only, by captain Lilly himself, which he received, negatives the proposition that he served to the end of the war. It would be impossible to account for his claiming a land bounty for three years service only, which did not entitle him to half pay for life; when, if he had served to the end of the war, he would have been entitled to both; nor could he be entitled to a land bounty for three years service only, and also claim for service during the war, upon any sound construction of the acts of the legislature on that subject. He must be presumed to have understood his own claim, much better; especially when his name is found in a list of a board of officers appointed to ascertain the claims of others. The
560 testimony of commodore *Barron, also the most competent witness, who knew him intimately well, and who was in the same service, negatives the proposition, by proving nothing that tends to support it. The declarations of the other witnesses that they understood and believed, that captain Lilly served to the end of the war, though entitled to grant credit for their veracity, are entitled to little weight, when it is considered, that none of them profess to have any precise knowledge of

the facts they speak of. Believing, then, that it is not proved, by any of the foregoing testimony, that captain Lilly served to the end of the war, what is the evidence of that proposition to be extracted from the report of the board of officers, lately found and brought into the record? That board, it appears, was constituted, not for the purpose of ascertaining who were entitled to half pay under existing laws, but who had forfeited their claim by misconduct or other causes; and all that can be extracted from the report, is, that captain Lilly had not forfeited his existing rights. That this was the character of the board, is clearly inferrible from the circumstance, that some of the officers of the state troops are reported to have lost their claim, though they had served to the end of the war. If I am correct in this, captain Lilly's pretensions are not strengthened by any thing in the report, and his claim must still rest on the other evidence, and on the provisions of the law; and putting it on the most favourable ground, and considering him as a supernumerary officer, the inquiry is, whether it can be brought within the act of 1779, and the subsequent acts on that subject?

On a fair construction of that act itself, it would be impossible to bring the officers of the navy within its provisions: they are not in terms included in it. The officers of the navy were commissioned to command particular vessels, and though there was an organized navy board and staff, yet no officer could be accurately said to be an officer of the navy of Virginia, in the sense that would be applicable to a more permanent day, such as that of the United States. *Their service was more transient and fluctuating, than the service of the state troops, and that may account for their not being named or included in the act of 1779. But I think it is very clear, that the legislature considered them as included by the acts of November 1781, and May 1783. The act of November 1781, § 12, enacts that, the officers and seamen of the navy of this state, as they stand arranged by a late regulation, shall be entitled to the same advantages as the officers belonging to this state in the land service, agreeably to their respective ranks. Whether the advantages here mentioned, included half pay for life, is, at least, doubtful; but by the act of May 1783, this doubt was then removed. It enacts and directs, that the auditors shall yearly issue to such of the officers of the state line and navy as are by law intitled to half pay for life, their warrants for the same, and make a return &c. This act, though it provides for such officers of the navy as were entitled to half pay, does not specify who they were, nor directly affirm that they were entitled; but leaves that to be settled by the auditors or the courts.

No inference can be drawn, from the circumstance, that warrants were to be issued, and the return made to the next session of the legislature, that supernumerary officers who had not served to the end of the war, were entitled to half pay; because, half pay was due to some who did serve to the end of the war, having been supernumer-

aries, and again having returned to service, according to the terms of the act of 1779. However that may be, it is very clear, that the legislature meant to leave that inquiry to the auditors and the courts. This is made more manifest by the doubt, which appears to have existed at the time, whether the supernumerary officers who had never been required, and never returned to service, were entitled to half pay. On the 11th of December following, we find that the attorney general gave his opinion to the auditors, that the supernumerary officers were entitled to half pay; in consequence of which, it can be hardly doubted, the legislature, on the 22d of the 562 *same month, December 1783, passed the resolution directing the auditors to issue no more warrants to the officers of the state line. Why the officers of the navy were not included in that resolution, it is difficult to decide. As they were not included in terms in the act of 1779, probably for the reason before stated, and very doubtfully provided for, as to half pay, by the act of November 1781; and as by the act of May 1783, though included in terms, their right to half pay was not affirmatively settled, but left to the auditors, to be ascertained by the pre-existing acts; the legislature, by not including them in the resolution of December 22d 1783, left it as an open question, whether they were or were not entitled to half pay. And thus the matter stood until the act of 1790; which, though it professes to explain the act of 1779, in relation to the officers of the state line, uses, as to them, the same language that is found in the latter act, disregarding intirely the officers of the navy. Was this because, by that time, the legislature had come to the conclusion, that, though they had been named in the act of 1783, their claim was to be ascertained by the auditors or the courts, and that, in truth, not being provided for in the act of 1779, they had no claims? or was it, because, as was the fact, that not more than one vessel, at most, was in the service at the end of the war, and, perhaps, not that one precisely at the proclamation of peace by the governour of the state? However that may be, it is certainly a remarkable circumstance, that the officers of the navy were omitted in the act of 1790, enacted to explain the act of 1779.

But, waiving the exposition of the act of 1790, and supposing that captain Lilly's claim stands on as high ground as that of the supernumerary officers of the state line, in the case of the Commonwealth v. Roane &c. it must, on the authority of that case, and on principle, have the same fate. No officer of the state line or navy held their commissions to serve during the war: there was no binding obligation on them to continue in service during the war: they were, at all times, at liberty to resign their 563 commissions, *except when under special orders to perform some duty: nor was there, in the nature of things, any obligation, on the part of the government, to keep them in service longer than the exigencies of war required; it had a right to disband them at will. The act of 1779, then, did not put them on the footing of

officers of the state line in continental service. These were commissioned by congress, and, when supernumerary, liable to be called into service at any moment, without the power of refusal when called, though they also might resign, when not under special orders to perform some duty. The offer, then, of the act of 1779, to the supernumerary officers of the state line, who, when called into service, should not refuse to return, and who should then continue in service to the end of the war, was of an intirely different character from the offer by congress, of half pay for life, to the officers of the continental line, who should remain in service to the end of the war, or, coming into service after the resolution of 1780, should remain in service to the same period. On the one hand, from the moment that the officers of the state troops were put out of actual service by the reduction of their corps, with the right to refuse to come into service again when called, they were completely disbanded, and were as if they had never been in service, as to any obligation on them for future service. On the other hand, the officers of the continental line were never disbanded: though supernumerary, for want of command, they were virtually in service, and so continued until the end of the war. The court, therefore, in the case alluded to, was not bound to consider how congress had treated its officers, in regard to half pay. The act of 1779, and the succeeding acts, were its guides to the conclusion to which it came; in these, it found no obligation on the part of the government, but a mere offer, depending on a state of things, which never had occurred in the case before it. The chancellor, whose decree it reversed, gave a different construction to the act of 1779. He disregarded the distinction between those supernumerary officers, who

564 came "again into service, and served to the end of the war, and those who never returned to service: he was perplexed by the words, "command or service," in the act. By referring the word "service," to officers of the staff, who never command in that character, though they do service, and the word "command," to officers who do command, and do service also, reddendo singula singulis, he would have perceived, that the act of 1779, required actual service to the end of the war, to entitle an officer to half pay for life; and did not include those officers, who, being supernumerary and out of service, had not refused to return, not having been required. This court construed the act of 1779, according to the obligations of the parties, at the time it passed; not the supposed obligations for a glorious peace and independence.

The government, when it could not recruit men to fill up the ranks, was under no obligation to retain the supernumerary officers on pay and rations; it had a right to disband them, and it did so, in effect, when, by the act of 1779, they had a right to refuse to again enter the service: these words, again enter into service &c. imply

disbandment; for, when an officer has a right to refuse to do duty, by the license of the government, he is disbanded. It would not have been esteemed patriotic in the officer, to remain at home, and retain his rank, exempt from militia duty; and, though never again in service, to claim a compensation like that given to the officers, who, if supernumerary, had returned to service, and continued to the end of the war, or who had remained in service from the date of their commissions, to the same period. Those words "if required, shall again enter into service," imposed no binding obligation on either party: they contained the nature of the condition on which half pay was to be given: they impute no fault to either party, who might not act. Under them, the government was not bound to require the service of officers, when it had not men; nor was the officer bound to comply, if required again to enter into service.

565 *This court gave this construction to the act more than thirty years ago, which has been acquiesced in by the officers and their representatives; if it is now to be disturbed, I presume we shall hear no more of the rule stare decisis. It considered the claims of the officers, in the case before it, with great precision; it was bound to do so by its judicial duty. Was it founded on contract, or a mere promise of a bounty for future service, depending on the requirement of the government itself? In either aspect, as there was no binding obligation on the officer to the government, he was held to prove exact performance of the condition prescribed by the acts under which he claimed: virtual performance was not enough, in such case, however strong was the claim on the gratitude of the country, which was fully admitted; and though, in that case, the claimants were in service to the signing of the preliminary articles of peace, that was not proof of exact performance of the condition, prescribed by the act of 1779. It was not, in contemplation of law, service to the end of the war. They had retired from service, before the proclamation of peace by the governour of the state. The government, to which the public force belongs, has the sole right, as respects it, to decide when the war ends and peace begins. Though the proclamation of peace did not make the peace, it revived the obligations of peace, and put an end to the obligations of war. In this respect, though it did not make peace, it put an end to the war, and thereby fixed the term of service required by the act of 1779, to entitle the claimants to half pay for life. If I am right in the opinion, that captain Lilly did not serve to the end of the war, though his claim is placed on as high ground as that of the supernumerary officers of the state line, it should be rejected, and the judgment of the superior court of Henrico reversed.

By the majority of the court, judgment affirmed.

REPORTS OF CASES
ARGUED AND DETERMINED IN
THE GENERAL COURT OF VIRGINIA,
AT JUNE AND NOVEMBER TERMS, 1829.

569

*JUNE TERM 1829.

JUDGES PRESENT.*

<i>Brokenbrough,</i>	<i>Semple,</i>
<i>Smith,</i>	<i>Parker,</i>
<i>Dade,</i>	<i>Upshur,</i>
<i>Saunders,</i>	<i>Field,</i>
<i>Daniel,</i>	<i>May.</i>

The Commonwealth v. Pegram.

June, 1829.

Statutes—Application to Offences Committed Previous to Enactment under Former Statute.—A statute passed in the session of assembly of 1827-8, prescribing a new punishment for an offence committed after the 1st May 1828, does not repeal former statutes, defining the offence, and prescribing other punishment for the same, as to such offence committed before 1st May 1828.

Henry D. Pegram was presented, in the circuit court of Henrico, in July 1825, for keeping and exhibiting a faro bank table.

This offence was, at the time of the presentment, punishable by imprisonment in the common jail, and by stripes at 570 *the discretion of the court, by force of the act of 1822-3, ch. 32, § 1. But, by the act of 1827-8, ch. 36, § 4, it is enacted, that whoever shall hereafter be guilty of any of the offences enumerated in the 17th section of the statute against unlawful gaming (1 Rev. Code, ch. 147, pp. 566, 7), shall be sentenced to confinement in the jail of the county, for a period not less than two nor more than eight months, and be fined in a sum not less than 200 nor more than 800 dollars, at the discretion of a jury. This offence of keeping and exhibiting a faro bank, is one of the offences enumerated in the 17th section of the statute against unlawful gaming.

Pegram was not arrested until December 1829. And being then brought into court, he moved the court to direct the attorney for the commonwealth, to enter a nolle prosequi or a dismissal of the presentment, on the ground, that the 4th section of the act of 1827-8, above mentioned, as to all offences committed before the passing thereof, repealed the 17th section of the statute against unlawful gaming, as well as the 1st section of the act of 1822-3. And the question, whether the act of 1827-8 did so repeal the former laws on the subject, was, with the

consent of the accused and of the attorney for the commonwealth, adjourned by the circuit court to this court.

BROCKENBROUGH, J. In the case of *Attoo v. The Commonwealth*, 2 Virg. Ca. p. 382, it was decided, that where a new statute prescribes a new punishment for an offence, which had been previously punishable otherwise, and the new statute repeals all laws which come within its purview, but does not provide that offences committed before the operation of the new law, shall be punished under the old, such repeal operates as a discharge of all such offenders. But that case is very different from this. There the law repealed and annulled the punishment enacted before that time against the offenders: here the act of 1827-8

does not, either expressly or impliedly, 571 repeal the previous punishment *prescribed by the act of 1822-3, except in the case of future offences. There is no repealing clause in the act of 1827-8; and although the principle is correct that *leges posteriores priores abrogant*, yet they only abrogate them from the time that the latter law is passed, or goes into effect. The principle on which this rule prevails, is, that the latter statute being incompatible with the former, they cannot exist together, and the latest expression of the will of the legislature is the law. But there is no incompatibility in the statutes now under consideration. A punishment affixed to an offence prior to the 1st May 1828, is not incompatible with a different punishment, either lighter or more severe, affixed to the same offence subsequent to that date. They may both well stand together. The punishment prescribed by the act of 1827-8 being different from that prescribed by the act of 1822-3, is certainly an implied repeal of it as to new offences from the time it goes into effect; but by the very terms of the law, the new punishment is not only applied to the offences happening after the 1st May 1828, leaving the old punishment to be applied to the offences happening before that day. In the case of *The Commonwealth v. Wyatt*, 6 Rand. 694, this principle was taken for granted, and a judgment was rendered against him under the act of 1822-3; which could not have been done, if that act were not still in force as to offences happening before the act of 1827-8.

Therefore, the court is of opinion and doth decide, that the 4th section of the act passed February 26, 1828, entitled "an act to alter and amend the laws against the keepers and exhibitors of certain unlawful games," doth not repeal the 17th section of the act entitled "an act to reduce into one the several acts and parts of acts to prevent unlawful gaming," nor the act

*JUDGES SMITH AND DADE did not sit in any of the cases here reported.

†**Statutes—Prescribing New Punishments—Effect upon Offences Committed under Former Statute.**—For the proposition that, a statute passed in the Assembly of 1827-8, prescribing a new punishment for an offence committed *after* May 1, 1828, does not repeal former statutes, defining the offence, and prescribing other punishment for the same, as to such offence committed *before* May 1, 1828, the principal case is cited and approved in *Allen v. Com.*, 2 Leigh 731; *Pitman v. Com.*, 2 Rob. 807, 808; also, in dissenting opinion of *CHRISTIAN, J.*, in same case; *Foot-note* to *Attoo v. Com.*, 2 Va. Cas. 382.

passed the 21st day of February 1823, entitled "an act farther to amend the penal laws of the commonwealth," as to offences committed against the 17th section of the aforesaid act prior to the 1st May 1828.

572 *Mitchell v. The Commonwealth.

June, 1829.

Commission Merchants—Right to Sell Tobacco Prepared for Market without Merchant's Licence.—Tobacco the growth of the state, in the condition in which it is ordinarily prepared for market by the grower, is not goods, wares and merchandize, within the meaning of the act of 1823—ch. 3, and a commission merchant in Richmond is not obliged to obtain a merchant's licence to justify him in selling the same.

An information was filed against Garland H. Mitchell, in the hustings court of Richmond, for selling, by wholesale, goods, wares and merchandizes, of domestic growth, without licence, contrary to the statute of February 26, 1823, (sess: acts of 1822-3, ch. 3,) which provides, that if any person shall sell, by wholesale or retail, goods, wares and merchandize, of foreign or domestic growth or manufacture, without licence &c. he shall forfeit and pay 100 dollars.

At the trial, it was proved, that Mitchell was a commission merchant, and sold tobacco &c. on commission: whereupon he moved the court to instruct the jury, "that one selling tobacco on commission was not bound to obtain a licence for so doing." The court refused to give this instruction; but stated that persons so selling tobacco, the property of the growers, were not bound to obtain a licence for that purpose. The jury found Mitchell guilty, and judgment was rendered accordingly. To this judgment he obtained a writ of error from the circuit court of Henrico; which has adjourned to this court, the questions, 1. What is the proper construction of the act of February 24, 1823? And 2. Ought the judgment of the hustings court to be reversed or affirmed?

MAY, J. We consider the hustings court as having decided, in effect, that tobacco of the growth of this state, in the condition in which it is ordinarily prepared for market by the grower, is comprehended within the terms "goods, wares and merchandize," in the statute. It is believed, that this construction was never given to the statute, until the year 1823—five years after it was passed; and the fact that

573 *the legislature, by an act of the last session, have provided against it in future, is entitled to some consideration.

A careful examination, however, of the various statutes on this subject, leads us to the conclusion, that the words "goods, wares and merchandize," as used in the revenue laws, were never intended to embrace the agricultural productions of the state. Thus, the annual act imposing taxes &c. exempts from this tax, farmers &c. who purchase and sell sugar, salt, iron &c. "as a return load for their produce and other property, taken to market." The law defining wholesale and retail merchants, declares the former to be those, of whose annual sales, one half or more, shall be made by the bale, piece, package, or

dozen; terms wholly inapplicable to corn, wheat, tobacco &c. And we know, that these, and many other articles of produce and property, are not, in this state, ordinarily termed "goods, wares and merchandizes;" and have never been regarded as such, within the meaning of the revenue laws. To give this comprehensive signification to them, would make them embrace almost every subject of ordinary traffick and sale in the country; and would require a large portion of several classes of our citizens to obtain licences as merchants.

Construing the act of February 24, 1823, therefore, with reference to its object and subject matter; and guided, in the interpretation of its words, by the provisions of other laws on the same subject; we are of opinion, and do accordingly certify to the circuit court, that tobacco, of the growth of this state, and in the condition in which it is ordinarily prepared for market by the grower, is not goods, wares or merchandize, within the meaning of the said act, no matter how or by whom sold; and that the judgment of the hustings court ought to be reversed, for not giving the instruction, which was asked for, in this case.

574 *Walker v. The Commonwealth.

June, 1829.

Larceny—When Evidence of Other Larcenies Not Admitted.—On trial of indictment for larceny of a watch, evidence of another larceny of a cloak, committed by prisoner, the two acts being wholly distinct and unconnected, is not admissible for any purpose.

Samuel Walker was indicted in the circuit court of Henrico, for the larceny of a watch, of the value of 50 dollars, and of a gold chain and key, the property of Elizabeth Bolton. At the trial, he excepted to an opinion of the court given against him, and being convicted, he now applied for a writ of error.

The bill of exceptions states, that the commonwealth having introduced evidence to shew, that the watch had been taken without the consent of the owner, from her house, and that it was seen in the possession of the prisoner on the same day, introduced another witness, who testified, that he went to Norfolk in pursuit of the prisoner; that the prisoner, on the morning after the arrival of the steam boat in which the witness was, came to the boat, and the witness informed him that he had come to get the watch, the cloak, and the amount of Mr. Thomas his landlord's bill; and an altercation ensued, in which the prisoner denied that he had taken a watch, and insisted on leaving the steam boat in spite of opposition. The witness also testified, that although he and the prisoner had boarded together in the same house (Mr. Thomas's) yet no particular intimacy had existed between them. On his cross exam-

*Separate Offences—How Punished.—In State v. Porter, 25 W. Va. 687, it is said: "The two offences, being separate and unconnected, and resulting from different and distinct impulses, could not be regarded as parts of one and the same act and punished as such, but could only be prosecuted distributively and punished as separate offences." 1 Whart. Crim. Law, §27; Walker's Case, 1 Leigh 574.

ination, he said there had been some dealings between him and the prisoner in relation to a pair of pantaloons, bought by him of the prisoner. The attorney for the commonwealth then asked the witness, if he had sold the prisoner the cloak which the prisoner had carried away; and directed the cloak to be brought in. The prisoner's counsel objected to any inquiries being made as to the cloak; contending, that that was a separate transaction, for which there was a separate indictment pending, and that the evidence concerning it could

575 have no effect on *this case. The court, however, decided that the question might be asked, and that the conduct of the prisoner respecting the cloak, which, it was alleged, had been carried off by him from Thomas's boarding house, on the same day that he carried away the watch from Elizabeth Bolton's, might be inquired into on two grounds; 1. because the inquiry of the prisoner's counsel, as to the witness's purchase of the pantaloons from the prisoner, let in the question as to the cloak; and 2. and principally, because the conduct of the prisoner in carrying away the cloak, on the same day that he carried off the watch, was admissible to prove the intent with which the watch was carried off, it being contended by the prisoner, that the watch was loaned by Elizabeth Bolton to him; declaring at the same time, that whatever might be the prisoner's motive in carrying away the cloak, the jury could not convict him, unless they were satisfied that the watch was taken with a felonious intent. To this opinion of the court the prisoner excepted.

The jury found the prisoner guilty of the larceny, charged in the indictment, without finding the value of the article stolen; and ascertained the term of his imprisonment in the penitentiary, to be two years; and the court passed sentence on him accordingly.

And now he applied to this court, by petition, for a writ of error. Upon this application, the whole merits of the case were argued by Schmidt and Michie for the petitioner, and by the Attorney General for the commonwealth.

The objections taken to the proceedings and judgment, were, 1. that the court permitted evidence to be given to the jury, of another offence committed by the prisoner, distinct from that charged in the indictment, namely, the larceny of the cloak; and 2. that the verdict was defective in not finding that the goods stolen were of the value of ten dollars, so as to constitute the taking of them grand larceny.

BROCKENBROUGH, J., delivered the opinion of the court. It is certainly true, that, in public prosecutions for a specific *offence, it is incumbent on the 576 prosecution to prove that the offence which is charged has been committed: he is not allowed to go into proof of the commission of any other offence than that charged, or of the character of the prisoner, unless the prisoner himself opens the way for the admission of that evidence by putting his character in issue; and, even in that case, the prosecutor cannot prove particular facts, but must content him-

self with evidence of general character. The reasons on which these positions are founded, are sufficiently obvious. Not only must the proof correspond with the allegation, but it is an important principle, that the prisoner should not be taken by surprise. As he is charged with a particular offence, he has notice to be prepared to defend himself against that charge, and that alone: he cannot be prepared to defend himself against other charges, not exhibited against him, or to maintain the integrity of his whole life, when that is not put in issue; and when it is, he cannot be prepared to account for particular instances of misconduct, of which he is not previously informed, and as to which he is not required to defend himself.

It frequently happens, however, that as the evidence of circumstances must be resorted to for the purpose of proving the commission of the particular offence charged, the proof of those circumstances involves the proof of other acts, either criminal or apparently innocent. In such cases, it is proper, that the chain of evidence should be unbroken. If one or more links of that chain consist of circumstances, which tend to prove that the prisoner has been guilty of other crimes than that charged, this is no reason why the court should exclude those circumstances. They are so intimately connected and blended with the main facts adduced in evidence, that they cannot be departed from with propriety; and there is no reason why the criminality of such intimate and connected circumstances, should exclude them, more than other facts apparently innocent.

577 Thus, if a man be indicted for murder, and there be proof that the *instrument of death was a pistol; proof, that that instrument belonged to another man, that it was taken from his house on the night preceding the murder, that the prisoner was there on that night, and that the pistol was seen in his possession on the day of the murder, just before the fatal act committed, is undoubtedly admissible, although it has the tendency to prove the prisoner guilty of a larceny. Such circumstances constitute a part of the transaction; and whether they are perfectly innocent in themselves, or involve guilt, makes no difference, as to their bearing on the main question which they are adduced to prove. But if the circumstances have no intimate connexion with the main fact; if they constitute no link in the chain of evidence; then, supposing them innocent, their admission, to be sure, may do no harm, yet they ought to be excluded, because they are irrelevant; but if they denote other guilt, they are not only irrelevant, but they do injury, because they have a tendency to prejudice the minds of the jury; and for this additional reason they ought to be excluded.

The same principles which apply to the proof of the fact, are applicable to the proof of the criminal intent.

The intent with which an act is done, is to be known from the circumstances which precede, accompany, or follow, the act: that intent may be generally ascertained with great correctness, from the conduct of the prisoner on the particular occasion, and

from the circumstances connected with the act proved to have been committed. This is the legitimate source from which to draw information of the *quo animo*. I do not deny that the proof of other criminal acts done by the prisoner, may afford a strong or even violent presumption of his intention in the particular act under consideration. To prove that a prisoner charged with larceny, had in his possession other stolen goods, taken from other persons, at other times, or that he has general bad character for honesty, or that he has before been guilty of theft, may afford a presumption that his intent on the present, is similar to his intent on former occasions. But they

578 do not prove any necessary *connexion between his intent and his act on this particular occasion, and are liable to all the objections before stated to that kind of evidence.

There is one class of cases in which the courts of England, have allowed the evidence of other criminal acts of the same character to be given in evidence in support of the charge: cases in which it is necessary to prove the scienter. Thus, in prosecutions for uttering forged notes &c. knowing them to be forged, it has been frequently permitted to prove that the prisoner has committed other utterings of forged notes, for the purpose of proving, or of enabling the jury to infer, that he knew that the note which he is charged with uttering, was a forged note. Such was *Whiley's case*, 1 New Rep. 94; 2 Leach 983, and *Ball's case*, 2 Leach 985, in note; both of which are referred to, and approved by this court in *Finn's case*, 5 Rand. 710. The principle on which this species of evidence has been admitted in those cases, is, that it is frequently impossible, from the insulated fact of the uttering a single forged note, to ascertain whether the accused knew it was forged or not. Knowledge exists in the mind; and it is impossible, say the courts, to become acquainted with the secret knowledge of another, without referring to his conduct or his acts on other occasions. A man perfectly honest, who is not skilled in the character of bank notes, may pass a forged note with perfect innocence: the single fact of passing does not prove his knowledge: the courts therefore say, that you may prove other utterings, and the circumstances attending them, for the purpose of proving the knowledge which constitutes the guilt. It is necessity which has driven the courts to the adoption of this rule, and some judges doubt whether it is correctly established. But it has not been extended, and, for the reasons which I have given, will probably never be extended, to the proof of the *quo animo*. In the above mentioned case of *Whiley*, lord Ellenborough is reported to have said, (in assigning his reasons why other and substantive felonies may be given in evidence in an indictment for

579 uttering) that he *knew a case, where, in a prosecution for burglary, proof had been given of three burglaries committed on the same night: that a shirt which had been taken from the first house, had been found in the second, and that when facts are intimately blended and con-

nected together, they may be given in evidence. The remark is calculated to mislead; and on examination it appears to have been a very loose report of what probably took place on some criminal trial. The case is not reported, but it is easy to conjecture a case of burglary, in which it may be proper to prove three burglaries. Thus, if from the first house the burglar carried off sundry articles of clothing, and, amongst others, "a shirt," which it was easy to identify, and the "shirt" was found at the second, from which sundry other articles were taken, some of which being identified were found in the third, from which also sundry other articles were taken, and found on the prisoner; now on a prosecution for the first burglary, these other burglaries, and the facts connected therewith, may constitute so many links in the chain of evidence, and, therefore, may be proper to be given in evidence. The case referred to by lord Ellenborough may have been such an one as here represented, and, if so, was properly decided; but it is not easy to understand why he referred to such a case so loosely reported, for the purpose of proving the position which he was then endeavouring to establish.

Let us now apply the principles here laid down, to the case before us. Evidence was introduced for the purpose of proving, that the prisoner had carried away a cloak from the witness, on a charge of stealing a watch from another person. The first reason assigned was not apparently much relied on, and seems not to be tenable. The witness had said that he was not intimate with the prisoner; to repel this, he was asked, on cross examination, whether he had not had some dealings with the prisoner, and, particularly, whether he had not sold him a pair of pantaloons: the object seems to have been to produce a contradiction of the witness's statement respecting their 580 intimacy. The attorney *for the commonwealth then asked him, if he had sold him the cloak which the prisoner had taken from him. It does not appear, that the object of this inquiry was to add to the proof of their intimacy, because, if it had, that would have operated in favour of the cross examination. The object probably was to ascertain, with what motive a particular, distinct fact had been done; and, if so, it does not seem, that the question put in the cross examination could be a reason for introducing it. The principal reason for allowing the question, was to prove the intent with which the cloak was carried away, in order to raise a presumption that if the cloak was taken *animo furandi*, the watch was taken with the same intent. According to the principles already laid down, this evidence was inadmissible. It was a distinct charge, which the prisoner was not called on to defend, which he could not be prepared to defend, and which had no such necessary connexion with the transaction then before the court as to be inseparable from it. It ought, therefore, to have been rejected.

The objection made to the verdict in this case, may be disposed of in a few words. The prisoner was indicted for grand larceny, and the jury find him guilty

of the larceny of which he is indicted, and affix to his crime a punishment which cannot be applied to petty larceny, but is an appropriate one for grand larceny. They affirm, then, that he is guilty of grand larceny. And there is no error in this respect.

But for the error before stated, the judgment is to be reversed, by the unanimous opinion of the court; the verdict to be set aside; a venire facias de novo awarded, and a new trial had &c.

581 *Rawlings v. The Commonwealth.

June, 1829.

[19 Am. Dec. 757.]

Assault—Evidence in Mitigation of Fine That Prosecutor Used Abusive Language to Defendant—Admissibility.*—On the trial of indictment for an assault, defendant offers evidence, in mitigation of fine, that the prosecutor was on bad terms with him, and had on days previous to the assault, used provoking and abusive language of and to him: HELD such evidence is inadmissible.

Richard Rawlings was indicted in the circuit court of Orange, for an assault on one Robert Jones. He pleaded not guilty. The jury found him guilty, and assessed a fine against him of 50 dollars.

At the trial, he offered evidence "in mitigation of damages," to prove that the infomer Jones, "had been on bad terms with him; and on previous days to the time of making the assault, and at other places, had used provoking and abusive language of and to him." This evidence the court refused to admit; to which he filed exceptions. And now he applied, by petition, to this court, for a writ of error to the judgment, assigning in his petition the opinion of the court rejecting the evidence as the only error of which he complained.

PARKER, J. The evidence offered by the defendant, tended to establish two points, to wit, the prosecutor's previous hostility, and his antecedent provocations; and the question is, Whether it ought to have been received in mitigation?

It can scarcely be contended, that the "bad terms" existing between the prosecutor and defendant, could have any other effect, than to render it probable that the assault had been made through revengeful feelings. The only question, therefore, is as to the provoking and abusive language used on previous days. On this point we have not looked to english authorities in cases of indictments for assaults; because, the practice in England, and in several of the states, is for the court, which fixes the punishment, to hear evidence in mitigation of the fine, and that evidence may be often loose and irregular, because the

582 correction is "in the breast of the court. But we have looked into civil cases of this character, where evidence of previous provocations has been offered in mitigation of the damages, the principle of which is strictly applicable, where evidence for the same purpose is offered in a case of misdemeanour, to lessen the fine. We particularly refer to the cases of Avery v.

Ray, 1 Mass. Rep. 12; Lee v. Woolsey, 19 Johns. Rep. 319, and Waters v. Brown, 3 Marsh. 559. They establish this principle, that previous provocations, to have the effect of mitigating the damages, should be so recent as to induce a fair presumption, that the violence was committed during the continuance of the feelings and passion excited by them, and such as in fact may fairly be considered a part of one and the same transaction. This rule is adopted in analogy to the one which prevails in cases of homicide. Antecedent provocations will not there mitigate the offence, if a sufficient time has intervened between the provocation and the killing, for passion to subside, the warm blood to cool, and reason to interpose; for the law which notices the weaknesses of men, will not indulge their passions. A contrary course would not only encourage an appeal to force and violence, in every case of real or supposed insult, but would lead to inquiries wholly different from the one on the record, and thus divert and distract the attention of the jury. It is matter of necessity, that all the parts of the same transaction, and whatever is immediately connected with and led to it, should be heard and considered, although involving several inquiries. But the courts have steadily resisted any extension of this rule, to prevent the attention of the jury, from being drawn from the issue they are sworn to try, to the examination of collateral facts. The case under consideration might have furnished an exemplification of the impropriety of permitting such evidence; for if the defendant had been allowed to give in evidence provocations received on previous days, and at different places, the prosecutor ought to have been allowed to shew under what

583 circumstances they were offered; and then where would be "the stopping point? The court is, therefore, of opinion, that immediate provocations only, or such as are plainly a part of the res gesta, received so recently that the blood has not had sufficient time to cool, can properly be received in evidence for the purpose stated in the bill of exceptions; and that the circuit court of Orange did right in rejecting such as was offered by the defendant, he not having shewn on the record the relevancy of such inquiries to the issue joined.

It has indeed been suggested, that, as under some possible state of things, previous provocations, even on a former day, might be admitted as explanatory of the transaction itself, namely, where allusion to them is made at the time, the court, in this case, ought to have received the testimony offered, with an instruction to the jury to disregard it, if the connexion between the insult and the violence was not established to their satisfaction. But we think, that it is not only the province, but the duty of the court, to decide on the admissibility of evidence, with reference to the facts in issue, even although such admissibility depends on matters of fact; and to reject it, if a proper foundation is not laid for its admission, lest the jury might be prejudiced and misled by testi-

***Assault—Evidence in Mitigation of Fine.**—The principal case is cited in Davis v. Franke, 33 Gratt. 417. See monographic note on "Assault and Battery" appended to Roadcap v. Sipe, 6 Gratt. 213.

mony, which, upon the subsequent facts proved, might turn out to be irrelevant and improper. The course pursued in relation to confessions of guilt, and to declarations made in articulo mortis, both depending upon the circumstances or facts of each case, furnishes the illustration of this rule. The defendant, in the present case, shews by his bill of exceptions, no collateral facts which might have justified the court in admitting his proof. He offered evidence prima facie inadmissible. He established no connexion between the assault and battery charged upon him, and the provocations he had previously received; nor did he offer any fair presumption from which the court ought to have concluded, that the one was the consequence of the other, and committed before his blood had time to cool. Under these circumstances the court is clearly of opinion, that his application for a writ of error ought to be overruled.

584 *Jones v. The Justices of Stafford.

June, 1829.

Mandamus—Right of Circuit to Compel County Court to Open Road.—A county court rejects an application for opening a new road, on a regular hearing. **Held**, that an appeal lies from such a judgment; but the circuit court cannot award a mandamus to the justices of the county court to compel them to open the road.

Thomas Jones made an application to the county court of Stafford, for a road to be opened in that county. The county court appointed viewers, who duly made their report; whereupon summonses, in the usual form, were directed to the owners of the land through which it was proposed that the road should pass, who appeared, and prayed writs of ad quod damnum; which were awarded, and inquisitions regularly taken thereon, and returned to court. The case being regularly matured for hearing, according to the provisions of the statute, the court decided that the proposed road ought not to be opened. From this judgment an appeal was taken to the circuit court of Stafford; which dismissed the appeal, on the ground, that it ought not to have been granted. And, thereupon, Jones moved for a mandamus to be directed to the justices of the county court commanding them to open and establish the road. An alternative mandamus was accordingly issued, commanding the justices to open the road, or shew cause to the contrary. This process was duly served on the justices; but they made no return to it, and shewed no cause against the issuing of a peremptory mandamus; and thereupon, such peremptory mandamus being moved for, the court adjourned to this court, the following questions, 1. Is the mandamus the proper remedy in this case? 2. What judgment should be rendered in the premises?

UPSHUR, J. The judgment of the county court in this case, was strictly within the scope of their jurisdiction and powers.

***Mandamus to Compel Court to Open Road.**—The county court cannot be enforced by mandamus to open a road. *Doolittle v. County Court*, 28 W. Va. 177, citing *Jones v. Justices of Stafford*, 1 Leigh 584. To the same effect the principal case is cited in *State v. County Court*, 33 W. Va. 504, 11 S. E. Rep. 74.

They were the proper judges in the first instance, whether the proposed road ought to be opened or not. They 585 *have decided that the public convenience did not require it, and that, all circumstances being weighed, it ought not to be opened. This judgment is conclusive upon the subject, and binding upon all the parties to the record, so long as it remains unreversed. Any party who considered himself aggrieved by that judgment, might have appealed from it; and if the appeal had been regularly taken and prosecuted, full justice in the premises might have been attained in that mode.

It is unnecessary to decide, whether the appeal that was taken in this case, was properly dismissed or not: for, if not, there was still an ulterior tribunal, to which the party might have resorted by appeal. Not having done so, the dismissal left the judgment of the county court in full force. The effect of a mandamus, in such a case, would be, to compel the county court to reverse its own decision, and to enter another judgment, contrary to its views of the law and the right of the case. This is strictly the province of an appellate court, but it does not upon any principle, present a proper case for a mandamus.

A mandamus is the proper remedy in certain cases, to compel an inferior court to proceed to judgment; but we consider it very clear, that an erroneous judgment already pronounced cannot be corrected by that process, in any case where the party may have a different remedy.

The court is of opinion, and doth decide, that the mandamus is not the proper remedy in this case; and, of course, that a peremptory mandamus ought to be refused.

586 *NOVEMBER TERM 1829.

JUDGES PRESENT.*

<i>Stuart,</i>	<i>Daniel,</i>
<i>Brockenbrough,</i>	<i>Semple,</i>
<i>Johnston,</i>	<i>Parker,</i>
<i>Smith,</i>	<i>Field,</i>
<i>Allen,</i>	<i>May.</i>

The Commonwealth v. Bartlett and Others.

November, 1829.

Breach of Peace—Right of Justice to Recognize Party to Appear before Circuit Court.—Upon complaint of breach of the peace before a justice of the peace, he cannot recognize the party accused to appear before the circuit court to answer the charge.

Benjamin Bartlett, being brought before a justice of the peace of the county of Harrison, for a breach of the peace, entered into a recognizance, with George I. Williams his surety, with condition that Bartlett should appear at the next circuit court of the county, to do and receive what should be then and there enjoined him by the said court, and, in the meantime, to keep the peace and be of good behaviour towards the commonwealth and all its citizens, and especially towards John Smith, his wife and children, and property. Bartlett failed

*JOHNSTON, J., did not sit in any of the cases here reported; and SEMPLE, J., was absent in Bartlett's and Jones's cases.

to appear at the circuit court, according to the condition of this recognizance; and that court, on the motion of the attorney for the commonwealth, ordered a scire facias on the recognizance, against Bartlett and Williams. They appeared to the scire facias, and put in a general demurrer to it. Whereupon the court, with the assent of the parties, adjourned the following questions to this court:

587 *1. Has a justice of the peace power and authority to recognize a party charged before him with a misdemeanour, to appear before the circuit court of the county, to answer the same?

2. If such general power does not exist, is such a recognizance void, as to the appearance of the party only, or void as to all purposes?

3. What judgment ought the court to give on the demurrer to the scire facias in this case?

FIELD, J., delivered the opinion of the court. Regarding the recognizance upon which the scire facias in this cause issued, as an ordinary recognizance to keep the peace and be of good behaviour, taken by a justice of the peace; and being of opinion, that a justice of the peace, in such a case, has no authority to bind the party to appear before a circuit court; a majority of this court is of opinion, and doth decide, that the condition of the recognizance, requiring the appearance of Bartlett before the circuit court, is void to all purposes; and the demurrer to the scire facias, should, therefore, be sustained, and judgment rendered for the defendant thereupon.

MAY, J. This is an ordinary recognizance to keep the peace, entered into according to law, and essentially in due form, except that the condition requires the defendant to appear at the circuit, instead of the county, court. In England, the statute directs that the justices shall return such recognizances to the next sessions; but we have no such statute here. Our circuit courts have jurisdiction to require surety of the peace: and, therefore, the magistrates may take recognizances in such cases, with condition for the appearance of the party bound, at either the county or the circuit court. Upon this ground, I am of opinion, that judgment should be rendered for the commonwealth on the demurrer to the scire facias.

In this opinion, judges BROCKENBROUGH and PARKER concurred.

588 *Davenport v. The Commonwealth.

November, 1820.

Criminal Law—Stealing Free Negro Knowing He Is Free—D. is indicted for stealing a free mulatto boy, knowing at the time that he was free: HELD,

1. **Same—Same—Sale.**—That the offence is complete by the kidnapping, without the actual sale of the negro by the kidnapper, under the statute 1 Rev. Code, ch. 111, § 28.

2. **Same—Same—Knowledge of Defendant.**—That the stealing a free negro, with felonious intent to appropriate him, is criminal, whether the person so stealing him know him to be free or not.

3. **Same—Same—Same—Averment of Surplusage**—That though the knowledge of the freedom is

*Criminal Law—Indictment—Surplusage.—The principal case is cited in *foot-note* to *Pomeroy v. Com.*, 2 Va. Cas. 342; *foot-note* to *Derieux v. Com.*, 2 Va. Cas. 379. See monographic *note* on "Indictments, Infor-

averred in the indictment, it need not be proved, but may be regarded as surplusage; but

4. **Same—Sale of Free Negro—When Knowledge Material.**—That if one come lawfully into possession of a free negro, not knowing him to be free, and sell him: knowledge of his freedom at the time of selling, is necessary to make the selling criminal.

5. **Same—Stealing Free Negro—Consent.**—That when one takes and carries away a free negro boy of eight years of age, with criminal intent to appropriate him, the consent of such a boy does not excuse or lessen the offence.

Argument of Counsel—Right of Counsel to Controvert Opinion of Court before Jury.—If the prisoner's counsel, in a criminal case, asks the opinion of the court and an instruction to the jury on a point of law, and the court rules the point against the prisoner: his counsel shall not be allowed to controvert the correctness of the court's opinion on such point, before the jury.

Alfred R. Davenport was indicted in the circuit court of Henrico, for stealing a free boy of colour. The indictment charged, that the said Davenport did feloniously steal, take and carry away, one mulatto boy named David Caesar, who was a free boy and not a slave, the said Davenport at the time knowing him to be free. Davenport demurred to the indictment. The court overruled the demurrer. And then he pleaded not guilty, and was put upon his trial. The jury found him guilty, and ascertained the term of his imprisonment in the penitentiary, to be two years; and sentence was pronounced accordingly.

Several points of law arose in the course of the trial, and were decided by the court against the prisoner:

1. He moved the court to instruct the jury, that to maintain the prosecution, the commonwealth must prove to their satisfaction, that he, the prisoner, knew at the time when the alleged stealing was committed, that the person named in

589 *the indictment, as the person stolen, was free at that time; which instruction the court refused to give, and instructed the jury, that if they were satisfied that the mulatto boy was free at the time he was stolen, and that the prisoner took and carried him away with the felonious design of selling him as a slave, the prisoner ought to be convicted, whether he knew or not that he was then free.

2. The prisoner moved the court to instruct the jury, that to constitute the felonious taking and carrying away, charged in the indictment, they must be satisfied, that such taking and carrying away was against the consent of the said David Caesar; which instruction the court refused to give, it appearing, that the said David Caesar was not more than eight years of age at the time the offence alleged in the indictment was committed.

3. After the last mentioned instruction had been given, and in the course of the argument before the jury, one of the counsel for the accused attempted to argue the correctness of the instruction, when he was stopped by the court, and informed, that

mations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

***Same—Sale of Free Negro—Consent**—The principal case is cited in *foot-note* to *Mercer v. Com.*, 2 Va. Cas. 144.

***Same—Jurors—Law and Fact.**—The principal case is cited in *Brown v. Com.*, 86 Va. 471, 10 S. E. Rep. 745; *Sparf v. United States*, 156 U. S. 51, 715, 15 Sup. Ct. Rep. 312. See monographic *note* on "Juries" appended to *Chahoon v. Com.*, 30 Gratt. 733.

the court would not permit the question of law, embraced in the instruction, to be argued or controverted by the counsel; the instruction having been given on a motion of the prisoner's counsel to give the contrary instruction.*

590 "To these opinions of the court the prisoner filed exceptions. And now he applied, by petition, to this court, for a writ of error: and on this application, the case was argued by R. G. Scott, S. C. Scott, and Michie, for the petitioner, and the Attorney General for the commonwealth.

BROCKENBROUGH, J. The first question is that presented by the demurrer to the indictment: Whether the indictment was good and sufficient in law? This depends on the construction of the statute on which the indictment is founded. The statute declares that "if any person shall hereafter be guilty of stealing or selling any free person for a slave, knowing the person so sold to be free," such person being convicted thereof, shall be imprisoned in the penitentiary for a term not less than one or more than ten years. 1 Rev. Code, ch. 111, § 28, p. 427.

It is alleged by the prisoner's counsel, that the statute does not intend to declare the stealing alone of a free person to be felony, but that the selling him for a slave is an essential ingredient of the offence; that both acts must concur to make the crime. In support of this position, they rely, 1st, on the preamble of the original act of 1787, and 2dly, that the word stealing is a technical word, and that there can be no larceny except of property.

591 "The preamble of the original statute recites, that "whereas several evil disposed persons have seduced or stolen the

children of black and mulatto free persons, and have actually disposed of the persons so seduced or stolen as slaves, and punishment adequate to such crimes not being by law provided for such offenders;" and then the enacting clause uses the words above recited. Although the preamble of a statute is the key which unlocks the mind of the legislature, where its intention is doubtful, yet where the words are clear and unambiguous, the language of the enacting clause furnishes the rule which is to be followed. If the enacting clause clearly and plainly provides for the punishment of an offence, which is not contained within the preamble, surely the courts must carry the enactment into effect. If they do not, then they substitute the preamble for the enactment. If the preamble is more extensive than the enactment, they make a law which the legislature did not enact; if less extensive, they omit to enforce a law which is enacted. In this case, though the preamble recites that the children of free blacks and mulattoes had been stolen and disposed of, yet the enactment prohibits the stealing or selling. If the legislature had intended, that both acts should concur, it would have said, "if any person shall be guilty of stealing and selling." There can be no good reason why the courts should convert or into and, and there is the best reason why they should not. If the word "and" had been used, then a person might lawfully obtain possession of a free negro, or the child of one, and knowing perfectly that he is free, might sell him as a slave, without violating this law. A guardian might thus dispose of his ward, or a master of his apprentice. So a person might unlawfully, and secretly steal such free negro, with the most felonious intention, hire him out from year to year for his whole life in a distant part of the country, and not be subject to its penalties. Or one might steal, and another sell, without either being liable to the punishment of felony. Such being the consequences, which would result from changing the language of the

592 enacting "clause, to make it fit the preamble, we are all of opinion, that it cannot be done.

*The following history of the proceeding mentioned in this bill of exceptions, was drawn up by the judge of the circuit court, and filed:

Memorandum—To understand the ground on which this bill of exceptions is founded, the court thinks it proper, at this time, to make the following statement. As soon as the jury was sworn, the prisoner's counsel proposed, that the jury should find a special verdict: but the attorney for the commonwealth would not agree to it, and the prisoner's counsel withdrew the proposition. After the evidence was closed, and the attorney for the commonwealth, in his opening speech to the jury, had argued the law of the case involving the construction of the statute under which the prisoner was indicted, the prisoner's counsel insisted, that the court should then before the defence was opened to the jury, express its opinion, whether the construction put on the statute by the attorney, was correct or not. The judge stated, that he should reserve his opinion on the law, till the argument was closed: that the prisoner's counsel were at liberty to argue the law and the fact before the jury; and that the jury had a right to decide the whole case including the law, whether it agreed with the court or not. The counsel for the prisoner were not satisfied with this arrangement, stating, that if the opinion of the court was in favour of the prisoner on the law, he had the right to that opinion immediately: if it was against the prisoner, his counsel had the right to combat it before the jury. The judge said, that if the opinion of the court was required at the instance of the prisoner, and upon argument, and it should be unfavourable to him, his counsel could not again argue it before the jury: and repeated, that he should prefer giving his opinion at the close of the whole argument. The counsel for the prisoner then made the motion which is set forth in this bill of exceptions."

The above was indorsed "Statement of the court in Davenport's case: but as the prisoner's counsel are not in court, though the prisoner is, it cannot be entered on the record:" which statement, by request of the judge, was filed with the papers in the case.—Note in Original Edition.

But it is argued that "stealing" is a technical word, that it means a larceny, and that there cannot be a larceny except of the personal good of another, and a free person is not property. It is true, that the word is usually applied to the taking of property, but it is certainly competent for the legislature to apply it to the felonious taking of a free person, although the common law does not so apply it; and to the court it seems clear, that it is the appropriate phrase. Negroes and mulattoes are in our state generally slaves, and as slaves they are personal chattels: when they are emancipated, or otherwise become free, they, are no longer chattels, but their colour renders them an easy prey to the arts and violence of desperate and abandoned villains. If they are carried away by force, or seduced by fraud, from their accustomed homes, to places where they are not known, their freedom is easily wrested from them, and they become slaves, and as such chattels. If then a person wrongfully takes

and carries away a free negro, with the felonious design of converting him to his own use, by selling, or otherwise making him his property, he may with great propriety be said to be guilty of stealing him, and in this sense it was undoubtedly used by the legislature in the act now under consideration.

For these reasons we are of opinion that the demurrer to the indictment was properly overruled.

The next question arises from the first bill of exceptions taken to the opinion of the court. (Here the judge stated the substance of the instruction given by the circuit court to the jury, from the bill of exceptions.) Whether this instruction be correct or not, depends, 1st, on the construction of the statute. Is it necessary to constitute the offence, that the person stealing a free person should know him to be free?

The object of the statute was to protect free negroes and mulattoes in the enjoyment of their freedom; and to pre-

593 serve *that freedom it was necessary to guard them against two classes of persons; 1st, those who might obtain a wrongful or illegal possession of them for the purpose of converting them to their own use; 2ndly, those who having a rightful possession, or at least a possession not illegal, might sell them as slaves. The moral guilt of the first class, is complete by the very act of feloniously taking and carrying them away. The act of stealing a negro slave had previously been made felony. If a person steals a negro, he is then clearly guilty of felony, if he be a slave; and certainly it does not diminish, it rather aggravates, his moral guilt, that the negro so stolen (and whom he intends to sell or otherwise convert to his own use), is a free person. In both cases, he is equally guilty of the fraudulent or forcible taking; of the fraudulent or forcible carrying away; and of the felonious intention of making the negro his own. In the one case, he deprives another of his property; in the other he deprives the person stolen of his freedom, which is a greater injury to him than the loss of his property is to the owner of the slave. The offence, then, of stealing a free negro, being greater than that of stealing a negro slave, it is not at all probable, that the legislature in passing a law, especially designed to prevent free negroes from being stolen, would require an additional ingredient in the constitution of the crime; an ingredient not required in any case of larceny, nor necessary to the completion of the offence. But in the other class of offenders—those who having a lawful possession, yet sell the negro—a knowledge of the fact that the negro is free, seems to be a necessary constituent of the offence. A man may receive stolen goods innocently, but if he receives them knowing them to be stolen, in that knowledge consists his crime. So if a man having purchased a negro, sells him, although the negro be in fact free, yet when he sells him he is guilty of no crime, if he did not know him to be free: the criminal intent is altogether wanting. If he acquires possession in any other lawful manner, by loan, or by hire, and sells him, although he

594 is not innocent, *having violated his trust, yet he is guilty of no offence against the freedom of the negro, unless he knows at the time of the sale that he is free. If those who drafted this short act, had not been too anxious for brevity, and too much afraid of tautology, there could not have been a doubt raised on the subject. "If any person shall hereafter be guilty of stealing"—What? "any free person" is the subject of the stealing. Is it then proper to read, "knowing the said person so sold to be free?" Certainly not, because the words so sold do not refer to the stealing, but to the selling. Those words, therefore, do not form any part of the offence of stealing: it is complete without them. The clause then must be understood thus: "If any person shall hereafter be guilty of stealing any free person, or selling any free person for a slave, knowing the person so sold to be free," &c. By using the words "any free person" after stealing, and then repeating them after selling, the whole difficulty is cleared away.

It is argued, however, that, as the indictment charges that the prisoner knew the mulatto boy to be free, it is necessary to prove the allegation. But we do not understand, that such is the rule. On the contrary, if an averment be introduced into an indictment, which is altogether superfluous and immaterial, and if the indictment is sufficient without the words so introduced, they may be rejected as surplusage, and need not be proved. 1 Chitty Cr. Law, 173; Ib. 232; Bennett's case, 2 Virg. Ca. 235; Pomeroy's case, Ib. 342, and Derieux's case, Ib. 379. Now, in this case, if the construction given to the statute be correct, the averment of the knowledge of the prisoner that the boy stolen was free, is entirely unnecessary and superfluous. The indictment is good without it, and it was therefore unnecessary to prove it.

This case differs intirely from Booth's case, 6 Rand. 669, cited by the petitioner's counsel. The statute, in that case, punishes a master &c. who shall knowingly permit more than five negroes or slaves, other than his own, to be and remain &c.

The indictment charged, that the de-

595 fendant permitted *more than five negro slaves to be and remain &c. The court said, that as the prosecutor had not charged an assemblage of free negroes, but one of slaves only, he was not allowed to prove what he did not charge; for the allegata and probata must agree. There was no surplusage in that indictment; but the prosecutor wished to produce surplus proof. But here there is surplusage in the averment; and as the crime is sufficiently alleged, when that surplusage is rejected, it need not be proved.

Of the point stated in the second bill of exceptions, little need be said. The prisoner's counsel moved the court to instruct the jury, that they must be satisfied that the taking and carrying away of the free boy was against his consent, he being not more than eight years of age. A child of that age is incapable of giving his consent, and incapable of collusion. It was, therefore, not necessary to prove, that it was

against his consent. It is not like Mercer's case, 2 Virg. Ca. 144.

On these questions, this court is unanimous in its opinion, but on the questions arising on the last bill of exceptions, there is some difference of opinion. From that bill of exceptions it appears, that after the instruction had been given to the jury by the court on the construction of the statute, one of the counsel for the accused attempted to argue the correctness of the instruction, when he was stopped by the court, and informed that the court would not permit the questions of law embraced in that instruction to be argued, or controverted by the counsel, and prevented the same from being so argued or controverted, the instruction having been given on a motion of the prisoner's counsel to give the contrary instruction. Did the court err in this respect?

To decide this question, the majority of the court does not deem it necessary to inquire into the general question of the power of the court, to controul the prisoner's counsel in arguing questions of law before the jury, which have been decided by the court, when that decision has been

596 *made by the court without any application from the bar, or upon the motion of the commonwealth's counsel, nor into the question of the right of the jury, as contradistinguished from its power, to hear and decide on the law as well as the fact in a criminal case. Those general questions are yet pending in this court in Word's case, and Garth's case, and may be decided hereafter. But, in this case, the question is, whether after the prisoner's counsel has moved the court to instruct the jury on a question of law, and the court has performed that duty, which it could not refuse, but has given an instruction different from that which the counsel thought ought to have been given, the counsel can then be allowed to controvert that opinion, and argue the same question of law before the jury. The bill of exceptions does not give the particulars of that proceeding; and, as it was tendered by the counsel for the accused, it must be presumed, that if there was any thing else in the conduct of the court, which the prisoner or his counsel supposed was irregular, or deprived him of any other title of his rights, it would have been excepted to. It may then be assumed as a fact, that when the prisoner's counsel moved for the instruction on a question of law, he argued that question of law before the court, that the attorney for the commonwealth answered him, that the prisoner's counsel replied to the attorney, and that these arguments were all in the hearing of the jury; that the court then gave its instruction to the jury, to which the prisoner's counsel excepted. It may also be assumed as a fact, that before the motion for the instruction was made, the court expressed its wish, that the counsel on each side would argue before the jury the whole case, law and fact, and its determination to give its opinion to the jury, on the law after the argument on both sides should be closed; and that this wish of the court was frustrated by the motion of the prisoner's counsel asking for a decision of the law before the

argument should be made before the jury. These assumptions are intirely compatible with the statements in the bill of exceptions. The question then is, whether 597 the prisoner's *counsel, after arguing on the law before the court, in full hearing of the jury, insisting on the court's judgment on the law, before the question is submitted to the jury, and excepting to the opinion of the court, by which he may resort to the appellate tribunal for the correction of the errors of the judge, may again argue the law before the jury, in direct contradiction to the opinion expressed by the court. We think he cannot. The court must regulate the course and order of its own proceedings, and cannot yield up that power to any counsel however respectable. If the prisoner's counsel, after having elected to argue the law before the appropriate tribunal, in the presence of the jury, be at liberty again to argue it before the jury, the attorney for the commonwealth must again argue it before them, and the court must again charge the jury on the same subject. This course of proceeding has a tendency to impair the respect which the court ought to entertain for itself, and which it ought to endeavour to inspire in others. We do not perceive, that the prisoner, or his counsel, have been deprived of any of their rights, or that the court has encroached on the rights of the jury in this case. We are of opinion, that the last bill of exceptions does not shew that any error has been committed by the court: but in this opinion two of our brethren (judges Semple and May) do not concur.

Writ of error denied.

598 *The Commonwealth v. Jones.

November, 1829.

Criminal Law—Distinction between Murder in First and Second Degrees.—Distinction between murder in the first and murder in the second degree, within the meaning of the statute 1 Rev. Code, ch. 171. § 2. considered, and the distinction between the two crimes explained.

Criminal Proceedings—Motion for New Trial—Verdict Not Warranted by Evidence.—When a motion is made for a new trial, in a capital case, on the ground that the verdict is not warranted by the evidence, the court is not bound to re-examine the witnesses and state the evidence verbatim, but may state the material facts proved and evidence adduced at the trial from the judge's own notes, aided by those of the counsel on both sides.

Same—Jurors—Objection—Waiver.—By standers are called as jurors in a capital case, and, at the instance of the accused, sworn and examined touch-

***Criminal Law—Distinction between Murder in the First and Second Degrees.**—On this question, the principal case is cited in Hill v. Com., 2 Gratt. 598; *foot-note* to Burgess v. Com., 2 Va. Cas. 483; *foot-note* to Boswell v. Com., 20 Gratt. 860; Howell v. Com., 26 Gratt. 1007; Willis v. Com., 32 Gratt. 936; *foot-note* to Mitchell v. Com., 33 Gratt. 872; Wright v. Com., 75 Va. 920; McDaniel v. Com., 77 Va. 284, 286; Price v. Com., 77 Va. 386; Robertson v. Com., 1 Va. Dec. 858; State v. Abbott, 8 W. Va. 769, 771; State v. Welch, 36 W. Va. 700, 15 S. E. Rep. 422.

†**Jurors—Objection—Waiver.**—The principal case is cited in Bristow v. Com., 15 Gratt. 647, and *note*; Heath v. Com., 1 Rob. 743, and *note*; *foot-note* to Hallstock v. Com., 2 Gratt. 564; *foot-note* to Kennedy v. Com., 2 Va. Cas. 510; *foot-note* to Poore v. Com., 2 Va. Cas. 474; *foot-note* to Smith v. Com., 2 Va. Cas. 6; Curran's Case, 7 Gratt. 623; Dillworth v. Com., 12 Gratt. 692, 698; Simmons v. McConnell, 36 Va. 500, 10 S. E. Rep. 338; State v. McDonald, 9 W. Va. 465; Sweeney v. Baker, 18 W. Va. 238; State v. Greer, 22 W. Va. 324; State v. Hobbs, 37 W. Va. 236, 17 S. E. Rep. 385. See monographic *note* on "Juries" appended to Chahoon v. Com., 30 Gratt. 733.

ing their indifference; and then elected by the prisoner and sworn to the jury: upon objections to the indifference of these jurors, discovered after the trial, not directly inconsistent with what was disclosed by the jurors themselves on their examination touching their indifference, the court ought not to set aside a verdict of guilty, just in itself, though the objections be such, that if known and disclosed before the jurors were elected and sworn, they might have been good cause of challenge to the jurors; much less, if the objections be such as would not have been good cause of challenge.

Same—Same—Challenge for Cause—Waiver—Discretion of Court.—A person accused has a right to challenge a juror for cause, before he is sworn, and the court is bound to judge whether the cause is sufficient or no to sustain the objection: but when, after a juror has been elected and sworn, and after trial and verdict, the prisoner asks a new trial on grounds of exception against him, existing before he was elected and sworn, such motion is addressed to the sound discretion of the court; and in the exercise of this discretion, the court ought to consider the whole case, and be satisfied that justice is done.

John M. Jones was indicted, and tried, for the murder of George Hamilton, in the circuit court of Lynchburg. The jury found him guilty of murder in the first degree. He moved the court to set aside the verdict, and direct a new trial, on the ground that the verdict was not warranted by the evidence. The court intimated its opinion that the verdict was right: upon which his counsel asked the court to spread the evidence upon the record, and to state it from the mouths of the witnesses. The judge said he would make an accurate state of all the facts which he considered proved at the trial, with the aid of his own notes and those of the counsel on both sides; but he refused to re-examine all the witnesses, for the purpose of stating their evidence verbatim.

599 *The circumstances of the case, as stated by the court, were as follows:

On the 22d May 1829, between three and four of the clock in the afternoon, Jones the prisoner, and Hamilton the deceased, and several others, met, casually, at a grocery in the town of Lynchburg, not far from the river, in a disreputable part of the town. The grocery was kept by a uncle of Jones, and Jones was abiding there with him at the time. The whole party was in peace, and had been drinking; when one Betsey Fulcher, a common prostitute, with whom Jones, (a young unmarried man) had had for sometime an illicit intercourse, came into the grocery, and soon insulted Hamilton in very gross language: he warned her to desist; she repeated the insult; and he gave her a severe slap on the face. She appealed to Jones for protection. Jones said he would not suffer any woman, especially a woman he had a feeling for, to be so treated in his presence: Hamilton said he could whip her and her protectors: they instantly approached each other as if to fight; but the other persons present interposed, and prevented them from coming to blows; and they were soon, apparently, reconciled. Shortly after, Hamilton stepped out of the house, as if with design to go away; but he stopped at the door, and said, in a loud voice, that if any were dissatisfied with what he had said or done, he could whip them. No notice was taken of this challenge; and Hamilton went off towards his boat. After he was gone, the woman Fulcher told Jones,

she did not think he would suffer her to be abused by any man, without protecting her; upon which Jones bade her be easy, and said he could whip any one man, but could not fight a community of men. Jones then left the house, but shortly returned, apparently in a passion, pulled off his coat, abused Hamilton, and said he would kill him, or any other person that would strike a woman he had a feeling for, and he would see his heart's blood before sunset. One Trimble, a boatman from Rockbridge, advised Jones to let Hamilton alone; that he was too stout for him, and was a 600 violent *man when angered. Jones giving no heed to this advice, and continuing his abuse and threats against Hamilton, one M'Caul, who had witnessed the quarrel, left the house, and went towards the river where the boats lay: on his way he met Hamilton, who said he was going to the grocery; that he apprehended Jones and Trimble would get into an affray, and said he wanted to see what was the matter. M'Caul told him that Jones and Trimble were not quarrelling; that Jones was abusing and threatening him (Hamilton), and was armed with a dirk; and he advised him not to go to the grocery, where Jones was, but to return to his boat. Hamilton returned to his boat, and armed himself with a large bludgeon (part of a boat pole) saying Jones had drawn a dirk upon him, and he meant to avenge himself with that stick; and then, in spite of M'Caul's earnest intreaty and advice, he persisted in his resolution to return to the grocery; but he said he would not interrupt Jones, unless he attempted to strike him with a dirk. Hamilton, and M'Caul with him, proceeded to the grocery; they stopped near the door; Jones and others were still in the house; they heard Jones's voice still in passion; M'Caul endeavoured to persuade Hamilton not to go in, and got between him and the door; they heard Jones say (alluding to Hamilton, as M'Caul supposed, but not naming him) "damn him, I will see his heart's blood before sunset." Hamilton hearing this, exclaimed, "by G—d, I will not take that—stand out of the way;" and, pushing M'Caul aside, stepped into the door, and struck Jones a blow on the forehead, with the bludgeon, which staggered him: the blow inflicted a wound an inch and a half long, and cut to the bone; it bled profusely. M'Caul, with the aid of others present, got Hamilton out of the house; and the door was closed before any other blow was struck. Hamilton began to pick up stones; and Jones, shortly after, appearing at an open window, Hamilton shewed a determination to throw a large stone at him, which M'Caul endeavoured to prevent him from doing; but Hamilton said, "stand out of the way—damn 601 him I will kill *him;" and immediately threw the stone at him, which struck the facing of the window. The stone was so large, and thrown with such force, that, in the opinion of the by-standers, if it had struck Jones, it might have killed him. Hamilton picked up other stones, to throw at Jones; and some of the witnesses said he did throw more than one; others, that he did not. Hamil-

ton was then persuaded to go away; some of the witnesses said, he again threatened that he would kill Jones; others, that they heard no other threats than those above mentioned. He was advised to throw away his bludgeon—that it was too large to strike a man with; but he carried it away with him. There was one point touching the affray in the house, as to which the witnesses differed: M'Caul said, that when he and Hamilton got to the door, Jones was brandishing a dirk; and several persons, who were in the house, said, he was brandishing the dirk shortly before Hamilton came in, and swearing he would kill Hamilton, or any other man who should strike a woman he had a feeling for, and that he would have his heart's blood before sunset: but it was deposed by another witness, that Jones had, at his instance, put up the dirk before Hamilton entered the house and struck him. It was doubtful too, whether Jones saw Hamilton, before he came into the grocery and gave him the blow: the probability was, that he did not.

Jones had had no previous acquaintance with Hamilton, who was a boatman from Rockbridge, and, it was proved, was a stout man, apt to quarrel in his cups, and when angered very violent and careless of consequences, but of a generous temper when cool, and not apt to harbour resentment for things past. At the time of this affray, Jones had been drinking, and was under the excitement of strong drink; some thought him quite drunk; and there was evidence, that excitement of that kind, sometimes produced in him a state of phrenzy. Other witnesses said, that Jones had indeed been drinking, but was not drunk, and by no means deprived of his reason. Hamilton and Jones were
602 *both strong athletic men; Hamilton somewhat the larger of the two.

After this affray, Hamilton went to a lumber house near the river, where he gave a boastful account of his victory, declared his willingness to renew the contest, and raising his stick, said "this never fails me."

And after Hamilton's departure, a friend of Jones washed the wound on his forehead, applied lint to it, and bound it up: Jones borrowed a clean waistcoat, turned in the collar of his shirt which was bloody, tied a black cravat over it, and left the grocery, apparently composed, saying he was going to get a clean shirt. The time, from the end of the affray till Jones's departure from the grocery, was, according to one witness, ten minutes, according to another, half an hour.

The next evidence concerning Jones's actions, placed him in the town, about 200 yards from the grocery, at the shop of a gunsmith named Lewis, where he applied to borrow a gun, saying he wanted to shoot some body. The young man in the shop asked whom? He named no person, but raised his hat, and pointed to the wound on his forehead, from which the blood appeared to be still issuing through the lint and bandage. The young man purposely handed him a defective gun, the main spring of the lock being broken. Jones examined the gun, snapped it, and said it

would not do; he wanted one that would fire. He was told he could have no other gun in the absence of Lewis: Jones inquired where he was: he was in the blacksmith's shop, in the cellar beneath: Jones went thither, and applied to him, and then returned with Lewis, to the gunsmith's shop; Lewis offered him the same defective gun; Jones rejected it, repeating that it would not do; he wanted one that would fire. Lewis then handed him another gun, which Jones examined, snapped, primed and flashed; and said, "this will do." He proceeded to load the gun (where he got the ammunition, did not appear). He was at

Lewis's some ten or fifteen minutes.
603 He went off from thence with *the gun to the market house, about 250 yards from Lewis's shop; and thence proceeded down the most public street of the town, towards the toll house of the bridge across the river, near which stood the lumber house, in which Hamilton had been, as above stated, and which was 300 or 400 yards from the market house, and not far from the place where the boats lay in the river. As he passed near the toll house, where one of his uncles lived, this uncle, who had heard of the affray between him and Hamilton, called to him to come back; he refused to do so, and went on. At this time, several persons were near and following Jones; and it was said and repeated (by whom the witnesses did not know) that he was going to shoot Hamilton. He proceeded to the lumber house (the same where Hamilton had been, but from which he had shortly before retired) and stepping in, with a drawn dirk and the gun in his hands, he pointed the gun at a man there, saying "damn you, I know you by your whiskers:" the man turned to look at him, upon which he retired backwards out of the door, saying nothing. He immediately turned the corner of the lumber house, on the river bank where the boats lay, in one of which was Hamilton with three others: Hamilton had come into the boat a few minutes before, with his stick in his hand, which he had now laid down; he was sitting on the gunwale of the boat; he said a man was coming to shoot him; and one of the company doubting this, he repeated it, and said he had seen him coming down the hill with a gun. About this time, those in the boat heard some movement on the river bank, near the corner of the lumber house, and looking that way, saw Jones coming down the bank, with the dirk and gun in his hands—the gun raised and pointed as in the act of taking aim. Jones said, "aye, damn you, you are there, are you; I know you by your whiskers." The whole party in the boat, including Hamilton, who had now no weapon of any kind in his hands, attempted to escape from the boat by the head, which was near the bank, lying towards Jones; Hamilton endeavouring
604 to keep the *others between him and Jones, and they endeavouring to escape from the danger of Jones's fire, which was directed towards Hamilton. Hamilton called to Jones, to keep his distance, adding he had done him no harm; another of the party called to Jones, and said "no shooting here." Hamilton was the hindmost of the

party. Two had escaped from the boat: the third, immediately behind whom Hamilton was, had just leaped from the head of the boat, and had not time to turn, when Jones fired the gun at Hamilton then standing on the head of the boat. Hamilton stood a moment, and only saying "boys, I am gone," fell over the boat into the water.

Jones's conduct immediately after the fatal shot, was variously represented by the witnesses. One said, he immediately put his gun down, and advancing with his dirk drawn, said "damn you, if I have not killed you, I will finish you;" then, changing the dirk from his right to his left hand, he raised Hamilton's head, and placed it on a rock, out of the water, saying "damn you, you are dead enough." Another said, that the first blood he saw after the shot, seemed to him to issue from Hamilton's breeches, and as he did not fall, he inferred he might not be mortally wounded, and seeing Jones quickly put down his gun, and advance with his dirk, he thought Jones was under the same impression, and advanced with the dirk lest Hamilton might yet be able to resent the shooting; but Hamilton fell, and then Jones halted, and said, "damn you, you thought I would not shoot, but damn you, I have killed you;" then, changing the dirk to his left hand, he raised Hamilton's head out of the water, said he was dead enough, and placed the head on the rock. Several of the witnesses concurred in this account of Jones's language and conduct after the shot; and several of them concurred in saying, that Jones said, if Hamilton was not dead, he would finish him, or words to that effect. All concurred, that Jones made no attempt to use the dirk. Several witnesses said, that before Jones advanced to raise Hamilton out of the water, some one cried,
605 "take him out of the water;" and one witness thought this was Jones, and that he said, "if no one will do it, I will do it myself," and then advanced.

After this, Jones left the boat, took up his gun, ascended the bank, brandished the gun over his head, said he had killed the damn'd rascal, and there were two more he intended to kill, M'Caul and Trimble; and began to re-load his gun. M'Caul passing by, asked Jones why he wished to kill him; Jones said, "damn you, I will kill you any how," and advanced upon him with his dirk. M'Caul retreated. M'Caul was well acquainted with Jones, and had been on friendly terms with him. M'Caul and Trimble both said, there was no grudge between them and Jones, that they knew of.

When M'Caul retreated from the dirk, Jones took up his gun, and as he walked off, said, "he had killed the damn'd rascal, and he was glad of it, and that he would do the like by any man who should strike the woman he loved, and any man of spirit would do the like, and now they might hang him for it."

The several witnesses made various estimates of the time that elapsed from the end of the affray in the grocery till the act of shooting—from ten minutes to an hour and a quarter—the judges comparing these estimates, and considering all the circum-

stances, thought it at least three quarters of an hour, most probably more.

Jones was shortly after arrested, making no resistance to the officer, and no attempt to fly. Before the magistrate, he admitted he had borrowed and loaded the gun, and prepared himself, for the express purpose of killing Hamilton; and said, that any man of honor and spirit would do the same under like provocation: and he acknowledged, that what the witnesses said, was true, except in one particular; in explaining which, he said, that Hamilton could not have seen him as he approached, for that he had kept the lumber house between them. At this time, the wound on Jones's forehead was still bleeding.

606 *After the court had intimated its opinion, that the verdict was right, and at a subsequent day of the term, the prisoner's counsel moved the court to set aside the verdict, on the ground of objections discovered since the trial, to three of the jurors, Wilkins, Gilliam and Angle. These jurors had been called as talesmen; and before they were sworn of the jury, they were, at the prisoner's instance, examined on oath as to their indifference.

1. Upon this examination, Wilkins said, he had heard part of the evidence at the examining court, and had expressed some opinion as to the probable result; but he thought he could give the prisoner as fair a trial as if he had heard nothing; he was conscious of no bias or prejudice to prevent it. Upon which the prisoner elected to be tried by him.

The prisoner now proved, by one witness, that he had heard Wilkins, say, before the trial, that he was at the examining court, and had heard part of the evidence, and if he was on his jury he should hang him; but that Wilkins was a man of good character, and did not speak as if he had any prejudice against Jones, but as if he was speaking in relation to the supposed truth of what he had heard. It was testified by another witness, that he had heard Wilkins say, in a general conversation concerning Jones's case, that if he was on the venire he should hang him: and by a third, that he heard Wilkins say he thought Jones would be hanged.

2. When Gilliam was examined, he said he had heard none of the evidence against the prisoner; he had heard his case talked of in the town, by various persons, but he did not know that any of them had heard the evidence; he had no bias or prejudice on his mind; and thought he could give the prisoner as fair a trial as if he had heard nothing of his case. The prisoner elected to be tried by him.

The prisoner now adduced a witness, who said, he had heard Gilliam say he thought from the evidence he had heard, that Jones ought to be hanged: that he had frequently heard him repeat the same sentiment:

607 that he had *a conversation with the juror the same day (and before) he was empaneled, when he repeated the opinion, that Jones would be hanged, and if he was on the jury, he should be compelled, from the evidence he had heard, to hang him; and that he told Gilliam, that as he had expressed his opinion, he could not be

on the jury, and Gilliam seemed to understand the same. On cross examination, this witness said, he could not say, that Gilliam told him he had heard any part of the evidence, nor did he know that he ever had; he inferred that he had: that Gilliam was a respectable man, and deserved full credit on his oath.

3. When Angle was examined as to his indifference, he said he had heard no evidence, but had heard various reports of what the evidence was; he did not recollect from whom; he did not know, whether those reports were true or not; they were different from each other; he had expressed an opinion of what would be the probable result, in conversation with others; he had no bias on his mind to prevent him from giving the prisoner a fair trial; he had no prejudice against the prisoner or his family, any way; and he thought he could give the prisoner as fair a trial as if he had heard nothing about the case. Upon this, he was elected by the prisoner.

The prisoner now proved by a witness, that shortly after the homicide was committed, he and the juror were in conversation about it, when Angle "allowed" the prisoner would be hung; the witness "allowed" he would not; and a gallon of whiskey was bet upon the event. Angle said, if witness knew as much as he did, he would not bet. He was not far off when prisoner killed Hamilton, and heard the evidence, as witness thought, before the inquest. Angle did not speak as if he had any personal prejudice against Jones, nor does the witness think he had. Angle is a respectable man, and deserves to be credited on oath. The juror (Angle) being present was sworn, and stated, that he had made the bet with the witness as he mentioned;

it was a casual thing which had escaped his recollection, and he should never have thought to demand the whiskey, nor does he suppose the witness would. He never thought of it, at or during the trial; it had altogether escaped his mind, until reminded of it by the witness after the trial; and he repeated, that he was neither at the called court, nor present at any examination of witnesses, at any time, respecting the case, nor heard any statement of the evidence from any body that had heard it, so far as he knew, before the trial.

The prisoner offered another witness, Martha Gilliam, who said—"I was at Angle's house on the day of the called court. Angle returned home. I asked him what was done with Jones. He said he did not stay to hear the trial over. I said I wished he might be cleared; he said, he wished he might be hung. I said, how can you say so, Mr. Angle? You know that when a man is drunk, when he is in a passion, his wit is out, and he ought to be excused for his acts. Angle said, he wished Jones and all such damn'd rascals to be hung. He did not say that he had heard any part of the evidence or any part of the trial. I have heard Angle speak of the subject several times. We live close neighbours. He always said Jones ought to be hung. I am the daughter of Patterson Gilliam, who was a witness for Jones. I am no

ways related to Jones, or any of his family, and but little acquainted with him." Angle, the juror, denied having had any such conversation with Gilliam as she detailed; and said that she had shewn great anxiety for Jones's acquittal since the trial, and had declared she would do any thing in her power to procure his discharge. Gilliam denied this.

The counsel for the prisoner also presented to the court an affidavit of the prisoner in relation to the three jurors aforesaid; which was made a part of the record. This affidavit stated, that since the rendition of the verdict, he had been informed, that the three jurors had, previous to their being empaneled, formed, and repeatedly expressed, an opinion that he ought to be hanged; and that Angle had, moreover, previously to his being empaneled, made a bet *that he would be hanged, and expressed a wish that he should be hanged: that at the time the said three jurors were so empaneled, he did not know, believe, or suspect, that either of the said three jurors had expressed the opinion above stated, or he would have challenged them.

The circuit court, with the prisoner's assent, adjourned the following questions to this court:

1. Ought the verdict of the jury to be set aside, and a new trial directed, upon the state of the facts of the case, as above set forth?

2. Ought the court, in order to prepare the state of the case, to have re-examined the witnesses, after the verdict rendered, so as to state verbatim what they said? and having declined to do so, ought a new trial to be granted for that cause?

3. Ought the verdict to be set aside, on the grounds disclosed by the evidence respecting the three jurors above mentioned, or either of them? or ought the court to proceed to judgment?

The case was argued by Johnson for the prisoner, and by the Attorney General for the commonwealth.

The questions debated were, 1. Whether, upon the facts of the case, the homicide was murder in the first degree, as the jury had found it to be, or only murder in the second degree? within the definition of the statute, 1 Rev. Code, ch. 171, § 2, p. 616. 2. Whether the objections to the three jurors, or either of them, were such, as would have entitled the prisoner to have challenged them for cause, had he been apprised of those objections before the jurors were elected by him and sworn? and supposing the objections would then have been good, whether, having been discovered since the trial, the court ought now, for this cause, to set aside the verdict, and direct a new trial?

DANIEL, J. The first question refers to a state of the facts which were proved before the jury upon the trial, and *upon which the verdict was rendered; and makes it necessary for this court to examine the facts and the circumstances of the case, to ascertain what offence the prisoner had committed, and what degree of criminality marked the offence. That the prisoner committed the homicide charged

in the indictment, there can be no doubt. Was it committed under circumstances, which, according to law, made it manslaughter? murder in the second degree? or murder in the first degree?

That the offence proved is greater than manslaughter, the prisoner's counsel does not deny; but he contends, that, though it be murder, it is not murder in the first degree.

To determine whether it be murder in the first or second degree, it is necessary to refer to and consider the provisions of the statute, by which the distinction between the first and second degree of murder is created. The statute declares, "that all murder which shall be perpetrated by means of poison—or by lying in wait—or by duress of imprisonment or confinement—or by starving—or by malicious, wilful and excessive whipping, beating or other cruel torture—or by any other kind of wilful, deliberate or premeditated killing—or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall henceforth be deemed murder in the first degree. And all other kinds of murder shall be deemed murder in the second degree."

The counsel for the prisoner has supposed, and argued with great ability and ingenuity (as he always does) in support of his supposition, that the words "any other kind of wilful, deliberate or premeditated killing," ought to be construed, and of necessity, as referring to the character or kind of killing or murder specified in the previous enumeration (by means of poison, lying in wait, duress of imprisonment or confinement, starving, wilful, malicious, or excessive whipping, beating or other cruel torture) as if it read, "any other kind of such wilful, deliberate or premeditated killing;"

because, otherwise, as he supposes, the preceding *particular enumeration would be useless. Now, a plain and invincible answer to this argument, is presented in the import of the terms used; other and such. Other killing, means any other whatever, which is different from the same; such killing would refer to the modes of killing enumerated, and confine itself to the kind of killing enumerated and the means by which it was effected. To admit this construction of the prisoner's counsel, would be to allow that the legislature meant nothing, or did not understand what it meant, when it used, upon this very important subject of life and death, those words of plain and obvious import; "any other kind of wilful, deliberate and premeditated killing." This is what this court cannot admit. Poison may reach the life of one or more not within the design of him who lays the bait; lying in wait, may be with a view to great injury, abuse and bodily harm, without the settled purpose to kill; imprisonment or confinement or starving, may be with a view to reduce the victim to the necessity of yielding to some proposed conditions, as well as a punishment for the failure of prompt obedience, without any certain and fixed determination to destroy life; and the same may be said of malicious or excessive whipping, beating or other cruel torture. In all these enumerated

cases, the legislature has declared the law, that the perpetrator shall be held guilty of murder in the first degree, without further proof that the death was the ultimate result, which the will, deliberation and premeditation of the party accused sought. And the same authority has declared the law, that any other kind of killing, which is sought by the will, deliberation and premeditation of the party accused, shall also be murder in the first degree; but that as to this other kind of killing, proof must be adduced to satisfy the mind, that the death of the party slain was the ultimate result which the concurring will, deliberation and premeditation, of the party accused, sought. But to this general rule the same authority adds an exception, which is, that any death consequent upon the perpetration or attempt to perpetrate any arson, rape,

612 *robbery, or burglary, shall be deemed murder in the first degree: and all other murder at common law, shall be deemed murder in the second degree. So that the cases within the exception, as now put, and the cases enumerated as first mentioned, are, in fact, placed upon the same principle: there is no necessity of proof in either, to establish the fact that a homicide was intended. And it follows, of course, that all other homicide which was murder at common law, is now murder in the second degree, except when it shall be proved, that the homicide was the result of a "wilful, deliberate and premeditated killing;" and it also follows, of necessity, that, when by the proof the mind is satisfied that the killing was wilful, deliberate and premeditated, such killing must be taken and held to be murder in the first degree. This construction of the act of assembly is consistent with, and supported by the decisions of this court, in Burgess's case, 2 Virg. Ca. 483, and Whiteford's case, 6 Rand. 721.

According to the above construction of the statute, it remains to be determined, whether, upon the proof disclosed by the record, the prisoner is guilty of a "wilful, deliberate and premeditated killing." The court does not think it necessary, in this case, to enter into a definition or description of the various operations of the mind in relation to any act, whereby such act should be regarded as wilful, deliberate and premeditated; but, approving the opinion heretofore indicated by this court in relation to this subject, in the cases above referred to, and considering the circumstances of this case, we feel no difficulty in determining, unanimously, that the jury was well justified in finding, that the killing, in this instance, was wilful, deliberate and premeditated. The prisoner, although excited by strong drink, and by an insult offered to a woman, which he thought himself bound to resent, and by a severe blow on himself, for which he had a right to redress, was not, by any of these causes or all combined, so deprived of his mental faculties, according to any evidence in the case, that he could not distinctly under-
613 stand *what he willed and was about to do; or so that he could not reflect, and reason, and deliberate, and determine, and choose what he would or would not do. According to the evidence, the first moving

cause to commit the act, which constitutes his offence, was the injury done to a woman, for whom he felt an attachment; to her he promised redress for the insult and injury, which she had received; and, before he had himself received any personal injury, he avowed, that the measure of the redress which she should receive, should be filled with the heart's blood of the deceased before sunset. And after he had shed the blood of the deceased, as he had threatened, he said, "he had killed the damn'd rascal, and was glad of it; that he would do the like by any man who should strike the woman he loved, and that any man of spirit would do the like." It is true he had received a severe blow, in the mean time, which was calculated to increase, and no doubt did increase, his resentment against the deceased. But still he referred the revenge he had sought and taken, to the original cause of offence—the blow given to the woman he loved. A considerable time elapsed after both causes of offence, and threats of deadly revenge were made, before he executed his purpose; at least three quarters of an hour; in which time his resentment might have cooled. He employed this time, not in hasty but in deliberate preparation to execute the purpose he had avowed of shedding the blood of the deceased. He dressed his wound, adjusted his clothes, and, being apparently composed, deliberately armed himself with a dirk, or, being already thus armed, went abroad a considerable distance in quest of a gun; chose one with cautious circumspection and judgment; deliberately tried its fitness for the object he had in view, a sure fire; primed, snapped, and flashed it; procured powder and lead, and loaded it; and, thus armed with a drawn dirk, and a loaded gun, traversed the public streets, passed the market place, where, perchance, he might meet the deceased, and, finally, sought him

614 then, with deliberate *aim, shot him to death, while the deceased was unarmed, unresisting, and in actual flight from him. This must certainly be "a wilful, deliberate, and premeditated killing." And, therefore, this court, in answer to the first question propounded, doth unanimously decide, that a new trial ought not to be granted on the ground therein referred to.

As to the second question, this court is, unanimously, of the opinion, that, on a motion for a new trial, the court is not bound to re-examine the witnesses, or to state the evidence verbatim as it was given by the witnesses; and doth, therefore, decide, that a new trial ought not to be awarded for that cause.

As to the third question adjourned: the three jurors referred to, as it appears from the record, were called as by-standers, and were severally, before they were sworn of jury, at the instance of the prisoner, sworn to answer questions touching their indifference. In answer to these questions, they each said for himself, that they had expressed opinions on the prisoner's case, and disclosed generally the grounds on which they had so expressed opinions. Wilkins said he had heard part of the evi-

dence: Gilliam and Angle had heard no part of the evidence, and nothing but the accounts and rumours which were circulated in town: they all said, they had no prejudice against the prisoner, or bias on their minds, so as that they could not give him a fair and impartial trial, in like manner as if they had heard nothing about the affair: and the prisoner, thereupon, elected them, and they were sworn to try his cause. Several days after a verdict was returned against the prisoner, and a motion for a new trial on the merits had been overruled, the prisoner moved for a new trial on the ground of exceptions to these jurors, which, if good, existed at, and before, the time when they were empaneled, but which were then unknown to the prisoner. In support of these exceptions to the jurors, severally, the prisoner adduced witnesses to prove the various opinions which they had expressed unfavourable to his acquittal. But we do not perceive, that

615 any *of these witnesses prove anything inconsistent with what the jurors respectively disclosed on their voir dire. They did not disclose when, where, and to whom they had expressed their opinions, because the prisoner did not demand it. They did not disclose what were the precise opinions they had expressed, whether favourable or unfavourable to the prisoner, because that would have been improper. But they did distinctly disclose the fact, that they had expressed opinions as to what would be the result of his trial, and thereby put him upon his guard. If, in this state of things, the prisoner is at liberty to elect a juror, and take a chance for his acquittal, if the juror should be favourably disposed for it, and to set aside the verdict, if the juror should have expressed opinions unfavourable to it, then almost every verdict of guilty would be set aside. For it is most probable, nay almost certain, that twelve men could not be selected, without previous examination, from any neighbourhood in which an atrocious murder or other felony has been committed, no one of whom has heard of the offence, and expressed an opinion unfavourable to the discharge of the perpetrator. And it is also certain, that by diligent inquiry, for several days pursued, among the neighbours of such one or more, proof could be obtained to establish what was the opinion expressed. This is a practice which should not be indulged. Besides, if the opinion expressed should not, when truly proved, with all the circumstances under which it was uttered, be a good cause of challenge, it might be easily modified by the addition or abstraction of a single word, or at most of a few words. And if the party accused be a man of wealth, of influence, and numerous friends, it would be an easy matter to find some one to make the little, though needful, addition or abstraction, to suit the occasion. And in favour of life, this effort would be made, and with the greatest probability of success, if new proofs were received several days after a motion had been overruled on the merits, and the precise points, in which

the prisoner's evidence was deficient, 616 pointed out by *the court. This prac-

tice leads directly to perjury and corruption, and ought not to be allowed.

But if the practice here condemned were allowable, a majority of this court is of the opinion, that no sufficient cause of challenge, against the jurors, is established in this case. For, although the cause of challenge might have been sufficient, if proved by the prisoner, without the oath of the jurors respectively, yet, after he has caused them to be sworn, and appealed to their testimony, he shall not thereafter be permitted to reject it altogether, without proof that falsifies it; and if it is not so falsified, it should be taken in conjunction with the testimony of his subsequent witnesses, so as to form one whole; and, in this point of view, if the cause of challenge so proved, had been alleged before the jurors were sworn, it would not have been sufficient. This conclusion is not contradicted, but supported, by the decisions of this court, in Kennedy's case, 2 Virg. Ca. 510; Smith's case, Id. 6; Poore's case, Id. 474.

There is another view of this case, which presents itself to the consideration of this court. We do not know of any case decided in England, or in this country, in which, after a juror had been elected by the prisoner, without making any previous objection to him, a new trial has been granted on the single ground of any cause of challenge for favour existing at the time of his being elected, whether known or unknown to the prisoner. Our statute provides, in terms, "that no exception against any juror on account of his estate, or age, or any other legal disability, shall be allowed after he is sworn." But, as the judge who presides in a criminal case, especially of life and death, ought to be satisfied before he pronounces sentence, that the judgment which he pronounces is just, he may, notwithstanding this act, hear such suggestions of the prisoner, upon proof, as go to shew any flagrant fraud on the part of the juror towards the prisoner, or such unquestionable hostility towards him as necessarily to render it not only improbable, but almost impossible, that such a

juror could give the prisoner a fair and impartial trial; and this, although the exception proved against the juror existed before he was elected and sworn. Yet, in the absence of any decision to sustain the position, we cannot consider it as a matter of right, *ex debito justitiæ*, that the prisoner should have a new trial, in every case, wherein he could shew such

cause of challenge against a juror, after trial, as might have been allowed if made before the juror was sworn; especially in a case, wherein the prisoner, having caused the juror to be sworn on his *voir dire*, elected to be tried by him, without taking any exception. When the prisoner excepts to a juror for cause, before he is sworn, it is matter of right, to be adjudged by the court; when he excepts after trial, for cause existing before the juror was elected and sworn, it is matter addressed to the discretion of the court: in the exercise of this discretion the court ought to consider the whole case, and be satisfied that justice has been done. To grant the prisoner a new trial in the present case, would be to allow that a cause of challenge existing at the time, but not asserted by the prisoner, because it was not known to him, should be as available to the prisoner, after the juror, being elected by the prisoner, has been sworn, and a verdict rendered, as if it had been asserted before; and this cause to be proved by testimony conflicting with the evidence selected by the prisoner himself, the oath of the juror; which, in this case, is proved, in relation to each juror, to be above exception. The decisions of this court heretofore made, do not present this precise view of the question, but they tend to fortify the opinion herein expressed.

Upon the whole matter, this court is of opinion, and doth decide, that a new trial ought not to be granted for any cause suggested by the record; and that the circuit court ought to proceed to pronounce judgment upon the verdict of the jury, according to law.

Judges Brockenbrough and Semple dissented from the opinion of the majority of the court, on the last point. And
618 *Judges Parker and May, though they concurred in the opinion, that the verdict ought not to be set aside, dissented from the opinion of the majority, that there was no just cause of challenge to any of the three jurors, if the prisoner had exercised his right of challenge before they had been elected and sworn.

There are two errata in the above report of this case, so material that it is deemed best to note them here. In the report of the juror Gilliam's first examination, there is a line omitted: after the word "evidence," p. 608, 8th line from the bottom, read "he had expressed an opinion, as others had, in conversation." And in the report of the juror Angle's first examination, p. 607, 16th and 17th lines, instead of "he had expressed no opinion," read "he had expressed an opinion." &c.—Note in Original Edition.

INDEX.

ABANDONMENT.	
See Revolutionary Claims, No. 5, and	525
ABATEMENT—Pleas in.	
See Pleading, No. 1, and	64
ABSENT DEBTORS AND ABSENT DEFENDANTS.	
1. A claim arising on a contract of bailment made out of Virginia against a non-resident of Virginia, is a claim for debt for which a foreign attachment in chancery lies.	
Peter v. Butler.	285
2. A claim arising out of the official neglect of the clerk of a county court in Virginia, against the officer a non-resident of Virginia at the time the claim is asserted, is not a claim for debt for which a foreign attachment in chancery lies.	
Dunlop & Co. v. Keith & others.	430
3. Neither is the non-resident officer, in such case amenable to the jurisdiction of the court of chancery as an absent defendant.	Ibid., 430
ACTS OF ASSEMBLY.	
1. See Repeal, and	569
2. See Merchant, and	592
ANSWER IN CHANCERY.	
See Usury, No. 4, and	453
APPEALS.	
1. Appeal from an interlocutory decree in chancery denied because the party asking it might and more properly ought to apply to the chancellor to suspend the effect of the decree under the act of 1827-8, c. 25, § 4.	
Graves v. Graves.	34
2. What is a final and not an interlocutory decree. See Decrees in Chancery, No. 2, and	108
3. Where county court overrules motion for award of execution on forthcoming bond and circuit court reverses this judgment and awards execution, an appeal lies from such judgment of circuit court as of right; aliter where circuit court affirms judgment of county court awarding execution, or itself gives original judgment awarding execution on such bond.	
Anderson v. Letch & Co.,	462
ARBITRATION.	
See Awards, and	491
ATTACHMENT.	
1. See Absent Debtors, No. 1, and	285
2. See also Absent Debtors, No. 2, 3, and	430
AWARDS.	
All fair presumptions shall be made in favour of an award: and if on any fair presumption the award may be brought within the submission, it shall be sustained.	
Armstrong v. Armstrongs,	491
BAIL.	
1. Semble an affidavit before a justice to found an order requiring bail ought to be in writing.	
Hawkins v. Gibson,	476
2. Quære, whether such affidavit ought to be filed with the process.	Ibid., 476
3. After judgment by default and writ of enquiry awarded, and after the defendant has left the state: HELD, a motion to discharge the bail comes too late.	Ibid., 476
4. To obtain an order to discharge bail the proper course of proceeding is by rule to shew cause why the bail should not be discharged.	Ibid., 476
BILLS OF EXCEPTIONS.	
1. Where exceptions are taken to opinions *of a court given at the trial of a cause on specific points, the appellate court will examine no points but such as were presented to and decided by the court below, though from the matters stated in the bill of exceptions there be apparently other points that might have been made.	
Newsum v. Newsum,	86
2. The judgment of a court shall not be reversed for excluding evidence unless the case stated on the record shew the relevancy of the evidence excluded.	
Rowt's adm'r v. Kile's adm'r,	216
3. Defendant in ejectment relies on twenty years adverse possession as a bar: verdict against him which he moves court to set aside, as contrary to evidence: court overrules the motion: then he moves court to certify the facts that were proved which went to establish his twenty years adverse possession: this the court refuses to do: HELD, the court was right in so refusing.	
Vaughan v. Green,	237
4. Quære, whether if the judge in such case, refuse to certify a proper state of the facts proved, the party may take an exception for that cause and appeal from the judgment? or ought to tender a fair and full state of the facts proved, and upon the judge refusing to certify it, take evidence of its fairness, and then ask the appellate court for process to compel the judge to sign and seal it?	
Ibid.,	237
5. Question, whether exceptions to an opinion of a court, overruling a motion for a new trial on the ground that the verdict was contrary to evidence, were well taken or not? whether the exceptions stated the facts proved or only the evidence adduced to prove them.	
Carrington v. Burnett,	340
6. Where a bill of exceptions is uncertain so that the true state of the case and question in the court below cannot be gathered from it, this court will for that cause reverse the judgment and send the cause back for a new trial.	
Raines v. Phillips' ex'or,	438
7. When a motion is made for a new trial, in a capital case, on the ground that the verdict is not warranted by the evidence, the court is not bound to re-examine the witnesses and state the evidence verbatim, but may state the material facts proved and evidence adduced at the trial from the judge's own notes, aided by those of the counsel on both sides.	
Commonwealth v. Jones,	598
BOND.	
1. See Marshal, and	290
2. Hastings courts of Williamsburg without any authority of law for the act, appoints a collector of the public taxes for the city, and takes his bond with surety for due collection, &c. payable to the Governor and his successors: HELD, such bond is not valid and obligatory on the surety.	
Commonwealth v. Jackson's ex'or & others,	485
BREACH OF THE PEACE.	
See Recognizance, and	566
BUYING AND SELLING OFFICES.	
M. sheriff of Scott farmed his shrievalty to G. whom he appointed his deputy for a sum in gross to be paid him by G. who by the same contract was to discharge all duties and to take all emoluments of the office: HELD, that such contract is not prohibited by the statute of Virginia against buying and selling offices, and is lawful.	
Salling v. McKinney,	43
CAPIAS AD SATISFACIENDUM.	
See Lien, No. 4, and	257
CAVEAT.	
See Land Titles, No. 1, and	353
CLERKS' FEES.	
If a clerk's tickets be delivered after 1st June in any year to a sheriff or marshal for collection, he is not bound to account for them on 1st November following, nor before 1st November in the next year.	
Coplin & others v. McCalley,	280
CONSIDERATION.	
See Parol Agreements, and	36
CONTINGENT REMAINDERS.	
See Estates Tail, and	368
CONTINUANCE.	
Under what circumstances it is error to refuse a continuance.	
Anthony & another v. Lawhorne,	1
CONTRACT.	
What is not a mere executory contract but a conveyance. See Conveyance, No. 1, and	125

*CONVEYANCE.

1. M. agrees to sell R. a tract of land parcel of a larger tract held by him to consist of equal quantities of bottom and hill land, the boundaries of the bottom being fixed but its quantity unknown: M. by deed, conveys R. a tract of land within specified bounds supposed to contain equal quantities of bottom and hill with a proviso inserted after the conveying part of the deed that if the specified bounds contain less or contain more hill than bottom, in the one case, one of the lines described in the deed shall be drawn in so as to exclude the excess of hillland, and in the other case that the same line should be thrown out so as to include as much of hill as bottom: and it is found by survey that the lines described in the deed contain 76 acres less of hill than bottom, so that the line specified in the proviso is thrown farther out to include this 76 acres of hill: HELD, that the proviso is not a mere executory contract to convey the additional 76 acres of hill land, but this 76 acres is conveyed by the deed and that with sufficient certainty.

- Richards v. Mercer, 125
 2. Quære, whether certain circumstances which are set forth are not sufficient to authorise the presumption of a conveyance?
 Edwards v. Van Bibber, 183
 3. See Recording of Deeds, and 448

COSTS.

If a party resort to equity to obtain discounts against a judgment at law to which he is not justly entitled, claiming also other discounts to which he is justly entitled, but which his creditors were willing to allow him, the costs should be decreed against him.

Tapp v. Beverley, 80

DECREES IN CHANCERY.

1. Rule concerning appeals from interlocutory decrees. See Appeals, No. 1, and 34
 2. A decree in chancery, disposing of the whole subject, deciding all questions in controversy, ascertaining the rights of all parties, and awarding costs, though it appoint a commissioner to sell part of the subject, and account for and pay the proceeds to the parties, with liberty to them to apply to the court to add other or substitute new commissioners, or for a partition of the subject directed to be sold, in kind, is a final decree.

Harvey and wife v. Branson, 108

DEED.

1. What is not a mere executory contract but a conveyance. See Conveyance, No. 1, and 125
 2. Quære, whether certain circumstances which are set forth are not sufficient to authorise the presumption of a deed.
 Edwards v. Van Bibber, 183
 3. See Recording of Deeds, and 448

DEVISE.

See Wills, construction of.

DOWER.

1. Quære as to the extent of a widow's rights to enjoy the mansion house, messuage and plantation, free of rent till dower assigned, under the Virginia Statute of Dower, 1 R. C. c. 107, § 2, p. 408.

Grayson and wife v. Moncure, 449
 2. Where a widow obtained a decree against an infant heir, directing commissioners to assign dower, which she might have had executed immediately, but did not for a year, during which she remained in the mansion house, and consented to the cultivation of the land by the agent of the heir; and after her dower was assigned, received one-third of the rents of the messuage and plantation thereto belonging, accrued before dower assigned, claiming no more at the time; and subsequently brought her action to recover the other two-thirds of the rents: HELD, she was not entitled to recover them.

Ibid., 449

ELEGIT.

See Lien, No. 3, and 140

EMANCIPATION.

See Freedom.

EMBLEMENTS.

See Growing Crops, and 297

ENTRY.

See Land Titles, and 353

EQUITABLE ASSETS.

1. Testator, in first clause of his will appoints 623 *his executor and provides that no security shall be required of him, except such as shall be necessary for his just debts; and then adds, "the residue of my estate I confide in him to dispose of

as I shall hereafter direct:" and then directs him to sell all his real estate, except a very small part: HELD, the real estate is charged with debts.

Dunn v. Amey and others, 465

2. B. owning real and personal estate, makes his will, beginning "It is my will and desire that all my just debts be paid: after that I wish that C. have \$1000 provided my estate will admit of it:" then he bequeaths to the same C. the greater part of his personal chattels, specifically; making no mention of his real estate which descends to his heir at law: the whole personal estate proves insufficient to pay debts, and the legacy of \$1000: HELD, that both the testator's debts and C.'s legacy are charged by the will on the real estate descended.

Clarke and wife v. Buck, 487

ESCHEAT.

See Specific Performance, No. 5, and 183

ESTATES TAIL.

Testator having realty of his own inheritance, and personally, part acquired in his own right and part in right of his wife, devises all his worldly estate in manner following: All the profits of my estate after providing genteel support for my wife and daughter, to be applied to my debts; and after debts paid I wish my estate kept together for mutual benefit of my W' and D' till my D' attain full age or marry, or my W' wish a division or marry. After which, I wish my estate divided in the following manner: I leave my W' one half the land I live on, and one half of my estate during her life. If my W' die without any more issue the whole of my estate to revert to my D' and if my D' die without issue the whole of my estate to revert to my W'; and if they both die without issue, then that part of my estate which came by my W' to revert to her brothers and sisters that may be then living, and the balance of my estate to revert to my brother J. or to his heirs, if any, if none to be equally divided between my two half brothers. If my W' marry and again have issue, I wish her to have the disposal of the whole of the property that came by her: HELD.

1. The daughter took by the devise, the moiety of the land that was not devised to the wife.

2. The daughter took an implied estate tail in the moiety of the land devised to her; and the wife took an implied estate tail in the moiety devised to her expressly for life; each of which estates was converted into a fee simple, by force of the statute abolishing estates tail: consequently

3. The executory limitations were contingent remainders, and barred by the statute.

Jiggetts and wife v. Davis, 368

EVIDENCE.

1. See Hand-writing, No. 1, and 216
 2. See Bills of Exceptions, No. 2, and 216
 3. See Hand-writing, No. 2, and 483
 4. On the trial of indictment for larceny of a watch, evidence of another larceny of a cloak, committed by prisoner, the two acts being wholly distinct and unconnected, is not admissible for any purpose.

Walker v. Commonwealth, 574

5. On the trial of indictment for an assault, defendant offers evidence in mitigation of fine, that the prosecutor was on bad terms with him, and had on days previous to the assault, used provoking and abusive language of and to him: HELD, such evidence is inadmissible.

Rawlings v. Commonwealth, 581

EXCEPTIONS.

See Bills of Exceptions.

EXECUTION.

1. See Lien, No. 3, and 140
 2. See Lien, No. 4, and 257
 3. See Growing Crops, and 297
 4. See Motions, No. 4, and 436

EXECUTORS AND ADMINISTRATORS.

1. If an administrator sell a chattel whereof his intestate died possessed, but which in truth belonged of right to another, and apply the proceeds to payment of his intestate's debts in due course of administration, without any notice of the right or claim of the true owner, he is personally liable to the true owner for the value in trover brought by the owner against him.

Newsum v. Newsum, 86

2. Upon a fa. against M. adm'r of L. a female slave of L.'s estate is taken and sold by the sheriff in 1797, at which sale M. the adm'r himself, is purchaser: In 1801, the adm'r settles his accounts

623 *of administration before county court commissioners, whereby it appears that at time of sheriff's sale in 1797, he had no funds of L.'s estate besides this slave, to satisfy the execution, and he

accounts for the price of the slave: L.'s daughter and sole distributee, while yet an infant, in 1810, marries T. who is soon after informed of every fact concerning the sale and purchase of the slave: the adm'r M. lives till 1822; and after his death, T. and wife exhibit a bill against his representative, praying a settlement of M.'s administration account, in chancery, impeaching the sale and purchase of the slave in 1797, as irregular and illegal, and praying decree for the slave and her increase, and for profits: HELD, this bill was rightly dismissed by the chancellor.

Todd and wife v. Moore's adm'r &c., 457

EXECUTORY LIMITATIONS.

1. G. T. having three legitimate children and a natural son, by his will in 1803, makes provision for each, and then adds: In case all my children by my wife die without heirs, my natural son C. shall fall heir to my whole estate; and in case he also die without heirs, my estate shall be divided into six parts, and 2-6ths shall go to my father's brothers that are alive, and the heirs of those that are dead, receiving no more among them than my father's brothers would have received had they been living; 3-6ths to go to C. Leland, S. Leland, L. Leland, H. Gaskins and T. Legg; and the other 6th to go to my wife, to be disposed of as she may think proper; but my wife is to have the use of the whole as long as she lives, if all her own children die without issue: Two of the testator's legitimate children, and his natural son die without leaving issue: his legitimate daughter, E. G. T. survives all her paternal uncles, the three Lelands, H. G. and T. L. and the testator's wife; and then dies without leaving issue:

HELD, as to the personal subject, that the executory bequest thereof, after the death of the natural son without heirs, was void in its creation; and that E. G. T. was entitled to the whole in absolute property.

Griffith v. Thomson and others, 321

2. See Estates Tail, and 308

FINAL DECREE.

See Decrees in Chancery, No. 2, and 108

FOREIGN ATTACHMENT.

See Absent Debtors.

FORTHCOMING BOND.

1. Fl. fa. against three A. T. and H.: Forthcoming bond taken, the condition whereof does not distinctly state to which of the three defendants the property taken in execution belonged, and omits to state that it was restored to the debtor: HELD, the bond is good.

Harpers and another v. Patton, 306
2. Judgment on forthcoming bond instead of awarding execution thereon, is that plaintiff recover the debt against defendants: HELD, irregular in form yet well in substance. Ibid., 306

3. In a notice of a motion to be made on a forthcoming bond, the bond is described by mistake as executed by John when it was in fact executed by George M. Cooke: HELD, variance material, and notice insufficient.

Cookes v. The Patriotic Bank, 433
4. A fl. fa. is sued out by M. & M. on judgment recovered by them; they indorse on the writ that it is for the benefit of H.: the sheriff levies it and takes a forthcoming bond payable to H.: HELD, the bond is naught.

Meze v. Howver, 443
5. Where county court overrules motion for award of execution on forthcoming bond, on particular ground which renders all other defence unnecessary, and this judgment is reversed by circuit court for error in the particular point: HELD, circuit court ought not to proceed to award of execution immediately, without giving defendant opportunity to make other defence, unless it appear from the record he had no other defence to make.

Anderson v. Leitch & Co., 462
6. Where county court overrules motion for award of execution on forthcoming bond, and circuit court reverses this judgment and awards execution, an appeal lies from such judgment of circuit court, as of right; aliter, where circuit court affirms judgment of county court awarding execution or itself gives original judgment awarding execution, on such bond. Ibid., 462

FREEDOM—Suits for.

1. Contract between master and slave, whereby the master agreed to emancipate the slave for \$1000 to be paid by the slave to him, of which the slave paid \$500: HELD, that the chancellor cannot
624 "on a bill by the slave against the master, enforce such contract so partly performed.

Stevenson v. Singleton, 72
2. HELD, generally, that the chancellor cannot

enforce any contract between master and slave, though it be fully performed on the slave's part.

Ibid., 73

3. By statute of Maryland of 1796, all slaves, brought in that state to reside are declared free: a Virginia bond slave is carried by his master to Maryland: the master settles there, and keeps the slave there, in bondage for 12 years, the statute in force all the time: then he brings him as a slave to Virginia, and sells him here: Adjudged, in an action brought by the man against the purchaser, that he is free.

Hunter v. Fulcher, 173

4. Testator directs that his executor shall emancipate his four slaves A. J. P. and N. and by his will gives them legacies: HELD, the slaves are manumitted by the will, not by the executor's deeds of emancipation.

Dunn v. Amey and others, 465

5. Testator emancipates slaves, by will written all with his own hand, proved to be so by two witnesses and recorded, but the will is not sealed nor attested by two subscribing witnesses: HELD, this will is duly executed and proved to emancipate slaves.

Ibid., 465

6. Slaves so emancipated are still subject to testator's debts, and shall be sold for such term as will yield enough to pay debts. Ibid., 465

7. The court of chancery has jurisdiction to adjust the rights of the creditors and of the freedmen, and to protect the freedmen from absolute sale under the creditor's execution, or from any sale, if the other estate of testator be sufficient to pay his debts. Ibid., 465

FULLY ADMINISTERED.

Debt on bond against an administrator: issues joined on pleas of payment and fully administered: verdict for plaintiff on first issue, and on the last "that assets more than sufficient to pay the debt &c." came to defendant's hands to be administered: HELD, verdict on last issue insufficient to found judgment de bonis testatoris.

Sturdevant's adm'r v. Raines's ex'or, 481

GROWING CROPS.

Mortgage of land, slaves and stock: chancellor in May 1822 decrees foreclosure, and directs his marshal, unless the debt be paid within six months, to sell the subject to satisfy the debt: mortgagor is allowed to retain possession, and sows crop in spring of 1823: marshal sells the subject in June 1823 and mortgagee purchases it and completes crop: afterwards and before marshal's sale reported and confirmed, creditors of mortgagor levy fl. fa. on crop of 1823 then gathered: HELD,

1. Vendee at marshal's sale entitled to the then growing crop.

2. Though mortgagor in possession be tenant at will to mortgagee, yet doctrine of emblements does not apply to his case.

3. Chancellor ought, in such case, to protect vendee's property in the crop, by injoining mortgagor's creditors from proceeding under their execution.

Crews v. Pendleton and Mountcastle, 297

HAND-WRITING.

1. Upon the trial of issue on plea of non est factum whether the party's signature to the instrument in question be genuine or no: HELD inadmissible to lay other proved specimens of the party's handwriting before the jury, that it may judge by comparison thereof with the writing in question whether this be genuine evidence. Such comparison of hand-writing is not proper evidence.

Row's adm'r v. Kile's adm'r, 216

2. Where the subscribing witness to an instrument is dead, and it is shewn to be impracticable to prove his hand-writing, evidence of the hand-writing of the party himself is admissible.

Raines v. Phillips' ex'or, 483

HEIR.

See Wills, No. 2, and 287

INJUNCTIONS.

1. If pending an injunction to a judgment at law, plaintiff in equity pay part of the debt due by the judgment enjoined, the injunction should be perpetuated as to the sum so paid.

Tapp v. Beverley, 80

2. Where a party defendant in a suit at law, before judgment, resorts as plaintiff to equity, praying relief against the claim asserted at law on equitable grounds, and an injunction to stay proceedings at law, the injunction should be granted "only on condition that he confess judgment at law, tho' he may have grounds of defence at law, distinct from the grounds of relief preferred to the court of equity.

Warwick &c. v. Norvell, 96

3. Where an injunction has been granted in such a case and the chancellor dissolves the injunction unless the plaintiff in equity will confess judgment at law; on appeal from such an order this court will not examine the merits, though at the time the order was made the cause stood for hearing. *Ibid.*, 96

4. See Growing Crops, No. 3, and 297

INSTRUCTION.

See Jury, No. 2, and 588

INTEREST.

See Revolutionary Claims, No. 2, and 516

INTERLOCUTORY DECREES.

See Decrees in Chancery.

JUDGMENTS.

See Lien, No. 1, 2, 3, and 140

JURISDICTION.

1. See Trusts and Trustees, No. 2, and 163

2. See Trusts and Trustees, No. 4, and 195

JURY.

1. In a civil case, the jury after retiring from the bar, without leave of court or consent of parties, separated and dispersed and afterwards rendered verdict for defendant: *Held*, verdict ought for that cause to be set aside. 455

Howle's adm'r v. Dunn & Co., 455
2. If the prisoner's counsel in a criminal case, asks the opinion of the court, and an instruction to the jury on a point of law, and the court rules the point against the prisoner; his counsel shall not be allowed to controvert the correctness of the court's opinion on such point, before the jury. 588

Davenport v. Commonwealth, 588

LAND TITLES.

1. Under what circumstances, a party shall be entertained in equity, to assert a prior equitable right against a grantee claiming under a patent, the claimant having never prosecuted a caveat against the patentee. 858

Lewis & others v. Billips & others, 858
2. In the location of a land warrant, the entry calls to begin at three marked red-oaks and to extend down for quantity: these three oaks are on the head waters of a stream called Poplar Fork; the survey does not extend down that stream for quantity, but leaving it entirely, extends down the general course of the country; and there is evidence that the call of the entry to extend down for quantity, in the usual sense of that phrase in locations, required the locator to extend down Poplar Fork for quantity: *Held*, the survey is naught for not conforming with the entry. *Ibid.*, 858

3. An entry calls to begin one mile above a marked tree and a rock on Big Hurricane creek, eight or nine miles above its mouth; the marked tree and rock are on the east side of the creek, thirteen miles from its mouth by the meanders, and more than nine miles in a straight line: the survey of this entry begins at a point on the west side of the creek, 66 poles from the stream and one mile and 84 poles from the designated tree and rock: *Held*, 1. The entry is special and precise enough: 2. The survey conforms with the entry with reasonable exactness, especially as a jury had so found shortly after the survey, upon a caveat to which though not all yet some of the parties, now contesting the right under this survey were parties. *Ibid.*, 858

LAPSE OF TIME.

See Revolutionary Claims, No. 5, and 525

LEGACY.

See Equitable Assets, No. 2, and 487

LEX LOCI.

See Freedom, No. 3, and 172

LIEN.

1. If several creditors, by judgments of different dates, resort to a court of equity for satisfaction out of an equitable interest of their debtor in real estate, they are to have satisfaction out of the fund according to the order of their judgments in point of time, the elder being entitled to priority over the younger. 140

Haleys v. Williams, 140
2. In equity, judgments are liens on the whole of the debtor's equitable estate in lands: so that not a moiety only but the whole fund is first to be applied to satisfy the elder judgment, and not a moiety only, but the whole of the residue is then to be applied to satisfy the younger judgment. *Ibid.*, 140

3. Quare, whether if there be two judgments of different dates and elegits on each, and a moiety of the debtor's lands be extended on the elder, the whole instead of half only of the other moiety, be not properly extendible on the younger judgment. *Ibid.*, 140

4. H. obtains judgment against J. and sues out a ca. sa. on which the debtor is taken in execution: while he is in custody, the commonwealth obtains a judgment against him, and sues out a fi. fa.: under which his lands are sold: and then the debtor takes the oath of insolvency, and is discharged from custody under H.'s ca. sa.: *Held*, the lien of H.'s ca. sa. executed, given by the statute, 1 R. C. c. 124, § 10, overreaches the lien of the commonwealth's judgment and gives the priority to H. 257

Jackson v. Heiskell, 257

LIMITATION OF ACTIONS.

1. A party who buys a trust subject with notice of the trust, is charged with it, and cannot protect himself in a court of equity under the statute of limitations. 163

Rankin v. Bradford & Co., 163

2. If a person who purchases slaves from one having no title remove them to a distant county, and thus keeps the owners in ignorance where they are, this is an obstruction to the assertion of the rights of the owners by action within § 14, 1 Rev. Code, c. 128, p. 491. And the purchaser will not be admitted to plead the statute. *Ibid.*, 163

3. See Revolutionary Claims, No. 5, and 525

LIMITATION OF ESTATES.

See Executory Limitations.

LOSS.

See Payment, No. 1, and 206

MANDAMUS.

1. A county court rejects an application for opening a new road, on a regular hearing: *Held*, that an appeal lies from such a judgment; but the circuit court cannot award a mandamus to the justices of the county court to compel them to open the road. 584

Jones v. Stafford Justices—Gen. Court, 584

MARRIAGE SETTLEMENT.

1. See Recording of Deeds, No. 1, and 443

2. Marriage settlement of slaves to use of husband and wife during their joint lives; remainder to wife if she survive; remainder to whomsoever the wife shall appoint, if she die before husband; remainder in default of such appointment to husband for life, and after, to offspring of the marriage; to the intent that the property shall not be subject to disposal, debts, contracts or engagements of husband: *Held*, during wife's life, the property cannot be disposed of by husband or applied to satisfaction of his debts. 443

Hughes v. Pledge & others, 443

MARSHAL.

1. A marshal of the court of chancery (an officer appointed by and holding during the pleasure of the court, required to give bond with surety for the due discharge of his office, which the court is required to have renewed from time to time at intervals not exceeding three years,) on being appointed gives bond with sureties; but no new bond is required within three years; and he continues in office: *Held*, the sureties are answerable for his misconduct after the expiration of three years. 280

Coplin & others v. McCalley, 280

MASTER AND SLAVE.

See Freedom.

MERCHANT.

Tobacco the growth of the State, in the condition in which it is ordinarily prepared for market by the grower, is not goods, wares and merchandise, within the meaning of the act of 1822-3, c. 3, and a commission merchant in Richmond is not obliged to obtain a merchant's license to justify him in selling the same. 572

Mitchell v. Commonwealth, 572

MILLS.

1. L. owning land on both sides of a stream, applied for leave to build a mill upon and dam across it: it was found by inquest on an ad quod damnum, that lands in the possession of A. of the value of \$35, would be overflowed: the court on a hearing, being of opinion that these lands belonged not to A. but to L. himself, granted L. leave to build his dam without paying any damages to A.: *Held* error: for the right in the lands could not be thus collaterally tried. 1

Anthony & another v. Lawhorne, 1

2. In such case leave should be granted only on condition that L. pay A. the damages assessed by the jury; and L. might build his dam at his peril, without paying them, and then defend A.'s action against him on the ground that the lands overflowed are his own, and thus put the title directly in issue. *Ibid.*, 1

MORTGAGE.

See Growing Crops, and

297

MOTIONS.

1. Execution sued out in the name of W. indorsed for the benefit of E.: HELD, that E. cannot maintain a motion in his own name against the sheriff for the amount levied on the execution, or for his default in the service and return of the writ.

Tolson v. Elwes,

436

2. See Forthcoming Bond.

MURDER.

Distinction between murder in the first and murder in the second degree, within the meaning of the statute 1 Rev. Code, c. 171, § 2, considered and the distinction between the two crimes explained. Commonwealth v. Jones, -

598

NEW TRIAL.

1. See Bills of Exceptions, No. 3, 4, and
2. See also Bills of Exceptions, No. 5, and
3. See also Bills of Exceptions, No. 6, and
4. See also Bills of Exceptions, No. 7, and
5. By-standers are called as jurors in a capital case, and, at the instance of the accused, sworn and examined touching their indifference; and then elected by the prisoner and sworn of the jury: upon objection to the indifference of these jurors, discovered after the trial not directly inconsistent with what was disclosed by the jurors themselves on their examination touching their indifference, the court ought not to set aside a verdict of guilty just in itself, though the objections be such that if known and disclosed before the jurors were elected and sworn, they might have been good cause of challenge to the jurors; much less if the objections be such as would not have been good cause of challenge.

287

340

483

598

598

Commonwealth v. Jones,
6. A person accused has a right to challenge a juror for cause before he is sworn, and the court is bound to judge whether the cause is sufficient or no to sustain the objection: but when, after a juror has been elected and sworn, and after trial and verdict the prisoner asks a new trial on grounds of exception against him, existing before he was elected and sworn, such motion is addressed to the sound discretion of the court; and in the exercise of this discretion, the court ought to consider the whole case and be satisfied that justice is done.

Ibid., 598

NOTICE.

1. See Forthcoming Bond, No. 3, and
2. See Recording of Deeds, and

438

448

OYER.

See Variance, No. 1, and

491

PAROL AGREEMENTS.

A parol agreement between father-in-law and son-in-law that the former will give the latter a piece of land, supported by no substantially valuable or meritorious consideration, will not be specifically executed at the suit of the son-in-law, after the death of his wife, against the father's devise of the land; neither would such an agreement be specifically executed under such circumstances, even if it had been in writing; nor would equity have aided a defeected conveyance, had such a one been made.

Darlington v. M'Coole,

36

PARTIES.

A court of equity ought not to dismiss a bill absolutely for want of proper parties, the plaintiff showing enough to give colour to his claim for relief against the parties not before the court: in such case the chancellor is right in giving the plaintiff leave to amend, and make the proper parties.

Allen and others v. Smith,

231

PATENT.

See Land Titles, and

353

PAYMENT.

H. indebted to P. on forthcoming bond, solicits him not to move for awards of execution thereon and to take flour for the debt; which P. refuses to do; but it is at last agreed that P. shall send H.'s flour to his own commission merchant at Richmond to be by him sold there and the net proceeds to be applied to H.'s credit on the bond: P. in March,

sends the flour to Richmond, consigns it to his commission merchant, and directs him to sell it and remit proceeds in May to himself at Baltimore, where he should then be: the merchant writes to P. that he has received and sold the flour and will remit proceeds to him at B. according to his directions: but before time appointed for remittance, the merchant fails, and the money without any fault of P. is wholly lost: HELD, that H. must bear the loss.

Harpers and another v. Patton,

306

PLEADING.

1. Sci. fa. by husband and wife upon a judgment recovered by wife dum sola suggesting that since rendition of the judgment the wife had intermarried with the husband. Plea actio non because at the date of the emanation of the sci. fa. the wife was not married to the husband as suggested in the writ; concluding to the country. And plea held naught upon general demurrer; 1. because the matter of it is properly pleadable in abatement only, in bar; 2. because it neither distinctly negatives the fact suggested in the writ nor affirms any matter to avoid the action; and 3. because instead of concluding with a verification, it concludes to the country.

Buck v. Foushee and wife,

64

2. In debt against an executor, after judgment by default, defendant tenders at the next term four good pleas in bar, to all which plaintiff instanten puts in proper replications, tendering issues; but defendant refuses to join the issues, or to rejoin, or to demur; whereupon the court rejects defendant's pleas and proceeds to judgment: HELD, under the circumstances, the pleas were rightly rejected.

Wyatt's ex'or v. Woodlief,

473

3. In debt against an executor, defendant pleads that his testator was in his lifetime guardian of an infant, that accounts of the guardianship had been settled by county court commissioners, which shewed a large balance due to the ward, and that this was a debt of higher dignity than that claimed by plaintiff: HELD, this was not an issuable plea.

Ibid., 473

POWERS TO SELL.

See Sales for Taxes, and

231

PRESUMPTION OF PAYMENT.

See Revolutionary Claims, No. 5, and

525

PRETENSED TITLES.

The statute against buying and selling pretended titles does not prohibit the sale and purchase of equitable rights in land.

Allen and others v. Smith,

231

PRINCIPAL AND SURETY.

See Surety, and

434

RECOGNIZANCE.

Upon complaints of breach of the peace before a justice of the peace, he cannot recognize the party accused to appear before the circuit court to answer the charge.

Commonwealth v. Bartlett and others,

586

RECORDING OF DEEDS.

Deed of marriage settlement of slaves then in Hanover, where deed was made and duly recorded: husband, entitled to and holding possession under settlement, removes with the slaves to Richmond and there mortgages them for debt of his own, contrary to terms of the settlement, within twelve months after his removal of them: the trustee of the subject under the settlement, fails to have it recorded in Richmond, within twelve months after the removal of the slaves; but within the twelve months, he files a bill in chancery against the husband and mortgagee, asserting his legal title to the slaves and the trusts of the settlement; HELD, the mortgagee is a purchaser with notice of settlement within twelve months after removal of slaves to Richmond, and as to him, the failure of the trustee in the deed of marriage settlement to have it recorded in Richmond, does not make the settlement void, under statute 1 Rev. Code, c. 90, § 11, p. 364.

Hughes v. Pledge and others,

443

REPEAL.

A statute passed in the session of assembly of 1827-8, prescribing a new punishment for an offence committed after the 1st May 1828, does not repeal former statutes, defining the offence, and prescribing other punishment for the same, as to such offence committed before 1st May 1828.

Commonwealth v. Pegram,

569

REVOLUTIONARY CLAIMS.

1. An officer of the state navy of Virginia during the war of the revolution, who was taken prisoner in April 1781 and remained prisoner of war unchanged till end of war, entitled to half pay for life, under act of May session 1779.

Markham's adm'r v. The Commonwealth, 516
2. Officers of state navy entitled to half pay for life, not to be allowed interest on the same. Ibid., 516

3. Officers of state navy, not entitled to the commutation of five years full pay with interest thereon, in lieu of half pay for life. Ibid., 516

4. An officer of the state navy during the war of the revolution, who became supernumerary before and so continued till the end of the war, entitled to half pay for life, under the act of May 1779.

Commonwealth v. Lilly's adm'r, 526
5. The act of limitations does not apply to such a claim; nor does the lapse of time from 1783 when the claim accrued till 1826 when it was asserted, under the circumstances of the case, afford any presumption of payment or of abandonment of the claim. Ibid., 526

ROADS.

See Mandamus, and 584

SALES FOR TAXES.

In a sale of lands by a collector of taxes imposed by the act of congress of 1798, the collector must comply strictly with the requisitions of the act, in his proceedings preparatory to the sale; it is incumbent on the purchaser claiming under such sale to prove the regularity thereof; the marshal's deed to him, is not even prima facie evidence of the regularity of the collector's proceedings; nor shall the regularity thereof be presumed from twenty-two years quiet possession under the sale, or from any time short of that from which any other link in the chain of title to real estate may be presumed.

Allen and others v. Smith, 231

SHERIFF.

1. Legality of a contract by him for the sale of his office. See Buying and Selling Offices, and 431
2. See Sales for Taxes, and 42

SPECIFIC PERFORMANCE.

1. See Parol Agreements, and 86
2. See Vendor and Vendee, No. 1, and 80
3. M. agrees to sell R. 822 acres of land for \$5,754, and the parties covenant that as the sufficiency of M.'s title is not certain, M. shall procure his brother to join him in the conveyance with general warranty to R. which is done accordingly: the 822 acres is parcel of a large tract of 19,500 acres, which was purchased of P. in London, in 1803, and then mortgaged to secure the purchase money, £3,875 sterling: this mortgage has never been recorded in Virginia, and there is strong reason to believe the debt thereby secured fully paid; but no release of it has been obtained: HELD, this mortgage is no valid objection to a decree for M. against R. for a balance of the purchase money of the 822 acres of land.

Richard v. Mercer, 126
4. A. by covenant in July 1779, contracts to sell land to B. for £3,500, whereof B. pays £1,734 in cash, and covenants to pay balance on A.'s making him a conveyance; in September following, B. pays balance in full, to A. in person, and receives possession; but A. makes no conveyance; or if he made one, it cannot be found; in July 1791, B. by assignment sealed and indorsed on A.'s covenant, assigns all his right, &c. in the land to C. for value received; and C. takes possession; in October 1797, C. contracts to sell the land to D. for £200, whereof £500 was to be paid in 1798, and £300 in 1799; and C. covenants to give D. possession on receiving the first payment in 1798, and to make him a lawful title on 630 receiving the last payment: D. makes *the first payment in 1798 and receives possession, which he and his heirs have ever since held; D. never makes or tenders the last payment; C. never makes or tenders the conveyance; and they both die. Upon a bill by C.'s adm'r and heirs against D.'s adm'r and heirs, for specific execution of the contract of Oct. 1797, the chancellor decrees specific execution, and charges the balance of purchase money on the land; and decree affirmed.

Edwards v. Van Bibber, 183
5. Pending the bill in the court of chancery, the escheator takes an inquisition on the land, whereby it is found that A. died seized thereof, without heirs, and without having disposed thereof, so that it is escheated: D.'s heirs make no opposition to this proceeding, and give C.'s heirs no notice thereof: HELD, this escheat is no obstacle to the specific execution claimed by C.'s heirs against D.'s heirs; but the commonwealth and her officers shall be enjoined from any farther proceeding on the escheat. Ibid., 183

6. Quære, whether, under the circumstances, a deed from A. to B. conformably with the contract of July 1779, must not be presumed? Ibid., 183

7. A vendee claiming specific execution of a contract for the sale of lands, proves that there was a contract in writing, but does not prove the terms of it, the instrument being alleged to be lost: the heir and devise of the vendor, by deed, which does not pass the title, acknowledges that the vendee is entitled to the land: HELD, that this, in a contest between the vendee and third persons, is enough to shew his right to specific execution.

Allen & others v. Smith, 231

STEALING A FREE PERSON.

D. is indicted for stealing a free mulatto boy, knowing at the time that he was free: HELD,

1. That the offence is complete by the kidnapping, without the actual sale of the negro by the kidnapper under the statute 1 Rev. Code, c. 111, § 28.

2. That the stealing a free negro with felonious intent to appropriate him, is criminal, whether the person so stealing him know him to be free or not.

3. That though the knowledge of the freedom is averred in the indictment, it need not be proved, but may be regarded as surplusage; but

4. That if one come lawfully into possession of a free negro, not knowing him to be free, and sell him; knowledge of his freedom at the time of selling, is necessary to make the selling criminal.

5. That when one takes and carries away a free negro boy of eight years of age, with criminal intent to appropriate him, the consent of such a boy does not excuse or lessen the offence.

Davenport v. Commonwealth, 568

SURETY.

1. A mere indulgence given by a creditor to a principal debtor, the creditor not binding himself to suspend his proceedings against the principal for any time, though such indulgence be given at the very time the sheriff is about to levy the execution on the principal's property, and though in consequence of that indulgence the principal is enabled to remove his property out of the reach of future process, does not, even in equity, discharge the surety.

M'Kenny's ex'ors v. Waller, 434

2. See Bond.

SURPLUSAGE.

See Stealing a Free Person, No. 3, and 568

SURVEY.

See Land Titles, and 353

TAXES.

1. See Sales for Taxes, and 231
2. See Bond No. 2, and 485

TENANT AT WILL.

See Growing Crops, and 297

TOBACCO.

See Merchant, and 572

TROVER.

1. If an administrator sell a chattel whereof his intestate died possessed, but which in truth belonged of right to another, and apply the proceeds to payment of his intestate's debts, in due course of administration, without any notice of the right or claim of the true owner, he is personally liable to the true owner for the value, in trover brought by the owner against him.

Newsum v. Newsum, 86

2. It seems that a naked trustee of a chattel is entitled to recover, in trover, not nominal damages only, but the full value. Ibid., 86

631 *3. Proof of demand and refusal is never necessary in trover, where there is proof of actual conversion. Ibid., 86

TRUSTS AND TRUSTEES.

E. C. bequeathed four slaves to C. C. and F. T. trustees, in trust to apply the profits to maintenance of testator's daughter, J. B. and her husband, S. K. B. and their children, during lives of daughter and husband, and of survivor, remainder to the children of the daughter by that husband: both trustees declined the trust: no trustee was substituted: the executor delivered the slaves to Mrs. B. her husband being then in Europe, where he died: Mrs. B. then married V. who in 1798 sold R. all the trust slaves, for his wife's life, R. having notice of the trust: R. removed them from Fredericksburg to Augusta, held some there, gave some away, sold others: the second husband, V. died in 1806. Upon bill in chancery by Mrs. V. and her children by B. against R. praying discovery of names &c. of the slaves and their increase, restoration of them and account of profits, and

(on a charge that R. would remove the property out of the State) an injunction to restrain him from doing so; and R. not pleading to the jurisdiction: Decreed.

1. R. had no right to hold the slaves, even during Mrs. V's life, as they were a trust subject, and the profits applicable to maintenance of her and her children; though quære how far her interest passed by her second husband's sale to R.

2. The court of chancery had jurisdiction of the case: because the charges in the bill of the necessity of a discovery and of a design to remove the slaves out of reach, saved the bill from being demurrable, and if that charge were only colourable, R. should have pleaded to the jurisdiction; and (chiefly) because the slaves were a trust subject, represented by no trustee who could sue at law, and which equity alone could apply to the purposes of the trust.

3. R. could not protect himself under the statute of limitations: because he bought with notice of the trust and so was charged with it; and because his removal of the slaves to a distant county, thus keeping owners in ignorance where they were, was an obstruction to the assertion of their rights by action, precluding him from pleading the statute, within § 14, 1 Rev. Code, c. 128, p. 491.

Rankin v. Bradford and others, 163
4. M. by deed of trust conveyed (inter alia) twenty slaves to a trustee, to secure a debt due to W. & Co. payable twelve months after the date of the deed: within the year M. sold one of the slaves to A. two to B. one to C. and one to R. who alleged that M. sold at request and by authority of W. & Co.: when the debt fell due, all the rest of the trust subject was sold and the proceeds fell far short of the debt due W. & Co.: W. & Co. brought suit in chancery against M., the purchasers of the five slaves, and the trustee: denying M.'s authority to sell the five slaves; praying a foreclosure of the equity of redemption thereof, and that the purchasers be decreed to deliver them up to be sold under the deed of trust: HELD, that though W. & Co. might have brought actions at law in the trustee's name, to recover the slaves of the respective purchasers, yet their case was properly relievable in equity.

Ambler and others v. Warwick & Co., 195
5. See Sales for Taxes, and 231
6. See Marriage Settlement, and 443

USURY.

1. C. wanting to raise \$2,335, tells J. this, and offers him as many slaves as will command that sum: upon which J. pays him \$2,335 in gross, for sixteen slaves, and C. gives him a bill of sale thereof: and it is at the same time agreed that the slaves shall remain in C.'s possession on hire for one year; and if at the end of the year, C. shall pay J. \$2,935, J. shall in consideration thereof, re-sell the slaves to him; if any of the slaves die during the year, C. to pay same price, and no less for survivors; and if C. shall not pay the \$2,935 punctually, J.'s agreement to re-sell them to him to be void: HELD, a shift to evade statute of usury, and contract usurious.

Clarkson's adm'r v. Garland and another, 147
2. C. contracting usurious debt to G. gives him a deed of trust on slaves to secure it: afterwards, C. voluntarily surrenders trust slaves to trustee to be sold to satisfy the debt: at trustee's sale, in itself fair, G. buys greater part of trust slaves, and the proceeds of sales are applied to the debt: HELD, though deed of trust usurious, yet trustee's sales of the subject to G. the usurious creditor, shall not be disturbed in equity. Ibid., 147

3. Though where one resorts to equity for relief against usurious debt yet unpaid, he shall be required to pay only the principal advanced to him without even lawful interest according to the statute of Virginia: yet where debtor seeks, in equity, an account of and decree for money already paid on usurious contract, the measure of relief is, the excess paid above principal and lawful interest: and if his payments exceed principal and lawful interest, the surplus with interest shall be decreed to him. Ibid., 147
4. In a bill for relief against usury, plaintiff charges usury exacted at rate of two and a half or three per cent. per month: defendant in his answer, admits he exacted usury but says he does not remember the rate: and there is no proof to ascertain the rate: HELD, that in this state of the

case, the court should consider the rate of usury two and a half per cent. per month.

Fulcher v. Baker and others, 458
5. M. borrows money of L. on usury, and by deed of trust conveys land to a trustee, with power to sell the subject when required after debt should fall due, and raise money to pay it: the lender dies: his administrators require trustee to sell trust subject: the borrower exhibits a bill in chancery charging the usury, requiring defendants to answer the charge, insisting that the deed of trust is null and void, and praying injunction to restrain trustee from selling: the administrators of the lender and the trustee disclaim all knowledge of the usury: but the usury is proved by one witness: HELD, that in such a case, the court of chancery should injoin the trustee from selling the trust subject, till the creditors claiming under it should establish its legal validity in some proper forum where the debtor may have opportunity to contest it—dissentiently CARR, J.

Martin v. Lindsay's adm'rs and others, 499

VARIANCE.

In covenant, defendant takes over of the covenant, and afterwards pleads covenants performed: HELD, that defendant by over, has made the covenant itself a part of the record, and cannot at the trial of the issue object to the covenant as evidence on the ground of variance between it and the covenant set forth in the declaration.

Armstrong v. Armstrongs, 491

VENDOR AND VENDEE.

1. Vendors of land, bound to make a conveyance thereof, are bound so to execute it in presence of witnesses or so to acknowledge it before magistrates, that the vendee may have it recorded according to law.

Tapp v. Beverley, 80

2. What is not a mere executory contract, but a conveyance of land. See Conveyance, No. 1, and 125

3. See Specific Performance, No. 3, 4, 5, 6, and 7

VERDICT.

See Fully Administered, and 481

WILLS.

Attestation and Probat.

1. An attestation of a will of lands made in the same room with testator, is prima facie an attestation in his presence, according to the statute of wills: an attestation not made in the same room is prima facie not an attestation in his presence: but as in the one case the attestation is good, if shewn to have been made within the scope of testator's view from his actual position: so in the other it is not good, if it appear that in the actual relative situation of testator and witnesses, he could not possibly have seen the act of attestation, nor have so changed situation as to have enabled him to see it, without aid from others, which was at hand, but was neither asked nor given.

Nell & others v. Nell & others, 6

2. Will, disposing of real and personal estate, but not duly executed as to the real, was admitted to probat by county court, in general terms, in 1785, and never contested: HELD, this was full probat: the heir could only have contested the will, by bill in chancery, within seven years; and he instead of so contesting it, having taken, as devisee under it, it must now be regarded as a complete will of lands.

Vaughan v. Green, 287

Construction of.

3. John Crow bequeathed that the balance of his slaves should be divided equally between his children, to wit: the heirs of W. C. (a deceased son of testator) naming them, seven in number, T. C., M. C., and J. C., (sons of testator) and the children of his deceased daughters M. J. and S. C., but the children of his daughters M. J. and S. C. should take respectively only such part as their mothers respectively would take if still alive, that is to say a child's part: HELD, that the seven children of the deceased son took equally per capita with the testator's three living sons, and the children of his two deceased daughters took per stirpes each, their mother's part.

Crow & others v. Crow & others, 74

4. See Executory Limitations, and 321

5. See Estates Tail and 38

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS,
AND IN THE
GENERAL COURT,
OF
VIRGINIA.

By BENJAMIN WATKINS LEIGH.

VOLUME II.

Eastern District of Virginia, to wit:

BE IT REMEMBERED, That on the eighth day of November, Anno Domini one
{ L. S. } thousand eight hundred and thirty-one, BENJAMIN WATKINS LEIGH,
{ } of the said district, for and on behalf of the commonwealth of Virginia, hath
{ } deposited in this office, the title of a book, (for the benefit of the said common-
wealth,) the title of which is in the words following, to wit:

"Reports of Cases argued and determined in the Court of Appeals, and in the General
Court, of Virginia. By Benjamin Watkins Leigh. Volume II."

the right whereof he claims as author, in conformity with an act of congress, entitled
"an act to amend the several acts respecting copy rights."

R'D JEFFRIES,
Clerk of the District.

JUDGES
OF THE
COURT OF APPEALS

FRANCIS T. BROOKE, PRESIDENT.
WILLIAM H. CABELL. JOHN COALTER.*
JOHN W. GREEN. DABNEY CARR.

*Resigned 23d March 1831.

JUDGES
OF THE
GENERAL COURT

ROBERT WHITE.*	JAMES SEMPLE.
ARCHIBALD STUART.	RICHARD E. PARKER.
WILLIAM BROCKENBROUGH.	LEWIS SUMMERS.
PETER JOHNSTON.	ABEL P. UPSHUR.
DANIEL SMITH.	RICHARD H. FIELD.
JAMES ALLEN.	JOHN F. MAY.
FLEMING SAUNDERS.	JOHN T. LOMAX.†
WILLIAM DANIEL.	

Attorney General: JOHN ROBERTSON.

*Died 9th March 1831.

†Appointed 17th December 1829.

TABLE OF CASES REPORTED.

Accomack Justices, Poulson v.,	743	Fugate, Commonwealth v.,	724	Murdaugh, Jones v.,	447
Allen v. Commonwealth,	727	Garland v. Ellis,	555	Norfolk Justices, Harrison v.,	764
Anderson, Bowyer v.,	550	Garlands v. Jacobs &c.,	651	Norris v. Hume,	384
Armistead's adm'ors, Waller v.,	11	Garner, South v.,	372	Orndoff v. Turman and others,	200
Arnold, Lovell v.,	16	Gee, Bacchus v.,	68	Overseers of the Poor v. Tucker,	580
Bacchus v. Gee,	68	Gilliat v. Lynch,	493	Page and others, Currie and	617
Barker's Case,	719	Givens and others, Mann and	769	others v.,	617
Bass and wife and others v.	356	others v.,	566	Parker and Goodwyn, Win-	361
Scott and others,	665	Gooch and Brown, Young v.,	626	drum v.,	195
Bangh, Gregory v.,	416	Gordon, Fitzbush v.,	665	Peasley v. Boatwright,	183
Bell v. Hammond and others,	329	Gordon v. Jeffery,	512	Pegram and others, Vizon-	717
Bennett, Chapman v.,	425	Gregory v. Bangh,	512	neau v.,	425
Beverley v. Brooke and others,	484	Grymes' adm'or &c., Heffer-	512	Perryman &c., Commonwealth	149
Beverley v. Pickett and others,	—	nan's adm'or v.,	572	Pickett and others, Beverley	707
Bishop's ex'or v. Bishop and	584	Hammond and others, Bell v.,	584	Plunkard's ex'or, M'Kinney v.,	474
others,	582	Hannah and others, Thrift v.,	525	Pistor, Hay's adm'x v.,	490
Bishop v. Harrison's adm'or	29	Hardiman, Clark v.,	532	Pleasants v. Clements,	157
&c.,	29	Hardin's ex'ors v. Hardin,	704	Poage v. Willson,	743
Blow v. Maynard,	195	Harris v. Harris,	584	Porterfield v. Smith and others,	540
Blow, Lawrence v.,	178	Harrison's adm'or &c., Lambv.,	707	Poulson v. Justices of Acto-	732
Boatwright, Peasley v.,	170	Harrison's adm'or &c., Bishop	707	mack,	569
Bolling v. Stokes,	560	v.,	512	Randolph v. Randolph &c.,	189
Bowman, Branch v.,	425	Harrison v. Norfolk Justices,	6	Rawson and Pugh, Howard v.,	140
Bowyer v. Anderson,	398	Harvey and Worth and others,	145	Reed's heirs v. Vannorsdale	650
Branch v. Bowman,	557	Kinney's ex'ors and devisees	584	and wife,	356
Brooke and others, Beverley	732	v.,	661	Robertson and others, Wal-	249
v.,	834	Hay's adm'x v. Pistor,	709	thall's ex'or v.,	157
Brown, Little and Telford v.,	630	Heffernan's adm'or &c. v.	630	Robin and others v. King,	750
Browne and others, Taylor and	410	Grymes' adm'or &c.,	410	Robinson, Leavell v.,	178
wife v.,	447	Hickman v. Stout,	70	Rootes v. Stone,	6
Brown v. Commonwealth,	140	Hill and others, Jacobs v.,	512	Sanders and wife and others,	744
Buckner v. Mackay,	181	Hite and others, M'Kays v.,	108	Jacksons v.,	372
Burfoot v. Burfoots,	557	Hooper, Couch v.,	398	Schley and Schroeder, Tier-	25
Carlisle, Lockridge v.,	732	Howard v. Rawson and Pugh,	108	Scott and others, Bass and wife	356
Chapman v. Bennett,	248	Hudgin, Commonwealth v.,	398	and others v.,	249
Chapman, Fletcher v.,	186	Hume, Norris v.,	661	Sharp v. Sharp and others,	157
Clarke's adm'or v. Day,	329	Jacksons v. Sanders and wife	709	Smith and others, King v.,	157
Clark v. Hardiman,	560	and others,	630	Smith and others, Porterfield	157
Clayton v. Fawcett's adm'ors,	173	Jacobs v. Hill and others,	410	Smoot v. Marshall,	134
Clements, Pleasants v.,	347	Jacobs &c., Garlands v.,	410	Snapp v. Spengler and wife,	1
Cole and wife and others, Watts	474	Jacobs and others v. Common-	447	Snider, Commonwealth v.,	744
v.,	633	wealth,	447	Southall v. Garner,	372
Commonwealth v. Hudgin,	248	Jarrett's adm'or, Crawford and	140	Spencer v. Commonwealth,	751
Commonwealth, Moore v.,	701	others v.,	157	Spengler and wife, Snapp v.,	1
Commonwealth v. Cousins,	708	Jeffery, Gordon v.,	165	Stephen v. Commonwealth,	750
Commonwealth, Jacobs and	709	King, Robbin and others v.,	70	Stokes, Bolling v.,	178
others v.,	717	King v. Smith and others,	525	Stone, Rootes v.,	650
Commonwealth v. Perryman	721	King William Justices v. Mun-	525	Stout, Hickman v.,	6
&c.,	724	day,	161	Stuart and others, Lee and	76
Commonwealth, Webb v.,	727	Kenney's ex'ors and devisees	161	wife v.,	84
Commonwealth v. Fugate,	739	v. Harvey and Worth and	77	Tate v. Liggit and Matthews,	74
Commonwealth, Allen v.,	741	others,	84	Taylor and wife v. Browne and	419
Commonwealth v. Willson,	744	Lamb v. Harrison's adm'or &c.,	74	others,	741
Commonwealth, Thomas v.,	745	Lawrence v. Blow,	84	Thomas v. Commonwealth,	321
Commonwealth v. Snider,	751	Leavell v. Robinson,	588	Thompson v. Cumming,	451
Commonwealth, Martin v.,	759	Lee and wife v. Stuart and	588	Threlkeld's adm'or v. Fitz-	200
Commonwealth, Spencer v.,	769	others,	588	hugh's ex'x,	580
Commonwealth, Stephen v.,	769	Liggit and Matthews, Tate v.,	588	Thrift v. Hannah and others,	300
Couch v. Miller,	769	Liggit and Matthews v. Mor-	588	Tiernans v. Schley and Schroe-	25
Couch v. Hooper,	769	gan and others,	588	der,	189
Cousins, Commonwealth v.,	769	Linney's adm'or v. Dare's	588	Turman and others, Orndoff v.,	200
Coutts v. Walker,	769	adm'or &c.,	588	Tucker, Overseers of the Poor	580
Crawford and others v. Jar-	769	Little and Telford v. Brown,	588	v.,	560
rett's adm'or,	769	Lockridge v. Carlisle,	588	Vannorsdale and wife, Reed's	560
Crews, Miller v.,	769	Lovell v. Arnold,	588	heirs v.,	183
Cumming, Thompson v.,	769	Loyd and others, Foreman v.,	588	Vizonneau v. Pegram and	183
Currie and others v. Page and	769	Lynch, Gilliat v.,	588	others,	208
others,	769	Case,	588	Walker, Coutts v.,	11
Dare's adm'or &c., Linney's	769	Mackay, Buckner v.,	588	Waller v. Armistead's adm'ors,	189
adm'or v.,	769	Madden v. Madden's ex'ors,	588	Walthall's ex'or v. Robertson	29
Davis and others, Dickenson v.,	769	Mann and others v. Givens and	588	and others,	658
Day, Clarke's adm'or v.,	769	others,	588	Webb v. The Commonwealth,	721
Dickenson v. Davis and others,	769	Marshall, Smoot v.,	588	Willson, Poage v.,	490
Ellis, Garland v.,	769	Martin v. Commonwealth,	588	Willson, The Commonwealth v.,	739
Ewing v. Ewing,	769	Maynard, Blow v.,	588	Windrum v. Parker and Good-	361
Fawcett's adm'ors, Clayton v.,	769	Mayo v. Winfree,	588	wyn,	370
Fitzhugh's ex'x, Threlkeld's	769	M'Kays v. Hite and others,	588	Winfree, Mayo v.,	588
adm'or v.,	769	M'Kinney v. Pinkard's ex'or,	588	Young v. Gooch and Brown,	588
Fitzhugh v. Gordon,	769	Miller, Couch v.,	588		
Fletcher v. Chapman,	769	Miller v. Crews,	588		
Foreman v. Loyd and others,	769	Moore v. Commonwealth,	588		
Frazier &c. v. Frazier's ex'ors	769	Morgan and others, Liggit and	588		
&c.,	769	Matthews v.,	588		
	642	Munday, King William Jus-	588		
		trices v.,	588		

TABLE OF CASES CITED.

Abraham v. Matthews, 6 Munf. 159.	673	Brett v. Rigden, Plowd. 843.	210
Adams, Read v., 6 Serg. & Rawle. 356.	322	Bridgman, Trier v., 2 East. 359.	196
Adderly v. Sparrow, Mitf. Plead. 154.	544	Bridgen v. Parkes and others, ex'ors, 3 Bos. & Pul. 424.	587
Addis v. Knight, 2 Meriv. 131.	504	Brinkerhoff v. Brown, 4 Johns. Ch. Rep. 671.	91
Adney's Case, 2 Cowp. 460.	687	Brisbane v. Dacres, 5 Taunt. 144.	82
Aldrich, Vigers v., 4 Burr. 2482.	306	Briscoe v. Clarke, 1 Rand. 213.	481
Alexander & Co., Stott & Donaldson v., 1 Wash. 381.	322	Britton, The United States v., 2 Mason's Rep. 470.	757
Anderson, Drew v., 1 Call. 51.	564	Bromley v. Holland, 7 Ves. 28.	21
Anderson, Carrington v., 5 Munf. 32.	662	Bronaugh v. Freeman, 2 Munf. 366.	546
Angell v. Draper, 1 Vern. 309.	91	Brooke v. Young, 3 Rand. 106.	197
Annesley, Saunders v., 2 Scho. & Lef. 104.	694	Brooke, Peyton v., 3 Cranch. 96.	366
Anonymous v. Ves. sen. 682.	419	Broome, Beachcroft v., 4 T. R. 441.	386
Anthony v. Lettwich, 3 Rand. 238.	506	Broome, Swann v., 3 Burr. 1595.	373
Anthony v. Lawhorne, 1 Leigh. 1.	586	Brown, Brinkerhoff v., 4 Johns. Ch. Rep. 671.	91
Antrobus v. Smith, 12 Ves. 39.	342	Brown, Pells v. Cro. Jac. 590.	123
Archbishop of Canterbury, The King v., 8 East 218.	160	Browne v. Like, 14 Ves. 302.	185
Archer and others, Tabb and others v., 3 Hen. & Munf. 399.	540	Brown v. Harraden, 4 T. R. 151.	196
Argent v. Durrant, 8 Term R. 403.	608	Brown v. Barry, 3 Dall. 365.	322
Armistead v. Butler, 1 Hen. & Munf. 176.	506	Brownrigg, Bryson v., 9 Ves. 1.	242
Armstrong, Wiggins v., 2 Johns. Ch. Rep. 144.	91	Brunsen, Salter v., 4 Mod. 231.	450
Arnold, Lovell v., 2 Munf. 167.	5. 16	Bryson v. Brownrigg, 9 Ves. 1.	242
Arundel v. Phipps, 10 Ves. 139.	47	Buck and others, Dunbar v., 6 Munf. 34.	506
Ashdown, Stileman v., 2 Atk. 607, Amb. 13.	66. 91	Bullythorpe v. Turner, Willes, 476 note a.	375
Atkins, Story v., 2 Ld. Raym. 1490.	196	Bunn v. Markham, 7 Taunt. 324.	341
Atkyns v. Horde, 1 Burr. 60, 115.	222	Burdett v. Rockley, 1 Vern. 58.	102
Atwood, Moth v., 5 Ves. 845.	153	Burk v. Levy, 1 Rand. 1.	546
Aveson v. Kinnaird, 6 East. 192.	141	Burnell, English v., 2 Wils. 268.	375
Bagge, Grant v., 3 East. 123.	549	Burr's Case.	750
Bailey, Green v., 5 Munf. 246.	666	Burridge v. Earl of Sussex, 3 Ld. Raym. 1392.	217
Bain v. Clark, 10 Johns. Rep. 435.	375	Burrow, Hill v., 3 Call. 349.	138
Baird, Tabb v., 3 Call. 475.	669	Burrow, Bellamy v., Ca. Temp. Talb. 107.	637
Balch v. Westall, 1 P. Wms. 445.	91	Burwell's ex'ors, McDowell v., 4 Rand. 317.	565
Ballet v. Ballet, Godb. 151.	456	Butler v. Haskell, 4 Desaus. Ch. Rep. 651.	154
Bance, Heams v., 3 Atk. 630.	418	Butler, Armistead v., 1 Hen. & Munf. 176.	506
Bank of England, Rex v., 2 Doug. 526.	169	Butterworth v. Stagg, 2 Johns. Ca. 291.	736
Barbour, Shelton v., 2 Wash. 64.	675	Byrd's Case, 3 Virg. Cas. 490.	777
Barclay, Hammonds v., 2 East. 227.	21	Campbell, Lewis v., 8 Taunt. 715.	459
Barford v. Street, 16 Ves. 135.	386	Canterbury (Archbishop of), The King v., 8 East. 213.	160
Barling v. Reeder, 1 Hen. & Munf. 154.	144	Carrington, Smith v., 4 Cranch. 71.	197
Barker v. Dixie, Rep. Temp. Hardw. 264.	141	Carrington v. Bennett, 1 Leigh. 340.	337
Barker, Rex v., 3 Burr. 1267.	160	Carrington v. Anderson, 5 Munf. 32.	652
Barnes, Rockbold v., 3 Rand. 473.	331	Carter v. Tyler, 1 Call. 184.	214
Barry, Brown v., 3 Dall. 365.	322	Caruthers v. Caruthers, 4 Bro. Ch. C. 500.	80
Bartlett, Jackson v., 8 Johns. Rep. 281.	364	Cawood's Case, 2 Virg. Cas. 537.	744
Bass' ex'ors, Elam v., 4 Munf. 301.	351	Chamberlayne v. Temple, 2 Rand. 384.	56. 91
Bassett v. Salter, 2 Mod. 136.	360	Chamberlayne, Hewlett v., 1 Wash. 367.	548
Battersbee v. Farrington, 1 Swanst. 106.	49	Chapman v. Emery, Cowp. 278.	46
Baugh, Gregory v., 4 Rand. 611.	666	Chapman, Forth v., 1 P. Wms. 667.	138
Bayard v. Hoffman, 4 Johns. Ch. Rep. 450.	106	Chase v. Joyce, 4 Mau. & Selw. 412.	549
Bayntun, Dewey v., 6 East. 257.	53	Chester (Bishop of), The King v., 1 T. R. 404.	169
Beachcroft v. Broome, 4 T. R. 441.	386	Chew v. Justices of Spotsylvania, 2 Virg. Cas. 208.	743
Beake, Wiseman v., 2 Vern. 121.	156	Chichester v. Boggess, 5 Munf. 98.	3. 656
Beale v. Willson, 4 Munf. 380.	547	Chinn, Downman v., 2 Wash. 303.	367
Bedford, Talbot v., Cook's Rep. 447.	463	Chudleigh's Case, 1 Rep. 135, b. 135, a.	227
Bedingfield, Higham v., Noy. 46.	664	Churchill v. Grove, Nels. Ch. Rep. 89, 1 Ch. Ca. 35.	281
Bell, Scot v., 3 Lev. 70.	46	2 Ch. Rep. 180.	
Bells v. Gillespie, 5 Rand. 278.	128	Clark, Machell v., 2 Ld. Raym. 779, Com. Rep. 119.	209. 664
Bell, Mills v., 3 Call. 320.	455	and 7 Mod. 18.	
Bell, Booker v., 3 Bibb. 177.	463	Clark, Machell v., 2 Salk. 620.	209
Bellamy v. Burrow, Ca. Temp. Talb. 107.	637	Clarke v. Russell, 3 Dall. 415.	322
Bender v. Fromberger, 4 Dall. 443.	461	Clarke v. Clement, 6 T. R. 525.	366
Bennet v. Musgrove, 2 Ves. sen. 51.	91	Clarke, Briscoe v., 1 Rand. 213.	481
Bennett v. Hardaway, 6 Munf. 125.	337	Clayton v. Kynaston, 2 Salk. 574.	55
Bennett, Carrington v., 1 Leigh. 340.	337	Clement, Clarke v., 6 T. R. 525.	366
Bennett, Holbech v., 2 Wms. Saund. 319, a.	374	Clerke v. Martin, 2 Ld. Raym. 757.	199
Berkeley, Willson v., Plowd. 232.	226	Clough v. Clough, 5 Ves. 717.	80
Bertie v. Pickering, 4 Burr. 2455.	449	Cocke, Coleman v., 6 Rand. 618.	57
Beverley v. Fogg, 1 Call. 484.	3	Codwise, Sands v., 4 Johns. Rep. 536.	93
Bibb, Duval v., 3 Call. 362.	659	Codwise v. Gelston, 10 Johns. Rep. 517.	443
Binnis, M'orkle v., 5 Binney, 349.	263	Coffin, May v., 4 Mass. Rep. 341.	326
Bishop of Chester, The King v., 1 T. R. 404.	169	Cohon, Riddick v., Rand. 547.	385
Blackborough v. Davis, 1 Salk. 38.	729	Cole v. Gibbons, 3 P. Wms. 290.	152
Blackburn v. Stupart, 2 East. 243.	366	Cole v. Pennell, 2 Rand. 174.	657
Blackstone, Lavender v., 2 Lev. 147.	47	Coleman v. Cocke, 6 Rand. 618.	57
Blakey, Newby's adm'ors v., 3 Hen. & Munf. 57.	350	Coleman v. Winch, 1 P. Wms. 777.	62
Boggess, Chichester v., 5 Munf. 98.	3. 656	Coleman v. Dick, 2 Wash. 234.	676
Bohn v. Sheppard, 4 Munf. 403.	367	Coles v. Trecothick, 9 Ves. 249.	260
Bolling v. Mayor of Petersburg, 3 Rand. 563.	5	Coles, Hunt v., 1 Com. Rep. 226.	260
Bolton, (Duke of) v. Williams, 2 Ves. Jun. 150.	185	Colgin, Hendren v., 4 Munf. 231.	267
Booker v. Bell, 3 Bibb. 177.	463	Collingwood v. Pace, 1 Ventr. 417.	111
Bowes v. Heaps, 3 Ves. & Beam. 117.	156	Colman v. Croker, 1 Ves. Jun. 160.	91
Bowman v. Plunkett, 2 M'Cord. 518.	263	Colville v. Parker, Cro. Jac. 158.	46
Bowyer v. Creigh, 3 Rand. 25.	579	Commissioners of Dean, Rex v., 2 Mau. & Selw. 80.	169
Bradley, Miller v., 8 Mod. 190.	279	Commonwealth v. Fairfax, 4 Hen. & Munf. 308.	365
Bradley v. Westcott, 13 Ves. 452.	386	Commonwealth, Wood v., 4 Rand. 329.	556
Bradt, The People v., 6 Johns. Rep. 318.	736	Commonwealth v. Fairfax Justices, 2 Virg. Cas. 9.	708
Brazier, Gore v., 3 Mass. Rep. 543.	463	Comyn, O'Gorman v., 2 Scho. & Lef. 138.	57

Contencin, Hoare v., 1 Bro. C. C. 27.....	592	Fox v. Rootes.....	283
Coope v. Eyre, 1 Hen. Black 37.....	564	Franklin, Osgood v., 2 Johns. Ch. Rep. 1, 26; and 14 Johns. Rep. 527.....	152
Cooper, Standford v., Het. 72, Cro. Car. 102, Hutt. 95.....	278	Frazier, Griffith v., 8 Cranch, 1.....	730
Corp. Sturgis v., 12 Ves. 190.....	185	Freeman v. Jugg, 8 Salk. 307.....	371
Corporation of Carlisle v. Wilson, 13 Ves. 278.....	9	Freeman, Hawkins v., 8 Vin. Discount. A. pl. 26.....	504
Couch, Webster v., 6 Rand. 519.....	506	Freeman v. Hyett, 1 W. Black 304.....	506
Countess Granard, Farrer v., 4 Bos. & Pul. 80.....	171	Freeman, Brunaugh v., 2 Munf. 266.....	546
Cousins, Rhodes v., 6 Rand. 188.....	91	Frescobaldi v. Kinaston, 3 Stra. 733.....	668
Cox v. Strode, 2 Bibb. 276.....	463	Fromberger, Bender v., 4 Dall. 443.....	461
Coxe v. Phillips, Ca. Temp. Hardw. 387.....	736	Fullerton, Lewis v., 1 Rand. 15.....	307
Crary and Morgan v. Turner, 6 Johns. Rep. 51.....	364	Furman v. Gaskin, 3 Caines, 369.....	366
Creigh, Bowyer v., 3 Rand. 26.....	579	Furman v. Elmore, 2 Nott & M'Cord, 189.....	463
Crews v. Pendleton, &c., 1 Leigh, 297.....	576	Gaither, James v., 2 Har. & Johns. 176.....	306
Crocker's Case, 5 Bos. & Pul. 87.....	757	Gammon v. Stone, 1 Ves. sen. 339.....	56
Croker, Colman v., 1 Ves. jun. 160.....	91	Gardner v. Painter, Ca. Temp. King, 65.....	46
Cumming's Case, 2 Virg. Cas. 123.....	704	Garland v. Rives, 4 Rand. 282.....	93
Cutchin v. Wilkinson, 1 Call. 1.....	267	Garland, Knox v., 2 Call. 241.....	481
Cutts v. Perkins, 13 Mass. Rep. 206.....	21	Garnett v. Sam, 5 Munf. 542.....	673
Dacres, Brisbane v., 5 Taunt. 144.....	82	Garrard v. Norris, Latch. 53.....	278
Dally, Scilly v., 2 Salk. 562, 1 Bro. P. C. 525.....	674	Garrard v. Henry, 6 Rand. 112.....	735
Daniel, Rowletts v., 4 Munf. 473.....	380	Garratt, Pearson v., Comb. 227.....	193
Darby, Ross v., 4 Munf. 423.....	583	Gaskin, Furman v., 3 Caines, 369.....	366
Darlington v. M'Coolie, 1 Leigh, 36.....	570	Gelston, Codwise v., 10 Johns. Rep. 517.....	443
Davis, Jiggetts v., 1 Leigh, 419.....	128	George v. Parker, 4 Rand. 659.....	673
Davis, De Costa v., 1 Bos. & Pul. 242.....	366	Gibbons, Cole v., 3 P. Wms. 290.....	152
Davis, Blackburn v., 1 Salk. 38.....	720	Gilbert, Kellogg v., 10 Johns. Rep. 220.....	364
Davis v. Wood, 1 Wheat. 6.....	670	Gillespie, Bells v., 5 Rand. 278.....	123
Davis, Hannah v., Gen. Court, April, 1787.....	685	Givens v. Manns, 6 Munf. 191.....	307, 703
Dawkins, Wits v., 12 Ves. 501.....	185	Glasscock's adm'r v. Dawson, 1 Munf. 605.....	547
Dawson, Row v., 1 Ves. sen. 332.....	21	Gleeson's heirs v. Scott, 3 Hen. & Munf. 278.....	269
Dawson, Glasscock's adm'r v., 1 Munf. 605.....	547	Goodright v. Forrester, 8 East, 552, 1 Taunt. 578, 288.....	664
Dean (Commissioners of), Rex v., 3 Mau. & Selw. 80.....	169	Goodtitle v. Otway, 2 Wills. 6.....	386
Dean, Edlows v., Bumb. 36.....	649	Goodwin, Hooper v., 1 Swanst. 455.....	344
De Costa v. Davis, 1 Bos. & Pul. 242.....	366	Gordon, Powell v., 2 Esp. 735.....	21
De Faria, Gowland v., 17 Ves. 20.....	152	Gore v. Brazier, 3 Mass. Rep. 543.....	463
De Gallion v. L'Aigle, 1 Bos. & Pul. 8, 357.....	171	Gorges, Pettipiece v., 3 Bro. C. C. 8.....	185
Delze's Case, 1 Atk. 228.....	497	Gower, Sawley v., 2 Vern. 61.....	280
Demaindray v. Metcalfe, Prec. in Ch. 419.....	498	Gowland v. De Faria, 17 Ves. 20.....	152
Devonshir v. Newenham, 2 Scho. & Lef. 197.....	544	Granard, Farrer v., 4 Bos. & Pul. 80.....	171
Dew v. Judges of Sweet Springs, 3 Hen. & Munf. 1.....	170	Grant v. Bagge, 3 East, 123.....	543
Dewey v. Bayntun, 6 East, 257.....	53	Graves v. Webb, 1 Call. 443.....	564
Dick, Coleman v., 3 Wash. 234.....	676	Green v. Lite, 8 Cranch, 243.....	18
Dillon, O'Fallon v., 2 Scho. & Lef. 138.....	57	Green v. Farmer, 4 Burr. 2220.....	492
Dixie, Barker v., Rep. Temp. Hardw. 264.....	141	Green v. Bailey, 5 Munf. 246.....	656
Dodswell, Middleton v., 13 Ves. 266.....	56	Greenbank, Hearle v., 3 Atk. 709, 1 Ves. sen. 303.....	185
Doe v. Prestwidge, 4 Mau. & Selw. 178.....	235	Greenhill, Hyde v., 1 Dick. 106.....	102
Doe v. Reade, 8 East, 353.....	608	Gregory, Pelham v., 8 Bro. P. C. 39.....	544
Doe v. Pembroke, 11 East, 504.....	689	Gregory v. Baugh, 4 Rand. 611.....	666
Downam v. Matthews, Prec. in Ch. 580.....	504	Griffith v. Frazier, 8 Cranch, 1.....	720
Downer, Palmer v., 2 Mass. Rep. 179, note.....	114	Grove, Churchill v., Nels. Ch. Rep. 89, 1 Ch. Ca. 35, 2 Ch. Rep. 180.....	281
Downman v. Chinn, 2 Wash. 303.....	367	Groves, Yates v., 1 Ves. jr. 280.....	21
Draper, Angell v., 1 Vern. 399.....	91	Gwynne v. Heaton, 1 Bro. C. C. 1.....	152
Drew v. Anderson, 1 Call. 51.....	564	Gynn v. Kirby, 1 Stra. 402.....	735
Driver v. Lawrence, 3 W. Black. 1259.....	138	Hackley, Miller v., 5 Johns. Rep. 575.....	326
Duchesse de Pienne, Walford v., 2 Esp. Rep. 554.....	171	Hales v. Margerum, 2 Ves. jr. 299.....	185
Dudley's adm'r, Epes' adm'r v., 5 Rand. 436.....	533	Haley's v. Williams, 1 Leigh, 140.....	57, 275
Duke of Bolton v. Williams, 2 Ves. jr. 150.....	185	Hallett, Peyton v., 1 Caines' Rep. 379.....	21
Duke of Rutland, Welby v., 2 Bro. P. C. 39.....	544	Hamline v. Lee, 4 Ves. 747.....	102
Dunbar v. Buck & others, 6 Munf. 34.....	505	Hammond, Russell v., 1 Atk. 18.....	46
Dundas v. Dutens, 1 Ves. jr. 196.....	49	Hammonds v. Barclay, 2 East, 227.....	21
Dundass, Taylor v., 1 Wash. 94.....	367	Hampton v. M'Connell, 3 Wheat. 234.....	174
Dundass, Hendricks v., 2 Wash. 50.....	367	Hancock, Wright v., 3 Munf. 521.....	93
Dunford v. Lane, 1 Bro. C. C. 106.....	83	Hannah, Thrift v., reported 800, cited.....	763
Durrant, Argent v., 8 T. R. 403.....	608	Hannah v. Davis, Gen. Court, April, 1787.....	685
Duryee, Mills v., 7 Cranch, 481.....	174	Harcourt, Hooper v., 1 H. Black. 584.....	736
Dutens, Dundas v., 1 Ves. jr. 196.....	49	Hardaway, Bennett v., 6 Munf. 125.....	327
Duval v. Bibb, 3 Call. 393.....	659	Hardaway, Robin v., Jefferson's Rep. 109.....	83
Dykes & Co. v. Woodhouse's adm'r, 3 Rand. 287.....	536	Harewood, Milner v., 18 Ves. 279.....	624
Earl of Sussex, Burridge v., 2 Ld. Raym. 1292.....	217	Harman, The King v.....	198
Eckles, Hawkins v., 2 Bos. & Pul. 359.....	375	Harraden, Brown v., 4 T. R. 151.....	181
Edlows v. Deane, Bumb. 36.....	649	Harris, Wroe v., 2 Wash. 126.....	381
Elam v. Bass' ex'ors, 4 Munf. 301.....	350	Harrison v. M'Intosh, 1 Johns. Rep. 379.....	375
Elmore, Furman v., 2 Nott & M'Cord, 189.....	463	Harwood, Nelson v., 3 Call. 394.....	207
Emery, Chapman v., Cowp. 278.....	46	Harwood, Faulkner's adm'r v., 6 Rand. 125.....	336
England v. Slade, 4 T. R. 632.....	138	Hasel, Lowthian v., 3 Bro. C. C. 162.....	499
English v. Burnett, 2 Wils. 258.....	375	Haskell, Butler v., 4 Desaus. Ch. Rep. 651.....	154
Epes' adm'r v. Dudley's adm'r, 5 Rand. 436.....	533	Hatch v. Hatch, 9 Ves. 292.....	14
Eppes v. Randolph, 3 Call. 186.....	272	Hawes v. Loader, Yelv. 106.....	353
Eriswell, Rex v., 8 T. R. 721.....	694	Hawkins v. Eckles, 2 Bos. & Pul. 359.....	375
Essington, Wyat v., 1 Stra. 637.....	449	Hawkins v. Freeman, 8 Vin. Discount. A. pl. 26.....	504
Evans, Peacock v., 16 Ves. 512.....	154	Hayne, Tanner v., 7 T. R. 420.....	366
Everard v. Herne, Litt. Rep. 191.....	56	Hayward, Page v., 2 Salk. 570.....	125
Eyre, Coope v., 1 Hen. Black 37.....	564	Heams v. Bance, 3 Atk. 630.....	413
Fairfax, Commonwealth v., 4 Hen. & Munf. 208.....	395	Heaps, Bowes v., 3 Ves. & Beam. 117.....	156
Fairfax Justices, Commonwealth v., 2 Virg. Cas. 9.....	708	Hearle v. Greenbank, 3 Atk. 709, 1 Ves. sen. 303.....	185
Farmer, Green v., 4 Burr. 2220.....	496	Heatley v. Thomas, 15 Ves. 596.....	185
Farrar, Irwin v., 10 Ves. 86.....	386	Heaton, Gwynne v., 1 Bro. C. C. 1.....	152
Farrar v. Countess Granard, 4 Bos. & Pul. 80.....	171	Heiskell, Jackson v., 1 Leigh, 257.....	284
Farrington, Battersbee v., 1 Swanst. 103.....	49	Henchett v. Kimpton, 2 Wils. 140.....	678
Faulkner's adm'r v. Harwood, 6 Rand. 125.....	336	Hendren v. Colpin, 4 Munf. 231.....	267
Fawcett v. Pothergill, 4 Ves. 747.....	102	Hendricks v. Robinson, 2 Johns. Ch. Rep. 144.....	91
Pettipiece v. Gorges, 3 Bro. C. C. 8.....	185	Hendricks v. Dundass, 2 Wash. 50.....	367
Findlay, Wisely v., 3 Rand. 361.....	390	Heningham's Case, Dyer, 344.....	59
Flureau v. Thornhill, 3 W. Black. 1078.....	458	Henry, Garrard v., 6 Rand. 112.....	735
Fogg, Beverley v., 1 Call. 484.....	3	Hepburn, Mima Queen v., 7 Cranch, 290.....	670
Forrester, Goodright v., 8 East, 552, 1 Taunt. 578.....	238, 664	Herbert's Case, 3 Rep. 12.....	445
Forth v. Chapman, 1 P. Wms. 637.....	128	Herne, Everard v., Litt. Rep. 191.....	56
Fothergill, Fawcett v., 4 Ves. 747.....	102	Hewlett v. Chamberlayne, 1 Wash. 367.....	548
		Higgins v. The York Buildings Co., 2 Atk. 107.....	67, 91

Higham v. Beddingfield, Noy. 46.....	664	Lindenberger, Walsmsley v., 2 Rand. 478.....	657
Hill v. Burrow, 3 Call. 349.....	213	Lindsay's adm'ors, Martin v., 1 Leigh. 499.....	636
Hinchman v. Clark & others, 1 Cox's Rep. 840.....	216	Liter, Green v., 8 Cranch. 243.....	18
Hirst, adm'or, &c. v. Smith, 7 T. R. 183.....	535	Lithgow's Case, 2 Virg. C. 297.....	778
Hoare v. Contencin, 1 Bro. C. C. 27.....	592	Littlepage, Starke's ex'ors v., 4 Rand. 308.....	350
Hodge, Walters v., 2 Swanst. 106.....	344	Livingston, Reade v., 3 Johns. Ch. Rep. 481.....	51
Hodson, Stamper v., 8 Mod. 302.....	366	Livingston, Pitcher v., 4 Johns. Rep. 1.....	463
Hoffman, Bayard v., 4 Johns. Ch. Rep. 450.....	105	Loader, Hawes v., Yelv. 196.....	352
Hogg, The King v., 1 T. R. 731.....	624	Long, Shirley v., 6 Rand. 735.....	106, 445
Hulbech, Bennet v., 2 Wms. Saund. 319, a.....	374	Long, Turberville v., 3 Hen. & Munf. 309.....	3, 658
Holden and others, The King v., 2 Taunt. 834.....	778	Longueville, Poole v., 2 Wms. Saund. 282, 284, b. note 3.....	374
Holland, Bromley v., 7 Ves. 28.....	21	Lovell v. Arnold, 2 Munf. 167.....	5, 16
Hoove v. Tebbs, 1 Munf. 501.....	564	Lowthian v. Hasell, 3 Bro. C. C. 162.....	499
Hook v. Nanny Pagee, 2 Munf. 379.....	676	Lucas, Sheepshanks v., 1 Burr. 410.....	658
Hooper v. Goodwin, 1 Swanst. 45.....	244	Luddington, Stewart v., 1 Rand. 407.....	409
Hooper v. Harcourt, 1 H. Black. 584.....	736	Lupton, Tidball v., 1 Rand. 194.....	128
Hoover, Meze v., 1 Leigh. 442.....	548	Lynne v. Moody, 2 Stra. 851.....	450
Hopkins v. Ward, 6 Munf. 38.....	659	Macchell v. Clark, 2 Ld. Raym. 779, Com. Rep. 119; and 7 Mod. 18, 209.....	664
Horde, Atkins v., 1 Burr. 60, 115.....	222	Macchell v. Clark, 3 Salk. 620.....	309
Horsford v. Wright, Kirby's Conn. Rep. 3.....	468	Mackreath v. Symmonds, 15 Ves. 353.....	281
Houston, Taylors v., 2 Hen. & Munf. 161.....	654	Mandeville v. Welch, 5 Wheat. 277.....	502
Howlett v. Strickland, 1 Cowp. 56.....	505	Manns, Givens v., 6 Munf. 191, 307.....	763
How's adm'or, Tomlin's adm'or v., Gilm. 1.....	480	Marguerum, Hales v., 3 Ves. 299.....	185
Hudgins v. Wright, 1 Hen. & Munf. 184.....	676	Margrave of Anspach, Le Texier v., 15 Ves. 165.....	143
Hudson's, Hudson's adm'or, 6 Munf. 352.....	351	Markham, Bunn v., 7 Taunt. 224.....	241
Huffman's Case, 6 Rand. 685.....	772	Marks, Smith v., 2 Rand. 449.....	9
Hull, Jones v., 1 Hen. & Munf. 212.....	546	Marks v. Morris, 2 Munf. 407.....	636
Humphrey's adm'or v. M'Clenahan's adm'or, 1 Munf. 493.....	455	Marquis of Stafford, The King v., 3 T. R. 651.....	169
Hunt v. Rousmanier, 8 Wheat. 204.....	23	Marsh, Jones v., Ca. Temp. Talb. 64.....	46
Hunt v. Coles, 1 Com. Rep. 225.....	280	Marsh v. Hutchinson, 3 Bos. & Pul. 236.....	171
Huston, Taylor v., 2 Hen. & Munf. 161.....	3	Martin, Clerke v., 2 Ld. Raym. 757.....	198
Hutchinson, Marsh v., 2 Bos. & Pul. 236.....	171	Martiz v. Strachan, Willes' Rep. 451.....	221
Hyatt v. Wood, 4 Johns. Rep. 182.....	606	Martin v. Lindsay's adm'ors, 1 Leigh. 499.....	626
Hyde v. Greenhill, 1 Dick. 106.....	102	Mathews v. Warner, 4 Ves. 186, 5 Ves. 28.....	254
Hyett, Freeman v., 1 W. Black. 394.....	505	Mathews, Nelson v., 2 Hen. & Munf. 164.....	455
Hylton, Ramsden v., 2 Ves. sen. 304.....	46	Mathews, Downam v., Prec. in Ch. 580.....	504
Irons v. Smallpiece, 2 Barn. & Ald. 552.....	341	Mathews, Abraham v., 6 Munf. 159.....	673
Irwin v. Farrar, 19 Ves. 86.....	386	May v. Comin, 4 Mass. Rep. 341.....	326
Isabel, Pegram v., 1 Hen. & Munf. 288, 2 Id. 298.....	675	Mayor of Petersburg, Bolling v., 3 Rand. 568.....	5
Jackson v. Heiskell, 1 Leigh. 357.....	284	Mazagora, Rex v., Russ. & Ryan, 291.....	776
Jackson v. Bartlett, 8 Johns. Rep. 281.....	364	M'Clenahan's adm'or, Humphrey's adm'or v., 1 Munf. 493.....	455
Jackson, Stout v., 2 Rand. 182.....	455	M'Connell, Hampton v., 3 Wheat. 234.....	174
James, Romilly v., 6 Taunt. 263.....	128	M'Coole, Darlington v., 1 Leigh. 36.....	570
James v. Galthier, 2 Har. & Johns. 176.....	306	M'Coole v. Binns, 5 Binney. 549.....	258
Jacques v. Withy, 1 T. R. 557.....	365	M'Curdy, Phillips v., 1 Har. & John. 187.....	326
Jeffs v. Wood, 2 P. Wms. 128.....	504	M'Dowell v. Burwell's ex'ors, 4 Rand. 317.....	565
Jenkins v. Tom, 1 Wash. 133.....	675	M'Intosh, Harrison v., 1 Johns. Rep. 376.....	375
Jiggetts v. Davis, 1 Leigh. 419.....	128	M'Murdo, Werneck's adm'or v., 5 Rand. 51, 518, 534, 649.....	209
Johnson, Williams v., 1 Stra. 504.....	142	Mead & others, Tyrrel v., 3 Burr. 1708.....	153
Johnstons v. Meriwether, 3 Call. 523.....	548	Medlicott v. O'Donel, 1 Ball. & Beat. 166.....	548
Jones v. Marsh, Ca. Temp. Talb. 64.....	46	Meriwether, Johnstons v., 3 Call. 523.....	498
Jones v. Smith, 2 Ves. jun. 372.....	498	Metcalfe, Demalandray v., Prec. in Ch. 419.....	548
Jones v. Hull, 1 Hen. & Munf. 212.....	546	Meze v. Hoover, 1 Leigh. 442.....	56
Joyce, Chase v., 4 Mau. & Selw. 412.....	549	Middleton v. Dodswell, 13 Ves. 268.....	237
Judges of Sweet Springs, Dew v., 3 Hen. & Munf. 170.....	375	Mildmay's Case, 6 Rep. 42, a.....	279
Juggs, Freeman v., 3 Salk. 307.....	364	Miller v. Bradley, 8 Mod. 190.....	326
Kellogg v. Gilbert, 10 Johns. Rep. 220.....	375	Miller v. Hackley, 5 Johns. Rep. 375.....	368
Kille's adm'or, Rowt's adm'or v., 1 Leigh. 216.....	354	Miller v. Parnell, 6 Taunt. 370.....	174
Kimpson, Henchett v., 2 Wils. 140.....	638	Mills v. Duryee, 7 Cranch. 481.....	455
Kinaston, Prescobaldi v., 2 Stra. 738.....	658	Mills v. Bell, 3 Call. 320.....	586
King v. Marquis of Stafford, 3 T. R. 651.....	169	Millstead v. Redman, 3 Munf. 319.....	83
King v. Bishop of Chester, 1 T. R. 404.....	169	Milner v. Harewood, 18 Ves. 279.....	670
King v. Archbishop of Canterbury, 8 East. 213.....	169	Mima Queen v. Hepburn, 7 Cranch. 290.....	668
King & Porterfield v. Smith, &c., reported 157, cited.....	413	Mitford, Pybus v., 2 Lev. 77.....	141
King v. Hogg, 1 T. R. 731.....	624	Monroe v. Twisleton, Peake's Ev. App. lxxxvii.....	450
King v. Saltrem, cited in 1 T. R. 724.....	624	Moody, Lynne v., 2 Stra. 851.....	505
King v. Harman, Bott. 8.....	624	Moore, Ritchie & Wales v., 5 Munf. 388.....	699
King, Short v., 1 Stra. 681.....	736	Morewood, Outram v., 3 T. R. 123.....	625
King v. Kinnear and others, 3 Barn. & Ald. 462.....	750	Morris, Marks v., 2 Munf. 407.....	153
King v. Holden & others, 2 Taunt. 834.....	773	Moth v. Atwood, 5 Ves. 845.....	395
Kinnaird, Aveson v., 6 East. 192.....	141	Munford v. Rice, 6 Munf. 81.....	396
Kinnear & others, King v., 2 Barn. & Ald. 462.....	750	Munford v. Overseers of Poor, 2 Rand. 312.....	505
Kirby v. Taylor, 6 Johns. Ch. Rep. 242.....	14	Murchie, Rose v., 2 Call. 409.....	91
Kirby, Gynn v., 1 Stra. 402.....	735	Musgrove, Bennet v., 2 Ves. sen. 51.....	274
Kirk, Plucknet v., 1 Vern. 411.....	280	Mutual Assurance Society v. Stanard, 4 Munf. 539.....	676
Knight, Addis v., 2 Meriv. 121.....	504	Nanny Pagee, Hook v., 2 Munf. 379.....	505
Knox v. Garland, 2 Call. 241.....	481	Nekervis, Porter v., 4 Rand. 359.....	407
Kynaston, Clayton v., 2 Salk. 574.....	55	Nelson v. Harwood, 3 Call. 394.....	357
L'Aigle, De Gaillon v., 1 Bos. & Pul. 8, 357.....	171	Nelson v. Matthews, 2 Hen. & Munf. 164.....	59
Lane, Durnford v., 1 Bro. C. C. 106.....	88	Neville, Shetelworth v., 1 T. R. 454.....	216
Lang v. Lee, 3 Rand. 410.....	409	Neville v. Rivers, 7 T. R. 276.....	350
Langston's Case, 17 Ves. 227.....	501	Newbolt, Wells v., Cam. & Norw. Rep. 375.....	350
Lavender v. Blackstone, 2 Lev. 147.....	47	Newby's adm'ors v. Blakey, 3 Hen. & Munf. 57.....	544
Lawhorne, Anthony v., 1 Leigh. 1.....	586	Newenham, Devonshir v., 2 Scho. & Lef. 197.....	209
Laurence, Driver v., 2 W. Black. 1259.....	138	Newman, Stone v., Cro. Car. 429.....	278
Leadbetter, Southall v., 3 T. R. 458.....	182	Norris, Garrard v., Latch. 53.....	152
Leake, Royster v., 2 Munf. 280.....	395	O'Brien, Roche v., 1 Ball. & Beat. 330.....	497
Lee, Hamline v., 4 Ves. 747.....	102	Ockenden's Case, 1 Atk. 235.....	154
Lee, Lang v., 3 Rand. 410.....	409	O'Donel, Medlicott v., 1 Ball. & Beat. 166.....	57
Leftwich, Anthony v., 3 Rand. 238.....	505	O'Fallon v. Dillon, 2 Scho. & Lef. 13.....	57
Le Texier v. Margravine of Anspach, 15 Ves. 165.....	143	O'Gorman v. Comyn, 2 Scho. & Lef. 138.....	661
Levy, Burke v., 1 Rand. 1.....	546	Orndoff v. Turman, reported 200, cited.....	152
Lewis, Smithier v., 1 Vern. 398.....	91	Osgood v. Franklin, 2 Johns. Ch. Rep. 1, 23 and 14 Johns. Rep. 527.....	386
Lewis v. Thornton, 6 Munf. 87.....	107	Otway, Goodtitle v., 2 Wils. 6.....	689
Lewis v. Fullerton, 1 Rand. 15.....	307	Overseers of Poor, Munford v., 2 Rand. 313.....	896
Lewis v. Campbell, 8 Taunt. 715.....	459	Pace, Collingwood v., 1 Vent. 417.....	111
Liggat, &c. Tate v., reported 84, 108, cited.....	409		
Like, Browne v., 14 Ves. 302.....	185		
Lincoln College Case, 3 Rep. 58, b.....	237		

Page v. Haywood, 2 Salk. 570.	125	Sands v. Codwise, 4 Johns. Rep. 586.	98
Page, Hook v., 3 Munf. 379.	676	Saunders v. Ld. Annesley, 2 Scho. & Lef. 104.	664
Painter, Gardner v., Ca. Temp. King. 65.	46	Sawley v. Gower, 3 Vern. 61.	260
Palmer v. Downer, 2 Mass. Rep. 179, note.	114	Scholey, Scott v., 8 East. 407.	272
Parker, Colville v., Cro. Jac. 158.	46	Scilly v. Dally, 2 Salk. 562, 1 Bro. P. C. 525.	874
Parker, George v., 4 Rand. 659.	678	Scott v. Bell, 3 Lev. 70.	46
Parkes & others, ex'ors, Bridgen v., 2 Bos. & Pul. 424.	587	Scott, Gleeson's heirs v., 3 Hen. & Munf. 278.	209
Parkes Case, 3 Leach. 775.	758	Scott v. Scholey, 8 East. 407.	272
Parnell, Miller v., 6 Taunt. 370.	366	Scott v. Trent, 1 Wash. 77.	505
Partington, Pomeroy v., 3 T. R. 665.	457	Scott, Young v., 4 Rand. 415.	627
Patterson, Pollard v., 3 Hen. & Munf. 67.	8	Seymour's Case, 10 Rep. 95.	209
Peacock v. Evans, 16 Ves. 512.	154	Shallett, Ward v., 3 Ves. sen. 18.	46
Pearson v. Garrett, Comb. 227.	198	Shaver v. White, 6 Munf. 110.	520
Peggy, Redford v., 6 Rand. 316.	253	Sheepshanks v. Lucas, 1 Burr. 410.	658
Pegram's Case, 1 Leigh. 569.	731	Shemeld v. Radcliff, Godb. 300, Hob. 334.	209
Pegram v. Isabell, 1 Hen. & Munf. 388, 2 Id. 193.	675	Shelly's Case, 1 Rep. 103, b.	216
Pelham v. Gregory, 3 Bro. P. O. 204.	544	Shelton v. Ward, 1 Call. 538.	400
Pella v. Brown, Cro. Jac. 500.	123	Shelton v. Barbour, 2 Wash. 64.	675
Pembroke, Doe v., 11 East. 504.	689	Sheppard, Bohn v., 4 Munf. 408.	267
Pendleton v. Vandever, 1 Wash. 381.	208	Shetlworth v. Neville, 1 T. R. 454.	59
Pendleton, &c., Crews v., 1 Leigh. 297.	576	Shindley v. Roberts, Barnes, 126.	736
Pennell, Cole v., 2 Rand. 174.	657	Shirley v. Watts, 3 Atk. 200.	91
People v. Bradt, 6 Johns. Rep. 318.	736	Shirley v. Long, 6 Rand. 735.	105, 445
Perkins, Cutts v., 12 Mass. Rep. 306.	21	Short v. King, 1 Stra. 681.	736
Peyton v. Hallett, 1 Caines' Rep. 379.	21	Slade, England v., 4 T. R. 682.	188
Peyton v. Brooke, 3 Cranch. 96.	366	Smallpiece, Irons v., 3 Barn. & Ald. 552.	341
Phillips v. M'Curdy, 1 Harr. & John. 187.	326	Smith v. Marks, 2 Rand. 449.	9
Phillips v. Smith, 1 No. Caro. Reps. 475.	463	Smith, Wagstaff v., 9 Ves. 530.	185
Phillips, Cox v., Ca. Temp. Hardw. 237.	736	Smith v. Carrington, 4 Cranch, 71.	197
Phlips, Arundell v., 10 Ves. 139.	47	Smith, Antrobus v., 12 Ves. 39.	342
Pickering, Bertie v., 4 Burr. 2455.	449	Smith, &c., King & Porterfield v., reported, 157, cited.	413
Pienne (Duchesse de), Walford v., 2 Esp. Rep. 554.	171	Smith, Phillips v., 1 No. Carol. Rep. 475.	463
Piggott's Case, 5 Coke. 39, b.	720	Smith, Jones v., 2 Ves. jun. 572.	498
Pinson, Plunket v., 2 Atk. 290.	220	Smith, Hirst adm'r &c. v., 7 T. R. 182.	535
Pitcher v. Livingston, 4 Johns. Rep. 1.	463	Smithier v. Lewis, 1 Vern. 368.	91
Pleasants v. Pleasants, 2 Call. 319.	691	Snapp v. Spengler, reported, 1 cited.	657
Plucknet v. Kirk, 1 Vern. 411.	260	Southall v. Leadbetter, 3 T. R. 468.	182
Plunket v. Pinson, 3 Atk. 290.	220	Sparrow, Addeley v., Miffl. Plead. 154.	544
Plunket, Bowman v., 3 M'Cord. 518.	253	Spengler, Snapp v., reported, 1 cited.	657
Pollard v. Patterson, 3 Hen. & Munf. 67.	8	Spotsylvania Justices, Chew v., 3 Virg. Cas. 208.	743
Pollard's Case, 5 Rand. 658.	778	Sprouce's Case, 3 Virg. Cas. 375.	771
Pomeroy v. Partington, 3 T. R. 665.	457	Staats v. Ten Eyck, 3 Caines' Rep. 111.	463
Pomeroy's Case, 2 Virg. Cas. 342.	704	Stafford, The King v., 3 T. R. 651.	169
Poole v. Longueville, 3 Wms. Saund. 282, 284, b. note, 3.	374	Stagg, Butterworth v., 3 Johns. Ca. 291.	736
Porter v. Nekervis, 4 Rand. 359.	505	Stamper v. Hodson, 8 Mod. 302.	366
Powell v. Gordon, 2 Esp. 735.	21	Stanard, The Mutual Assurance Society v., 4 Munf. 539.	274
Prestwidge, Doe v., 4 Mau. & Selw. 173.	235	Standford v. Cooper, Het. 72, Cro. Car. 102, Hutt. 95.	278
Purcell v. Richardson, 4 Hen. & Munf. 406.	547	Starke's ex'ors v. Littlepage, 4 Rand. 368.	350
Pybus v. Mitford, 2 Lev. 77.	663	Stephen's Case, 11 Ves. 24.	505
Quinten's Case, 3 Ves. 243.	505	Stileman v. Ashdown, 2 Atk. 479.	46
Radcliff, Shemeld v., Godb. 300, Hob. 334.	209	Stileman v. Ashdown, 2 Atk. 607, Amb. 13.	66, 91
Ramsden v. Hylton, 2 Ves. sen. 304.	46	Stone, Gammon v., 1 Ves. sen. 339.	56
Randall v. Russell, 3 Meriv. 194.	389	Stone v. Newman, Cro. Car. 429.	209
Randolph, Eppes v., 3 Call. 186.	273	Story v. Atkins, 3 Ld. Raym. 1430.	192
Randolph and others v. Randolph and others, 3 Hen. & Munf. 399.	540	Stott & Donaldson v. Alexander & Co., 1 Wash. 381.	332
Rasnick's Case, 2 Virg. Cas. 356.	772	Stout v. Jackson, 2 Rand. 132.	456
Read v. Adams, 6 Serg. & Rawl. 356.	323	Stowell v. Zonch, Plowd. 366.	226
Reade v. Livingston, 3 Johns. Ch. Rep. 481.	51	Strachan, Martin v., Willes' Rep. 451.	221
Reade, Doe v., 8 East. 353.	908	Street, Barford v., 16 Ves. 135.	386
Redford v. Peggy, 6 Rand. 316.	253	Strickland, Howlett v., 1 Cowp. 58.	505
Redman, Millstead v., 3 Munf. 219.	586	Strode, Cox v., 2 Bibb. 279.	463
Reeder, Baring v., 1 Hen. & Munf. 154.	144	Stuart v. Luddington, 1 Rand. 407.	409
Rex v. Barker, 3 Burr. 1367.	169	Sturgis v. Corp. 13 Ves. 190.	185
Rex v. Bank of England, 2 Doug. 536.	169	Stupart, Blackburn v., 2 East. 243.	366
Rex v. Commissioners of Dean, 2 Mau. & Selw. 80.	169	Sussex (Earl of), Burridge v., 2 Ld. Raym. 1292.	217
Rex v. Mazagora, Russ. & Ryan, 291.	776	Swann v. Broome, 3 Burr. 1595.	173
Rex v. Eriswell, 3 T. R. 721.	604	Sweet Springs Judges, Dew v., 3 Hen. & Munf. 1.	270
Reynolds v. Thorpe, 2 Stra. 766.	875	Symmonds, Mackreath v., 15 Ves. 353.	281
Rhodes v. Cousins, 6 Rand. 188.	91	Tabb & others v. Archer and others, 3 Hen. & Munf. 399.	540
Rice, Munford v., 6 Munf. 81.	305	Tabb v. Baird, 3 Call. 475.	650
Richardson, Purcell v., 4 Hen. & Munf. 406.	547	Talbot v. Bedford, Cook's Rep. 447.	463
Riddick v. Cohoon, 4 Rand. 547.	385	Tallafarro, Wallace v., 2 Call. 447.	423
Rigden, Brett v., Plowd. 343.	210	Tally, Tate v., 3 Call. 354.	128
Ritchie and Wales v. Moore, 5 Munf. 588.	505	Taltarum's Case, cited in 1 Burr. 60, 115.	222
Rivers, Neville v., 7 T. R. 276.	209	Tanner v. Hayne, 7 T. R. 430.	366
Rives, Garland v., 4 Rand. 232.	93	Tate v. Tally, 3 Call. 354.	128
Roberts, Shindler v., Barnes, 126.	736	Tate v. Liggett, &c., reported 84, 108, cited.	409
Robin v. Hardaway, Jefferson's Rep. 109.	672	Taylor v. Huston, 2 Hen. & Munf. 161.	3
Robinson v. Tong, 3 Vin. Abr. 145.	58	Taylor, Kirby v., 6 Johns. Ch. Rep. 242.	14
Robinson, Hendricks v., 2 Johns. Ch. Rep. 200.	91	Taylor v. Dundass, 1 Wash. 94.	363
Roche v. O'Brien, 1 Ball & Beat. 330.	152	Taylor v. Houston, 2 Hen. & Munf. 161.	656
Rockbold v. Barnes, 3 Rand. 473.	331	Tabbs, Hooe v., 1 Munf. 501.	584
Rockley, Burdett v., 1 Vern. 518.	102	Temple, Chamberlayne v., 2 Rand. 384.	91, 56
Romilly v. James, 6 Taunt. 263.	129	Ten Eyck, Staats v., 3 Caines' Rep. 111.	463
Rose v. Murchie, 2 Call. 409.	505	Thomas, Heatley v., 15 Ves. jun. 596.	185
Ross v. Darby, 4 Munf. 428.	583	Thomas' Case, 2 Virg. Cas. 479.	750
Rousmanier, Hunt v., 3 Wheat. 204.	23	Thomas' Case, 2 East's C. L. 605.	758
Row v. Dawson, 1 Ves. sen. 332.	21	Thompson's Case, 1 Leach. 293.	704
Rowlets v. Daniel, 4 Munf. 473.	660	Thornborough, White v., Prac. in Ch. 425.	46
Rowt's adm'r v. Kille's adm'r, 1 Leigh. 216.	254	Thornhill, Fleureau v., 2 W. Black. 1078.	458
Royster v. Leake, 2 Munf. 280.	395	Thornton, Lewis v., 6 Munf. 87.	107
Russell v. Hammond, 1 Atk. 13.	46	Thornton v. Thornton, 3 Rand. 179.	660
Russell, Clarke v., 3 Dall. 415.	322	Thorpe, Reynolds v., 2 Stra. 766.	374
Russell, Randall v., 3 Meriv. 194.	389	Thriff v. Hannah, reported 300, cited.	763
Salter, Bassett v., 2 Mod. 186.	363	Tidball v. Lupton, 1 Rand. 194.	128
Salter v. Brunson, 4 Mod. 231.	624	Tom, Jenkins v., 1 Wash. 123.	675
Saltrem, The King v.	673	Tomlin's adm'r v. How's adm'r, Gilm. 1.	480
Sam, Garnett v., 5 Munf. 542.	673		

Tong, Robinson v., 3 Vin. Abr. 145.....	58	Wright, Huddins v., 1 Hen. & Munf. 184.....	676
Trecothick, Coles v., 9 Ves. 249.....	260	Wroe v. Harris, 2 Wash. 126.....	331
Trent, Scott v., 1 Wash. 77.....	506	Wyat v. Essington, 1 Stra. 637.....	449
Trier v. Bridgman, 3 East. 369.....	198	Wyatt's Case, 6 Rand. 604.....	731
Turberville v. Long, 3 Hen. & Munf. 309.....	3, 658	Wynne v. Wynne, 1 Wms. 39.....	273
Turman, Orndoff v., reported 200, cited.....	661	Yates v. Van Ransellaer, 5 Johns. Rep. 364.....	366
Turner, Ward v., 2 Ves. sen. 439.....	244	Yeates v. Groves, 1 Ves. jun. 380.....	21
Turner, Crary & Morgan v., 6 Johns. Rep. 51.....	364	York Buildings Co., Higgins v., 2 Atk. 107.....	57, 91
Turner, Bullythorpe v., Willes, 476, note a.....	375	Young, Brooke v., 3 Rand. 106.....	197
Twisleton, Monroe v., Peake's Ev. App. lxxxvii.....	141	Young v. Scott, 4 Rand. 415.....	627
Twoood's Case, 11 Ves. 517.....	505	Zouch, Stowell v., Plowd. 366.....	236
Tyler, Carter v., 1 Call. 184.....	214	Zouch v. Waters, 12 Vin. Abr. Evi. T. b. 87, pl. 5, p. 244.....	689
Tyrrrell v. Mead and others, 3 Burr. 1703.....	209		
United States v. Britton, 3 Mason's Rep. 470.....	757		
Upshaw v. Upshaw, 2 Hen. & Munf. 381.....	423		
Venderzee v. Wills, 3 Bro. C. C. 21.....	501		
Vandever, Pendleton v., 1 Wash. 381.....	208		
Van Ransellaer, Yates v., 5 Johns. Rep. 364.....	366		
Vernon v. Vernon, 2 P. Wms. 564.....	570		
Vigers v. Aldrich, 4 Burr. 2482.....	365		
Wagstaff v. Smith, 9 Ves. 530.....	185		
Walford v. Duchesse de Plenne, 3 Esp. Rep. 554.....	171		
Wallace v. Tallafarro, 2 Call. 447.....	423		
Walmsley v. Lindenberger, 2 Rand. 478.....	657		
Walsingham's Case, Plowd. 547.....	209		
Walter v. Hodge, 2 Swanst. 106.....	344		
Ward v. Shallet, 2 Ves. sen. 18.....	46		
Ward v. Turner, 3 Ves. sen. 439.....	344		
Ward, Shelton v., 1 Call. 538.....	400		
Ward, Hopkins v., 6 Munf. 38.....	659		
Ware v. Weathnall, 2 M'Cord. 418.....	463		
Warner, Matthews v., 4 Ves. 186, 5 Ves. 23.....	354		
Wastall, Balch v., 1 P. Wms. 445.....	91		
Waters, Zouch v., 12 Vin. Abr. Evi. T. b. 87, pl. 5, p. 244.....	689		
Watts, Shirley v., 3 Atk. 200.....	91		
Weathnall, Ware v., 2 M'Cord. 413.....	463		
Webb, Graves v., 1 Call. 448.....	564		
Webster v. Couch, 6 Rand. 519.....	505		
Welby v. Duke of Rutland, 2 Bro. P. C. 39.....	544		
Welch, Mandeville v., 5 Wheat. 277.....	502		
Wells v. Newbolt, Cam. & Norw. Rep. 375.....	216		
Wernick's adm'r v. M'Curdo, 5 Rand. 51, 518, 534.....	649		
West v. West's ex'ors, 3 Rand. 373.....	185		
Westcott, Bradley v., 13 Ves. 452.....	386		
Whitbread's Case, 19 Ves. 208.....	501		
White v. Thornborough, Prec. in Cha. 425.....	46		
White, Shaver v., 6 Munf. 110.....	520		
Wiggins v. Armstrong, 2 Johns. Ch. Rep. 144.....	91		
Wilkinson, Cutchin v., 1 Call. 1.....	267		
Williams v. Johnson, 1 Stra. 504.....	142		
Williams, Duke of Bolton v., 2 Ves. jun. 150.....	185		
Williams, Hales v., 1 Leigh. 140.....	57, 275		
Willis, Vanderzee v., 3 Bro. C. C. 21.....	501		
Willson v. Berkeley, Plowd. 232.....	226		
Willson, Beale v., 4 Munf. 380.....	547		
Wilson, Corporation of Carlisle v., 13 Ves. 278.....	9		
Winch, Coleman v., 1 P. Wms. 777.....	62		
Wiseley v. Findlay, 3 Rand. 361.....	390		
Wiseman v. Beake, 2 Vern. 121.....	156		
Withy, Jaques v., 1 T. R. 557.....	385		
Wits v. Dawkins, 12 Ves. 501.....	185		
Wood, Jeffs v., 2 P. Wms. 128.....	504		
Wood v. Commonwealth, 4 Rand. 339.....	556		
Wood, Hyatt v., 4 Johns. Rep. 152.....	608		
Wood, Davis v., 1 Wheat. 6.....	670		
Woodhouse's adm'r, Dykes & Co. v., 3 Rand. 287.....	535		
Wright v. Hancock, 3 Munf. 521.....	93		
Wright, Horsford v., Kirby's Conn. Rep. 3.....	463		
		WHICH WERE DISAPPROVED, DOUBTED OR EXPLAINED.	
		Anonymous Case, Pr. in Ch. 101, disapproved in	
		Blow v. Maynard.....	49
		Baring v. Reeder, 1 Hen. & Munf. 154, distinguished from Robin & v. King.....	144
		Bayard v. Hoffman, 4 Johns. Ch. Rep. 450, doubted in Tate v. Liggit &.....	105
		Bennett v. Hardaway, 6 Munf. 126, explained and approved in Ewing v. Ewing.....	337
		Brown v. Barry, 3 Dall. 365, explained in Thompson v. Cumming.....	324, 327
		Carrington v. Bennett, 1 Leigh. 340, explained and approved in Ewing v. Ewing.....	337
		Clarke v. Russell, 3 Dall. 415, disapproved in Thompson v. Cumming.....	324, 327
		Demaindray v. Metcalfe, Prec. in Cha. 419, doubted in Gilliat v. Lynch.....	500, 507
		Dunbar v. Buck and others, 6 Munf. 34, doubted in Gilliat v. Lynch.....	505
		Dundas v. Dutens, 1 Ves. jun. 199, disapproved in Blow v. Maynard.....	49
		Gore v. Brazier, 3 Mass. Rep. 543, disapproved in Threlkeld's adm'r v. Fitzhugh.....	463
		Higgins v. York Buildings Co., 2 Atk. 107, remarked on in Blow v. Maynard.....	60
		Horsford v. Wright, Kirby's Conn. Rep. 3, disapproved in Threlkeld's adm'r v. Fitzhugh.....	463
		Jackson v. Heiskell, 1 Leigh. 257, overruled in Foreman v. Loyd &.....	284
		Jones v. Smith, 2 Ves. jun. 372, though reversed in House of Lords, approved notwithstanding in Gilliat v. Lynch.....	501, 508
		Kirby v. Taylor, 6 Johns. Ch. Rep. 242, disapproved in Waller v. Armistead's adm'ors.....	14
		Lewis v. Thornton, 6 Munf. 87, distinguished from Tate v. Liggit &.....	108
		Matthews v. Warner, 4 Ves. 186, and 5 Ves. 23, distinguished from Sharp v. Sharp, &.....	257
		Quinten's Case, 3 Ves. 248, doubted in Gilliat v. Lynch.....	505
		Read v. Adams, 6 Serg. & Rawle. 356, disapproved in Thompson v. Cumming.....	327
		Smithier v. Lewis, 1 Vern. 368, explained in Tate v. Liggit &.....	100
		Stott & Donaldson v. Alexander & Co., 1 Wash. 331, explained in Thompson v. Cumming.....	324, 337
		Williams v. Johnson, 1 Stra. 504, explained in Robin & v. King.....	143

CASES

ARGUED AND DETERMINED IN THE

Supreme Court of Appeals of Virginia.

Snapp v. Spengler and Wife.

February, 1890.

(Absent COALTER and GREEN, J.)

Writ of Right—Count—Certainty of Demand.—The count in writ of right demands a certain tenement consisting of the one stone house with the appurtenances &c. HELD, this is a demand of the land on which the house stands, and is certain enough.

Same—Plea—Blanks—Bad Grammar—Effect of Verdict.—To count in writ of right by husband and wife in right of wife, tenant files a plea in blank throughout, and tenders the mise to the defendant in the singular; replication filed by both demandants joins the mise as for male defendant only; assize is charged to inquire whether demandants have right as they demand: HELD, after verdict for demandants, the blanks, informalities and bad grammar of plea and replication, immaterial.

In a writ of right, brought by the appellees against the appellant, in the circuit court of Shenandoah, the demandants' count was in these words: "Anthony Speugler and Catharine his wife, by their attorney, demand a certain tenement consisting of the one stone house with the appurtenances in the county of Shenandoah, of which the said Snapp now holds possession, and which is situated on the
2 *land conveyed by Joseph Stone to Christian Stover, and by him devised to the said Catharine Spengler: whereupon the said A. S. and C. his wife say, that they have right to have the tenement aforesaid consisting of the said stone house with the appurtenances" &c.

Snapp, the tenant, put in a plea, which was in blank throughout, thus: "And the aforesaid , by his attorney, cometh and defendeth the right of the said stone house with the appurtenances, when and where it behoveth him, and all that concerneth it, and whatsoever he ought to defend, and chiefly the tenement aforesaid with the appurtenances as of right, namely, tenement, containings , in the county of Shenandoah, and bounded by , and putteth himself upon the assize, and prayeth recognizance to be made whether he hath greater right to hold the tenement aforesaid with the appurtenances as he now holdeth it, or the said to have as he now demandeth it."

The replication was as follows: "And the aforesaid A. S. and C. his wife in like manner putteth himself upon the assize, and prayeth recognizance to be made, whether he hath greater right to hold the tenement aforesaid with the appurtenances

as he now holdeth it, or the said Snapp to have it as he now demandeth it."

The assize was sworn and charged to try, "Whether Snapp had more right to hold the tenement, which A. S. and C. his wife demanded against him, or A. S. and C. his wife to have it as they demanded."

Verdict for the demandants, that they had greater right to have the tenement with the appurtenances in the count mentioned, to wit, the said stone house, than the tenant had to hold the same. Whereupon the circuit court gave judgment for the demandants; and Snapp appealed to this court.

Johnson, for the appellant. The only description of the subject demanded is that contained in the count—"the one stone

house with the appurtenances in 3 Shenandoah," &c. "No land is

claimed. It is doubtful, whether a writ of right lies for a house, eo nomine, though it lies for a messuage: in Co. Litt. 56, b. it is said, a præcipe lies not de domo, but de messuagio. But if the writ lies for a house, that term includes the orchard, garden, and curtilage, and thus it may include an acre or more of land besides what the house itself covers. Co. Lit. Ibid. and 5, b. Therefore, in a writ of right for a house, it is necessary to describe the boundary; else it cannot be known, what and how much land is claimed with the house.

In this case, neither count, plea, replication, nor verdict contains any description of the boundary; and it is impossible to know what or how much land is to be adjudged to the demandants. And this defect, which leaves the very subject in controversy unascertained, so that the judgment is as vague and uncertain as the pleadings and verdict, is not cured by the verdict. *Beverley v. Fogg*, 1 Call 484; *Turberville v. Long*, 3 Hen. & Munf. 309. The pleadings are wholly irregular. The plea being in blank throughout, is no better than if the record had stated that the defendant put in the "usual plea;" in which case it has been held that a repleader should be awarded: *Taylor v. Huston*, 2 Hen. & Munf. 161.

The plea also is framed to join the mise with one demandant only; to contest that single demandant's right: but there were two demandants. So, in the replication, it is the husband only that joins the mise, though the count claims the subject in right of his wife. And the replication reverses the claims of the parties, stating the demandants' claim as a claim to hold, and the tenant's as a claim to demand. These also are faults in the pleadings not cured by the verdict: *Chichester v. Boggess*, 5 Munf. 98.

***Conveyance of Land—Description by Metes and Bounds Unnecessary.**—A description by metes and bounds, in a deed conveying land, is not necessary when the premises are well known by name. *Lennig v. White*, 1 Va. Dec. 887, citing the principal case and *Beverley v. Fogg*, 1 Call 484.

Stanard, for the appellee. The statute for reforming the proceedings in writs of right, gives the forms of the pleadings, but is careful not to confine the parties strictly to those forms: it provides and repeats, as to the writ, the plea, the replication, the charge to the assize, respectively,

4 that each "shall be "in this form, or to this effect." We are then to look to the substance. Though the plea, in this case, was left in blank in some respects, yet it was filed by the tenant, and it denies the right to the very subject demanded in the count: it is, therefore, a plea in writing to the count, and defends the right as clearly as if the blanks had been filled up. The other objections taken to the plea and replication, are only objections to bad grammar. As to the alleged defect in the description of the property in the count: the count does not claim a house with the appurtenances, merely; it claims a certain tenement being the one stone house with the appurtenances, whereof the tenant was then in possession &c. This furnishes the description of the land claimed; namely, the land on which the house stands. And it is hard to imagine any description of the premises, which would have given the tenant more certain knowledge of the property demanded of him, or which could more certainly identify the subject.

BROOKE, P. Upon a review of the cases relied on in the argument for the appellant, it is very apparent, that this court, in its construction of the statute for reforming the proceedings in writs of right, has looked more to the effect of the pleadings, than to the forms prescribed and set out in the statute; which was fully warranted by the words of the statute, so often repeated, that the count and the pleadings shall each be in the form there given, "or to that effect." And the inquiry, in all the cases cited, has always been, is there sufficient certainty in the description of the land and premises, demanded in the pleadings, to give full notice to the parties of the controversy on which the mise was joined, so that the judgment or the verdict would be a bar to another writ for the same matter? To require greater strictness in the pleadings, after verdict, would countenance all the delays of the view, which embarrassed the proceedings at common law, which had been abolished by the statute of 1734, ch. 6, §

10, (4 Hen. stat. at large, p. 402,) and 5 which, among *other inconveniences, the statute for reforming the method of proceeding in writs of right was intended to obviate. At the common law, the tenant by waiving view, and joining the mise, took upon himself a knowledge of the land demanded in the count; and, under the statute, by joining the mise, he waives all objection to the description of the land demanded in the count, if it be sufficient for the purposes before stated. The cases of *Turberville v. Long*, 3 Hen. & Munf. 309, *Lovell v. Arnold*, 2 Munf. 167, and *Bolling v. Mayor of Petersburg*, 3 Rand. 563, illustrate this doctrine.

In the case before us, the first objection is to the sufficiency of the description of the tenement demanded in the count: "a

certain tenement, consisting of the one stone house with the appurtenances" &c. This, it is insisted, is uncertain, because by a grant of a house eo nomine, the curtilage, which is of no fixed extent, will pass, and therefore ought to be described in the pleadings by metes and bounds. Had the count merely demanded a stone house and its appurtenances, it might possibly be within the case of *Beverly v. Fogg*. But the demand is of a certain tenement consisting of the one stone house and its appurtenances; limiting the description to the tenement or land on which the house stands. A tenement consisting of the one stone house, I think, can include no more.

The other objections to the blanks in the plea, and to the bad grammar of the replication, cannot be entitled to any weight, after a verdict on the mise joined, which is responsive to the charge to the jury. The tenant could not be permitted to set aside the verdict for faults in his own plea, especially in a case in which the blanks in the plea are supplied by the charge to the jury.

The other judges concurred, and the judgment was affirmed.

6 *Hickman v. Stout.

February, 1830.

(Absent COALTER and GREEN, J.)

Equity Jurisdiction—Account*—Case at Bar—Bill in chancery stating running accounts for many years between plaintiff and defendant, consisting of numerous items of debit and credit or claims for them on both sides, and praying an account and decree for balance: **Held**, this is a bill for an account which equity will entertain, though assumpsit might have lain at law.

Same—Exceptions to—Time of Taking.—Where bill in chancery states matter proper for relief in equity, and defendant without pleading to jurisdiction in abatement, answers the bill, he is precluded from taking exception to jurisdiction afterwards, by stat. 1 Rev. Code, ch. 66, § 86. *Aliter*, if bill on its face, shew case not properly relievable in equity.

***Equity Jurisdiction—Account.**—In matters of account, courts of equity possess a concurrent jurisdiction in most, if not all, cases with courts of law. *Tillar v. Cook*, 77 Va. 480, citing the principal case.

In discussing the jurisdiction of courts of equity in matters of account *Petty v. Fogle*, 16 W. Va. 518, and *Yates v. Stuart*, 39 W. Va. 129, 19 S. E. Rep. 425, cite the principal case.

For further information on this subject, see *foot-note* to *Coffman v. Sangston*, 21 Gratt. 263; *foot-note* to *Sturtevant v. Goode*, 5 Leigh 83; monographic note on "Jurisdiction" appended to *Phippen v. Durham*, 8 Gratt. 457.

***Same—Exceptions to—Statute—Application.**—By statute, 1 Rev. Code 1819, p. 214, § 86, it was provided that "after answer filed and no plea in abatement to the jurisdiction of the court, no exception for want of jurisdiction shall ever afterwards be made; nor shall the court every thereafter delay or refuse justice, or reverse the proceeding for want of jurisdiction, except," etc. Notwithstanding the strong language of this statute, it was unanimously decided in *Pollard v. Patterson*, 3 Hen. & M. 67, that the statute meant to embrace those cases only in which the bill showed on its face proper matter for the jurisdiction of equity, and the exception had to be taken by plea; and that the omission to plead gave equity no power to decree in favor of the plaintiff. If the case appeared upon the face of the bill to be a mere legal question. The construction of the statute adopted in this case has ever since been followed. *Stuart v. Coalter*, 4 Rand. 74; *Hickman v. Stout*, 2 Leigh 6; *Morgan v. Carson*, 7 Leigh 238.—MONCURE, J., delivering the opinion of the court in *Hudson v. Kline*, 9 Gratt. 386. To the same effect, see the principal case cited in *Beckley v. Palmer*, 11 Gratt. 632; *Boston Blower Co. v. Carman Lumber Co.*, 94 Va. 100, 26 S. E. Rep. 360. See further, *foot-note* to *Hudson v. Kline*, 9 Gratt. 380; *foot-note* to *Beckley v. Palmer*, 11 Gratt. 625; mono-

Chancery Practice—Statute of Limitations—How Relied on.—The statute of limitations cannot be insisted on in equity, without being pleaded, or in some form, relied on as a defence, in the pleadings.

Stout exhibited his bill against Hickman, in the superiour court of chancery of Clarksburg, setting forth that there had been for a series of years mutual accounts between him and Hickman, consisting on his part of charges for blacksmith's work done by him for Hickman, and on the other side of credits for various articles supplied and payments otherwise made to him by Hickman; that on these accounts there was a balance justly due to him of some 325 dollars; but that owing to his confidence in Hickman, to the circumstance of his frequently doing his smith's work by himself, and to the nature of the account, consisting of numerous small charges and running during several years, he was unable to adduce full proof of the items. He exhibited his state of the account with the bill; called upon Hickman for a discovery as to the justice of it; and prayed an account, and a decree for the balance that should be found due to him.

Hickman answered, that it was true that Stout had a claim against him for blacksmith's work, but he could not state the just amount due to him; that he had seen the account exhibited with the bill; it was in some parts just, in others unjust; there were items of debit against him in it, with which he was not justly chargeable, and he was entitled to credits that were not allowed him; but the answer did not
7 *specify either the items unjustly charged to him, or the credits unjustly omitted, in the account exhibited by Stout.

Many depositions were taken and filed by both parties. The answer of Hickman being vague and general, and affording no specific evidence of the justice of Stout's claim, or of any part of it, Stout had to rely intirely on his own proofs. He was only able to adduce specific evidence of a part of the items of his account, and evidence of his having done Hickman's blacksmith's work for several years, and of the probable quantum of work required by him; so that the case, in the event, depended upon an estimate of the probable amount of the work yearly done, to be made upon consideration of all the circumstances. It appeared, that all the evidence which was adduced by Stout in the progress of the cause, was in his power at the time he ex-

hibited his bill; and it is obvious, that the evidence was of a nature to avail him as well in an action at law, as in this suit in equity.

The charges in Stout's account, commenced in 1814; and his bill was exhibited in 1823; so that the charges of some three or four years were of an older date than five years before the commencement of the suit.

Chancellor Tucker referred the accounts between the parties to a commissioner, who made a report, which the chancellor disapproved; and, proceeding himself to adjust the account, upon the principle of a fair annual allowance to Stout for the work done by him for Hickman, he decreed to Stout 163 dollars with interest from March 1823; a sum far short of Stout's demand. From this decree Hickman appealed to this court.

The case was argued here by Michie for the appellant, and Wyndham Robertson for the appellee. Two points of law were made in the argument:

1. Michie objected to the jurisdiction of the court of chancery; and argued, that the case set forth in the bill was so exactly the proper subject of an action of assumpsit, that *if this bill should be entertained, every case of assumpsit might be brought into equity.

Robertson answered, that this was a bill for a discovery, and a case too of mutual accounts, which was a settled head of equity, and that the objection came too late. He referred to the statute, which provides, that "after answer filed, and no plea in abatement to the jurisdiction of the court, no exception for want of jurisdiction shall ever afterwards be made, nor shall the superiour courts of chancery, or any other court, ever thereafter delay or refuse justice, or reverse the proceedings for want of jurisdiction, except in controversies respecting lands lying without the jurisdiction of such court, and also of infants and femes covert." 1 Rev. Code, ch. 66, § 86, p. 214; Pollard v. Patterson, 3 Hen. & Munf. 67.

2. Michie insisted, that all the items of Stout's account of an older date than five years before the commencement of the suit ought to have been disallowed, as being barred by the statute of limitations; and, for the same reason, the chancellor on his principle of adjusting the claim, ought not to have carried the yearly allowances to Stout farther back than five years.

Robertson answered, that the statute of limitations was not pleaded, or in any way relied on.

Michie replied, that it could not have been pleaded; for, in the account which Stout exhibited with his bill, there was no debit to Hickman of an older date than the five years: the objection appeared in the progress of the cause, when the accounts came to be stated by the commissioner.

CARR, J. It was insisted for the appellant, that this was a simple demand for work and labour done, the proper subject of an action of assumpsit, and therefore no case for relief in equity. To which it was answered, that the objection comes too late, and that this is a bill for a discovery, and a case of mutual accounts. The posi-

graphic note on "Jurisdiction" appended to Phippen v. Durham, 8 Gratt. 457.

Chancery Practice—Statute of Limitations—How Advantage Taken.—No rule is better established than that one cannot avail himself of statute of limitations, in a suit in equity, without pleading it. To this effect the principal case was cited in Gibson v. Green, 80 Va. 526, 16 S. E. Rep. 661; Hubble v. Poff, 98 Va. 647, 37 S. E. Rep. 277; Woodard v. Polsley, 14 W. Va. 220.

In Humphrey v. Spencer, 36 W. Va. 18, 14 S. E. Rep. 413, and Bartles v. Gibson, 17 Fed. Rep. 298, the principal case was cited to the point that the statute of limitations must be in some way relied on by demurrer, plea, or answer. While this seems to be the West Virginia rule, in Virginia, the defense must be made by plea or answer; it cannot be taken advantage of by a demurrer to the bill. See *Foot-note* to Colvert v. Millstead, 5 Leigh 88.

See generally, monographic note on "Limitation of Actions" appended to Herrington v. Harkins, 1 Rob. 501.

tion, that the objection comes too late, was rested on the 86th section of the statute "concerning the courts of chancery. The very point was considered by this court, and ably and learnedly discussed in Pollard v. Patterson. The unanimous opinion of the court was, that the statute meant to embrace cases, where the bill shewed a case proper for equity, and the exception had to be taken by way of plea; but that the omission to plead gives equity no power to decree in favour of a plaintiff, upon a case appearing upon the face of the bill, to be merely a legal question. This opinion is supported by sound reason, and unquestioned authority; and the point has ever since been considered as settled. We must, therefore, inquire, whether this bill, on its face, states a case exclusively proper for law? whether, in other words, a demurrer to it would have been sustained? I do not think such demurrer could have been sustained. The bill states mutual accounts between the parties, running through a series of years, and consisting of numerous items of blacksmith's work, on the one hand; and on the other, of various articles of country produce delivered, such as wood, coal, hay, wheat, potatoes; of money paid at different times; of work done with wagons &c. When I speak of the bill, I consider the account filed with it, as a part of it. The bill also seeks a discovery: but without considering this last point, the first is sufficient, I think, to support the jurisdiction. It is laid down, in all the books of practice, that account is a settled head of equity jurisdiction. This point was before this court in the case of Smith v. Marks, 2 Rand. 449, where the authorities were examined, and this conclusion drawn, that the word account is to be understood as applying to every case, where there is a demand on one side, and a set-off on the other; that a single matter could not be the subject of a bill in equity, but there must be mutual demands. In the case of the Corporation of Carlisle v. Wilson, 13 Ves. 278, the chancellor states the grounds of this jurisdiction: "the principle (he says) upon which courts of equity originally entertained suits for an account, where the party had a legal title, is, that though he might support a suit at law, a court of law either

10 "cannot give a remedy, or cannot give so complete a remedy, as a court of equity; and by degrees courts of equity assumed a concurrent jurisdiction in cases of account; for it cannot be maintained, that this court interferes only when no remedy can be had at law." He concludes, that equity exercises a sound discretion, in decreeing or refusing an account. I do not think, therefore, that a demurrer to this bill could have been sustained.

It was also insisted in the argument, that the statute of limitations, though not pleaded, ought to have been applied to the appellee's account. There is no rule better established, than that one cannot avail himself of the statute of limitations, in a suit in equity, without pleading it. This was admitted as the general rule; but the appellant's counsel argued, that this case was taken out of it, because neither the

bill, nor the account exhibited with it, shewed any items of more than five years standing. If this were the fact, I do not think it would have entitled the defendant to avail himself of the statute without pleading it, however he might have taken advantage of the defect in another way: but it appears on examination, that the counsel is mistaken as to the fact: the account exhibited with the bill, the account which Hickman in his answer said he had seen, commences as early as 1814.

The chancellor has reduced Stout's demand more than I should have done upon the evidence; but of this the appellant cannot complain, and the appellee does not.

The other judges concurring, the decree was affirmed.

11 *Waller v. Armistead's Adm'rs.

February, 1830.

(Absent COALTER and GREEN, J.)

Husband and Wife—Antenuptial Conveyance—Fraud on Husband.—Deeds executed by a woman immediately before her marriage, giving away her property, without knowledge of her intended husband, are fraudulent as to the husband.

Guardian and Ward—Release Deed Executed by Ward Shortly after Attaining Majority—Validity.—Deeds of gift, or of release and acquittance, made by ward to guardian or person who has borne part of guardian, shortly after ward's attainment to full age, but before delivering of ward's estate and without any settlement of accounts, are void on the principle of public policy, without proof of actual fraud; much more, if circumstances of transaction evince actual fraud.

Same—Same—Same.—No just distinction. In this respect, between deeds of gift, and deeds of release and acquittance, by ward to guardian: both equally condemned by equity.

Same—Same—Lapse of Time—Effect.—Female ward makes deed of general release and acquittance to guardian, without any settlement of accounts, and deed of gift to guardian's infant son, without having its contents and effect explained to her; and marries the same day: husband lives for more than 20 years, and then dies: *Held*, the lapse of time during the coverture does not affect the right of the wife to impeach the deeds in equity.

Lucy B. Armistead, daughter of John Armistead who died in 1780, and of Mary his wife, who survived him and died in 1792, became entitled, on the death of her mother, to sundry slaves and to an interest in a tract of land in New Kent. She was then an infant, yet, as it appeared, she never had any guardian legally and regularly appointed; but her brother Robert B. Armistead, who was the administrator de bonis non of their father and the administrator of their mother, acted for her in the place of a guardian. He took upon himself the care of supporting her during her infancy, and possessed himself of the slaves

***Husband and Wife—Antenuptial Conveyance—Fraud on Husband.**—Where the disposition of her property by an intended wife is made in pursuance of an agreement entered into before the marriage was definitely contemplated, all presumption of fraud is negatived. *Gregory v. Winston*, 23 Gratt. 126, citing principal case.

See further, on this subject, monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 159.

***Guardian and Ward—Release Deed Executed by Ward Shortly after Attaining Majority—Validity.**—To the point that the law, on a principle of public policy, vacates, without proof of any actual fraud whatever, all conveyances by a ward to his guardian shortly after attaining his majority, the principal case is cited in *Pye v. Jenkins*, 20 Fed. Cas. 98.

See further, on this subject, monographic note on "Guardian and Ward" appended to *Barnum v. Frost*, 17 Gratt. 398.

belonging to her, employing them either on his own farm, or hiring them out and receiving the hires. This state of things continued till December 24th 1801, when she married Aylet Waller. Robert B. Armistead had made no settlement of the accounts of his guardianship, or agency for his sister; and he still retained in his own hands the estate she was entitled to, though she had then attained to full age.

12 But, on the very *day of her marriage, a few minutes before the ceremony, he stated to her in the absence and without the knowledge of her intended husband, that the advances he had made for her would, on a fair settlement, be about equal to the amount of the hires of her slaves; and without exhibiting any account, or stating any particulars, he proposed that she should give him an acquittance of the hires, and tendered a writing which he had previously prepared for the purpose, for her signature. She executed the instrument: it was a deed, dated December 24th 1801, whereby, after reciting that the parties had mutually agreed to settle all accounts, and to release, each to the other, all demands for money on any and every account whatsoever, the sister acquitted the brother of all demands, and acknowledged full satisfaction of whatever he might owe her. And at the same time, she executed another deed, bearing the same date, which had also been prepared by her brother, but which was not explained to her, nor did it appear that she had any knowledge of its contents or object: this purported to be a deed of gift, in consideration of natural love and affection, to her nephew John D. Armistead, an infant son of Robert B. Armistead, of all her right, title, interest, and proportion, of the proceeds of the sale of the tract of land in New Kent, on which Robert B. Armistead then lived, and which had been previously sold under a decree of the county court of New Kent, to a proportion whereof she was entitled as one of the children of John and Mary Armistead.

Robert B. Armistead died in the year 1811, without having ever settled his accounts of his administration of his father's or mother's estates. And, during his lifetime, Aylet Waller and his wife made no effort to set aside the deed of acquittance, or the deed of gift, of the 24th December 1801, or to compel him to settle his accounts of administration of the estates of his father and mother, and to distribute the surplus. But, in March 1813, they brought two suits, in the superiour court of chancery of Richmond: the one against George Semple and William Armistead, administrators

13 *of Robert B. Armistead, of which the object was to set aside the deed of acquittance of the 24th December 1801, as a fraud on the marriage, and have an account of the profits of the slaves while in R. B. Armistead's hands: the other against the same administrators and several other persons, to set aside the deed of gift to John D. Armistead of the 24th December 1801, and to compel a settlement and distribution of the estates of John and Mary Armistead, of which Robert B. Armistead had been the administrator. In these

two causes, the facts in regard to the execution of the two deeds of the 24th December 1801, appeared as above stated; indeed, the most material of them were admitted by William Armistead, one of the administrators of Robert B. Armistead deceased.

The two causes were heard together: and chancellor Taylor declared the two deeds in question valid and binding as between the parties and all persons claiming under them, and therefore dismissed the bill in the first suit: in the other case, he directed accounts to be taken of R. B. Armistead's administration of his father and mother John and Mary Armistead's estates, and other proper accounts.

Waller and wife appealed to this court, for the purpose of having the principle settled as to the validity of the deeds. Pending the appeal here, Waller died, his wife surviving him; and, as the suit was brought in her name and in her right, it survived to her, and the appeal was prosecuted in her name until she also died; after which it was revived in the name of her representative.

The cause was argued (very concisely) by Stanard for the appellant: no counsel appeared for the appellees.

CABELL, J., delivered the opinion of the court. The only question is as to the validity of the deeds. It may be well to premise that although Robert B. Armistead was not appointed the guardian of his sister, in the forms prescribed by law, yet, under the circumstances of this case, a court of equity must regard and treat him as if he had been her legal
14 *guardian; and as the deed of gift was procured by him, for the benefit of his infant son, that deed will be regarded as if it had been executed directly to himself.

As the rights of Aylet Waller, whatever they may have been, were lost by his death in the lifetime of his wife, it is not necessary for the court to decide what his rights would be, in case he were still alive. We deem it proper, however, to observe, that deeds executed by a woman just before her marriage, and giving away her property without the knowledge of her intended husband, are fraudulent and void as to the husband.

As to the rights of Mrs. Waller: The case of Hatch v. Hatch, 9 Ves. 292, (to which many others might be added) is extremely strong to shew the readiness and determination with which the courts will protect the interest of wards, by setting aside conveyances made by them in favour of their guardians, shortly after they attain their age, or at or before the time of settling the accounts and delivering up the estate. So many undue advantages may be taken in such cases, by means of the influence which may, in various ways, be exercised by the guardian, that the law, on a principle of public policy, vacates all such conveyances, without any proof of actual fraud whatever. On this ground, the court is clearly of opinion, that the deed of gift executed by Miss Armistead, is null and void. But there are particular circumstances which make it still more apparent. The time selected for the execution of the deed,

a few minutes only before the marriage; the absence of all proof of any previous intention of Miss Armistead to execute any such deed; the absence of proof that she had, at the time it was executed, any knowledge of its character or object; added to the care with which it was concealed from her friends, and particularly from her intended husband, who was then in the house; combine to stamp it with the foulest fraud.

Then, as to the deed of acquittance and discharge, executed by Miss Armistead to her brother. Chancellor Kent, in *Kirby v. Taylor*, 6 Johns. Ch. Rep. 242, 15 draws a distinction "between a deed giving a gratuity or bounty to a guardian in remuneration of an antecedent duty, and a deed of release, acquittance or discharge. He admits that the policy of the law utterly reprobates the former, as being absolutely null and void; but he contends that a simple release is *prima facie* good, and consequently (as we understand him) will not be set aside, unless it be shewn to be unfairly obtained. We cannot perceive the justness of this distinction. A simple release, by which the guardian is exonerated from accounting, and consequently from paying a just balance which may be in his hands, is as much a gratuity as a direct gift by formal conveyance. It may be as gainful to the guardian, and as disadvantageous to the ward, as a direct gift would be. And if such a practice were tolerated, it would lead to greater mischiefs than would result from sanctioning direct gifts or gratuities; for wards might be much more easily induced to grant releases for unascertained balances of unsettled accounts, than to make direct gifts of what they have in possession, and know to be their own. Besides, if we say that every acquittance executed by a ward is *prima facie* good, we exempt the guardian from the obligation of shewing that it was given in consequence of a just settlement, or that if a settlement had been made, nothing would have been due to the ward; and we throw upon the ward the burthen of proving that the settlement (if one was made) was not fair, or that if a fair one were made, the guardian would be brought in debt. This shifting the burthen of proof, in such cases, is intirely contrary to our ideas of propriety. We think therefore that an acquittance or release given shortly after a ward comes of age, or before or at the time of giving up the estate, so far as it may be sought to be used either as evidence of a fair settlement or a discharge from the obligation of making such a settlement, stands on the same footing as a direct gift or gratuity. But in addition to the great principle of public policy, the acquittance, in this case, stands reprobated by all the circumstances of fraud, which we have already mentioned as attaching to the deed of gift.

16 *The objection as to the length of time that was permitted to elapse before the institution of the suit, cannot be made to apply to Mrs. Waller; because she was under the legal disability of coverture from the date of the deeds to the time

when the suit was brought. It is not material, and therefore we give no opinion as to the effect of such an objection, if it had been made against Waller. We shall only observe, that in the case of *Hatch v. Hatch*, before referred to, relief was given after a much longer time, and even to a husband who had participated in the fraud.

Decree reversed.

Lovell v. Arnold.

February, 1830.

(Absent COALTER, J.)

Writ of Right-Abatement-Revival-Case at Bar.
—Writ of right abates by death of tenant in 1812, and the abatement is entered of record; sci. fa. sued out by demandant in 1820, to revive the suit against heirs of tenant: HELD, the abatement was absolute, and suit could not be revived under provision of statute of 1819, 1 Rev. Code, ch. 128, § 37, that provision being prospective.

This was a writ of right brought by Elisha Arnold against Markham Lovell in his lifetime, for sixty acres of land in the county of Franklin. The case was before this court in 1811, when the court reversed a judgment that had been recovered for the demandant, and remanded the cause to the circuit court of Franklin, for a new trial. See *Lovell v. Arnold*, 2 Munf. 167. Afterwards, in the circuit court at May term 1812, before the new trial was had, an entry was made that the suit abate by the death of the tenant. No further proceeding was attempted till April 1820, when the demandant sued out a *scire facias* against the heirs of the deceased tenant, to revive the suit, under the provision of the statute enacted at the revival of 17 1819, 1 Rev. Code, *ch. 128, § 37, p. 496, 7. The tenant's heirs named in the *scire facias*, were ten in number: the process was served on only two of them, William and John Lovell: and John only appearing, the cause was at last tried, upon the original pleadings, as between the demandant and that heir alone. Verdict and judgment for demandant; to which, on the application of Lovell, this court awarded a *supersedeas*.

Johnson, for the plaintiff in error, said, that the abatement in 1812 put an end to the cause. As the law then stood, a writ of right, abated by the death of a party, could never be revived in any way: the abatement was absolute. The new provision of the statute, which obviated the abatement of real actions by the death of either party, and gave the *scire facias* to revive, for or against the heirs of the deceased party, was altogether prospective: the provision is, that "where any action, real or mixed, is now or shall be depending &c., for the recovery of any lands &c., and any party thereto shall die before verdict rendered, such action shall not abate" &c. This suit having been determined by abatement in 1812, was surely not a suit pending at the time of this enactment. But, if the demandant had a right to the *scire facias*, the sequel of the proceedings was palpably irregular and erroneous; for the *scire facias* being against ten heirs of the tenant, was served on only two of them, and

then the cause was tried only as against one of those two.

Wynndham Robertson, for the defendant in error, insisted, that the objection to the scire facias was in truth an objection to the form of action, and an objection of which the tenant might have availed himself by demurrer to the scire facias; and he endeavoured to shew, that the objection was obviated by the provision of the statute of jeofails, which, after verdict, cures all defects whatsoever, whether of form or substance, which might have been, but have not been, taken advantage of by demurrer. 1 Rev. Code, ch. 128,

18 *§ 103, p. 512. As to the proceedings on the scire facias: the heir against whom the cause was tried, instead of going into trial on the mere right, might have pleaded the joint tenure of his co-heirs in abatement; but not having done so he could not rely on joint-tenure as a defence in bar. *Green v. Litter*, 8 Cranch, 243. Much less could he avail himself of such matter, after trial, verdict and judgment, as a ground of reversal.

Johnson replied, that the statute of jeofails by no means dispensed with pleadings, but only gave to a verdict the effect of curing such defects in pleading, as would have been properly demurrable. Here, there was nothing to demur to: there were no pleadings; the whole proceeding consisted of the scire facias and trial. The authority of *Green v. Litter* did not touch the present case: the only matter of abatement here, was the death of the tenant: that had been pleaded, and judgment of abatement rendered. And the objection now is, that from the time of the abatement, the cause was out of court, and therefore no farther proceeding could be had in it.

PER CURIAM. The suit was at an end, by the abatement in 1812 by the death of the tenant, and could not be revived.

Judgment reversed, and judgment entered for the plaintiff in error.

19 *Clayton v. Fawcett's Adm'rs.

February, 1830.

(Absent COALTER and GREEN, J.)

Equitable Assignment—What Constitutes*—Case at Bar.—A. holding a bond of B. places in C.'s hands, to collect the money for him when due, and if not paid, to put it in an attorney's hands to collect by suit: the money was not paid when due, and C. put the bond in attorney's hands for collection: then A. addressed a letter to C., telling him he owed D.

***Equitable Assignment—What Constitutes.**—A mere promise or agreement to pay a debt out of a designated fund when received, does not give an equitable lien upon the fund nor operate as an equitable assignment of it. Something more is necessary. To constitute an equitable assignment there must be an assignment or transfer of the fund or some definite portion of it, so that the person owing the debt or holding the fund on which the order is drawn can safely pay the order, and is compellable to do so, though forbidden by the drawer. *Hicks v. Roanoke Brick Co.*, 94 Va. 744, 37 S. E. Rep. 596, citing among others the principal case.

In discussing the question as to what constitutes an equitable assignment, in *Elb v. Martin*, 5 Leigh 138, 145, JUDGES BROCKENBROUGH and BROOKS, both cite the principal case with evident approval.

In *Brooks v. Hatch*, 6 Leigh 588, JUDGE BROCKENBROUGH said that, in the principal case, the letter of Fawcett would have been adjudged to be an equitable assignment, but for the condition contained in it, that the payment was to depend on the

about \$200 out of the money B. owed him: and desiring C., when he collected the money from B., if A. himself should not happen to be present, to pay the whole to D.; and this letter being presented by D. to C., without accepting the order therein contained, only told that B.'s bond was in the attorney's hand: the amount of B.'s bond to A. exceeded the amount due from A. to D.

Held, the letter of A. to C. was neither an equitable assignment by A. to D. of so much of B.'s debt to A., nor a security given by A. to D. for the debt he owed him.

Clayton in the autumn of 1818, sold Fawcett a parcel of fatted cattle, for 900 dollars. Fawcett drove the cattle to Richmond, and there sold them to Samuel Carlisle, and took his bond for the price or part of it, which he left in the hands of Martin Baker of Richmond, with instructions to collect the money if he could, if not, to place the bond in the hands of an attorney for collection. Fawcett made several payments to Clayton, which reduced the debt of 900 dollars he owed him, to about 200 dollars; and this balance remaining due, he addressed a letter or order to Baker, dated October 1, 1820, and delivered it to Clayton, in these words: "Sir, When you collect the money from Mr. Carlisle of me, and I should not happen with you, you will please pay the same to W. Clayton, as I am indebted to him about 200 dollars of the money due to me from Carlisle; and oblige your friend &c. (Signed) B. Fawcett." Meanwhile, Baker had put Carlisle's bond into the hands of Shepherd, an attorney at law, to collect by suit. On the 1st December 1820, Clayton presented Fawcett's letter to Baker, who informed him that Carlisle's bond was in Shepherd's hands for collection: there was no acceptance by Baker, of the

20 order for the payment of the *money to Clayton, contained in the letter. On the 21st December 1820, Fawcett died, in insolvent circumstances. And in February 1821, Clayton applied to Shepherd, who told him, that he had collected the money due from Carlisle; but, that he would not undertake to determine, whether Clayton was entitled to receive it on the strength of Fawcett's letter to Baker, or the representatives of Fawcett; and that he should deposit the money in bank, till the right to it should be decided.

Clayton then exhibited a bill in the su-

drawer's being absent. To the same effect, see *Hulings v. Hulings Lumber Co.*, 38 W. Va. 380, 18 S. E. Rep. 631.

And in *Brooks v. Hatch*, 6 Leigh 548, TUCKER, P., said: "When it is clear, that the order or power over the fund is given for satisfaction of a debt or for value, it is inferred that a transfer was intended: the transaction is looked upon and treated as a contract: it is irrevocable; and thus constitutes a complete equitable assignment. But where the drawer retains a power over the fund,—where the transaction shows he had no design to part absolutely with that power,—it is looked upon as no equitable assignment, however valuable the consideration may be which moved him to its exercise. Thus in *Clayton v. Fawcett's Adm'rs*, 2 Leigh 19,—A. owing B. about 200 dollars, drew an order on C. desiring him when he collected certain money of D. to pay the whole to B. if A. himself should not happen to be present. The amount to be collected exceeds the sum due to B. and that fact, and the provision that it should be paid to B. 'if A. should not happen to be present,' were properly held to evince, that the drawer A. did not part with his power over the fund, and so there was no assignment."

For further information on this subject, see *foot-note* to *Elb v. Martin*, 5 Leigh 132; *foot-note* to *Brooks v. Hatch*, 6 Leigh 584; monographic note on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 400.

perior court of chancery of Greenbrier, against Fawcett's administrators and Shepherd, setting forth the facts as above stated; insisting, that Fawcett's letter to Baker, of the 1st October 1820, was, in effect as it was in design, an assignment of Carlisle's bond to him; and praying, that Shepherd might be decreed to pay him the amount due to him from Fawcett, out of the amount in his hands collected of Carlisle; and general relief.

The administrators of Fawcett, in their answer, contested Clayton's right to the money, and stated that Fawcett's estate being inadequate to his debts, this money ought to be paid to his creditors in due course of administration.

Shepherd, being a mere stakeholder, did not answer.

The chancellor dismissed the bill; and Clayton appealed to this court.

Johnson, for the appellant. Fawcett's letter to Baker of October 1820, was an equitable assignment of Carlisle's bond to Clayton, or an order for the payment of the proceeds thereof to him. The letter shews that Fawcett considered Baker as having complete authority and control over the collection, and that he owed Clayton 200 dollars of this very money; therefore, he directed Baker to pay the money to Clayton. It may be objected, that those words of the letter, and I should not happen to be with you, evince that he meant to retain the power to receive the money himself. Suppose he did, he only

21 meant to retain *the right to receive it, on condition that he should be present; and that condition not having happened, then by the terms of the letter, the right to receive it was given to Clayton. But Fawcett honestly intended this money for Clayton, and if he himself came to Richmond, he meant to receive it for Clayton, and pay it to him: this was his reason for inserting those words; and they are not at all inconsistent with the design to transfer the subject to Clayton. If it be objected, that this is an order of Fawcett, not accepted by the drawee, and therefore revoked by the death of Fawcett before acceptance; I answer, that, if I am right as to the construction and effect of the letter, it is an order for paying over the specific fund; an equitable assignment of the fund; and, in that case, the death of the drawer or assignor can have no influence on the rights of the assignee. An order for the payment of money out of a specific fund, is not a bill of exchange, but an assignment of the subject; and even a letter of attorney to receive a debt, if given for a valuable consideration, is not a revocable instrument. *Peyton v. Hallett*, 1 Caines' Rep: 379; *Bromley v. Holland*, 7 Ves. 28; *Powell v. Gordon*, 2 Esp. 735; *Hammonds v. Barclay*, 2 East. 227; *Cutts v. Perkins*, 17 Mass. Rep. 206; *Row v. Dawson*, 1 Ves. sen. 332; *Yeates v. Groves*, 1 Ves. jun. 280.

Wickham, for the appellees. The whole question is, What is the just construction and effect of Fawcett's letter to Baker? is it an assignment to Clayton, of the debt due from Carlisle? or only an instruction by Fawcett to Baker as his agent, for the dis-

position of the money when collected? If the letter had contained an absolute order for the payment of a specified sum out of the money collected, it would have presented another question. But the letter directs Baker to pay Clayton, the whole of the money, which he should collect of Carlisle for Fawcett, if Fawcett should not happen to be present to receive it himself, as (he says) he owed Clayton about 200 dollars out of the money. It is apparent, then,

22 *that the parties knew the debt due by Carlisle to Fawcett exceeded Fawcett's debt to Clayton. If Fawcett's letter is a good assignment of any part of Carlisle's debt to Clayton, it is an assignment of all, so that if Clayton had assigned the order, his assignee would have taken the whole: which, surely, was not the intent of the transaction. The letter contains an authority to Baker to pay the money to Clayton, and an authority to the latter to receive it, only in case Fawcett should not be present to receive it himself. Notwithstanding the letter, then, Fawcett had the right to demand the money. How can this letter be regarded as an assignment, when it left and reserved to the assignor the right to take the subject? The letter is addressed to Baker, who was himself the mere agent of Fawcett, without any interest in the subject; and this agency of Baker was revocable at Fawcett's pleasure; nay, it was revoked, by the very terms of its creation, the moment Carlisle's bond was put into the attorney's hands for collection; and if it had not been so revoked, it would have been revoked by Fawcett's death. Baker had no authority to receive the money of the attorney, while Fawcett was yet living, much less after his death. In this state of things, the proposition that Fawcett's letter to Baker is an assignment of this subject to Clayton, is incongruous and hardly intelligible.

Johnson, in reply. Fawcett told Baker, he owed Clayton about 200 dollars out of the money which was due to himself from Carlisle, and which he had trusted Baker to collect. Now, if this was only intended as an instruction to Baker, and not as an assignment to Clayton; as a naked authority to Clayton to receive, without the transfer to him of any interest in the subject; why this acknowledgment of the debt to Clayton, and of a debt payable out of the very money to be collected from Carlisle? The circumstance that the money to be collected of Carlisle, exceeded Fawcett's debt to Clayton, cannot affect the question: the assignment operated as a security for the debt Fawcett owed Clayton.

23 *BROOKE, P. As the merits of this case must depend on the construction of the order of the 1st October 1820, drawn by Fawcett on Baker, I shall confine myself to that point only.

It is insisted for the appellant, that this order was an equitable transfer of the money due by Carlisle to Fawcett, or so much thereof as was equal to the amount due by Fawcett to the appellant. Fawcett's administrators claim it, as being still part of his estate, for the benefit of his creditors, to whom it is payable in due course of administration. In examining this question,

as there is no pretence of fraud or mistake, the meaning and intention of the parties must be collected from the terms of the order itself. The general rule is, that a power ceases with the life of the person who gives it. The exception to the rule is, that if the power be coupled with an interest, it survives the person giving it. But such an interest to be coupled with the power, must be an interest in the subject, on which the power is to be exercised; not an interest only in that which is produced by the exercise of the power itself; in other words (as is said by the chief justice Marshall in the case of *Hunt v. Rousmanier*, 8 Wheat. 204) the power must be ingrafted on an estate in the thing. I think it impossible to give to the order before us, a construction that would give the appellant an interest in the money due by Carlisle, in exclusion of the rights of the drawer Fawcett in his lifetime, or of his representatives since his death. It contains no words of transfer or assignment. The word pay, in the order, though generally a word of transfer, was not used in that sense; for if it was, it would assign over the whole of the money due by Carlisle to Fawcett, which was certainly not intended. Those words of the order, "if I should not happen with you," limited the power both of Baker to pay, and of the appellant to receive, to the case of Fawcett's being absent. Nor did this condition affect any right of the appellant to receive the money; it formed no stipulation between the parties to the order; it was merely directory to Baker, and indicated *to him, that the appellant was to supply the place of the drawer, in case he was absent when the money was received from Carlisle, and to receive the money for him (Fawcett) not for himself. The words in the order, "as I am indebted to him about 200 dollars," do not affect this construction: they only assign the motive of the drawer for substituting the appellant to receive the money in his absence. If any stipulation had been intended, it would have been expressed in other terms: if the order had been intended as a payment, the sum due would have been more accurately ascertained. That was clearly left to be ascertained after the money should be received by the appellant (as the agent, I think, of Fawcett) as was also the surplus of the money due from Carlisle over and above what should suffice to satisfy the appellant. That the order was not intended as a security for the money due from the drawer to the appellant, is quite manifest; as that idea is inconsistent with the right reserved to the drawer, to receive the money himself, if present. A security that could be thus defeated, would be worthless. The power given to the appellant, to receive not only the amount that might be due to himself, but the excess above that sum due from Carlisle to the drawer, in the event that he was not present to receive it himself, was, I think, a naked power as to the whole subject, and gave to the appellant no lien in equity on the fund on which the order was drawn. He could in no form of action have claimed either the money or any part of it of Baker, or of the attorney in whose hands the bond of Carlisle had

been placed for collection. The right of the drawer to receive it himself, by the terms of the order, survived to his representatives. The cases cited by the appellant's counsel, are intirely consistent with this opinion. *Row v. Dawson* was a case in which the interest was coupled with the power to receive the money: the order was drawn on a present consideration, in payment for money lent at the time; and though not a bill of exchange, was an equitable transfer of its amount, and attached on the fund on which it was

25 *drawn. The case of *Yeates v. Groves* was an order given on a specific fund, for a foregone consideration; but the original note for the amount was given up to the drawer. It was a power coupled with an interest in the subject drawn on. I think the decree is correct.

The other judges concurred, and the decree was affirmed.

Tiernans v. Schley & Shroeder.

February, 1830.

(Absent CABELL and COALTER, J.)

Foreign Attachment—Discharge of Appearance of Defendant.—In a foreign attachment in chancery against an absent debtor, laid on personally in hands of garnishees, and on lands claimed by persons under conveyance of absent debtor, the question being, whether conveyance gave vendees priority over rights of attaching creditors, or attachment gave these priority over vendees, the absent debtor was, upon motion of attaching creditors themselves, who waived demand of security from him, allowed to appear and file his answer, without giving security to abide and perform the decree:

Held, the attachment was thereby discharged, and the attaching creditors could, thenceforth, only prosecute their claim against their debtor, personally.

Henry R. Simmerman of Wythe county Virginia, being indebted to Luke and Charles Tiernan of Baltimore, Charles Tiernan came to Wythe in the summer of 1821, for the purpose of obtaining payment of or security for the debt; and an arrangement was made between them, that Simmerman should sell and convey to L. & C. Tiernan a tract of 287 acres of land near Evansham in Wythe, in satisfaction of the debt, which was 8,500 dollars, upon condition, however, that Luke Tiernan should approve and ratify the arrangement. In execution of this arrangement, Simmerman and wife executed a deed of bargain and sale, *conveying the land to L. & C. Tiernan in fee: the deed was dated the 7th June 1821, and was regularly acknowledged before two justices of Wythe, by Simmerman, and by his wife on privy examination, and their acknowledgment certified by the justices, in order that it

***Foreign Attachment—Discharge of Appearance of Defendant.**—In *Kelso v. Blackburn*, 3 Leigh 311. It is said: "It is admitted, on all hands, that an appearance discharges the attachment, where the property attached is personal. Surely, the same effect follows where land is attached, both from the reason of the case, and the care with which the land of an absentee is protected from sale, while there is any personal fund in the power of the court. And this very point was decided in *Tiernans v. Schley, etc.*, 2 Leigh 25. In that case, the appearance of the absent defendant was what, in the judgment of this court, changed the nature of the suit, and discharged the land."

See further, monographic note on "Attachments" appended to *Lancaster v. Wilson*, 27 Gratt. 624.

might be recorded: and this deed, thus perfected, was confided to the private care of John P. Matthews, the clerk of the county court of Wythe, to be kept by him till Luke Tiernan's approbation and ratification of the arrangement, or dissent from it, should be signified to him; and if and when he should approve and ratify it, and signify the same to Mr. Matthews, then the contract was to be consummate, and Matthews was to act officially, and to record the deed; and if he should dissent from it, the deed was to be returned to Simmerman or destroyed. No time was appointed, within which Luke Tiernan's assent or dissent from the contract, should be signified to Matthews; it was, however, expected to be made known within a short time. Luke Tiernan hesitated some months: at length, on the 15th December 1821, he addressed a letter to Matthews, wherein he gave his assent to the contract, and directed him to record the deed, and to deliver the original to the bearer of the letter. This letter was received by Matthews on the 17th February 1822, and thereupon he recorded the deed in his office.

But before Luke Tiernan had agreed to accept the deed, in October 1821, Schley & Shroeder of Baltimore, creditors of Simmerman, exhibited their bill in the superior court of chancery of Wythe, against Simmerman, L. & C. Tiernan and divers others, setting forth the debt due by Simmerman to them, and that he had recently removed from Virginia and was now a non-resident of this state; and stating, *inter alia*, the circumstances touching the deed executed by Simmerman to L. & C. Tiernan of the 7th June preceding; insisting, that that deed, not having as yet been accepted by the purchasers, was still inoperative to pass the subject; and praying to attach the land mentioned in the deed (as well as other property of Simmerman in the

27 *hands of other defendants) to answer their claim, under the 1st section of the statute concerning foreign attachments in chancery, as amended at the revision of 1819. 1 Rev. Code, ch. 123, § 1, p. 474.

The Tiernans, in their answer to the bill, insisted, that the deed they claimed under, gave them a right to the land it conveyed, in preference to the attaching creditors.

And thus the question between the attaching creditors Schley & Shroeder and the Tiernans, being, whether or no, under the circumstances, the right of the former to have satisfaction out of the land in question, attached to the land by force of their attachment, before the title thereof was vested in the Tiernans by the deed of June 1821; the absent debtor, Simmerman, on the 27th May 1823, appeared, and "upon the motion and by consent of the plaintiffs, who waived all exceptions to the filing of his answer," was permitted by the court to file his answer, without giving any security for performing the decree according to the 2d section of the statute.

A long litigation ensued in the court of chancery, concerning other matters as well as those above stated; other matters not necessary to be here stated, since they did not at all affect the point on which alone

the cause eventually turned in this court.

At the hearing before the chancellor, the counsel for the Tiernans, insisted, that the order of May 1823, made by consent and at the instance of the attaching creditors, whereby the absent debtor Simmerman was permitted to appear and file his answer, without giving security to perform the decree, was an absolute discharge of their attachment, by virtue of which alone they could pretend to any preference over the rights of the Tiernans under the deed of June 1821, or indeed to any lien whatever on the property of the absent debtor; and this point they alleged was preliminary to, and precluded the necessity of, all further inquiry. But the chancellor was of a different opinion; and considering the attachment as yet in full force, he held that

28 the rights of *the attaching creditors, by virtue of that process, attached to the land conveyed to the Tiernans, before the conveyance to them became operative, that is, before the deed was assented to and accepted by Luke Tiernan; and, therefore, he held the land in question subject to the claim of the attaching creditors, and decreed that it should be sold to satisfy their demand against Simmerman. The Tiernans appealed to this court.

The cause was argued here by Wickham and Leigh for the appellants, and Stanard and Johnson for the appellees, on all the points (and there were many) presented by the record. But the only point considered and decided by the court was the preliminary question made in the court of chancery, above mentioned, viz. Whether the permission of the absent debtor, Simmerman, to appear and answer, without giving security to perform the decree, on the motion and by consent of the attaching creditors, was not a discharge of their attachment? For if it was, Schley & Shroeder had no longer any ground to stand on, as against the Tiernans, or any garnishee, or any specific property of the debtor; they had only a right to proceed against the debtor himself, personally.

BROOKE, P., delivered the opinion of the court. The only question in this case, which it is necessary to decide, is, Whether the appearance of the absent defendant Simmerman, and the filing of his answer without giving security to perform the decree, at the instance and on the motion of the plaintiffs, was not a discharge of their attachment on the land in controversy? This question will be more satisfactorily settled by reference to the statutes on the same subject, preceding the revised statute of 1819, under which the attachment issued. By the act of 1744, ch. 1, 5 Hen. stat. at large, p. 220, the absent defendant was permitted to appear, plead or file his answer as the case might be, without giving security to perform the decree; after which the proceedings

29 against him were in the ordinary course of the court; and *the object of the act being only to compel him to appear and defend the suit, the attachment as to the property was thereby discharged. It was by the act of October 1777, ch. 15, 9 Id. p. 396, establishing the high court of chancery (which incorporated,

substantially, the above mentioned act of 1744, and transferred the jurisdiction to that court) that security was first required of the absent defendant, when he appeared and defended the suit. That provision is re-enacted in the revised statute of 1819. If the defendant Simmerman had given the security required by it, there can be no doubt the attached property would have been discharged; and the plaintiffs having dispensed with that security, can be in no better condition than if it had been given.

The decree is, therefore, reversed, and the bill dismissed as to the appellants, with costs.

Blow v. Maynard.*

Lawrence v. Blow.

March, 1880.

(Absent BROOKE, P., and COALTER, J.)

Post-Nuptial Settlements.—The doctrine of post-nuptial settlements discussed.

*For sequel of principal case, see Tazewell v. McCandlish, 10 Leigh 121.

Post-Nuptial Settlement—Presumption—Consideration—Burdens of Proving—Evidence—Answer.—Although a post-nuptial settlement will be supported when it appears to have been made in the execution of a fair contract, founded upon a valuable consideration, yet, from the relative situation of the parties and the convenient cover which such settlement afforded a debtor to protect his property and impose upon the world, they are always watched with jealousy. Every such settlement, therefore, where the settler is indebted, is as against his existing creditors, presumed to be voluntary and therefore fraudulent and void; and the onus is upon those claiming under it to prove that it was made for a valuable consideration moving from the wife; and the answer to a bill charging that it is voluntary is not allowed to shift this presumption, nor is it held to be evidence for the respondents; but, on the contrary the defence set up in the answer must be established by proof. To this effect the principal case was cited in Fink v. Denny, 75 Va. 669; Hatcher v. Crews, 78 Va. 465; Lewis v. Mason, 84 Va. 730, 10 S. E. Rep. 529; Robbins v. Armstrong, 84 Va. 811, 812, 6 S. E. Rep. 180; Campbell v. Bowles, 30 Gratt. 663; Nulton v. Isaacs, 30 Gratt. 748; Beecher v. Wilson, 84 Va. 815, 6 S. E. Rep. 210; Yates v. Law, 86 Va. 119, 9 S. E. Rep. 508; Massey v. Yancey, 90 Va. 325, 19 S. E. Rep. 184; Rixey v. Detrick, 85 Va. 45, 6 S. E. Rep. 615; Keagy v. Trout, 85 Va. 401, 7 S. E. Rep. 329; Perry v. Ruby, 81 Va. 323; Witz v. Osburn, 83 Va. 229, 2 S. E. Rep. 33; *foot-note* to Lewis v. Caperton, 8 Gratt. 149; *foot-note* to William & Mary College v. Powell, 12 Gratt. 372. The principal case was distinguished in Barton v. Brent, 87 Va. 888, 18 S. E. Rep. 29.

But a voluntary post-nuptial settlement is not void as to subsequent creditors, unless tainted with actual fraud. Witz v. Osburn, 83 Va. 227, 2 S. E. Rep. 33, citing Code 1873, ch. 114, §§ 1 and 2; Fink v. Denny, 75 Va. 663; *Blow v. Maynard*, 2 Leigh 29; Hatcher v. Crews, 78 Va. 460; Perry v. Ruby, 81 Va. 317.

See further, monographic note on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348.

Same—Consideration—Relinquishment of Rights in the Husband's Estate.—It is settled that the relinquishment by the wife of a certain or even a contingent interest in her husband's estate will support a post-nuptial settlement when there is no badge of fraud; so, likewise, the releasing her jointure or dower. DeFarges v. Ryland, 87 Va. 407, 12 S. E. Rep. 305, citing principal case. See also, *foot-note* to W. & M. College v. Powell, 12 Gratt. 372. It follows a *fortiori*, that her parting with her own estate, or making a charge upon it for her husband's benefit, will support such settlement. William & Mary College v. Powell, 12 Gratt. 386, citing principal case.

Where the wife relinquishes an interest in her husband's estate in consideration of a settlement upon her, and the deed of relinquishment and the deed of settlement are contemporaneous, or made about the same time, so that it may be reasonably presumed that the two deeds are parts of the same transaction, the court will so presume, and will look upon the relinquishment as the consideration which produced the settlement. This qualification of the rule laid down in the first paragraph of this note was—according to Keagy v. Trout, 85 Va. 401, 7 S. E. Rep. 329,—recognized in the principal

Same—Consideration—Evidence—Recitals in Deed.—

The recital in a post-nuptial settlement, of an agreement as the consideration of the deed, is evidence against persons claiming under the settler, but not against a creditor of the settler contesting the fairness and validity of the deed.

Principal and Surety—Release of Surety—Effect—Discharge of Obligation by Surety—Liability of Principal.

—B. is bound assurety for D. in a guardian's bond; the guardian dies indebted to his ward; the ward sues surety for the debt: the surety compromises

case. To the same effect, see the principal case cited in Fink v. Denny, 75 Va. 669, 670. In Keagy v. Trout, 85 Va. 401, 7 S. E. Rep. 329, the interval between the deed of relinquishment and the deed of settlement was only sixteen days and the court held the two deeds were virtually parts of the same transaction.

But where the relinquishment of the wife's interest has been first made by deed containing no recital of any agreement to make a settlement in consideration thereof, and a subsequent settlement made two years afterwards, is sought to be set up, there must be a distinct proof of the previous agreement. Fink v. Denny, 75 Va. 669, 670, citing principal case. See also, *foot-note* to William & Mary College v. Powell, 12 Gratt. 372.

Same—Same—Loan by Wife to Husband.—The simple fact that the husband used the wife's money is not a sufficient consideration to support a post-nuptial settlement, in the absence of proof that, at the time and times the various sums of money were received from the wife, it was understood to be loaned, and that then and subsequently both husband and wife recognizing it as a debt, and intended to stand to each other in the relation of debtor and creditor. Beecher v. Wilson, 84 Va. 815, 6 S. E. Rep. 211, citing principal case; William & Mary College v. Powell, 12 Gratt. 372; Campbell v. Bowles, 30 Gratt. 663.

Same—Same—Previous Parol Agreement—Statute of Frauds.—On this subject, see principal case cited in Perry v. Ruby, 81 Va. 321, 323, 324; Beecher v. Wilson, 84 Va. 817, 6 S. E. Rep. 211.

Same—Same—Evidence of Recitals in Deed.—Subsequent decisions sustain the proposition laid down in the principal case, that the recitals in post-nuptial settlements as to the consideration, though admissible as against the person claiming under the settler, are not evidence against a creditor by whom the fairness and validity of the deed is assailed. See, citing principal case, William & Mary College v. Powell, 12 Gratt. 384; Brockenbrough v. Brockenbrough, 31 Gratt. 597; Perry v. Ruby, 81 Va. 317, 325; Massey v. Yancey, 90 Va. 332, 19 S. E. Rep. 184; Flynn v. Jackson, 93 Va. 346, 25 S. E. Rep. 1; *foot-note* to William & Mary College v. Powell, 12 Gratt. 372.

Same—Same—Declarations of Wife.—Nor are declarations of the wife at the time of executing a deed, or at other times, that it was executed in consideration of a promise of the husband to make a settlement upon her, or because he had made such a settlement, sufficient evidence of a contract to support such a settlement if made, even to the extent of a reasonable compensation for the right of dower relinquished. William & Mary College v. Powell, 12 Gratt. 384; Perry v. Ruby, 81 Va. 325; *foot-note* to Lewis v. Caperton, 8 Gratt. 149, all citing the principal case.

Joint Obligors.—Release of One—Effect.—As recognizing the rule that the release of one of two or more joint and several obligors, releases all, whether standing in the relation of principals or sureties, the principal case was cited in Hewitt v. Adams, 1 Pat. & H. 37. In this case, the principal case is distinguished from the case at bar; and, while the decision in the principal case is approved, it is questioned whether the decision should have gone as far as it did, on the reasoning of the judges who sat in it. See discussion of the principal case at pp. 37, 38, 39. See Va. Code 1887, § 2856.

Principal and Surety—Discharge of Obligation by Surety—Liability of Principal.—The contract between a principal and his surety is for indemnity only, and therefore, if the surety discharges the obligation of the principal at a less sum than its full amount, he cannot, as against his principal, make himself a creditor for the whole amount, but can only claim as against his principal what he has actually paid in discharge. This rule seems settled, and several cases cited the principal case in support of it. See Tarr v. Ravenscroft, 12 Gratt. 663; Kendrick v. Forney, 22 Gratt. 753; Southall v. Farish, 85 Va. 406, 7 S. E. Rep. 534; Feamster v. Withrow, 9 W. Va. 317; Matthews v. Hall, 21 W. Va. 514. See principal case also cited in Cromer v. Cromer, 20 Gratt. 284.

Sureties—Contribution.—A *fortiori*, where one surety compromises the obligation of the principal, his co-sureties are entitled to the benefit, and re-

the suit with the ward, and pays her a less sum than on a settlement of the guardian's accounts was justly due her: and the ward by deed assigns to the surety all her claims upon the guardian's estate, and by the same instrument releases the surety from all demands on the guardian's bond: **Held**, 1. that the deed releasing the obligation as to the surety, released it also as to his co-obligor the principal, and thus left nothing for the assignment to operate upon: and 2. that the surety, notwithstanding the assignment, was only entitled, in equity, to demand indemnity from his principal's estate, for the money actually paid by him to the ward in satisfaction of her claim.

Dower—**Reversion of Lands**.—A husband dies entitled to reversion of lands; his widow is not entitled to dower thereof.

Same—**Reality Fraudulently Conveyed by Husband**.—

A husband makes a fraudulent conveyance of real estate to the use of himself and children, and contingently to the use of his wife, who does not execute the conveyance; the husband dies; a creditor exhibits his bill against the children and the widow, to avoid the conveyance as voluntary and fraudulent; the widow claims under the conveyance; it is declared fraudulent and void; **Held**, the widow is entitled to dower of the estate.

Fraudulent Conveyance—**Liability of Grantees for Rents and Profits**.—A man makes a conveyance of real estate to the use of his children and contingently to the use of his wife, and dies; upon a bill by a creditor after grantor's death, against grantees, who claim under the deed, conveyance declared not only voluntary but fraudulent in fact on the part of the grantor: Yet **Held**, that the grantees are not accountable for rents and profits prior to the decree.

Rents and Profits—**Liability of Heir for**.—Upon a bill against an heir at law, to subject real estate descended to a debt of the ancestor, the heir at law is not accountable for rents and profits accrued before decree.

Chancery Practice—**Sale of Land Descended and Fraudulently Conveyed to Pay Ancestor's and Donor's Debt**.—A father makes a voluntary and fraudulent

conveyance of real estate to his children, and dies leaving other real estate which descends; upon a bill by a creditor against the donees and heirs at law, to subject the land conveyed and land descended, to debt of the donor and ancestor, chancellor may decree a sale of both, out and out, to satisfy the creditor's demand.

The county court of Norfolk, in December 1797, appointed John Davis guardian of his infant brother and sisters, James, Evelina and Margaret Davis; and Richard Blow was his surety in the bond he gave to the county court, for the faithful discharge of that trust.

The county court, at September term 1807, upon the petition of Blow, representing that he was apprehensive of suffering loss by reason of this suretyship for Davis, summoned Davis to appear at the ensuing October term, and give counter-security to Blow, or deliver up the estate of his wards for his indemnity. And at October term, the summons having been returned executed on Davis, the court made a peremptory order, that he should give counter-security to Blow, or deliver the estate of his wards into his hands: which order having been served on Davis, he made a report to the court at

February term 1808, of the specific
31 *property of his wards in his hands, which he offered to deliver up, and to render an account of the profits of their estate by him received, when required. Blow objected to the report, that it did not exhibit the whole estate of the wards, and moved for an attachment against Davis for not delivering up the whole: that motion

the court continued till the next term, but ordered, that the estate specified in Davis's report, should be delivered up to Blow, and that Davis should render an account of the estate of his wards, of the profits thereof, and of his transactions as guardian, before commissioners appointed for that purpose, who were directed to make report to the next term. The commissioners did not make up their report till July term; when they submitted a report to the court, founded on Davis's own statements and vouchers, shewing balances due by the guardian, to his ward Margaret Davis, £370. 15. 3. and his ward Evelina Davis, £1053. 8. 10. This report was silent as to the guardian's account of the ward James Davis, who had died in 1804, for a suit was then pending in which the distributees of James were claiming their portions of his estate, and an order had been made that he should settle his accounts of the guardianship of James, before commissioners; under which order he had notice to attend the commissioners on the 10th October 1807, but he excused himself from attending at that time. In this suit it was afterwards ascertained, that he was indebted to James's estate 3019 dollars 64 cents.

John Davis, the guardian, by bill of sale bearing date the 10th June 1807, expressed to be in consideration of 2000 dollars, conveyed ten slaves to Eleanor Maynard, a

fix the grounds and extent of equitable jurisdiction in the enforcement of judgment liens. *RIVBS, J.* delivering the opinion of the court in *Cronle v. Hart*, 18 Gratt. 745. See also, 2 Bart. Ch. Pr. (3d Ed.) 1153.

The principal case was also cited in *Shields v. Anderson*, 3 Leigh 738.

sponsible only for their proportion of the amount actually paid, with interest. *N. Y. & W. Steamship Co. v. Inland, etc., Coasting Co.*, 64 Fed. Rep. 811, citing principal case. See also, *Tarr v. Ravenscroft*, 12 Gratt. 663. The object of the whole doctrine of contribution among sureties is equity, and equality of burdens is equity. *Strother v. Mitchell*, 80 Va. 157.

Dower.—On the subject of dower, see generally, monographic note on "Dower" appended to Davis v. Davis, 25 Gratt. 587.

Same—**Estates in Expectancy**.—In *Cocke v. Phillips*, 12 Leigh 257, it is said: "The widow has no claim to dower of the land in which her husband died entitled only to an estate in remainder expectant on his mother's life estate. To entitle a widow to dower, the husband must have been seized in fact or in law. If the husband maketh a lease for life of certain lands reserving rent, and be taketh wife and dieth, the wife shall not be endowed; neither of the reversion (albeit, it is within the word tenements) because there was no seisin in deed or in law of the freehold; nor of the rent, because the husband had but a particular estate therein, and no fee simple." *Co. Litt.* 32 a.; *D'Arcy v. Blake*, 2 Scho. & Lef. 387; *Blow v. Maynard*, 2 Leigh 29, 56."

Fraudulent Conveyances.—On this subject, see monographic note on "Fraudulent and Voluntary Conveyances" appended to *Cochran v. Paris*, 11 Gratt. 348.

Same—**Liability of Grantees for Rents and Profits**.—See, citing principal case on this subject, note to *Backhouse v. Jett*, 2 Fed. Cas. 323, case 710; *Parr v. Saunders*, 1 Va. Dec. 734; foot-note to *Com. v. Ricks*, 1 Gratt. 416.

The principal case was also cited in *Bank v. Hupp*, 10 Gratt. 42.

Chancery Practice—**Sale of Lands Descended and Fraudulently Conveyed to Pay Ancestor's and Donor's Debts**.—To the point that on a bill to marshal assets, or to set aside fraudulent conveyances in favor of judgment or bond creditors, after the debtor's death, a court of equity may sell the land conveyed or descended, the principal case was cited in *Tennent v. Patton*, 6 Leigh 201, 210, 220, 223, 225, 228. On the same subject, see the principal case cited in *Buchanan v. Clark*, 10 Gratt. 177; *Price v. Planters' Nat. Bank*, 92 Va. 481, 23 S. E. Rep. 887; *Werdenbaugh v. Reid*, 20 W. Va. 591, 592.

The Virginia statute, Code 1887, § 3571, Code of W. Va., ch. 189, § 7, was designed to clear up the difficulties arising under the decisions of *Haleys v. Williams*, 1 Leigh 140; *Blow v. Maynard*, 2 Leigh 29; *Tennent v. Patton*, 6 Leigh 196; *McClung v. Belrne*, 10 Leigh 304; *McNew v. Smith*, 5 Gratt. 84; and to

maiden aunt of his wife, living in his family at the time; and by another bill of sale, bearing date the 19th September 1807, expressed to be in consideration of 100 dollars, he conveyed another slave to her. There was evidence, and this court thought sufficient proof, that the first of these bills was antedated, having been in fact executed about the 14th October 1807. These two bills of sale were the subject of controversy in the case of Blow against Maynard.

32 *And on the 14th October 1807, Davis executed two other conveyances of his property: by one of which, in consideration of natural love and affection, he conveyed to his two children Samuel and Elizabeth (then infants, not above seven years old) a wharf in Portsmouth, with the improvements thereon, and the land adjoining the same: and by the other (reciting, that he had acquired by his wife Elizabeth a considerable estate, part of which was real; that upon her consenting to relinquish her right in her own real estate, he had agreed to convey to her and her issue other real property in lieu thereof; that he had appropriated the proceeds of the sale of his wife's real estate, and much of the personal estate acquired by his marriage, to the building a large brick house in Portsmouth, and to the purchase of furniture then in the house; and, therefore, he considered himself bound to secure that house and the lot it stood on and the furniture in it, to his wife and her children, Elizabeth and Samuel) in consideration thereof and of natural love and affection towards his wife and children, he conveyed the house and lot and furniture to S. Whitehead; in trust for himself for and during his life; remainder to the two children and the survivor of them, in fee, with an express power to them to alien after their attainment to full age; remainder, in case the children should die during the life of his wife and without issue living at the time of their death, to the wife in fee. These two deeds were the subject of controversy in the case of Lawrence against Blow.

It appeared, that the two bills of sale to Maynard, and the two deeds of the 14th October 1807, comprised all the visible property which Davis then had in possession.

He died in 1811. His widow Elizabeth married, in 1814, a second husband David Lawrence, who died about the year 1820. At the commencement of these suits she was again a widow.

Margaret Davis, the ward of John Davis, married Edward Young: Evelina, the other female ward, married John B. Levy, and died, living her husband, who took administration of her estate: and William

33 Dickson was the administrator of the ward James Davis, who died in 1804. And in 1821, a suit was brought upon the guardian's bond against Blow the surety, in the name of the justices of the county court, at the relation of Young and wife, Levy the administrator of Evelina, and Dickson the administrator of James Davis, to recover of Blow, the surety therein, the balances due from the estate of John Davis, to his wards respectively, upon his accounts of guardianship. Blow compromised the case with Young and wife,

and with Levy the administrator of Evelina, by the payment of 1000 dollars to each of them. The administrator of James Davis prosecuted the suit to judgment, for the interest of his intestate, and recovered 3019 dollars 64 cents; which was afterwards reduced by discounts, to the sum of 1483 dollars 81 cents; and this last was the sum Blow paid him.

Young and wife, upon the compromise between them and Blow, by deed dated the 27th June 1821, assigned to Blow, all rights, claims and demands, which they had upon the guardian's bond, against Blow himself, or against the estate of John Davis, on account of his guardianship of Mrs. Young; and by the same instrument, released to Blow all suits and actions whatsoever, including, of course, their right of action on the guardian's bond. And upon the compromise between Levy (the administrator of Davis's ward Evelina) and Blow, Levy by the deed dated the 3d August 1821, released to Blow, all claim and demand for or on account of the guardianship of his deceased wife by John Davis &c.

In 1822, Blow exhibited two bills in the superior court of chancery of Williamsburg, impeaching the above mentioned conveyances made by Davis of his property in his lifetime, as fraudulent and void as to creditors.

One was a bill against Eleanor Maynard, Elizabeth Lawrence, and Matthew Manning, sheriff of Norfolk and administrator of John Davis deceased; wherein after setting forth at large all the facts above stated, he alleged that the considerations expressed

in the two bills of sale of slaves, 34 *executed by Davis to Maynard, of the 10th June and 19th September 1807, were feigned; that, in fact, no money was ever paid by Maynard to Davis; that the slaves conveyed by those deeds were constantly held by Davis till his death, he taking and enjoying all the profits; and that the property had ever since his death been held by Mrs. Lawrence, and the profits thereof applied by her to the use of herself and family; that these bills of sale were, therefore, fraudulent and void as against him, and the slaves thereby conveyed ought to be subjected to the debt due to him from Davis's estate; and that attempts had been made to send the slaves out of the state, in order to defeat the plaintiff's claim to have satisfaction out of that property; so that an injunction was prayed, to restrain the defendant in possession of them, from carrying them beyond the jurisdiction of the court, and a decree to set aside the bills of sale, and subject the property to Blow's demand.

The defendants in their answers, denied the circumstances of fraud imputed in the bill; and insisted, that the bills of sale were fairly and bona fide made, and the considerations therein expressed, actually paid.

The only questions in this cause, were questions of fact; and a great many depositions were taken and filed on both sides. It is only necessary to mention, that it appeared in proof, that Miss Maynard had always resided in the family of Mrs. Lawrence and her children; and that the

profits of the slaves in question, had been applied to the use of the whole family, ever since Davis's death.

The chancellor thought the bills of sale fair, and dismissed the bill: and Blow appealed to this court.

The other bill was exhibited against Mrs. Lawrence, Samuel, Elizabeth and Christian Davis, infant children and heirs of John Davis, S. Whitehead, the trustee in the deed of the 14th October 1807, reconveying the house and lot in Portsmouth, Manning the administrator of John Davis, Edward Young and wife, and Levy administrator of his wife Evelina. In this bill also,

35 Blow detailed all the facts *above stated; and he represented the deed made by Young and wife to him of the 27th June 1821, and that made by Levy of the 3d August 1821, as assignments to him of their claims against John Davis's estate on account of his guardianship, entitling him not only to the money he had paid those parties in the compromise of their claims, but to the full amounts that should be found due to them, respectively, upon a settlement of Davis's guardian's accounts. He farther stated, that some real estate of Davis had descended to his heirs; of which he asked an account, and prayed that it might be subjected to his claim. But the chief purpose of this bill was to impeach and set aside, as fraudulent and void as to creditors, Davis's two deeds of the 14th October 1807. The bill alleged, that the deed conveying the wharf and improvements and adjoining land to his two infant children, was manifestly voluntary: and as to the deed conveying the brick house and lot and the furniture in Portsmouth to the trustee Whitehead, that the recital of the deed was false; that the wife had little or no real estate of inheritance; that if she had any, and had joined in the sale and conveyance of it by her husband, there had never been any agreement between them, that he should make any settlement on her and her children, as an equivalent for her inheritance: that the trusts declared in the deed were inconsistent with the agreement alleged in the recital, the deed being in fact a settlement of the subject to the use of Davis himself and his children, with only a contingent resulting use to the wife; that, considering these conveyances in connexion with the bills of sale of slaves to Maynard, and comparing the dates of the conveyances and bills of sale, with the dates of Blow's proceedings against Davis in the county court, it was obvious, that the conveyances were designed to defeat the claims of Davis's wards against him for the balances he owed them, and to defeat his surety's claim to indemnity; and that Mrs. Lawrence had ever since Davis's death been in possession of the brick house and lot and furniture in Portsmouth, receiving and enjoying the rents and profits thereof.

36 Wherefore, *the bill prayed, that the conveyances might be set aside as fraudulent and void, and the subject appropriated to the payment of the debts due by Davis's estate to his respective wards; accounts of Davis's guardianship, to ascertain the debts; accounts of the rents and profits of the property fraudulently conveyed by

the deeds of October 1820; an account of the furniture conveyed; and general relief.

The answer of Mrs. Lawrence insisted, that, in all events, Blow could only demand what he had paid to the wards of her first husband: and, as to the deed of conveyance of the brick house and lot and furniture to the trustee Whitehead, upon the trusts therein declared, she insisted that that deed was fair and valid; that the recital therein contained was true, she having in fact joined her husband Davis in the sale and conveyance of her own inheritance, upon the faith of his solemn promise to convey and settle other real estate upon her and her children; and she was content to have the principal benefit of the agreement given to her children; and that the furniture, for the most part, had been removed from Portsmouth to City Point during the late war, and there accidentally destroyed by fire.

Levy, in his answer, said he had, by his deed of August 1821, assigned to Blow all his interest in the debt due by Davis as guardian of Evelina his late wife and intestate, and had thereby acquitted Blow of all demand against him as Davis's surety in the guardian's bond.

An answer was put in for the infant defendants, heirs of Davis; but the answer was merely formal. As to the defendants Young and wife, Whitehead the trustee, and Manning the administrator of Davis, the bill was regularly taken pro confesso.

It appeared, that Mrs. Lawrence had real estate of inheritance, namely, a tract of land in Charles City county, which was sold by her first husband Davis, and she joined him in the conveyance of it: this conveyance was made as early as December 1801.

37 *There was a great deal of parol evidence, relating to the imputations of fraud.

The chancellor directed accounts to be taken, 1. of John Davis's guardianship of his three wards, respectively, and of Blow's demand against the estate of Davis; 2. of the defendant Manning's administration of Davis's estate; 3. of the value of the real estate of Mrs. Lawrence's own inheritance, sold by Davis in 1801; 4. of the value of the wharf &c. conveyed by Davis to his children by the deed of October 1807, and of the value of the brick house and lot in Portsmouth, conveyed by the deed of the same date to the trustee Whitehead, at the time of the conveyances, as well as the present value; 5. of the value of the furniture conveyed by the last mentioned deed; 6. of the rents, issues and profits of the brick house and lot, since Davis's death, shewing by whom the same had been received; and 7. of the real estate of John Davis descended to his heirs.

The commissioner reported: 1. That John Davis was indebted to his three wards, the aggregate sum of 12627 dollars 38 cents with interest on 7124 dollars 17 cents, part thereof (being the principal) from July 1st 1825; but, supposing Blow entitled to demand only what he had paid, in consequence of his compromises with Young and wife and Levy, his demand amounted to

only 4243 dollars 63 cents, with interest from July 1st 1825, on 3483 dollars 81 cents, part thereof, being the whole amount of principal actually paid by him. 2. That Manning administrator of Davis, owed the estate of Davis a balance of 90 dollars 75 cents. 3. That Mrs. Lawrence's real estate of inheritance, sold by her first husband Davis, in December 1801, was worth at the time, 1500 dollars. 4. That the value of the wharf &c. conveyed by Davis to his children by his deed of October 1807, was at that time, 2000 dollars, and its present value was 500 dollars; and the value of the brick house and lot in Portsmouth conveyed by Davis to Whitehead the trustee, by his deed of October 1807, was then 5000 dollars, and the present value thereof was 2500

38 dollars. *5. That the value of the furniture conveyed by the last mentioned deed, was, at the time of the deed, 500 dollars; and its present value 350 dollars, which the commissioner charged to Mrs. Lawrence, with interest from the 1st July 1811, the time of Davis's death, amounting, principal and interest, to 644 dollars. 6. That the rents and profits of the brick house and lot in Portsmouth, accrued since Davis's death, was 1960 dollars; all of which he charged to Mrs. Lawrence, with interest on the rents yearly as they accrued, amounting, principal and interest, to 2669 dollars. And 7. That the value of the real estate descended to Davis's heirs, was 750 dollars. This was a reversionary interest expectant on an estate of dower, which did not expire till after Davis's death.

And then, the cause coming on to be further heard, the chancellor, declaring that no rule of law or equity precluded Blow from acquiring and claiming as assignee for valuable consideration, the amounts justly due by John Davis to his wards Margaret and Evelina, and that, therefore, Blow was entitled to demand of Davis's estate the sum of 12627 dollars 38 cents, with interest &c. reported by the commissioner as the sum actually due by Davis to his wards, decreed that sum to Blow against Manning the administrator of Davis; that is to say, 90 dollars 75 cents, the balance reported to be in Manning's hands, to be levied de bonis propriis, and the residue to be levied of assets of Davis's estate, quando acciderint. He declared, that the widow was not entitled to dower of the real estate of Davis, which descended to his heirs, as Davis in his lifetime was only entitled to the reversion thereof; and he ordered, that the lands descended should be sold, and the proceeds brought into court to be applied towards the satisfaction of Blow's demand. And then, declaring that Davis's two deeds of October 1807, were fraudulent and void as to his creditors, but that his widow was nevertheless entitled to dower of the real estate thereby conveyed, he decreed, that

39 Mrs. Lawrence should pay Blow, the sum of 644 dollars, being the *present value of the furniture, with interest thereon from Davis's death, and the sum of 1779 dollars 87 cents (being the balance of the rents of the brick house and lot after deducting one third thereof for her dower) with interest on 1306 dollars 67 cents (being two thirds of the principal of the rents).

And, in case the sum directed to be paid by the administrator Manning, and the proceeds of the sale of the real estate descended, and the sums decreed to be paid by Mrs. Lawrence, should not suffice to satisfy the debt decreed to Blow, he directed Mrs. Lawrence's dower to be assigned her; and, that done, that the marshal should sell the wharf &c. and the brick house and lot, conveyed by Davis's two deeds of October 1807, and bring the proceeds of the sales into court, to be applied to the payment of the debt decreed to Blow.

From this decree, Mrs. Lawrence appealed to this court.

The causes were argued here, by Johnson and Leigh for Maynard and Lawrence, and by R. B. Taylor and Stanard for Blow. The questions discussed at the bar, were,

I. Whether the conveyances made by John Davis in 1807, namely, the two bills of sale to Maynard, and the deed conveying the house and lot in Portsmouth, and the furniture in it, to the trustee Whitehead, were fraudulent and void, as against Davis's creditors?

The question as to the bills of sale to Maynard, was intirely a question of fact, depending chiefly on the proofs in regard to the reality of the transaction, whether the considerations expressed in the bills of sale, were actually paid by Maynard to Davis or not. The fact, that Maynard had always lived with Lawrence and her children and that Lawrence had enjoyed the profits of the property jointly with Maynard, was relied on as an evidence that the bills of sale to Maynard were fictitious transactions; but the question, whether Lawrence was therefore accountable jointly with Maynard for the profits of the slaves, though it was decided by the court, was not made or discussed at the bar.

40 *The question as to the validity of the conveyance of the house and lot and furniture to the trustee Whitehead, was a mixed question of law and fact. The opinion of judge Carr exhibits, very fully, all the topics of the argument.

II. Whether Blow was entitled to demand as the assignee of the wards Margaret and Evelina, the full amounts due to them from Davis, on the accounts of his guardianship, or, as a surety bound in the guardian's bond, indemnity only, that is, the sums he actually paid to those wards on his compromise with them?

III. Supposing the conveyance of the house and lot in Portsmouth, fraudulent and void, whether Lawrence who had received the rents and profits since the death of Davis, was accountable for any rents and profits at all before the decree? Supposing her so accountable, whether she was accountable for the rents that accrued during her second coverture with David Lawrence? And whether, in all events, the decree was not erroneous in decreeing interest on the rents?

IV. Whether the decree was right in decreeing a sale of the real subject, instead of leaving the creditor to his extent?

V. Whether, supposing the two conveyances of Davis, of October 1807, fraudulent and void, his widow Mrs. Lawrence was

entitled to dower of the real estate thereby conveyed?

CARR, J. The first question is as to the amount, which Blow can claim of the guardian's representatives? The administrator of James has recovered against him as surety in the guardian's bond; to the amount of this recovery, he claims as surety; and thus far it is agreed, that he has a right to indemnity only. But, as to the claims of the wards, Margaret and Evelina, there has been no recovery against him: the suit on the guardian's bond was at the relation of these wards, as well as James; but pending that suit, Blow bought up their claims, and the suit as to them was dismissed. He now contends, that, as purchaser and assignee, he is entitled to

stand in their shoes, and recover of
41 Davis's *estate the full amount of their claims: it is contended, on the other hand, that Blow, being a surety, could not become a purchaser, otherwise than as trustee for his principal, to whom, as well as to himself, the benefit of the purchase must accrue; in other words, that he is entitled to nothing more than the money he had paid, with interest. The chancellor has decided, that there was nothing in Blow's character of surety, which prevented him from purchasing, for his own exclusive benefit, the rights and interest of the wards: and I am well satisfied that he is correct.

The analogy attempted between the surety in a bond and a trustee or other agent, does not (as it seems to me) hold. Trustees, agents, auctioneers &c. are intrusted confidentially with the property of others, for the purpose of selling it to the best advantage: it is their duty to use every fair effort, to enhance the sale: but if they are suffered to purchase this property for their own benefit, self-interest prompts them to depress instead of enhancing it; and he must be ignorant indeed of human nature, who has not learned, that in a conflict between interest and duty, the latter is too commonly the victim. To prevent these conflicts, and the temptations to fraud, which it is always difficult and often impossible for courts to unravel, the law has wisely determined, that no such agent shall purchase of himself for himself. But how does this reasoning apply to the surety in a bond? He has bound himself with his principal to pay a sum of money; to the obligee he is a debtor for that sum: but this creates no fiduciary relation between his principal and himself. He has lent the principal his name and his credit: but the principal has trusted nothing to him. In the case before us, Davis was appointed guardian for the three infants, and Blow as his surety, became bound with him, that he should discharge his trust faithfully, render just accounts, and pay and deliver to his wards, all such estates as should appear to be due to them, when thereto properly required. The guardian wasted the estate of his wards. At the instance of

the surety it was taken from him, and
42 he was ordered to settle *his accounts.

This settlement was made on vouchers furnished wholly by himself, and he was found largely a debtor to each of his wards.

The guardian died leaving things in this situation: time passed on; the infants married; and suit was brought on the bond against the surety, who, thus bound for the claims of the wards, bought out the interests of two of them. Did he in this, violate the letter or the spirit of that rule, which forbids a trustee to purchase for himself? I cannot conceive how. He bought, not of himself, but of the owners: his purchase was of their rights merely, and did not fix the amount of their claims. Nor was this amount to be fixed in any proceeding against him, or in which he could by collusion influence the decision. So far as he was a purchaser, he had to sue the representatives of his principal, and in that adversary proceeding establish the amount of the debt due from the guardian to his wards. No body will deny, that any stranger could have bought the rights and interests of the wards, and would have stood precisely in their shoes: and shall we deny the same power to the surety, whose kindness had exposed him to the danger of losing such large sums, and who had a much stronger and higher motive than the mere speculator, for seizing upon this tabula in naufragio? What right have the representatives of the guardian to make objections, or to claim the benefit of the purchase? Was it made with their money, or their credit, or at their risk, or by reason of any advantageous position in which they or the guardian had placed the surety, and which imposed on him a fiduciary character? Nothing of all this is pretended. The case, in my mind, stands intirely clear of the analogy attempted to be established.

But it was argued, that there is a privity between the principal and surety; that the latter is let into all the secrets and points of defence of the former, and should not be suffered, with the aid of these, to compromise the claim, and then demand the full amount from his principal. I can see nothing in the privity which should affect the case, especially in equity; and as to the secrets of defence being imparted to

43 *the surety, and enabling him to compromise, something must be shewn in the record to support these allegations, before we can venture to found conclusions on them. There seem to have been no secrets, no points of defence in the case. The guardian himself had furnished the materials for making up the accounts; and in the only case in which a judgment was rendered on the bond against the surety (that of Dickson administrator of James Davis) it was rendered for the amount appearing on the guardian's account previously settled. In this particular case, Blow claimed, as surety, to recover only what he had paid, and no objection was made as to the amount of the judgment. As to the two other cases, the surety purchased the rights merely of the wards: they might be something or nothing; the guardian might be solvent or otherwise; these were risks which he had to run. He bought just as any other would, and had to establish the claims by suit, in which his situation as surety gave him no advantage, and ought to subject him to no disadvantage.

There was another point made at the bar:

that Blow cannot recover more than the sum he paid to Levy, because the deed executed to him by Levy is not an assignment but a release, and a release to one obligor discharges all his co-obligors. The correctness of the legal position, that a release to one of several obligors releases all, cannot be doubted; and, if applicable, its effect would seem to be, not merely to restrict the claim of Blow to what he had paid, but to extinguish it altogether. Davis's representative might say to Blow, "you claim of me under this bond, into which you entered with Davis; but you have got a release from this bond, and that discharges your co-obligor, and me as his representative." So, when a surety pays off a bond, lord Hardwicke says, it would be useless for him to take an assignment of it; and the Master of the Rolls, in a subsequent case, assigns the reason; for he says, if the surety should sue upon it, he must do so in the name of the obligee, and the obligor could plead payment, and defeat the action. But these principles do not apply here: for we

44 know that *so soon as a surety has satisfied the creditor, he takes his place in equity, with all his rights, and all his powers. And what difference does it make to the principal debtor, whether the surety suffers a judgment first, or discharges the bond without? Suppose A. as principal and B. as surety execute a bond to C. for 1000 dollars. If there is judgment, and B. discharges it (no matter how), A. must pay the amount to him. But if B. takes up the bond, before judgment, what then? he applies to A. "Here is your bond to C. in which I was surety; I have taken it up, and you must pay me the money." A. may say, "you should have applied to me before you discharged the bond; I do not owe the money; the consideration has failed, or there was a fraud; and I will not pay you." In such a case, B. no doubt, would have to litigate the question, and could only recover of A. what he was found to owe C. But suppose A. should say to the surety, "I acknowledge that I owe this money; I had a valuable consideration from C. for the bond; and you were so kind as to lend me your credit: but for all this I cannot agree to pay you: you have given only 500 dollars for the bond; and besides, you have taken no assignment of the claim, but a release merely, which enures to my benefit, as well as yours." Would not reason and justice and equity reply, "you admit that you owe this money: here is an extinguishment of the claim of your creditor, which your surety has obtained: for what consideration he got it, or whatever the form of the transaction, are questions which do not concern you: you owed the debt to C.; your surety has extinguished his claim, and that transfers his rights and makes you debtor to the surety, for the precise sum you owed him." Does not this strike the common sense of every man? If not, it must be because he has perplexed his mind with the legal ideas of the equal obligation under which principal and surety come to the creditor, and the operation of a release to one co-obligor: but these ideas have no place in the view which equity

takes of the transaction. It considers the debt due by the principal only,
45 *though both are bound by the bond; and the moment the surety discharges the claim of the obligee, equity makes him the obligee. In the case before us, therefore, it seems to me a matter of no moment, for what consideration Blow obtained the discharge of Evelina's claim, provided he acted fairly, nor in what form it was taken, provided it effectually shielded the representative of Davis from that claim. Blow states, in his bill, that he purchased the claim, and took an assignment: Mrs. Lawrence says, she knows nothing of this transaction, and leaves Blow to his proof. The instrument is in the form of a release. Levy, who executed it, says he sold and assigned his claim, as administrator of his wife, to Blow. These are mere forms of speech, and cannot affect the real character of the transaction before the court. The true questions are, did Davis, as guardian of Evelina, owe her money? and had Blow extinguished that claim in a fair manner? If so, he stands in the shoes of Evelina. These principles appear so clear to me, that I cannot doubt of their correctness. I do not think, therefore, that the form of the deed, whether an assignment or a release, is material: and, though I think it of little moment, whether we take Blow as a surety extinguishing the debt, or a surety purchasing the claim, yet I think we must take him in the latter character; both because the parties to the transaction (and the only parties concerned) say it was a purchase; and because from the nature of the thing it seems so. It was the payment of a sum certain, for an uncertain, unliquidated claim, which might be more or less, and which might turn out a total loss from the insolvency of the debtors.

The next question is, as to the validity of the two deeds made by Davis of the 14th October 1807. It is agreed, that the deed conveying the wharf &c. to his two children, in consideration of natural love and affection, is fraudulent and void as to creditors. As to the other deed, conveying the brick house and the lot it stood on in Portsmouth and the furniture in the house, to the trustee Whitehead; it is contended, on the one hand, that this deed is also fraudulent

46 *and void as to creditors, and on the other, that though this is a post-nuptial settlement, it was fairly made for a valuable consideration, and therefore valid. As these settlements have not often come before the court, I have given the subject some examination, and shall state what seems to me the amount of the cases I have looked into.

That there are circumstances, under which post-nuptial settlements will be supported, both against creditors and purchasers, there can be no doubt. Thus, many cases decide, that a voluntary payment of a portion by any friend of the wife, will be a consideration which will support a settlement made after marriage. *Colville v. Parker*, Cro. Jac. 158; *Jones v. Marsh*, Ca. Temp. Talb. 64; *White v. Thornborough*, Prec. in Cha. 425; *Ward v. Shallet*, 2 Ves. sen. 18; *Ramsden v. Hylton*, Id.

304; *Russel v. Hammond*, 1 Atk. 13; *Stileman v. Ashdown*, 2 Id. 479. The portion, however, must be paid in consideration of the settlement. *Gardner v. Painter*, Ca. Temp. King. 65. So the giving up an interest in the settler's estate, will support a post-nuptial settlement; *Jones v. Marsh*, ubi supra. And though the relinquishment of this interest be not expressed to be in consideration of the settlement, yet if it be by the same deed, and the settlement is in favour of the person relinquishing, the relinquishment will be presumed to have been the inducement, and not that both were voluntary. And it is the opinion of *Atherley*, in his able *Treatise on Marriage Settlements*, (pp. 159-60,) that though the interest was not relinquished by the settlement, but by another deed; yet if it was done about the same time, so that it might be reasonably presumed to be a part of the same transaction, the court would so presume, and look upon it as the consideration which produced the settlement. For this opinion the cases of *Scot v. Bell*, 2 Lev. 70, and *Chapman v. Emery*, Cowp. 278, are cited. In the first of these, the wife joined the husband in levying a fine, and selling a tract of land, which had been settled for the benefit of herself and issue; and on the same day, the husband covenanted

47 *to stand seized of the manor of B. to the same uses, to which the land sold had been settled. The husband, some years after, mortgaged the manor of B. And one claiming under the mortgagee, having brought ejectment, the question was, whether the settlement of the manor of B. was fraudulent quoad the mortgage: and by *Hale* and the court, "the settlement is not void as to the mortgage, for the old settlement being destroyed, and the new made the same day, an agreement by him to make the new settlement, in consideration the wife would pass the fine, and bar the old settlement, shall be intended, and the consideration shall extend to all the uses of the old settlement." In the case in *Cowper*, the point was not directly before the court; but *lord Mansfield* expresses a pretty strong impression the same way. The cases also shew, that not only the relinquishment by the wife, of a certain and fixed interest in her husband's estate, but also of a contingent interest, will support a post-nuptial settlement, where there is no badge of fraud; as the giving up her interest in a bond, though contingent. 1 Eq. Ca. Abr. 19; 2 Ves. 16. So, likewise, the releasing her jointure or dower. *Pre. in Cha.* 113; 2 Lev. 70, 147; 2 Vern. 220. If the parting with these contingent interests by the wife, will support such settlements; it follows, a fortiori, that her parting with her own estate, or making a charge on it for her husband's benefit, will support them; 2 Lev. 148, Cowp. 278, and *lady Arundell v. Phipps*, 10 Ves. 139. It has also been decided, that in settlements after marriage, a consideration moving from the wife, will support limitations to her children, as well as in her own favour; *Ward v. Shallet*, before cited, *Lavender v. Blackstone*, 2 Lev. 147. But though these settlements will be supported, where they appear to have been

made upon a fair contract for a valuable consideration, and in the execution of such a contract; yet, from the relative situation of the parties, and the convenient cover they afford a debtor to protect his property and impose upon the world, they are always watched with considerable jealousy.

48 The *weight of authority goes to say, that a post-nuptial settlement will be good against subsequent creditors, even where there is no consideration, provided the settler is not indebted when he makes it, and the transaction is free from circumstances of fraud. But, where the debtor is greatly indebted, and harassed by his creditors, the very fact of his making a settlement, excites strong suspicion; and to support it, an adequate consideration must be shewn, together with the absence of those other badges, which generally attend a fraudulent transaction.

With this view of the law, let us examine the transaction before us. The deed from *Davis* and wife conveying her land in *Charles City*, was executed in *December 1801*. The price and value of this land was 1500 dollars. The deed from *Davis* to the trustee, for his children and wife, was executed in *October 1807*, (nearly six years after), and conveys real property valued at 5000 dollars and personalty worth 500 dollars. It was insisted, that these conveyances were made, in execution of an express positive agreement between the husband and the wife, by which she agreed to part with her inheritance, and he, in consideration thereof, bound himself to convey and settle the property mentioned in this deed of trust, to the use of her and her children. We have seen, from some of the cases I have cited, that if the deeds had been made the same day, or about the same time, so as to afford a fair presumption that they were parts of the same transaction, the court might have so presumed; but the lapse of six years takes away all ground for such presumption; and the case must stand (as indeed it was placed in the argument) upon the footing of express and positive contract. It was contended, that this contract was proved, 1. by the answer; 2. by the recital in the deed; 3. by the parol evidence. As to the answer; every voluntary post-nuptial settlement, where the settler is indebted, is, as against his creditors, fraudulent and void; and every settlement will be taken as voluntary, unless those claiming under it can shew, that it was made for a valuable consideration.

49 *The charge of fraud in the deed, made by the creditor here, is the common charge which every creditor would make under such circumstances; and there is no discovery sought of *Mrs. Lawrence*, by way of evidence as to the deed. If, under such circumstances, that defendant, charged with fraud in accepting and holding under a voluntary deed, could by her own answer, supply proof of a contract, and the execution of it, by which she establishes a valuable consideration for the deed; then in truth it may be said, that to require proof of a consideration at all is a mere farce, and the statute of frauds (calling for a written contract) a dead letter. But there is no such law: the defendant

who, in his answer, sets up a contract by way of defence, must establish it by legal and disinterested evidence. As to the recital in the deed; this point rests upon principles pretty nearly akin to the last. It would put into the hands of a fraudulent debtor, a most dangerous weapon: he could, at pleasure, by his own act, furnish evidence to support every conveyance he might make. In some early cases, it does however appear, that much more weight was given to such recitals than they deserved: see an anonymous case, Pr. in Cha. 101, and Dundas v. Dutens, 1 Ves. jun. 196. But in *Batterbee v. Farrington*, Swanst. 106, the master of the rolls places the subject in the true light: he says, "The distinction, I apprehend, is, that against all persons claiming under the settler, the recital is conclusive; but it would be difficult to maintain, that a recital in a post-nuptial settlement of ante-nuptial articles of the existence of which there is no distinct proof, would be binding on creditors. Such a doctrine (he adds) would give to every trader a power of excluding his creditors by a recital in a deed to which they are not parties." Lastly, the parol evidence relied on as proving the agreement, does not prove it. One of the witnesses, whose evidence is relied on, proves nothing at all to the purpose. Another witness proves, not an agreement indeed, but a loose and vague conversation between the husband and wife, in which the husband proposed,

50 that "if the wife would join in the conveyance of her real estate, he would build her a house on a lot of his in Portsmouth, which house and lot he would convey to her. It is impossible to regard this conversation as a contract, without an utter disregard of the policy and letter of the statute of frauds; but take it as the contract, can we consider this deed as made in execution of that contract? They are six years apart. By the contract, he was to convey a house and lot; by the deed, he conveyed a house, two lots, and 500 dollars worth of furniture: by the contract, he was to convey the house and lot to her alone; by the deed, he conveys to the use of himself for life, then to the use of his two children in fee, with power to them, or either, to sell the whole so soon as they arrive at age, and directions to the trustee to convey to their vendee, and it is only in case they shall not choose to alienate, and shall both die without issue living at their death, in the lifetime of the wife, that the trustee is directed to hold the property for her use. Is this executing a contract by which he agreed to convey the property to the sole use and benefit of the wife? It may be said she choose to have it settled on her children; but of such change in the contract (as I call it for argument sake) there is no proof; nor can we presume, that she would wish the land so settled as to cut herself off from all but a bare possibility of ever enjoying it; a possibility predicated upon the death of both her children without issue in her lifetime. In *Lavender v. Blackstone*, 2 Lev. 147, a man married before he was of age: he received a portion of £2000, with his wife, and promised that when he should arrive at age, he would set-

tle his estates on the marriage. Some three or four years after he came to age, being much indebted, he made a settlement; and this afterwards coming in question, lord C. J. Hale and the court say, in their fourth resolution, "Though it was proved that the infant, upon the marriage, promised to settle his estate when he came to age, upon himself and his issue (which it was agreed, was a sufficient consideration to avoid 51 fraud, though *an infant by law is not compellable to fulfil his promise) yet this settlement, not being made till three or four years after he came of age, and not being made directly according to the said promise, it shall not be presumed to be made in performance of the promise, without direct proof to that purpose." And the settlement was declared fraudulent. This decision, it must be observed, was made in the 27th year of Charles II. before the statute of frauds, when it was no objection to the promise, that it was by parol. The case of *Reade v. Livingston*, 3 Johns. Ch. Rep. 481, bears some resemblance to ours. A post-nuptial settlement was made by one in debt, and it was alleged to be in execution of an ante-nuptial parol promise; fourteen years had elapsed between the marriage and the settlement; and the provisions of the settlement did not exactly agree with those of the alleged ante-nuptial parol promise, but they agreed more nearly than in our case. The chancellor, in the course of his opinion, says, "If the present case had arisen prior to the statute of frauds, I apprehend it would have been deemed a fraudulent settlement in regard to existing creditors, from the want of a sufficient connexion in point of time, and of correspondence in point of proof, between the settlement and the alleged agreement."

I should pronounce this settlement, then, fraudulent as to existing creditors, upon these grounds, if there were none other: 1. that there is no contract proved; 2. that if a contract, it is a parol contract for land; 3. that there is such a lapse of time between the alleged contract and the settlement, and such a discrepancy in their terms, that the latter cannot be presumed to be in execution of the former.

But there are other and strong evidences of fraud attending this settlement. The situation of the settler: he had given up business, had become idle and intemperate. The large debts due to his wards, with the full extent of which he was well acquainted, were pressing heavily upon him. A suit was pending against him to compel him to settle the accounts of his guardianship 52 of his deceased ward James *Davis, and distribute his estate; he had been ordered to render his account, and was summoned to attend the commissioners on the 10th October 1807, but excused himself from attending at the appointed day. On the 21st September 1807, his surety Blow, had had him summoned to the ensuing October court, to give him counter security, or deliver up the estate of his wards. And on the 14th October, this settlement was made, just before the court to which he was summoned; for on the 19th October 1807, the court made an order, that Davis should give counter security at the Decem-

ber term, or deliver up the estate, the summons issued against him having been returned executed. Nor is this all: on the same 14th October, he executed to his two children, a deed for his house and wharf in Portsmouth; a deed confessedly voluntary and fraudulent. About the same time, too, as it appears in proof, he executed a bill of sale (antedated 10th June 1807), conveying to Miss Maynard, the aunt of his wife, living in his family, ten slaves, and a second bill of sale conveying to her another slave, probably forgotten when the first was made. By these deeds, he divested himself of every atom of property he held in possession; of house, lands, furniture, slaves; every thing of most necessary and daily use in living. And to whom were these conveyances made? A wife, two children not above seven years of age, and a maiden aunt of his wife, who had always lived, and always continued to live in his family. Could he possibly have selected instruments better fitted for his purpose, if his intention was to cover his property from his creditors, and still retain the use of it? And, accordingly, it is abundantly proved, that he did, to the day of his death, retain the actual use, possession, and substantial ownership of the whole property real and personal. Again; it is clearly proved, that the transactions were conducted with that sort of secrecy which is always a badge of fraud. There is yet another objection to which this settlement is obnoxious: the consideration for which it is alleged to be made is the wife's land, worth 1500 dollars; the property settled is worth 5500

53 *dollars, four times the value; and in these settlements, inadequacy of price, especially if the settler be embarrassed, and the inadequacy gross, is considered among the strongest evidences of fraud. See the very sound remarks of Atherley, in his chapter headed "Considerations which will support settlements after marriage," and the cases he cites, especially *Dewey v. Bayntun*, 6 East. 257. These objections taken together force my mind irresistibly to the conclusion, that this settlement was fraudulent in fact and void against creditors.

In the account taken, the commissioner has charged Mrs. Lawrence with the annual value of the house while she occupied it. This charge was sustained by the chancellor, and formed one of the grounds of objection to his decree, in the argument. With respect to this question of rents and profits, my brethren are against the decree allowing them. I have not been able to bring my mind to the same conclusion, though I cannot say that I have come decidedly to a different one. I, therefore, choose to leave this point open for a fuller court.

As to the case of *Blow v. Maynard*, in which the chancellor has declared the two bills of sale of slaves, made by John Davis to Eleanor Maynard, bearing date the 10th June and the 19th September 1807, fair and valid as against Davis's creditors, I differ with him in opinion *toto cælo*. I have seldom seen a case, which, in my judgment, was more strongly marked with actual fraud. The evidence leaves no doubt on

my mind, that the first of those instruments, though it bears date on the 7th June, was probably not executed, and at all events not delivered, till about the 14th October, when Davis was settling all his real estate in possession to the use of his family: that Maynard never paid the considerations expressed in the bills of sale, or any part of them, and never had any means of making such payment: that the payments were feigned, and the transactions wholly fictitious: that notwithstanding the bills of sale

Davis continued in possession of all 54 the slaves, taking and enjoying *the profits, thenceforth, till his death: and that these deeds were designed and contrived to defraud Davis's creditors, and especially his wards, of their just demands.

GREEN, J. Agreeing with my brother Carr, that the conveyances sought to be set aside in these causes, are fraudulent, in law and in fact, and void as to the creditors of the grantor, I shall confine myself to the examination of the questions which arise in consequence of such a declaration.

The first of these is as to the true amount of Blow's claim. He paid, in order to discharge himself from his responsibility as surety for John Davis, in his bond as guardian of Margaret, Evelina and James Davis, the sum of 3483 dollars 81 cents, upon compromises severally made with those who represented their rights: and if he is only entitled to claim indemnity, as a surety entitled to the remedies which belonged to the creditors, his recovery must be limited to the amount he so paid, and interest thereon. But he insists that he is entitled to claim as assignee of Margaret and her husband, and of the administrator of Evelina, the full amount due from Davis to them, which, together with the amount which he paid to the administrator of James upon a judgment, would be equal to nearly three times the amount of what he was really out of pocket.

The bill alleges, that, in consideration of 1000 dollars &c. the administrator of Evelina assigned to Blow his claim against Davis; and the deed of the administrator, is exhibited in support of that charge. The administrator, in his answer, admits that, by a deed executed by him, a copy of which was exhibited as a part of his answer, he did, for the consideration therein mentioned, assign and transfer to Blow all his interest in the debt due by John Davis to his intestate as her guardian, and released him from all claims on account of Davis's guardianship. From these pleadings, no one could possibly conceive, that Blow intended to affirm, or the administrator to admit, that there was any contract

55 between the parties, other than that evidenced by the deed *exhibited by both (for they are precise copies of each other) as the evidence in support of the declaration and admission, that an assignment had been made: there is no suggestion, that there was any agreement other than that evidenced by the deed, or that there was any mistake or omission in reducing the agreement to writing. When we look at that deed (which is perfectly formal) it contains a simple release of Blow's liability for Davis's guardianship,

and not the slightest intimation of an intent or agreement to assign the claim against him. The fact of the assignment averred in the bill, is put in issue by the answer: it was one in which the defendants had a deep interest, and in respect to which they had a right to call for proof: and no proof is given. The answer of the administrator would be no evidence against the other defendants, even if it admitted an assignment otherwise than by the deed itself.

The deed executed by the parties, in pursuance of the compromise between Blow and the other ward, Margaret, does indeed contain a formal assignment to him, of all her claims upon Davis's guardian's bond: but, at the same time, it contains also a general release of Blow's responsibility as his surety. This release extinguished the obligation in toto, as to all the parties. A release of one of several obligors, whether the obligation be joint only, or joint and several, is a release of all, even if it contain a proviso that the others shall not have the benefit of it. *Everard v. Herne*, Litt. Rep. 191; *Clayton v. Kynaston*, 2 Salk. 574. It was argued, that the surety might take an assignment of the debt and obligation of his principal, with the same effect as any stranger. Admit it (though the position is not maintainable) and what would be the effect of a release of one obligor, and an assignment quoad the other, to a stranger, by the same instrument? The assignment would pass nothing, since the release would annihilate the obligation intirely. But suppose there had been no release connected with the assignment, the effect would have been the same; it would have been a payment or satisfaction of the debt, which the

56 principal *might have pleaded with effect, since no man can owe a debt to himself. And this was in effect the judgment of lord Hardwicke in *Gammon v. Stone*, 1 Ves. sen. 339, in which he held, that a surety upon paying the debt, could not claim an assignment, because "it would be quite useless." Neither is there any instance in which a surety has come into a court of equity, claiming as a legal or equitable assignee, the benefit of the securities given by his principal to the creditor: he can only claim to be substituted to the right of the creditor, in respect to such securities, so far as to indemnify him. And this, I think, is the measure of the relief, to which Blow, the surety here, is entitled.

In respect to the personal property fraudulently conveyed, those who have held and enjoyed it, are accountable to the creditors of the fraudulent donor, for it and its proceeds and profits, in like manner as a rightful executor would be. The grounds upon which such creditors may resort to a court of equity, were examined in *Chamberlayne v. Temple*, 2 Rand. 384. In the present case, there was an additional ground of jurisdiction; the necessity of resorting to that tribunal, to prevent the property from being withdrawn from the claims of the creditor: an ordinary branch of equitable jurisdiction, in cases of fraud combined with danger to the property, or of miscon-

duct, waste or improper disposition of the assets, even in the case of a rightful executor. *Anon.* 12 Ves. 4; *Middleton v. Dodswell*, 13 Id. 266.

The chancellor properly held, that Mrs. Lawrence was not entitled to dower in the lands descended to Davis's children, which were held by his mother in dower until after his death, and that she was entitled to dower in the real property conveyed by Davis to his children and the trustee Whitehead, not indeed for the reason assigned, that the fraud, with which these conveyances were tainted, cannot be imputed to her by reason of her coverture, but because she did not join in the conveyances.

Another question is, whether the lands descended to Davis's heirs (the dower lands of his mother) and those conveyed *by him to his children and Whitehead (which, for the purposes of this cause, must be also considered as descending to the heirs of Davis, the conveyances being void), ought to be sold out and out, or only extended for the satisfaction of the plaintiff's claim. I do not know, that this question has ever been considered in this court. In the late cases of *Coleman v. Cocke*, 6 Rand. 618, and *Halley v. Williams*, 1 Leigh, 140, it did not occur. In the former, no objection was made to the decree directing the sale of the lands, as it was said to be wholly immaterial to the interests of the parties whether they were sold or not; and, in the latter, there was a valid mortgage which the judgment creditors had a right to redeem, and to stand in the shoes of the mortgagees, and (selling the land under the mortgage) to tack their judgments.

The real question here is, not whether a court of equity setting aside a fraudulent deed in favour of a judgment creditor in the lifetime of the debtor, can sell the land (a power repudiated by lord Hardwicke in *Higgins v. The York Buildings Co.*, 2 Atk. 107.) but, whether, in such a case, in a proceeding in equity against the heir and fraudulent donee of the debtor, upon a judgment against him in his lifetime, or on his bond binding his heirs, the lands can be sold? In the case of a creditor, who had obtained a judgment in the lifetime of the debtor, lord Hardwicke decided that question in the affirmative, decreeing a sale of a moiety only of the land, because only a moiety was bound by a judgment at law: declaring, that equity, whilst it could not change the rights of the parties, might accelerate the payment, by directing the sale of a moiety, and not let the creditor wait until he was paid out of the rents and profits. This principle was asserted by lord Redesdale in *O'Gorman v. Comyn*, 2 Scho. & Lef. 138, and *O'Fallon v. Dillon*, Id. 13. He states, that such was the settled doctrine in Ireland, where, we know, the english law is established, both in the courts of law and equity. The rule seems to have been established in England, as

58 far back at least as 1730; when, *in the case of *Robinson v. Tong*, 3 Vin. Abr. Assets, A. pl. 28, p. 145, it was affirmed by counsel; and, in that case, an advowson was decreed to be sold at the instance of creditors, as assets descended, and the decree

was affirmed in the house of lords. The creditors, there, do not appear to have been, and probably were not, judgment creditors. This principle, so far as I am informed, has been uniformly practised on in Virginia, in the cases of heirs bound by the obligations of their ancestors. And although I cannot see clearly the foundation of this equity to sell, when the law only authorizes an extent, or a personal judgment or decree against the heir, for the value of the assets descended, whether alienated by him or not (see the statute of fraudulent devises), yet, I think we are bound by the practice founded on these precedents so long acquiesced in.

The only portion of the real property in question, which has produced any profits since the death of Davis, is the house in which he resided, and the lots connected with it. These have been occupied by Mrs. Davis, during her widowhood, both before her second marriage, and after the death of her second husband, and by him during his life. Estimated rents (abating one third for her dower) with interest during the whole time, have been decreed against Mrs. Lawrence. The propriety of that part of the decree is questioned.

The decree is certainly erroneous, so far as it subjects her to the payment of rents and profits accruing during her second coverture, and with interest on any portion of them.

There is no adjudged case, either here, or in the courts of Westminster hall, so far as I am informed (and the counsel in this cause admitted it to be so) which determines the question, whether or no, in a case where there is no incumbrance on the land descended, either by judgment against the ancestor or otherwise, and a creditor by bond binding the heir, sues him at law or in equity, the rents and profits received by him can be reached as assets. There are, however, various dicta to be found in respect to that question.

59 *The first is in the year book of 48 Ed. 3, 32, b., which as abridged by Viner (vol. 3, Assets, C. pl. 3, p. 147,) is to this effect: "If the heir aliens the assets by fraud to oust the debtee of his action, and takes the profits to the value of the debt, this shall be assets." But Brooke, in abridging the same case (tit. Assets by descent, pl. 10, quoted 3 Vin. Assets, B. pl. 3, p. 146, note) states it more at large, thus: "So when the plaintiff said that assets descended to the heir, and that he had conveyed them away by fraud to oust him of his action, of which lands the heir took the profits; and the defendant said, that he made a feoffment to J. R. in fee upon condition, and as to taking the profits no law will put him to answer; and it was not adjudged: Nevertheless it seems, that it is not assets to charge him, for he had no franktenement in him of it." And in Heningham's case, Dyer 344, pl. 1, Dyer said, extrajudicially, "If the profits of the land descended, from the death of the ancestor to the day of the writ, amount sufficiently to satisfy the debt, and the plaintiff will shew that to the court, in an action of debt against the heir, and he cannot deny it, the plaintiff shall have a general judg-

ment and execution immediately;" that is a personal judgment against the heir; which Manwood denied totis viribus. In Shetelworth v. Neville, 1 T. R. 454, in an action of debt against an heir upon the bond of his ancestor, he pleaded, that particular lands specified descended to him, that his ancestor was bound to him in a bond for a specified sum, and that he had laid out for repairs of the property £100. beyond the rents and profits received before the suing out of the writ; to which the plaintiff demurred; and the court sustained the demurrer, upon the ground, that the plea was bad for want of an averment, that the repairs were necessary, and made before he had notice of the plaintiff's demand. And Ashurst, J., added as "a more substantial objection to the plea, in point of reason, that the case of an heir at law is not like that of a trustee for the payment of debts. A trustee is not at liberty to

60 use: they *must go in diminution of the just debts; but that is not the case with respect to an heir at law; for till possession is recovered against him, he is entitled to the rents and profits; he is entitled to receive them till judgment is given against him. In the meantime, he may have received more than sufficient to pay for the repairs." In the case of Higgins v. The York Buildings Co., 2 Atk. 107, several judgment creditors filed a bill to set aside a deed for an estate, as being fraudulent as to them; which being done, they claimed against the fraudulent donees an account of the rents and profits from the filing of the bill; which was refused. The observations of lord Hardwicke are stated in a most confused and blundering way, after the manner of that reporter; who attributes to him the declaration, that "he did not know, in the case of fraudulent conveyances, that the court of chancery had ever done any thing more than remove the fraudulent conveyances out of the way; nor were there any cases which he could find, of decreeing profits back against the original debtor and owner of the estate, received pendente lite, in that court, in favour of judgment creditors from the filing of the bill, nor any instance of a decree for a sale; but equity follows the law and leaves them to their remedy by elegit, without interfering one way or the other." It does not appear, whether the fraudulent donor was dead or alive; but I presume he was alive, as is indicated from the tenor of the foregoing remarks, and the fact, that shortly after, in the case of Stileman v. Ashdown, he decreed the sale of a moiety of the debtor's land in a suit by a judgment creditor against the heir. Lord Hardwicke is also reported to have said, that the plaintiff (speaking of one only where there were several) but for the fraudulent conveyance, might have had an elegit at law, but that could have entitled him only to a moiety: but there being more judgment creditors than one, gave a handle to decree an account of profits from the time of the decree. No reason is assigned for this conclusion; nor can I imagine any, which would not apply to one as well as 61 to several judgment creditors, *under

the same circumstances; especially, if the chancellor followed up the principles laid down by himself in the same case, and, removing the impediment, left the plaintiffs to their remedy by elegit; in which case, no account of profits from the time of the decree, could be of any benefit to them, as immediately after the decree they might execute their elegits. This reporter attributes a further remark to the chancellor: "the most usual case in this court, is a judgment creditor coming here against an heir at law, for an account of the rents and profits received by him, being considered as assets of the ancestor; for, if he brought an action of debt, he would have judgment for the full value of the estate, and therefore courts of equity make their decrees conformable to the judgment at law." This indicates that lord Hardwicke was of opinion, that in some cases a judgment creditor was entitled to an account of rents and profits from the heir, but it is not clear, whether he meant a creditor by judgment against the ancestor, or one who had obtained a judgment against the heir, or both. From the terms of the decree in the case of *Stileman v. Ashdown* (shortly after determined) as reported by Ambler, which reserved the question as to rents and profits, it would seem, that he had in his mind the case of creditors by judgments against the ancestor, which were a lien on the estate. But this is contradicted by the subsequent remark, that "if he had brought an action of debt against the heir" &c. Such an action could not be maintained upon a judgment against the ancestor; the only mode, in which it could be enforced against the lands descended, being by a scire facias against the heir as terretenant, and that only for a moiety and not the whole estate or its value. And yet he could not have referred to a creditor by judgment against the heir, for he supposes no action of debt to have been brought against him. All we can make of this confused report (the fault of the reporter, and not of the eminent judge who decided the case) is, that in whatever cases lord Hardwicke considered the heir responsible for rents and profits, he grounded

62 *his opinion upon the capacity of the creditor to recover the full value of the estate, by force of the statute against fraudulent devises; which is the same, to this purpose, with us as in England. That statute allowed the creditor to recover that full value, either when the heir had alienated the estate before the suing out of the writ, or without such alienation, if the heir pleaded "nothing by descent." The plaintiff might reply that he had assets by descent, and if the jury found that he had, the plaintiff might, at his election, have a special judgment against the land descended, or a general and personal judgment against the heir. This statute applies, in terms, to bills in equity, as well as suits at law, and gives no remedy for profits received by the heir. Lord Hardwicke's declaration, that decrees in equity were conformable to the judgments at law, whether generally or under the statute, excludes the idea, that any such decree can be given

for profits, since no such judgment at law was ever given.

We can make nothing of these dicta; and without the aid of authority and precedent, this question must be decided upon principle.

A creditor of the ancestor, by bond binding his heirs, had no lien upon the land descended, as is proved by the consideration, that if the heir had aliened the land bona fide before suit brought, he was intirely discharged from all responsibility for the debt at common law; although in equity, even before the statute against fraudulent devises, he was held to be responsible to the creditor for the value of the land aliened. *Coleman v. Winch*, 1 P. Wms. 777. The statute imposed the same responsibility upon him, in that case, in a suit at law; and gave to creditors a priority according to the date of their judgments, as in suits by creditors in equal degree, against executors and administrators; and also subjected the heir to a personal judgment for the value of the land descended, whenever he falsely pleaded nothing by descent. This was a relaxation of the common law, by

63 which in such case the heir was liable to *a personal judgment for the whole amount of the debt. This statute substituted the value of the land for the extent at common law. That did not reach the profits already received by the heir; nor does the statute subject such profits to the claim of the creditor in any case. A court of equity, instead of a personal decree against the heir, for the value of the land remaining in his hands, gives, in effect, relief to the same extent, by giving the proceeds of the sale of such lands; thus conforming to the spirit of the statute, and only changing the form, not the substance of the relief. But, if it gave also the rents and profits received by the heir, this would be changing the rights of the parties. If Blow could have maintained an action at law upon the guardian's bond against Davis's heirs, and they had pleaded, as they have in this case, that they had nothing by descent, and an issue had been taken on the plea; the very question of fraud involved in this suit, would have been involved in that issue; and if found for the plaintiff, all he could have had would have been an extent of all the land, or a personal judgment against the heirs for its value, at his election, and could not have reached the previous rents and profits. Why then should he be entitled to an account of these rents and profits in equity? I can, indeed, see a very persuasive reason for holding, in a case of a judgment against the ancestor (which binds his lands from its date, and under which a moiety might be taken immediately, and delivered to the creditor at a reasonable extent, so as to give him the subsequently accruing rents and profits, and he is deprived of that benefit by a fraudulent conveyance), the fraudulent donee, whether in the lifetime or after the death of the debtor, whether a stranger or his heir, should compensate in equity for the injury done by his fraud, and the amount of that compensation should be determined by the

amount of the rents and profits, enjoyed by him, and lost to the creditor, by reason of the fraud. But, in the case of a suit against the heir upon the ancestor's bond, no right accrues to the plaintiff to have the rents and profits until judgment
64 *or decree; and, therefore, a fraudulent conveyance, either to the heir or a stranger, deprives the creditor of no part of the rents and profits, which he would have been entitled to and received, but for the impediment of the fraudulent conveyance. For, whether such a conveyance existed or not, the creditor must have prosecuted a suit to judgment or decree, before his title to the rents and profits could accrue.

I am, therefore, of opinion, that in such case, the creditor is not entitled to an account of past rents and profits, whether received by the heir or a stranger.

CABELL, J. I concur in the opinion, that all the deeds are fraudulent and void. Indeed, few cases have come within my observation, where the fraud was more foul, or more thinly covered.

Several important questions of law arise in the case of Lawrence v. Blow. The first of these relates to the amount of Blow's recovery: whether it is to be restricted to the sums which he actually paid, or shall extend to any farther sums, which, on a fair settlement of Davis's accounts as guardian, shall be found due from his estate to his wards? This question can arise only as to the payments made to Young and his wife, formerly Margaret Davis, and to Levy as administrator of his deceased wife, formerly Evelina Davis. For, as to the sum paid to the administrator of the other ward, that was established by a judgment, which must be admitted to be conclusive.

As to the sum paid to Young and wife, Blow contends, that their assignment to him authorises him to recover, not only the sum which he paid as the consideration of that assignment, but whatever sum Davis owed them. The deed from Young and wife to Blow contained an assignment to him, of all the right, demand &c. which Mrs. Young had against Blow or Davis's estate on account of Davis's guardianship of Mrs. Young, and a release to Blow, of all suits, actions and remedies whatever. This release extended, unquestionably, to the bond executed by Blow as surety
65 for *Davis, and was in law, as it was in fact intended to be, an absolute discharge thereof, as to Blow. A release to one of two joint obligors, or to one of two joint and several obligors, is a release to the other. The bond is thereby discharged as to both, and no action can be sustained upon it. No body denies that this is so, in a court of law; and there is not an instance in any of the books, in which it has been held to be otherwise in a court of equity. The principle, that a release to one is a release to all, not less obligatory on courts of equity than on courts of law. The assignment to Blow of all the rights &c. of Mrs. Young cannot strengthen the case; for, by the release, the bond was functus officio; there was nothing left for the assignment to operate upon. And this would be equally the case, whether the as-

signment of a released bond, were made to a surety in the bond or to a stranger.

The payment made to Levy, cannot stand on more favourable ground; for, in that case, there was nothing more than absolute release.

The only ground on which Blow can recover, is the implied contract between principal and surety, that if the surety shall pay the money, the principal will pay it. On this ground, he might have brought an action at law; and it is on this ground only, that he can be admitted in a court of equity, by substitution to the remedies of the creditors against the principal. But this ground will support a demand for nothing beyond what he has actually paid, and the interest upon it.

Another question is, whether the chancellor was right in decreeing the rents and profits of the land. It must be borne in mind, that this is a case in which no judgment or decree had been obtained against the debtor in his lifetime, or against his heir since his death. The suit is brought, merely on the bond of the ancestor, against his heir and alienee. There are many contradictory dicta, which would seem to bear on this subject; but there is no decision giving rents and profits under such circumstances. Nor do I think
66 *such a decision would be consistent with the principles of the law. Until a creditor has obtained a judgment or decree, he has no lien on the land of his debtor, and, consequently, is not entitled to its possession, or to the profits of it. The decree, therefore, was wrong in giving the profits antecedent to the decree. And even if it were right to give the profits, it would be clearly wrong to give interest on those profits.

The chancellor has directed a sale of the lands, out and out; and a question is raised, whether this was proper; or whether he ought not to have left the party to his extent on the land, for paying the debt out of the rents and profits.

In the case of Stileman v. Ashdown, 2 Atk. 607; Ambler, 13, where a creditor, having obtained a judgment against his debtor, who afterwards made a fraudulent conveyance, and then died, came into a court of equity against the heir at law and fraudulent alienee, to set aside the conveyance, lord Hardwicke directed a sale of the moiety of the land: And it is believed that similar decrees are frequently made by the english chancellors. The decrees for a sale of the moiety of the land, in such cases proceed on the principle, that the creditor has, by his judgment, a lien on the moiety of the land for the payment of his debt out of the rents and profits; and the courts of equity, on the ground of rendering more effectual, accelerate the payment, by directing a sale, instead of levying the debt out of the rents and profits. 2 Scho. & Lef. 139. The principle, which justifies a sale of the moiety of the land, in the cases just mentioned, applies, in all its force, to the case before us, and extends to the sale of the whole land. Blow, by his decree, acquired a lien on the whole land; and has, consequently, the same equity to demand a

sale of the whole, that the plaintiffs in *Stileman v. Ashdown*, had to demand a sale of the moiety.

In *Blow v. Maynard*, the opinion of the court was, that the bills of sale to slaves made by J. Davis to the appellee Eleanor Maynard, under dates of June 7, 67 and September *19, 1807, were fraudulent and void as to his creditors; and that she is accountable for the slaves thereby conveyed, and the increase of the females of them, and their hires and profits accruing since his death, as executrix in her own wrong, in a like manner as a rightful executor would be accountable; and that the appellee, Elizabeth Lawrence, having been privy to the fraud, and having held and enjoyed the profits and produce of the property, so fraudulently conveyed, in common with E. Maynard, was in like manner responsible, jointly with her, except in relation to transactions in respect to the slaves, which occurred during her coverture with David Lawrence. Decree reversed with costs.

In *Lawrence v. Blow*, the court declared that Blow was entitled to recover against the defendants in this suit, only 4243 dollars 63 cents with interest on 3483 dollars 81 cents, the principal part thereof, from the 1st July 1825, that being the whole amount paid by him in satisfaction of the claims against him as surety for J. Davis in the guardian's bond: that none of the defendants were responsible for the rents and profits of the real estate in the proceedings mentioned: and that the said decree was erroneous so far as it conflicted with the foregoing opinion, and no farther. Decree reversed with costs.

68

**Bacchus v. Gee.*

March, 1880.

Sheriffs—Summary Motion by Sureties.—Under the statute concerning sheriffs, 1 Rev. Code, ch. 78, § 7, giving remedy to sureties of sheriffs against their principals, a summary motion does not lie for such sureties against their principals to recover judgment for the money paid; but only to obtain execution against the lands.

Principal and Surety—Summary Motion by Sureties.—And under the statute giving summary remedy to all sureties against their principals, Id. ch. 116, § 1, no motion lies for sureties against devisees of their principals.

The commonwealth recovered judgment in the general court, against Theron Gee, the surety of John B. Williams deceased, late sheriff of Prince George county, for 169 dollars with interest and costs, due from the sheriff on account of taxes on merchants' licences by him collected and not accounted for. Gee paid the debt; and then gave a notice to Richard and Julia Bacchus, heirs at law and devisees of Williams, of a motion to be made against them in the general court, for the amount so paid by him as the surety of their ancestor and devisor. The notice being duly proved, and the defendants not appearing to defend the motion, the court gave judgment for Gee against them personally, for the amount of his claim, without any inquiry as to the amount of the real assets de-

sended or devised, or whether there were any. And this court upon the petition of the defendants allowed a supersedeas to the judgment.

Allison for the plaintiffs in error; the Attorney General for the defendant.

1. The first question was, whether the statutory summary remedy by motion, lay for a surety, bound in the official bond of a sheriff, for judgment against the heirs and devisees of the principal, or for any surety against the devisees of his principal? which depended on the construction of the 37th section of the statute concerning sheriffs, 1 Rev. Code, ch. 78, p. 285, and of the 1st section of the statute providing summary remedy for sureties generally, Id. ch. 116, p. 460.

2. It was objected, that if the remedy lay, the proceedings were irregular, and the judgment unjust: that heirs or devisees are only chargeable in respect of the real assets that come to their hands, and to the extent thereof: yet here was an absolute judgment against heirs and devisees personally, without any inquiry what or whether any assets had been received by them. There ought to have been a writ of inquiry to ascertain the amount of assets. To which it was answered, where the heir or devisee makes default, an absolute judgment against him personally ought regularly to be entered. 2 Wms. Saund. 7, n. 4.

COALTER, J., delivered the resolution of the court:

That the 37th section of the statute concerning sheriffs, does not authorise a summary proceeding by motion by the sureties of a sheriff or collector, for a judgment for money paid by such sureties for their principals: the provision was only intended to bind the lands of the sheriff, to his sureties who pay his debt to the public, in like manner as his lands are bound to the commonwealth; and, a judgment being previously obtained for the sureties against the principal or his representatives, to authorise the court, upon motion, to award a like execution thereupon, against the lands in the hands of the principal, his heirs or devisees, as might be issued on a judgment for the commonwealth against the principal for the same debt. And that, taking the motion in this case, as a motion made under the 1st section of the statute providing the summary remedy for sureties, that statute does not authorise a judgment, in this form of proceeding, against devisees; and as the judgment here charges the plaintiffs in error both as heirs and devisees, the court, without deciding any other question made in the case, was of opinion that the judgment was erroneous.

Judgment reversed.

70 **Kinney's Ex'ors and Devisees v. Harvey and Worth and Others.*

March, 1880.

(Absent BROOKE, P. and COALTER, J.)

Chancery Practice—Answer—Caption—Dual Character

***Chancery Practice—Answer.**—See generally, monographic note on "Answers in Equity Pleading" appended to *Tate v. Vance*, 27 Gratt. 571.

***Sheriffs.**—See monographic note on "Sheriffs and Constables" appended to *Goode v. Galt*, Glim. 152.

amount of the rents and profits, enjoyed by him, and lost to the creditor, by reason of the fraud. But, in the case of a suit against the heir upon the ancestor's bond, no right accrues to the plaintiff to have the rents and profits until judgment
64 *or decree; and, therefore, a fraudulent conveyance, either to the heir or a stranger, deprives the creditor of no part of the rents and profits, which he would have been entitled to and received, but for the impediment of the fraudulent conveyance. For, whether such a conveyance existed or not, the creditor must have prosecuted a suit to judgment or decree, before his title to the rents and profits could accrue.

I am, therefore, of opinion, that in such case, the creditor is not entitled to an account of past rents and profits, whether received by the heir or a stranger.

CABELL, J. I concur in the opinion, that all the deeds are fraudulent and void. Indeed, few cases have come within my observation, where the fraud was more foul, or more thinly covered.

Several important questions of law arise in the case of Lawrence v. Blow. The first of these relates to the amount of Blow's recovery: whether it is to be restricted to the sums which he actually paid, or shall extend to any farther sums, which, on a fair settlement of Davis's accounts as guardian, shall be found due from his estate to his wards? This question can arise only as to the payments made to Young and his wife, formerly Margaret Davis, and to Levy as administrator of his deceased wife, formerly Evelina Davis. For, as to the sum paid to the administrator of the other ward, that was established by a judgment, which must be admitted to be conclusive.

As to the sum paid to Young and wife, Blow contends, that their assignment to him authorises him to recover, not only the sum which he paid as the consideration of that assignment, but whatever sum Davis owed them. The deed from Young and wife to Blow contained an assignment to him, of all the right, demand &c. which Mrs. Young had against Blow or Davis's estate on account of Davis's guardianship of Mrs. Young, and a release to Blow, of all suits, actions and remedies whatever. This release extended, unquestionably, to the bond executed by Blow as surety
65 for *Davis, and was in law, as it was in fact intended to be, an absolute discharge thereof, as to Blow. A release to one of two joint obligors, or to one of two joint and several obligors, is a release to the other. The bond is thereby discharged as to both, and no action can be sustained upon it. No body denies that this is so, in a court of law; and there is not an instance in any of the books, in which it has been held to be otherwise in a court of equity. The principle, that a release to one is a release to all, not less obligatory on courts of equity than on courts of law. The assignment to Blow of all the rights &c. of Mrs. Young cannot strengthen the case; for, by the release, the bond was functus officio; there was nothing left for the assignment to operate upon. And this would be equally the case, whether the as-

signment of a released bond, were made to a surety in the bond or to a stranger.

The payment made to Levy, cannot stand on more favourable ground; for, in that case, there was nothing more than absolute release.

The only ground on which Blow can recover, is the implied contract between principal and surety, that if the surety shall pay the money, the principal will pay it. On this ground, he might have brought an action at law; and it is on this ground only, that he can be admitted in a court of equity, by substitution to the remedies of the creditors against the principal. But this ground will support a demand for nothing beyond what he has actually paid, and the interest upon it.

Another question is, whether the chancellor was right in decreeing the rents and profits of the land. It must be borne in mind, that this is a case in which no judgment or decree had been obtained against the debtor in his lifetime, or against his heir since his death. The suit is brought, merely on the bond of the ancestor, against his heir and alienee. There are many contradictory dicta, which would seem to bear on this subject; but there is no decision giving rents and profits under
such circumstances. Nor do I think

66 *such a decision would be consistent with the principles of the law. Until a creditor has obtained a judgment or decree, he has no lien on the land of his debtor, and, consequently, is not entitled to its possession, or to the profits of it. The decree, therefore, was wrong in giving the profits antecedent to the decree. And even if it were right to give the profits, it would be clearly wrong to give interest on those profits.

The chancellor has directed a sale of the lands, out and out; and a question is raised, whether this was proper; or whether he ought not to have left the party to his extent on the land, for paying the debt out of the rents and profits.

In the case of Stileman v. Ashdown, 2 Atk. 607; Ambler, 13, where a creditor, having obtained a judgment against his debtor, who afterwards made a fraudulent conveyance, and then died, came into a court of equity against the heir at law and fraudulent alienee, to set aside the conveyance, lord Hardwicke directed a sale of the moiety of the land: And it is believed that similar decrees are frequently made by the english chancellors. The decrees for a sale of the moiety of the land, in such cases proceed on the principle, that the creditor has, by his judgment, a lien on the moiety of the land for the payment of his debt out of the rents and profits; and the courts of equity, on the ground of rendering more effectual, accelerate the payment, by directing a sale, instead of levying the debt out of the rents and profits. 2 Scho. & Lef. 139. The principle, which justifies a sale of the moiety of the land, in the cases just mentioned, applies, in all its force, to the case before us, and extends to the sale of the whole land. Blow, by his decree, acquired a lien on the whole land; and has, consequently, the same equity to demand a

sale of the whole, that the plaintiffs in *Stileman v. Ashdown*, had to demand a sale of the moiety.

In *Blow v. Maynard*, the opinion of the court was, that the bills of sale to slaves made by J. Davis to the appellee Eleanor Maynard, under dates of June 7, 67 and September *19, 1807, were fraudulent and void as to his creditors; and that she is accountable for the slaves thereby conveyed, and the increase of the females of them, and their hires and profits accruing since his death, as executrix in her own wrong, in a like manner as a rightful executor would be accountable; and that the appellee, Elizabeth Lawrence, having been privy to the fraud, and having held and enjoyed the profits and produce of the property, so fraudulently conveyed, in common with E. Maynard, was in like manner responsible, jointly with her, except in relation to transactions in respect to the slaves, which occurred during her coverture with David Lawrence. Decree reversed with costs.

In *Lawrence v. Blow*, the court declared that Blow was entitled to recover against the defendants in this suit, only 4243 dollars 63 cents with interest on 3483 dollars 81 cents, the principal part thereof, from the 1st July 1825, that being the whole amount paid by him in satisfaction of the claims against him as surety for J. Davis in the guardian's bond: that none of the defendants were responsible for the rents and profits of the real estate in the proceedings mentioned: and that the said decree was erroneous so far as it conflicted with the foregoing opinion, and no farther. Decree reversed with costs.

68

**Bacchus v. Gee.*

March, 1830.

Sheriffs*—Summary Motion by Sureties.—Under the statute concerning sheriffs, 1 Rev. Code, ch. 78, § 37, giving remedy to sureties of sheriffs against their principals, a summary motion does not lie for such sureties against their principals to recover judgment for the money paid; but only to obtain execution against the lands.

Principal and Surety—Summary Motion by Sureties.—And under the statute giving summary remedy to all sureties against their principals, Id. ch. 116, § 1, no motion lies for sureties against devisees of their principals.

The commonwealth recovered judgment in the general court, against Theron Gee, the surety of John B. Williams deceased, late sheriff of Prince George county, for 169 dollars with interest and costs, due from the sheriff on account of taxes on merchants' licences by him collected and not accounted for. Gee paid the debt; and then gave a notice to Richard and Julia Bacchus, heirs at law and devisees of Williams, of a motion to be made against them in the general court, for the amount so paid by him as the surety of their ancestor and devisor. The notice being duly proved, and the defendants not appearing to defend the motion, the court gave judgment for Gee against them personally, for the amount of his claim, without any inquiry as to the amount of the real assets de-

scended or devised, or whether there were any. And this court upon the petition of the defendants allowed a supersedeas to the judgment.

Allison for the plaintiffs in error; the Attorney General for the defendant.

1. The first question was, whether the statutory summary remedy by motion, lay for a surety, bound in the official bond of a sheriff, for judgment against the heirs and devisees of the principal, or for any surety against the devisees of his principal? which depended on the construction of the 37th section of the statute concerning sheriffs, 1 Rev. Code, ch. 78, p. 285, and of the 1st section of the statute providing summary remedy for sureties generally, Id. ch. 116, p. 460.

2. It was objected, that if the remedy lay, the proceedings were irregular, and the judgment unjust: that heirs or devisees are only chargeable in respect of the real assets that come to their hands, and to the extent thereof: yet here was an absolute judgment against heirs and devisees personally, without any inquiry what or whether any assets had been received by them. There ought to have been a writ of inquiry to ascertain the amount of assets. To which it was answered, where the heir or devisee makes default, an absolute judgment against him personally ought regularly to be entered. 2 Wms. Saund. 7, n. 4.

COALTER, J., delivered the resolution of the court:

That the 37th section of the statute concerning sheriffs, does not authorise a summary proceeding by motion by the sureties of a sheriff or collector, for a judgment for money paid by such sureties for their principals: the provision was only intended to bind the lands of the sheriff, to his sureties who pay his debt to the public, in like manner as his lands are bound to the commonwealth; and, a judgment being previously obtained for the sureties against the principal or his representatives, to authorise the court, upon motion, to award a like execution thereupon, against the lands in the hands of the principal, his heirs or devisees, as might be issued on a judgment for the commonwealth against the principal for the same debt. And that, taking the motion in this case, as a motion made under the 1st section of the statute providing the summary remedy for sureties, that statute does not authorise a judgment, in this form of proceeding, against devisees; and as the judgment here charges the plaintiffs in error both as heirs and devisees, the court, without deciding any other question made in the case, was of opinion that the judgment was erroneous.

Judgment reversed.

70 **Kinney's Ex'ors and Devisees v. Harvey and Worth and Others.*

March, 1830.

(Absent BROOKE, P., and COALTER, J.)

Chancery Practice—Answer*—Caption—Dual Character

**Sheriffs.*—See monographic note on "Sheriffs and Constables" appended to *Goode v. Galt*, Gilm. 152.

**Chancery Practice—Answer.*—See generally monographic note on "Answers in Equity Pleading" appended to *Tate v. Vance*, 27 Gratt. 571.

of Respondent.—A defendant in equity is charged as executrix and as devisee of a decedent: in the caption of her answer, she professes to answer only as executrix; but, in the body of her answer, she in fact answers as devisee: HELD, such answer places her before the court in her character of devisee.

Administrators.—Advances to Estate—Subrogation to Rights of Creditors Satisfied.—Bill by creditors against ex'ors and devisees, to charge their demands on decedent's real estate, the same being charged with debts by his will: on the settlement of the ex'or's accounts, it is found he is largely in advance to the estate, for payments made by him to creditors, beyond the available assets by him received; though there is a much greater amount, due the testator's estate, of debts not desperate: HELD, the ex'or shall rank as a creditor on the real, by substitution in the place of the creditors, whose demands he has satisfied out of his own pocket.

Chancery Practice—Bill to Charge Debts on Realty Devised—Parties.—Upon a bill by certain creditors of a decedent, to charge the debts due them on the debtor's real estate in the hands of his devisees, the court ought always to make an order to call in all creditors, to receive their dividends of the real assets.

This was an appeal from a decree of the superiour court of chancery of Staunton, upon a bill exhibited by the appellees, Harvey & Worth, Baker & Comegys, and John Thompson, merchants of Philadelphia, against the appellants Ann Kinney and Erasmus Stribling, executors of Jacob Kinney deceased, late of Staunton, and the same Ann Kinney with Jacob, Francis and Ann Stribling, his devisees, setting forth, that the plaintiffs in Kinney's lifetime, had placed certain claims they had against one Gideon Morgan, in Kinney's hands for collection, as their attorney at law and agent; which claims, though originally several and distinct, had been blended together by Kinney in the course of his agency, in the same securities obtained by him from the debtor, with the approbation of his clients and principals; and that Kinney, by his conduct in this agency, had incurred a personal liability to them, for large balances, and died without paying the same, or rendering any account:

71 *Shewing, that Kinney, by his will, charged his real estate, in the hands of his devisees, with all his just debts: Praying, therefore, an account of Kinney's transactions in the agency and collection confided to him; an account also of the administration of his personal estate by his executors, and an account of his real estate in the hands of his devisees; and a decree for the balances which should be found due to the plaintiffs, against Kinney's executors, if his personal assets should be sufficient to discharge the same, and if not, that the debts found due them might be charged on the real estate.

The defendants filed a joint answer, the caption of which was thus: "The answer of Ann Kinney and Erasmus Stribling executors of Jacob Kinney deceased, and of Erasmus Stribling as guardian ad litem

for his infant children," (meaning Jacob, Francis and Ann Stribling). Mrs. Kinney, the executrix, was the widow and principal devisee of the testator: and though, in the caption of the answer, she professed to answer only in her character of executrix, yet the sequel of the answer related to all the allegations of the bill, and as well to the real as the personal estate. It submitted the question of the court, whether the testator's will, charged his debts on his real estate. It admitted the fact of Kinney's agency for the plaintiffs, as alleged in the bill. And Stribling stated, that he was the sole acting executor; that he had administered all the personal assets of his testator's estate, which had come to his hands, excepting some outstanding claims for monies due the estate, the recovery whereof he had as yet been unable to accomplish; and that the estate was indebted to him in a large balance, for debts paid by him over and above the available assets he had received: and he claimed to be substituted in the place of the creditors, whose claims he had discharged, for satisfaction out of the real estate; in effect, to rank as a creditor on the real estate in proportion to the balance due him on his accounts of administration.

72 *It appeared, that Kinney died in 1812. His will, clearly, charged his real estate with his debts; and, subject to debts, devised it to his wife, part in fee, and part for life with remainder to his grand-children, the defendants, Jacob, Francis and Ann Stribling. The executors qualified in April 1812.

The accounts prayed in the bill having been directed by the chancellor, were taken and reported by a commissioner. 1. Of the accounts between Kinney's estate and Harvey & Worth, Baker & Comegys, and Thompson, respectively, the commissioner made several statements, founded on different principles, and shewing different results: those stated on the principle which was approved by the chancellor, shewed balances due from Kinney's estate to the plaintiffs, amounting, in the aggregate, principal and interest computed to the date of the decree, exclusive of five per cent. commission allowed Kinney for collection, to about 8533 dollars. 2. The commissioner reported an account of the executor Stribling's administration of Kinney's estate; shewing a balance due to that executor of about 4684 dollars, with interest from December 1819, for monies advanced by him, in payment of his testator's debts, beyond the amount of available assets that had come to his hands. 3. An account of the outstanding debts due to Kinney's estate, which the executor represented as separate, amounting, principal and interest computed to December 1819, to about 2497 dollars; and of other outstanding debts due to the estate, which, though somewhat doubtful, might ultimately be recovered, amounting, principal and interest, to about 8641 dollars; total amount of outstanding debts 11138 dollars. And 4. An account of the real estate left by Kinney, and devised by his will, estimated at about 9275 dollars.

The chancellor, upon a hearing, settled

†Administrators.—See generally, monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

*Same.—Advances to Estate—Subrogation to Rights of Creditors Satisfied.—See principal case cited in Morgan v. Fisher, 82 Va. 422; Powell v. White, 11 Leigh 332 (note by president collecting cases on subrogation). See generally, monographic note on "Subrogation" appended to Janney v. Stephen, 2 Pat. & H. 11.

†Chancery Practice—Administration of Assets—Parties.—See principal case cited in Stephenson v. Taverners, 9 Gratt. 406.

the principle upon which the accounts between Kinney's estate and the plaintiffs ought to be adjusted, and declared the balance due to them respectively, amounting, in the aggregate, principal and interest computed to the date of the decree,

73 (as above *mentioned) to about \$533 dollars: and considering the personal estate, as being (with regard to these creditors) in effect exhausted, he directed a sale, by the marshal of the court, of so much of the real estate as would be sufficient to discharge the debts, principal and interest, so declared to be due the plaintiffs, and the costs of suit, with orders that the proceeds of the sales should be brought into court. And, without taking any notice of the claim of the executors, to be substituted in the place of the creditors of his testator, whose claims he had satisfied out of his own means, and thus to rank on the real estate in proportion to the balance due him on his account of administration, the chancellor recommended that account to the commissioner, with directions to state and report an account of collections of the outstanding debts due the estate, made by the executor since the former report.

The defendants appealed to this court; where the cause was argued by Johnson, for the appellants, and the Attorney General, for the appellees.

I. The first point discussed, was the principle on which the accounts between Kinney's estate and his clients and principals, ought to be adjusted; as to which this court disapproved the principle of the chancellor's decree; but the point depended on the peculiar facts of the case, and involve no general question of law or equity.

II. The next was a point of practice. Johnson objected to the decree for the sale of the real estate, that all the devisees were not as such convened before the court at the time of the decree; for that, though Mrs. Kinney had joined in the answer with the other defendants, she had only answered in her character of executrix, and was not before the court in her character of devisee.

To this it was answered by the Attorney General, and resolved by the court, that though Mrs. Kinney described herself in the caption of the answer only as executrix, yet as the answer itself was responsive to all the allegations of *the bill, and related to the real as well as the personal estate, she thereby placed herself before the court in the character of devisee as well as executrix.

74 III. Johnson insisted, that the chancellor ought to have substituted the executor Stribling in the place of the creditors whose claims he had satisfied out of his own pocket, and thus let him in to rank on the real estate, in proportion to the balance due him on his account of administration; and, moreover, that the chancellor, instead of providing only for the satisfaction of the debts due to the appellees, out of the real estate, ought to have directed all the unsatisfied creditors of the estate to be called in, that they might participate of the real assets, in just and equal proportions.

The Attorney General answered, that it did not appear, that there were any other unsatisfied creditors, and considering the

time which had elapsed since the testator's death, and that no other creditors had appeared to charge the real estate devised, it was almost certain there were none: And that as to the claim of the executor Stribling, there being outstanding debts due the testator's estate, to the amount of 2497 dollars, which the executor admitted to be separate, and other debts to the amount of 8641 dollars which he did not allege to be desperate, it must have been owing to his own negligence, that he had not already collected enough to reimburse the balance of 4684 dollars due him for his advances; and that he ought to be left to look to these outstanding debts as the fund to reimburse the balance due him, since it was hardly possible but that he was justly chargeable with a sum equal to the balance reported to be due to him, either on account of outstanding debts actually collected, or of negligence in regard to those debts. Besides, the chancellor had only ordered the sale of the real estate: he had not disposed of the proceeds; he had ordered them to be brought into court, retaining the power to call in the other unsatisfied creditors, if it should appear proper, and to let in the executor Stribling to rank on the real, if upon the further account of his administration, any balance should appear to be justly due to him.

75 *Johnson replied, that there was no way to ascertain whether there were other unsatisfied creditors, but to call them in, and to give them an opportunity to exhibit their claims. That there was no proof, and indeed no allegation, of any negligence in the executor with respect to the outstanding debts: that he ought, at all events, in the actual state of the case, to be allowed his rateable dividend of the real assets, else that which was the only certain fund, might be exhausted in the satisfaction of the debts due to the appellees; and, hereafter, whatever should be collected out of the outstanding debts, would still be to be accounted for, and applied in due course of administration. That it was true, the chancellor's decree left this point open, or rather passed it by without notice; but, on this appeal from an interlocutory decree, it was the province of this court to settle all the principles of the cause.

PER CURIAM. The decree is erroneous, inasmuch as the real estate sought to be subjected to the demands of the appellees, constitutes an equitable fund, out of which all the creditors of the testator Kinney, are entitled to satisfaction, *pari passu*; and, among others, the executor Stribling, as standing in the place of the creditors whose claims he has discharged, and appearing to be a creditor to a large amount, unless it shall appear, that since the report of the commissioner, he has been reimbursed in whole or in part, by the receipt of personal assets of his testator. And opportunity should have been given to all the other creditors of the testator, coming in and agreeing to bear their proportions of costs, to prove their debts before the commissioner, within a reasonable time prescribed by the chancellor, and to participate equally of the equitable assets.

Decree reversed.

76 *Lee and Wife v. Stuart and Others.

• March, 1880.

(Absent CABELL and COALTER, J.)

Marriage Settlements*—Setting Aside—Infancy of Wife.

—A deed of marriage settlement is made before marriage, between infant female and her guardian, the intended husband, and trustees; whereby her real estate is settled on her and her children &c. and husband covenants, that he will, when after required, execute any and every further conveyance proper for more effectually settling and assuring the subject to the uses declared by the deed: husband and wife exhibit bill in chancery, praying that this settlement be set aside, on the ground of the infancy of the wife at the time it was executed: and the wife, on a privy examination directed by the chancellor, declares that she had freely and voluntarily joined in the bill: **HOLD**, whether the infant feme were bound by the deed or not, the husband was bound by his covenant, and equity will not aid him to avoid it; and bill dismissed.

Guardian and Ward—Accounting and Settlement—Overpayment to Ward—Effect—Case at Bar.—S. being second husband of M. and guardian of her infant daughters by first husband; and M. having claim to dower of lands of first husband, descended her infant daughters, over and above provision made for her by first husband's will: S. continually during his wife's life, and after her death, carries the whole profits of the lands descended, to the credit of his wards, and finally settles his accounts, allows them credit for the whole profits, and pays them the balance: one of the wards being married, a bill is filed by her husband and her, praying to open, surcharge and falsify the accounts previously settled; and then S. claims as against them, credit for one third of the profits, accrued during his wife's life, as belonging to her in right of dower: **HOLD**, that as S. accounted for and paid these profits, with full knowledge of his right, or at least of the facts out of which his right arose, he cannot now recover them back.

Daniel M'Carty, late of Westmoreland, died in the year 1800, having made a will, and leaving his wife Margaret, and two infant daughters, Anne and Elizabeth, him surviving. His will was almost wholly confined to the purpose of making a provision for his wife, out of his real and personal estate, giving her the personal in absolute property, and the real for life. The provision was a large one in proportion to his estate, but it was not expressed to be in lieu of dower. He made no express bequest or devise of the residue of his estate, to his children: but the will was concluded with this limitation: "Should I have no child legitimate, to arrive to lawful age or marry, I give all my property, real and personal, to my said wife Margaret."

77 *The testator's widow obtained administration of his estate with the will annexed, in the county court of Westmoreland. In 1802, she married Richard Stuart, upon whom (of course) the administration devolved, and who was afterwards

appointed by the same court, guardian of his two infant step daughters, Anne and Elizabeth M'Carty. Immediately after Stuart's marriage with Mrs. M'Carty, he severed that portion of her first husband's estate, which was specifically devised and bequeathed to her by his will, from the residue thereof, which, thenceforth during his wife's life, and afterwards till the termination of his guardianship, he considered, or at least treated, as the property of his wards, carrying all the profits thereof to their credit.

In 1817, Anne M'Carty intermarried with Henry Lee, she being still an infant: and by deed of marriage settlement, made before the marriage, and dated the 29th March 1817, between her with Stuart her guardian, of the first part, William S. Jett, and M'Kenzie Beverley, trustees, of the second part, and Henry Lee, the intended husband, of the third part, (reciting the intended marriage, and that the settlement was made by the advice and with the approbation of the guardian) the said Anne, in consideration of the intended marriage, and of one dollar paid her by the trustees, conveyed to Jett and Beverley, and to the survivor of them, all the lands and slaves whereof she was seized and possessed in her own right; upon trust, to hold the same to her own use till the marriage; and after the marriage, to the use of the husband and wife during their joint lives; and from and after the death of either, to the use of the survivor for life; and from and after the death of the survivor, to the use of any child or children or descendants of the wife by Lee or any future husband, such descendants to take per stirpes; and in default of such children or descendants, to the use of such person or persons as the wife should, by deed or will, notwithstanding her coverture, direct and appoint; and, in default of such appointment, to the use of such person or persons as should be her heirs,

78 *according to the existing statute of descents in Virginia. And Lee, the intended husband, covenanted with the trustees, that he would at any time after, upon their reasonable request, make and execute, or procure to be made and executed, any and every other deed or conveyance, for the more effectually conveying, assuring and confirming the subject to the trustees, and settling and limiting the same to the uses before expressed. And he covenanted with the trustees, and Stuart, the guardian of his intended wife, that it should be lawful for her notwithstanding her coverture with him, to execute the power of appointment in her vested, by deed or will, as before provided, in favor of any person she should think proper, without any hindrance, denial or molestation from Lee and his heirs, and that he and they would permit her appointment to be carried into effect.

The marriage was, soon after, celebrated. And in the course of the same year (1817), Elizabeth M'Carty made choice of Lee, now her brother-in-law, for her guardian, in the county court of King George: and he was, accordingly, appointed her guardian by that court. In the course of the same year also, commissioners were appointed by the county court of Westmore-

***Marriage Settlements—Antenuptial.**—On this subject, see monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 159.

***Ex Parte Settlement—Bill to Surcharge—What It Must Specify.**—A bill to surcharge and falsify an *ex parte* settlement must specify the particulars wherein it is supposed to be erroneous. And if the answer to the bill discloses nothing improper in the account, and the complainant exhibits no evidence to sustain his allegations, the bill should be dismissed. *Radford v. Fowkes*, 85 Va. 846. 8 S. E. Rep. 817, quoting from 4 Min. Inst. (3d Ed.) 1486, and citing, in addition, *Wyllie v. Venable*, 4 Munf. 369; *Lee v. Stuart*, 2 Leigh 76; *Garrett v. Carr*, 3 Leigh 407; *Shugart v. Thompson*, 10 Leigh 443-4; *Corbin v. Mills*, 19 Gratt. 406.

But while the plaintiff must specify the items of surcharge and falsification, it is competent for him to show error upon the face of the account. Note to *Backhouse v. Jett*, 1 Brock. 500, 2 Fed. Cas. 322, case 711.

land, to settle Stuart's accounts of administration of the testator Daniel M'Carty's estate, and of his guardianship of his wards Anne and Elizabeth M'Carty: and in November 1817, the accounts were audited and settled by the commissioners, in the presence of Lee, and then reported to the county court, where they were received without exception, and ordered to be recorded. In these accounts, Stuart credited his wards with all the profits that had accrued on all the estate of their father, except that which was specifically devised and bequeathed by his will to his wife Margaret, afterwards the wife of Stuart. And the accounts shewed a balance of £3627. 13. 2. due to Mrs. Lee, at the time of her marriage, reduced by payments to Lee since the marriage, to £1197. 17. 0.; and a balance due to Elizabeth M'Carty, at the date of the report, of £3479. 13. 10.

Stuart forthwith paid Lee the sum 79 due to himself in "right of his wife; and paid him also, as guardian of Elizabeth, the whole balance due to her: and Lee, in his own right and as guardian of Elizabeth, gave him a complete discharge.

In 1822, Lee and wife exhibited a bill in the superior court of chancery of Fredericksburg, against Stuart (the former guardian of Mrs. Lee and her sister Elizabeth), Elizabeth M'Carty, and Jett and Beverley the trustees; the two principal objects of which, and the only objects which it is necessary to state, were, 1. to open Stuart's accounts settled and reported by the commissioners of the county court in 1817, and to correct, surcharge and falsify them; and 2. to annul and avoid the marriage settlement between Lee and wife, in respect to the real estate thereby conveyed and settled, upon the ground, that it was executed by the wife, the grantor, while she was an infant, and therefore incapable of making any such conveyance or settlement of real estate, even with the concurrence of her guardian, and that, as there was no issue of the marriage, the husband and wife were the only persons in existence, interested in the settlement, and they both desired to have it annulled.

Stuart, in his answer, leaving the question concerning the marriage settlement to the court, denied all the allegations surcharging and falsifying his accounts as settled in 1817, and shewed that the commissioners had committed errors of addition to his prejudice, to the amount of above £700. And he insisted on his part, that these errors of addition should be corrected; and further, that, as the specific bequests and devises, made by Daniel M'Carty to his wife, were not expressed to be in lieu of dower, she was entitled to one third of the residue of his lands and slaves for life, and therefore that he, her second husband, was entitled to one third of the profits thereof during her life; but in the accounts of 1817, he had carried the whole of the profits to the credit of his wards; and now he claimed credit (as against Lee and wife only, not against Elizabeth M'Carty) or his wife's third of the profits of the lands and slaves.

80 *There was no undue influence ex-

ercised by Stuart, or any other party, to procure the execution of the marriage settlement: the transaction was perfectly fair in all respects.

The chancellor, on the motion of the plaintiffs, issued a commission to two justices of the peace of the county of Washington in the district of Columbia, where Lee and wife resided, to examine Mrs. Lee, privily and apart from her husband, to explain to her the nature and object of the bill, and to ascertain and certify to the court, whether she had freely and voluntarily, without his persuasion or coercion, consented to join with him in exhibiting the bill to the court, and whether she yet wished not to retract such consent. The justices certified, that they had executed the commission in the manner therein prescribed; and that Mrs. Lee acknowledged to them, that she had freely and voluntarily, without persuasion or coercion of her husband, consented to join with him in exhibiting the bill, and that she had no wish to retract such consent.

The chancellor, nevertheless, upon the hearing, dismissed the bill, so far as the same sought to annul the marriage settlement as to the lands thereby conveyed and settled: and he referred Stuart's account of administration of Daniel M'Carty's estate, and of his guardianship of Anne and Elizabeth M'Carty, settled by the commissioners in 1817, to a commissioner of the court, to be by him stated in regular form, with permission to either party to surcharge and falsify.

Lee and wife appealed from the decree to this court; where the cause was argued by Harrison and Leigh for the appellants, and Stanard for the appellees. The argument turned on two points:

I. It was argued for the appellants, that a deed of marriage settlement of lands, made by an infant grantor, was of no binding effect whatever on the infant. *Caruthers v. Caruthers*, 4 Bro. C. C. 500; *Clough v. Clough*, 5 Ves. 717. The consent and approbation of the infant's 81 guardian, and *his joining in the

deed, did not help the case, since the powers and trust of a guardian extended not to the execution of any such instrument. And, they said, Mrs. Lee's assent to the exhibition of this bill to annul the deed of marriage settlement as to the real subject, and her concurrence with her husband therein, having been ascertained by a privy examination under a commission issued by the chancellor, with all the solemnity prescribed and required by the law of Virginia, to ascertain the assent of a feme covert to a deed of conveyance, by husband and wife, of the wife's inheritance; that proceeding placed the case in the same situation, to all substantial purposes, as if the coverture had determined, and Mrs. Lee was *sui juris*, asking the court to annul the settlement.

Stanard, contra, said, the question was not whether the court may not, hereafter, when Mrs. Lee's coverture shall have determined, entertain a bill on her behalf, to set aside this marriage settlement of her real estate, on account of the disability of infancy she lay under at the time she ex-

ecuted it? but, whether the husband and wife, during the coverture, in other words, whether the husband, in the name of his wife, while she remains under a disability equal to that of infancy, shall be entertained to impeach the validity of the settlement, on the mere ground that the wife was disabled by reason of infancy to execute such a deed? And, he maintained, there was no reason, and no authority, to support such a bill as this; for if the wife was disabled by infancy to execute the settlement, she was equally disabled by coverture to annul or avoid it; and whether the settlement were binding on the wife or not, the covenants contained in it were binding on the husband. The bill was, in effect, an application to the court, to discharge the husband from the obligation of his own covenants contained in the deed.

II. Stanard contended for the appellee, that the property devised and bequeathed by the will of Daniel M'Carty to his wife (afterwards the wife of Stuart) not being declared to be in lieu of dower, the 82 wife had not only a right under *the will to the property so devised and bequeathed to her, but to her dower of the residue of the testator's lands; that, consequently, her second husband, Stuart, had a right to one third of the rents of the residue.

It was answered, that admitting the specific and ample provision made by the will of M'Carty for his wife, did not bar her claim to dower of the residue of his lands, still Stuart could not now maintain his claim to the profits of the dower, accrued during his wife's life. For, with full knowledge of all the facts on which his claim to one third of the profits rested, he had carried the whole profits to the credit of his wards, and had not only accounted for but had actually paid them the amount. If he was then aware of the legal right to one third of these profits which he now asserts, he abandoned it by design, and voluntarily paid the money to his wards. If he was not aware of this legal right, yet he was aware of all the facts out of which the right arose; he paid the money to his wards, through a mistake, not of the facts, but of the law; and he was not entitled to recover it back. *Brisbane v. Dacres*, 5 Taunt. 144; 1 Com. Law Rep. 43, where all the cases on this point are collected.

GREEN, J., delivered the opinion of the court. The objections alleged in the bill against Stuart's guardian's and administration account, are wholly unfounded. It is not surcharged or falsified as to a single item: there is, perhaps, error in it prejudicial to Elizabeth M'Carty, which she does not complain of, and a trivial error in the computation of interest prejudicial to Stuart: but there are no errors prejudicial to Lee and wife. According to the settled doctrine of this court, they have no right to open the account. But there is, on the face of the accounts, an error in addition, prejudicial to Stuart, to the amount of £700 or £800, which ought to be corrected; and there is a library belonging to M'Carty's estate, which is yet to be accounted for to his distributees; and the case should

83 be sent to a commissioner, *only for

the purpose of correcting the error in addition, and having an account of the library.

There is no shadow of ground, upon which a court of equity can set aside or declare the marriage settlement void, or lend its aid to assist the appellants in attaining their object in this respect. Lee was a party to the deed, and is bound by it; and no fraud or imposition on him being suggested, no court can, under any pretence, relieve him from the obligation of it. He covenanted with the trustees, to execute any further conveyance, and otherwise to give full effect to the provisions of the settlement. The object of the present proceeding is to procure the aid of the court to enable him to violate that covenant. For the only purpose and effect of setting aside the deed of settlement, would be to enable his wife to dispose of the property for his benefit, or according to his pleasure; since she could make no disposition of it without his concurrence. So far from a court of equity assisting him to frustrate the settlement, it ought to interfere, if necessary, to prevent him from assisting her in defeating it. *Durnford v. Lane*, 1 Bro. C. C. 106; *Milner v. Harewood*, 18 Ves. 279.

Nor can Stuart reclaim the proportions of the rents of the real estate of M'Carty, which he has passed to the credit of his wards, accounted for and paid, and which he now claims on account of his wife's right to dower. If she ever had such a right, the legal title is gone by her death, and nothing could be claimed at law on that account; the third of the rents and profits accruing during her life could only have been claimed after her death, in a court of equity. And Stuart, with a knowledge of this equity if it existed, or at least of all the facts upon which it arose, has deliberately abandoned it by his own acts.

Decree reversed, and corrected, but at the costs of the appellants, the appellees being the parties substantially prevailing.

84 **Tate v. Liggat & Matthews.*
Liggat & Matthews v. Morgan and Others.

March, 1880.

Fraudulent Conveyances—Impeachment by Creditor at Large. *—A creditor at large, not having obtained judgment or decree against his debtor, cannot resort to equity to set aside a fraudulent conveyance of his debtor, though interference of the court be also prayed to prevent a sale or removal

***Fraudulent Conveyances—Impeachment by Creditors at Large.**—In *Wallace v. Treake*, 27 Gratt. 486, it is said: "Previous to this enactment (Code 1849, ch. 179, § 2, p. 677; Code 1860, ch. 179, § 2; Code 1867, § 2460; Pol. Suppl. § 2460; Code W. Va. 1869, ch. 153, § 2, p. 886) it was the settled rule of the courts, that a creditor at large could not resort to a court of equity, to impeach any conveyance made by his debtor, on the ground of fraud. If real estate was the subject of the conveyance, a judgment was regarded as sufficient. If goods and chattels or any equitable interest therein, although incapable of being levied on, were embraced in the conveyance, the creditor was required to take out execution and have it levied or returned, so as to show that his remedy at law had failed. *Chamberlayne v. Temple*, 2 Rand. 384; *Kelso v. Blackburn*, 3 Leigh 300; *Rhodes v. Cousins*, 6 Rand. 189; *Tate v. Liggat & Matthews*, 2 Leigh 84." To the same effect, see the principal case cited in *McAllister v. Guggenheimer*, 91 Va. 319, 280, 21 S. E. Rep. 478; *Zell Guano Co. v. Heatherly*, 38 W. Va. 415, 18 S. E. Rep. 612; *foot-note to M'Cullough v. Sommerville*, 8 Leigh 415.

For further information on this subject, see

of the subject, and though the subject be equitable estate not liable to execution.

Same—Purchase of Equity of Redemption Pending Suit to Set Aside—Priorities.—Delson mortgages property to secure a fair debt due The Farmers' Bank, and a pretended debt to Tate: L. & M. bring a suit in chancery impeaching the security provided by the mortgage for pretended debt to T. as fraudulent: pending this suit, D. mortgages, not the property, but his equity of redemption in it, to S. & Co. fair creditors, to secure a just debt due them: and then L. & M. obtain a decree for their claim against D. HELD, that S. & Co. purchased only what D. could rightfully convey, that is, his equity of redemption, and took, subject not only to the fair debt due The Farmers' Bank, but the pretended debt secured to T. And L. & M. being creditors by decree, and thus having a right to satisfaction in preference to the pretended creditor T. acquired a preference also over the second mortgagees S. & Co. who were postponed by contract to the pretended creditor T.

Mortgage Creditor—Double Character of Creditor and Purchaser.—A creditor at large, procuring a mortgage of his debtor's property, cannot claim

monographic note on "Fraudulent and Voluntary Conveyances" (IV. B. 3) appended to Cochran v. Paris, 11 Gratt. 248.

Same—Effect of Conveyance Made Expressly Subject Thereto.—In Claffin v. Foley, 22 W. Va. 434, 442, a debtor executed two deeds of trust to secure creditors on the same property. The second deed was expressly made "subject to the rights of the creditors secured" by the first deed. It was held that, by their contract, the creditors secured in the second deed acquired simply the equity of redemption in the property therein conveyed, and that, although the first deed was fraudulent on its face and the creditors therein named were not entitled to its benefits, yet as the trustee and creditors in the second deed expressly excepted the amount secured in the first deed from their security, they were by their contract precluded from taking any benefit therefrom under the trust deed to them: that, the first deed being fraudulent on its face, the law conclusively presumed that the creditors in the second deed knew that fact when they took their deed, and that it was their intention to except the amounts secured in the first deed for the benefit of any persons who should in law show themselves entitled thereto. For this holding the principal case is cited as authority. See the principal case also cited in Schuapp v. Hukill, 84 W. Va. 382, 12 S. E. Rep. 504, where a lease was executed subject to a preceding lease of the same property.

Deed of Trust Creditor—Right to Plead Usury in Previous Deed.—Where a creditor is secured by a second deed of trust on the same property, he has but the equity of redemption, and cannot plead usury against a creditor secured under the first trust deed. Lee v. Feamster, 21 W. Va. 114, citing the principal case. On the subject of usury, see generally, monographic note on "Usury" appended to Coffman v. Miller, 26 Gratt. 698.

Same—Double Character of Purchaser and Creditor.—In Watts v. Kinney, 3 Leigh 272, 284, 292, 297, a judgment was recovered against a principal and his sureties. The sureties discharged the judgment and took a deed of trust from the principal debtor for the amount of the judgment. It was argued that by the taking of a deed of trust, the sureties changed their character of creditors into the less advantageous character of purchasers, and the principal case was cited to uphold this argument. But TUCKER, P., who delivered the opinion of the court said: "As to the position, that by taking the deed of trust, the sureties put off their character of creditors and assumed that of purchasers, I cannot understand that the opinion in *Tate v. Liggat*, referred to designed to go so far as to say, that a creditor by judgment, who takes a mere collateral security for the payment of his debt, thereby loses entirely the benefit of his judgment lien; and unless the principle be extended thus far, it can have no influence upon this case. Be this as it may, I understand that the principle is not considered as settled by that case. I am of opinion, therefore, that there is no validity in this objection."

And, in Runkle v. Runkle, 98 Va. 665, 666, 37 S. E. Rep. 276, a debtor conveyed to a trustee certain real and personal property to secure three classes of creditors. One of the creditors secured in the third class, while claiming under the deed, assailed the validity of other debts secured in the same deed. It was contended that a creditor, while asserting his rights as a beneficiary under a deed of trust given by his debtor to secure him and others, could not at the same time, attack the validity of another debt secured in the same deed: that the rights of a beneficiary under a deed of trust to secure debts

as a creditor, or in the double character of creditor and purchaser, but only as purchaser.

Fraudulent Conveyances—Effect on Subsequent Purchaser with Notice.—And per GREEN, J. if A. make a fraudulent conveyance of personal property to B. and then make a conveyance for valuable consideration to C. who has full notice of the previous fraudulent conveyance, the statute of frauds and perjuries does not apply to protect such a subsequent purchaser against the previous fraudulent conveyance, nor upon the principles of the common law can he claim against the previous fraudulent conveyance whereof he had notice when he purchased.

Appeal—Parties Standing on Distinct Grounds—Effect.—Suit in chancery against A. and B. Decree against A. for debt, and against B. declaring a

are not the rights of creditors, but of purchasers, and that, when the creditor accepts the benefit of a trust deed, given by his debtor to secure the payment of his debt, he thereby voluntarily lays down and surrenders all his rights as creditor, and takes in lieu of them his rights as purchaser. But the court held that the attitude of purchaser did not impair his right as creditor to assail other debts in the deed of trust as fraudulent or otherwise void. In delivering the opinion of the court, JUDGE HARRISON said: "It is true that the Virginia decisions speak of creditors as purchasers, and for many purposes, they are so treated. Generally, the question is whether they are affected with notice of the fraud alleged, or their rights are affected by prior equities, but we have never understood that this doctrine had gone to the extent of holding that, where a creditor took a deed of trust to secure his debt, it changed his character of creditor into the less advantageous attitude of purchaser. This theory is not consistent with the course of the Virginia decisions. It seems to find some countenance in *Tate v. Liggat*, 2 Leigh 84, though it is not clear that the question was necessarily involved in that case. However that may be, the view therein expressed was emphatically discountenanced by JUDGE TUCKER in *Watts v. Kinney*, 3 Leigh 298, wherein he speaks of it 'as an argument which rests upon a supposed decision of this court in *Tate v. Liggat*;' and again, referring to the same subject, says, 'the principle is not settled by that case.' At all events, that principle does not appear to have been followed by any subsequent case. On the contrary, the uniform practice in Virginia, as shown by the decisions, has been an unquestioned recognition of the right of one creditor in a deed of trust to attack and have eliminated any debt thereby secured which could be shown to be fraudulent or void."

But in *Cox v. Wayt*, 26 W. Va. 807, 817, a debtor conveyed certain real estate to a trustee to secure a certain creditor, which deed was never recorded. Later, the same debtor conveyed the same property in trust to secure other creditors, three of whom had notice of the unrecorded deed above mentioned. It was held that the three creditors secured in the second deed having notice of the existence of the prior unrecorded deed were purchasers with notice, and were bound by the unrecorded deed in the same manner as if it had been duly recorded; but that the other creditors secured in the second deed were subsequent purchasers for valuable consideration without notice and that therefore the unrecorded deed was void as to them. JUDGE WOODS, in delivering the opinion of the court, said: "It is well settled that a creditor obtaining a mortgage or deed of trust upon the property of his debtor, must claim the same as a purchaser, and cannot claim it in the double character of creditor and purchaser." 2 Leigh 84. In asserting this principle, JUDGE LOMAX says: "In regard to purchasers it would seem reasonable also, that purchasers, within the act relating to registration of conveyances, should be understood to mean the same description, as purchasers within the act relating to fraudulent conveyances. And as under the latter, creditors acquiring in any way, a lien upon their debtor's property by contract with him, are regarded as purchasers, they would be, in like manner regarded under the former." 2 LOMAX Dig. 489; *Tate v. Liggat*, 2 Leigh 104; *Evans v. Greenhow*, 15 Gratt. 153; *Bird v. Wilkinson*, 4 Leigh 266; *Beck v. De Baptists*, Ird. 349; *McClanahan v. Siter*, 2 Gratt. 309."

Same—Purchasers.—To the point that a creditor taking a deed of trust on real estate to secure his debt is a purchaser within the purview of the act relating to registration of conveyances, the principal case was cited in *Johnston v. Slater*, 11 Gratt. 325, 326; *Weinberg v. Rempe*, 15 W. Va. 858. See also, foot-note to *Evans v. Greenhow*, 15 Gratt. 153.

Appeal—Parties Standing on Distinct Grounds—Parties Standing on Same Ground—Effect.—When parties stand upon distinct and unconnected

conveyance by A. to him fraudulent as against plaintiffs; ca. sa. issued on decree against A. for the debt, and executed; then B. appealed from the decree so far as it affected him; and the court reverses the decree so far as it affected B. but **HOLD**, that it could not reverse the decree against A. who had not appealed, though the court of chancery had no jurisdiction to make the decree against him.

Charles Deison, by deed dated the 13th May 1820, and duly recorded, conveyed to Garland Tate and David G. Murrell, a tract of 104 acres of land in the county of Campbell, five slaves, and all his stock of horses &c. plantation utensils, and household and kitchen furniture, in trust,
85 *to secure debts due by him to the Farmers' Bank of Virginia at Lynchburg, upon notes indorsed by Whitlocke and Richardson, and discounted by the bank, for his accommodation, to the amount of 2080 dollars, and another debt of 5000 dollars to Edmund Tate (Deison's father-in-law); with power to the trustees to sell the subject at the request of the creditors or either of them, selling the slaves and other personal subject before the real; and to apply the proceeds, first to the payment of the debt due to the bank, and then to the debt due to Tate.

And by another deed, dated the 13th November 1820, and duly recorded, Deison conveyed the same subject, with the moiety of a carriage and harness held by him in common with Edmund Tate, in trust to indemnify Whitlocke and Richardson, his indorsers at the Farmers' Bank, and to secure Tate the debt of 5000 dollars due to him, as mentioned in the former deed, with like provisions as those contained in the former deed, as to the sale of the subject, and the preference of the bank debt.

The trustees advertised the subject for sale on the 24th July 1821, under the first deed of trust. But on the 24th May 1821, Deison executed his bond to Liggit & Matthews, for 1200 dollars payable on demand. And, immediately, on the same day, Liggit & Matthews exhibited a bill in the superior court of chancery of Lynchburg, against Deison, Edmund Tate, and G. Tate and D. G. Murrell the trustees; setting forth their claim against Deison upon his bond for 1200 dollars just executed to them; alleging, that the deed of trust, so far as it secured the debt of 5000 dollars to Edmund Tate, was fraudulent as against Deison's creditors; that no such debts, and indeed no debt of any considerable amount, was due from Deison to Tate; and that the deed was a contrivance of Deison and Tate, to defraud Deison's just creditors; praying, therefore, that the trustees should be in-

grounds, where their rights are separate and not equally affected by the same decree or judgment, then the appeal of one will not bring up for adjudication the rights or claims of the other: but where the parties appealing, and the parties not appealing, stand upon the same ground, and their rights are involved in the same question, and equally affected by the same decree or judgment, the appellate court will consider the whole case, and settle the rights of the parties not appealing, as well as those who bring up their cases by appeal. To this effect the principal case was decided with approval in Walker v. Page, 31 Gratt. 652, 653 (see also, *foot-note* to this case); Saunders v. Griggs, 81 Va. 517; Morgan v. Ohio River R. Co. 39 W. Va. 25, 19 S. E. Rep. 591; *foot-note* to Purcell v. McCleary, 10 Gratt. 248; Garrett v. Carr, 3 Leigh 418; Blackwell v. Bragg, 78 Va. 541. See also, Lenow v. Lenow, 8 Gratt. 349, and *foot-note*.

joined from proceeding to sell more of the trust subject than would suffice to satisfy the debt due to the bank; that the deed
86 might be declared fraudulent *and void as to the plaintiffs, so far as it secured the debt of 5000 dollars to Tate; and that the trust subject might be sold to satisfy the debt of 1200 dollars due to them.

The injunction was awarded.

Deison and Edmund Tate, in their answers, respectively, averred that the debt of 5000 dollars secured by the deeds of trust, was really and bona fide due to Tate, and that the deeds were in all respects fair. The trustees in their answer, disclaimed all knowledge on the subject, except that they had consented to act as trustees, and had at the request of Whitlocke (one of Deison's indorsers at bank) advertised the trust subject for sale. These answers were all sworn to before John M. Settle, an alderman of the town of Lynchburg; that of Edmund Tate on the 20th September, that of the two trustees on the 6th October, and that of Deison on the 8th October 1821.

And on the very day on which Deison's answer was sworn to before Settle as alderman, Settle filed in this cause (as Liggit & Matthews alleged) certain articles of agreement, bearing date the 9th July 1821, between Deison, Edmund Tate, and the same Settle; whereby, after referring to the two deeds of trust of the 13th May and 13th November 1820, and reciting that it was the intent of the parties to pay a debt of 2093 dollars, which Deison owed to J. M. Settle & Co. out of the profits of the trust subject in those deeds of trust comprised, Deison conveyed and transferred to Settle, all his interest in the same trust subject, real and personal; and Tate agreed, that the proceeds of the real part of the trust subject, that should be coming to him after satisfying the bank debts therein mentioned, should be placed in Settle's hands, to be by him used, with the assistance and agency of Deison, till, from the profits thereof, the debt of 2093 dollars, with interest, due J. M. Settle & Co. should be paid; and Tate thereby directed the trustees to pay Settle the surplus of the proceeds of the sales of the real subject, which the deeds of trust destined to him, according
87 to this agreement; and Settle relinquished to Tate, all right in *the property and the proceeds thereof, so soon as the debt of 2093 dollars should be discharged.

After the above articles of agreement were executed, Settle obtained a deed from Deison, dated the 10th October 1821, and duly recorded, whereby Deison conveyed to R. C. Haden and J. M. Reynolds, all Deison's right, title and interest in the trust subject, real and personal, comprised in the two deeds of trust of May and November 1820, in trust to secure to J. M. Settle & Co. the debt of 2093 dollars mentioned in the articles of agreement.

Meantime, the suit of Liggit & Matthews against Deison, Tate and the trustees, to annul the two deeds of trust of May and November 1820, was in full prosecution; and a volume of depositions was taken on each side, touching the fraud imputed to Deison and Tate in that transaction.

At the hearing, in November 1823, the chancellor was of opinion, that the debt mentioned in the two deeds of trust as due to Tate, was simulated, and that therefore those deeds so far as they pretended to secure the debt to Tate, were fraudulent; and though he disclaimed jurisdiction to charge the debt due Liggat & Matthews on the trust subject, and dissolved the injunction he had awarded to inhibit the trustees from proceeding to sell it, he nevertheless declared the deeds of trust, so far as they pretended to secure the debt to Tate, fraudulent and void, as to Liggat & Matthews; and he gave them a decree against Deison personally, for the debt of 1200 dollars with interest claimed in the bill, and against Deison and Tate, jointly, for the costs of suit.

Upon this decree, Liggat & Matthews sued out a *capias* ad satisfaciendum against Deison. He was arrested on that process in December 1823, made a general surrender of his effects, and was discharged as an insolvent debtor. At this time, however, he held only four of the slaves, and the stock of horses &c. comprised in the two deeds of trust of May and November 1870. For Whitlocke, his indorser at bank, (as to whom the deeds were, on all hands, acknowledged to be fair), having paid

88 the debt to the bank, had obtained *a decree subjecting the trust subject to sale for his indemnification; under which the tract of 104 acres of land, one of the slaves, and Deison's interest in the carriage and harness had been sold, and the proceeds applied to reimburse Whitlocke. The other part of the trust subject, namely, four of the slaves and their increase, and the stock of horses &c. which were in Deison's hands when he surrendered his effects and took the oath of insolvency, remained (for aught that appeared) in his possession to this day.

After the *ca. sa.* had been executed on Deison, and he had been discharged as an insolvent, Edmund Tate applied to this court for an appeal from the decree of the 1st November 1823; which was allowed, upon his giving security for costs. Deison never appealed from the decree.

And after the appeal, pending the case in this court, namely the first mentioned suit of Tate v. Liggat & Matthews, the second suit of Liggat & Matthews v. Morgan and others was commenced. The bill in the second suit, was exhibited by Liggat & Matthews against William Morgan, the surviving partner of J. M. Settle & Co. (Settle being now dead), Deison, Edmund Tate and Haden and Reynolds, the trustees named in Deison's deed of October 1821; wherein, after recapitulating the proceedings in their first suit against Deison, Tate and others, the chancellor's decree therein, the *ca. sa.* sued out therein against Deison and executed on him, his surrender of his effects and discharge as an insolvent, the pendency of the appeal taken by Tate from the decree, and Deison's acquiescence in it, and the sale of the land &c. to indemnify Whitlocke,—they set forth the articles of agreement of July 1821, between Deison, Settle, and Edmund Tate, and Deison's deed of trust to Haden and Reynolds of October 1821, to secure the debt of 2093 dollars due

to J. M. Settle & Co. And they charged, that these two instruments were obtained by Settle, with full notice of Liggat & Matthew's former suit, and of all the allegations of fraud contained in their bill in that suit, and by combination with

Deison, to delay, hinder and defeat 89 *Liggat & Matthews of their just claim against Deison; that Settle & Co. acquired no rights by those instruments, that could stand in the way of Liggat & Matthews's claim and proceedings; that their *ca. sa.* executed on Deison, and his surrender of his effects on taking the oath of insolvency, vested all the trust subject, comprised in the deeds of trust of May and November 1820 (except what had been sold to satisfy Whitlocke) in the marshal of the court for their benefit; that Deison, however, still had possession of the remaining subject, namely, four slaves and their increase, and the stock of horses &c.; that he was an improper depository of the property; and that Morgan, the surviving partner of Settle & Co. was making efforts to have it sold to satisfy the debt due him. Wherefore, the bill prayed an injunction to restrain Morgan, and his trustees Haden and Reynolds, from selling the subject under the deed of trust of October 1821; that that deed, and the articles of agreement of July 1821, might be declared fraudulent and void as against Liggat & Matthews; and that the trust subject then remaining in Deison's hands, might be forthwith ordered into the hands of the marshal, unless security should be given for the forthcoming thereof to answer the decree of the court.

An injunction was awarded against Morgan and his trustees, according to the prayer of the bill.

The defendant Morgan alone put in an answer, which was not explicit as to the charge, that Settle, at the time he procured from Deison and Tate the articles of agreement of July, and from Deison the deed of trust of October 1821, had notice of the proceedings of Liggat & Matthews in their first suit; but he insisted, that, admitting Settle had such notice at the time of the execution of the deed of trust of October 1821, that deed gave Settle & Co. a lien on the subject preferable to any claim of Liggat & Matthews to have satisfaction out of it: there was no fraud designed or practised, no collusion between Settle and Deison or Tate, no effort to favour either; the debt of 2093 dollars was bona

90 **vide* due from Deison to Settle & Co. and the agreement of July and the deed of trust of October 1821, were expedients, and honest and fair expedients, to secure the debt.

The only evidence in this case was documentary, namely, the record of the proceedings in the first suit, and the articles of agreement of July, and the deed of trust of October 1821, brought in question in this suit.

On the motion of Morgan, the chancellor dissolved the injunction he had awarded to restrain Morgan, and his trustees Haden and Reynolds, from proceeding to sell the trust subject to satisfy the debt due Settle & Co. And from this order Liggat & Matthews appealed.

In this court the two causes were heard together. The first, *Tate v. Liggat & Matthews*, was argued by Leigh for the appellant, and Johnson for the appellees: the other, *Liggat & Matthews v. Morgan* and others, by Johnson for the appellants, and Stanard for the appellees.

I. In the first case, Leigh said, that the question, whether the deeds of trust of May and November 1820, were fraudulent in respect to the security they provided for the debt therein stated to be due to Tate, was a mere question of fact which he should submit to the court upon the evidence, if indeed, the court should think it examinable in this cause. But, in truth, there was a fatal objection to the whole proceeding. Liggat & Matthews were only bond creditors; creditors, who had acquired no lien whatever on the property of their debtor, Deison; who had been no wise hindered of their recovery of the debt due them, by the conveyances they complained of and sought to avoid, since they had instituted no proceeding to encounter the obstruction presented by those conveyances. Now, he said, equity never entertains a bill on behalf of a creditor, to impeach a conveyance of land by the debtor, on the ground of fraud, till the creditor has prosecuted his demand to judgment, which binds the land; or to impeach a conveyance by the debtor

91 *has recovered judgment and delivered execution, whereby the debtor's personality is bound: and, even then, equity only interferes to remove the fraudulent conveyance out of the way. He cited *Angell v. Draper*, 1 Vern. 399; *Balch v. Wastall*, 1 P. Wms. 445; *Bennet v. Musgrove*, 2 Ves. sen. 51; *Shirley v. Watts*, 3 Atk. 200; *Higgins v. York Buildings Co.*, 2 Atk. 107; *Colman v. Croker*, 1 Ves. jun. 160; *Wiggins v. Armstrong*, 2 Johns. Ch. Rep. 144; *Hendricks v. Robinson*, Id. 296; *Brinkerhoff v. Brown*, 4 Id. 671; *Chamberlayne v. Temple*, 2 Rand. 384; *Rhodes v. Cousins*, 6 Id. 188. And he concluded, that the court had no jurisdiction to entertain this bill, either to decree the debt against Deison, or against Tate to declare the conveyances void, and set them aside.

Johnson admitted, that the general principle stated by Leigh, was sustained by the current both of english and american authorities. But, he said, the rule was not without exceptions; and instanced *Smithier v. Lewis*, 1 Vern. 398; *Stileman v. Ashdown*, Amb. 13, and *Chamberlayne v. Temple*, in this court; wherein, it would be found, the creditors were relieved against conveyances of their debtors, without having exhausted their remedies at law. And he contended, that every case, in which a creditor was under the necessity of resorting to equity to prevent the sale of the property of his debtor justly liable to satisfy the creditor's claim, under a fraudulent and void authority, or the dispersion, removal or eloinment of it, or to subject to his demand equitable interests that cannot be taken in execution, and can only be reached by the court of chancery, ought to be admitted as an exception. And such was this case: the creditors were compelled to resort to the chancellor to prevent the sale of the prop-

erty of their debtor, which was justly liable to satisfy their demand, and was yet about to be disposed of under the fraudulent deeds of trust. There was no other remedy for them, that would accomplish the ends of justice.

The statute of frauds and perjuries avoids fraudulent conveyances as against all persons, whose just demands "shall 92 *or might be disturbed, hindered, delayed or defrauded." 1 Rev. Code, ch. 101, § 2, p. 372. He asked, whether a bond creditor was not exposed to the mischief? and therefore, a person entitled to avail himself of the statutory provision intended to prevent it?

He said, the reason of the english cases on the subject, had never been clearly announced: but they appear to have proceeded on reasons of policy and convenience affecting the remedy, not the right: they were much influenced by the consideration, that the main object of equitable interference in such cases, was to remove obstructions to the remedy at law, out of the way; and, as the english chancery could not award execution for debt decreed, any remedy which it could administer, must be incomplete till judgment had been recovered at law. *Higgins v. York Buildings Co.*, 2 Atk. 107. The court of chancery of New York, where, as in Virginia, there is a statutory provision giving execution on decrees in chancery, in like manner as on judgments at law, had followed the english cases, without considering the influence which that provision ought to have on the point. And he endeavoured to maintain, that this provision authorising the award of executions on decrees in chancery, dictated the propriety of entertaining a bill in our courts of chancery, on behalf of any creditor, at one and the same time to ascertain and decree the debt due him, award execution for it, and remove fraudulent conveyances out of the way of the decree and execution.

II. In the other case of *Liggat & Matthews v. Morgan* and others; Johnson premised, 1. that at the time of exhibiting this bill, Liggat & Matthews had obtained a decree against Deison for the debt due them, and had sued out a ca. sa. thereon, upon which Deison had been arrested, and had taken the oath of insolvency and surrendered his effects; so that now, clearly, the creditors had a lien on the property of the debtor, which was justly liable to satisfy their demand: and 2. that the deeds of trust of May and November 1820, appeared 93 *fraudulent in fact, so far as they provided a security for Tate; there was no such debt due.

And then he contended, that Morgan, the surviving partner of *Settle & Co.* could claim nothing under the articles of agreement of July 1821, between Deison, Tate and Settle, providing for the security of the debt of 2093 dollars due *Settle & Co.* The motives and design of that agreement were apparent on the face of the transaction. The instrument was a transfer to *Settle & Co.* of Deison's equity of redemption of the subject pledged by the deeds of trust of May and November 1820,

and of the security thereby given to Tate, for the debt of 5000 dollars pretended to be due him; a transfer of Tate's lien, pending the suit of Liggat & Matthews, in which it was impugned as fraudulent; such a transfer of a security for debt, as no creditor not conscious of its fraudulency would ever have made; which was intended to secure a consideration to Settle & Co. for forbearing themselves to contest the fairness of Tate's claim; to defeat Liggat & Matthews, by interposing the claim of Settle & Co. and to preserve Tate's claim to satisfaction out of the subject, though it was postponed to a distant day. The agreement was not only a pendente lite transaction, but it was a combination between Deison, Tate and Settle, wherein the fraudulent intentions of the two former must have been perfectly apparent to the latter; who, lending himself to the accomplishment of their fraud, in consideration of the advantage they agreed to let him derive from it, was a party to the fraud. It was wholly immaterial, that the debt due to Settle & Co. was a real and just debt: they could not, on that account, hold an advantage obtained by a fraudulent combination with others against a just creditor. *Sands v. Codwise*, 4 Johns. Rep. 536; *Garland v. Rives*, 4 Rand. 282; *Wright v. Hancock*, 3 Munf. 521. Neither could the deed of trust of October 1821, whereby Deison conveyed to Haden and Reynolds, his equity of redemption of the subject mortgaged by his two

94 former deeds *of May and November 1820, as a security for the debt due to Settle & Co. avail them, as against Liggat & Matthews. Settle & Co. could not claim as creditors, or in the combined characters of creditors and purchasers: they could only claim as purchasers; as purchasers, namely, of Deison's equity of redemption under the deeds of May and November 1820. Those deeds, though void as against just creditors, in respect to the security they provided for the pretended debt to Tate, were good between the parties. They were binding on Deison. And, as he could not claim any thing by virtue of his equity of redemption, so neither could Settle & Co. his assignees thereof, claim any thing, till the debt secured to Tate, as well as that due to the bank, should be satisfied out of the trust subject. Settle & Co. could not, any more than Deison, contest the fairness of Tate's claim. Claiming under the same deeds under which Tate claimed, standing as Deison's assignees in his place, and claiming only his rights, they recognised and admitted Tate's rights; they took in subordination to them; they were postponed to him. Now, as Liggat & Matthews have obtained the preference to Tate, by establishing the fraudulency of his claims, they of necessity have the preference to Settle & Co. who can only claim after Tate.

He insisted, that, in the case of a conveyance tainted with actual covin however gross, or of a voluntary conveyance by a person overwhelmed with debt, if the grantor afterwards conveyed the same subject to a purchaser for valuable consideration having notice of the previous conveyance, and of the voluntary character of it in the one instance, or of the actual covin in the

other, such a subsequent purchaser cannot prevail against the voluntary or fraudulent grantee. How was such a subsequent purchaser defrauded and deceived by the previous conveyance. His intromission was wilful. To allow it, would be to enable a fraudulent grantor to relieve himself from the consequences of his fraud, by the assistance of another person conscious of the fraud. The grantor bound by his previous conveyance however covinous, 95 *could, by no act of his own, relieve himself from it; but if he might be allowed to go to another person apprised of the fraud, sell the subject to him, and pocket the price, the purchaser would thus effectually relieve him from the obligation of his previous conveyance. And if pending the suit of a creditor against a fraudulent grantor and his grantees, to impeach and avoid the fraudulent conveyance, the grantor might sell the subject to a purchaser charged with full notice, and such a transaction should be upheld; what would this be, but to enable the grantor to convert a visible, fixed, tangible subject, into money, which may be easily withdrawn from the creditor's pursuit? in effect, to enable the subsequent purchaser by combination with the fraudulent grantor, to defeat, in most cases intirely, and in all cases to delay, the creditor?

In the present case, he concluded, Settle & Co. purchased the equity of redemption of Deison, with full notice of Liggat & Matthews's suit against Deison and Tate, and with a view to defeat them in the recovery of their just demands, by appropriating the subject in controversy to themselves; which consideration alone sufficed to condemn their pretensions.

Stanard for the appellees, represented that Settle & Co. were acknowledged fair creditors of Deison, as well as Liggat & Matthews: both parties were endeavouring as justly they might, to obtain satisfaction of their demands; the one by a suit in equity prematurely brought before they had a right to ask relief there; the other by diligence exerted out of doors. Whether the motive or the end was regarded, both were alike blameless; and the question was, whether the means they respectively resorted to, were not equally fair and legal? If so, Settle & Co. whose equity was prior in time, had gained a fair preference.

As to the articles of agreement of July 1821, whereby Settle took a qualified assignment of the security provided for Tate by the deeds of trust of May and November 1820, *as a security for Deison's debt to Settle & Co. he said, there was no proof, and no ground to suspect, that Settle had, at the time, any notice of the fraudulency of the deeds of trust in respect to Tate's debt, or of the pending suit of Liggat & Matthews, impugning those deeds as fraudulent in that respect. The fair inference from the circumstances attending that transaction, was no more than this: that Settle & Co. being just creditors of Deison, and finding Deison's visible effects mortgaged to secure a debt due to the Farmers' Bank, and another to Tate his father-in-law; Settle, or Settle and Deison uniting, prevailed with the father-in-law

to give Settle & Co. the benefit of his security pro tanto. If Deison and Tate had been guilty of fraudulent conduct, or were actuated by fraudulent designs, there was nothing in the transaction to justify the imputation to Settle, of knowledge of their fraud, or confederacy with them in it.

The suit of Liggit & Matthews against Deison and Tate, viewed as a *lis pendens* affecting the subject in controversy, could have no influence on Settle & Co.'s case. For that was a suit, which the chancellor could not properly entertain, and in which he could never make any decree that could bind the subject in dispute.

Then with regard to Deison's deed of October 1821, whereby Deison conveyed to Haden and Reynolds, the equity of redemption of the subject mortgaged by his previous deeds of May and November 1820, as a security for his debt to Settle & Co.; he said, it was apparent, that Settle, before whom, as an alderman, the answers of Deison and Tate to Liggit & Matthews's first bill, had just been sworn to, had thereby been put upon inquiry, and had been informed of the fraudulency of the deeds of May and November 1820, with respect to the security they provided for Tate, whereof he had obtained an assignment by the agreement of July preceding; and apprehending that Tate's security of which he had obtained the assignment, was vitiated by fraud, and therefore worthless, he procured of Deison this deed of October

1821, mortgaging his equity of redemption *of the subject, to secure the debt due to Settle & Co. Fraudulent in fact this transaction could not be, unless diligence in a creditor to secure his just demand, in preference to other just creditors, be a fraud; which could not be pretended.

The obvious intent of this transaction, was to prefer Settle & Co.'s claim to satisfaction out of the trust subject, before Tate, if Tate's claim should be set aside as fraudulent. But it was now contended, that whether Tate's claim were fraudulent or not, Settle had notice of it; Settle & Co. took in subordination to it; they could not contest its fairness or validity. Settle had notice, certainly, of the deeds mortgaging the subject to Tate, but he had notice at the same time that those deeds, in respect to Tate, were fraudulent and void: could Settle's notice of a covinous and void conveyance, purify and make it good and valid? Suppose the same subject mortgaged to several creditors in succession, by different instruments, and the youngest mortgagee, at the time he accepted the security, apprised of the existence of all the previous mortgages, and of the fraudulency of some of them, must he when he comes to redeem, pay off every debt charged upon the subject by the previous mortgages, not only those fairly due and secured in good faith, but such as were feigned and secured with fraudulent views? Or, if there be a deed of trust securing the payment of several debts due several creditors in succession, must he who has been postponed to another, either relinquish the security altogether, or consent that the debt preferred to his own shall be paid, though that debt be simulated,

and the security as to it fraudulent? and this for the strange reason, that he knew that the security was in that respect fraudulent and void, and therefore paid no regard to it. The argument for the appellants must go the length of maintaining the affirmative of these and all such questions.

He referred to the statute, which, in one breath, avoids conveyances contrived of covin, to defraud creditors of their just demands, or to defraud and deceive subsequent purchasers; *1 Rev. Code, ch.

98 101, § 2, p. 372. If a conveyance be fraudulent, it can no more affect any purchaser, than it can affect any creditor.

He said, there was a wide difference, in the very essence of the transactions, between the supposed case of a purchaser buying of the grantor, a subject previously conveyed by a fraudulent deed, and actually paying him the purchase money, with full notice of the previous deed and of its fraudulency, much more of a suit on behalf of creditors to impeach and avoid the previous deed as fraudulent, and the actual case before the court, in which bona fide creditors have obtained a mortgage to secure a just debt, of a subject before fraudulently mortgaged to secure a pretended debt, with notice both of the previous mortgage and its fraudulent character. In the supposed case, the purchaser would really assist the fraudulent grantor to relieve himself from the effects of his fraudulent conveyance, and to apply the subject to his own use, or aid him to defeat or delay the creditor suing to avoid his fraudulent conveyance, by converting the subject into money, which may be easily put beyond reach. In the actual case, the fraudulent grantor derived no benefit from his second mortgage of the subject, by which he only devoted it to the satisfaction of a debt previously contracted and justly due. Deison's mortgage to Settle & Co. was neither in design nor in effect, of any advantage to himself. A subsequent purchaser from a grantor who has before made a fraudulent conveyance of the same subject, with notice of the previous conveyance and the fraud, may, in so purchasing, commit or make himself party to a fraud; but such subsequent purchase with notice is not per se fraudulent. It may be innocent and just: the circumstances must determine the character of the transaction. And, in the present case, all that could be said was, that Settle had succeeded better and earlier, in securing the debt due to Settle & Co. by diligence out of doors, than Liggit & Matthews by their proceedings in court.

Lastly, he strenuously contested the principle on which Johnson claimed priority of satisfaction for Liggit & Matthews:

99 *that, as they had succeeded in excluding Tate, by shewing that the security provided for him was fraudulent, they obtained the preference to Tate, and by consequence the preference to Settle & Co. also, because as between them and Tate, they could only claim after Tate. The consequence of avoiding Tate's security as fraudulent, was not, and could not be, that Liggit & Matthews were entitled to rank on the subject in Tate's place; the just consequence was, that Tate had no place. His fraudulent security was an-

nulled. The next incumbrancer ranked on the subject, as if the annulled security had never existed. The question was, who was the next incumbrancer? Settle & Co. whose mortgage was executed in October 1821, or Liggat & Matthews whose decree was obtained in 1823? Suppose several debts secured in the same mortgage, or several debts secured by several successive mortgages, and a creditor of the mortgagor should impeach or avoid one of the intermediate debts or mortgages as fraudulent, he thought it impossible to maintain that this creditor acquired priority over the subsequent mortgagees.

GREEN, J. It is admitted to be well settled, as a general rule, that a creditor at large (one who has not in some way acquired a right to have satisfaction out of his debtor's property, specifically), cannot come into a court of equity to impeach any conveyance made by his debtor on the ground of fraud; and, consequently, that the court of chancery had no jurisdiction in the first of these suits, unless, as it was insisted by the counsel for the appellees in that suit, the rule is liable to exceptions, within one of which this case falls.

The rule is founded upon the principle of the common law, essential to the enjoyment and circulation of property, that every debtor, until his property is specifically bound to the satisfaction of his debt, by his own agreement or by some judicial proceeding, has an absolute right to dispose of it at pleasure, to prefer one creditor to another, or even to waste or destroy it; a power which no tribunal whatever
100 *has authority to controul or limit.

The obligation of a debtor is purely personal, and in no way affects his property or any portion of it; and so long as his person is amenable to the process of the courts of justice, there are no means of reaching or affecting his property, but through that medium, and after judgment or decree against him personally. At common law, even when his person was withdrawn from the jurisdiction of the courts, so that process could not be served upon him, there were no means of reaching his property, but by outlawry, which forfeited it, and enabled the creditor in that indirect way to charge it. Our statutes have in such cases (those of absent and absconding debtors) allowed a remedy, which affects the property in the first instance: and these statutory exceptions prove the rule; for if, upon the general principles of equitable jurisdiction, a court of equity could in the first instance act upon the debtor's property, in favour of a creditor at large, these statutory provisions would have been superfluous, since no stronger cases than those provided for by the statutes, could have occurred to justify its interposition.

To this rule no solitary exception can be found, nor can one exist, until the principles of our law are so changed as to authorise courts of equity to administer the estates of living debtors, as if they were dead. The supposed exceptions to the rule, suggested in the argument, are susceptible of ready explanation. In *Smithier v. Lewis*, *Vernon* does not state that a *fi. fa.* upon the judgment, had been delivered

to the proper officer: it was sufficient to state, that the bill was by a judgment creditor, leaving it to be inferred, from the known general rule, asserted in the very next case reported, that the creditor had proceeded so far upon his judgment at law, as to entitle him under that rule to resort to a court of equity; and in *Madd. Chan. 169*, this case is referred to, as one in which there had been a return of *nulla bona*. In cases in which lands are sought to be subjected, it is sufficient, that the creditor has obtained his judgment, without taking out an *elegit*, or, in case of the death of
101 the *debtor after judgment, without reviving it against his heirs or terre-tenants, as in the case cited from *Ambler, of Stileman v. Ashdown*; because the judgment binds all the lands of which the defendant was seized at its date, or at any time thereafter, and the capacity to enforce it and overreach all intermediate alienations and incumbrances, gives the creditor a right to satisfaction out of that specific property, in preference to all others whose rights have not attached upon it before the judgment. Nor is the right of a creditor to resort originally to a court of equity, against his debtor's property in the hands of his heirs or personal representatives, an exception to the rule: for, in those cases, there is no longer any one personally responsible to the creditor, or any one who has a right to dispose of the property at pleasure. The creditor has a right to satisfaction out of the specific property in the hands of the heir or executor, who is liable only in respect to such property; which, though not strictly a lien, is so far in the nature of one, that the creditor can follow the property into the hands of a fraudulent alienee of the debtor, or of his heir or executor. Of this class was the case of *Chamberlayne v. Temple*, which was relied upon as an exception to the rule. There, the defendants were responsible as executors in their own wrong; and the jurisdiction of the court was founded on the right of a creditor to a discovery of assets, which is universal, and strengthened in that case by the ingredient of fraud.

The circumstance also, that, with us, any execution which may be taken upon a judgment, may be taken on a decree, was relied on as affecting the rule in question. I cannot perceive how that can possibly have such effect, or enlarge the jurisdiction of the court of equity in any respect whatever. It is only substituted as a more simple and direct means of enforcing decrees, than the original remedy by sequestration, which, in effect, bound all the debtor's property, real and personal, to a greater extent than any common law execution; the rents and profits of all his lands instead of
102 a moiety, as under an *elegit*; the personalty from *the time of awarding the commission, instead of the time of delivering the process to the officer, as in the case of a *fi. fa.*; and it extended to subjects, which cannot be reached by any common law execution, such as the dividends of bank stock. *Hyde v. Greenhill*, 1 *Dick.* 106; *Burdett v. Rockley*, 1 *Vern.* 58; *Hamline v. Lee*, and *Fawcett v. Fothergill*, cited 4 *Ves.* 747.

Nor is there any thing in the idea suggested, that, in case of a fraudulent deed, especially a deed of trust, the court can take jurisdiction upon the assumption, that the donees may be considered in equity, as trustees for all the creditors of the donor. If the deed be wholly fraudulent, then such a claim to hold the donee a trustee, would contradict the very foundation of the creditor's suit, who comes for relief upon the ground that the deed is as to him utterly void; or if fraudulent and void in part only, then the holder of the legal estate is in equity a quasi trustee, only as to such creditors as have otherwise acquired a right to satisfaction specifically out of the trust fund.

In the first case, therefore, the court had no jurisdiction as to the question of fraud, nor as to that of debt, taken separately, nor when considered together, unless the addition of two negatives can make an affirmative; and the bill in that case should have been wholly dismissed. But as Deison has not appealed from that part of it decreeing the debt against him, the decree cannot be reviewed as to that point. It can only be reviewed, as it affects the appellant Tate, by setting aside the deeds or far as it provides for his claim, and giving costs against him.

The decree against Deison, and the proceedings under it, afforded a proper foundation for the second of these suits, which brought fairly into discussion, the claims of Liggit & Matthews, Tate and Morgan respectively, to satisfaction out of the trust fund. If the deeds in question were fraudulent and void so far as they purported to secure a debt to Tate (a question to be decided de novo in this cause) and Morgan

had the priority over Liggit & Matthews, the *injunction was properly dissolved. If, on the other hand, Liggit & Matthews were entitled in preference to Morgan, it should have been continued, and the fund secured to answer the final decree of the court. And the case presented this question, Whether a debtor making a fraudulent conveyance of personal property, and afterwards giving a deed of trust upon it to secure a debt to a creditor, who has full notice of the fraudulent deed, and afterwards another creditor recovers a judgment and delivers to the sheriffs a writ of fi. fa. or a ca. sa. which is executed, the creditor claiming under the deed of trust, or that under the judgment, is entitled to the preference? Unless, indeed, this question was anticipated by the circumstance, that in the agreement of the 9th July, as well as in the subsequent deed of trust under which Morgan claims, the alleged fraudulent deed is recited, and referred to as a valid deed; and nothing was assigned and conveyed by the deed of trust, but all Deison's right, title and interest in and to the property conveyed by the fraudulent deed; so that, in truth, the parties contracted only for Deison's equity of redemption, subject in the first instance to the payment of both the debts secured by the original deed, one of which is alleged to be fictitious: an inference, which is fortified by the circumstance, that in the first agreement Settle treated with Tate as entitled to

a preference under the deed, and procured from him a transfer of his right in the surplus of the real property after satisfying the bank debt. And this I think is the true effect of the transaction, and that Morgan is estopped from impeaching the deed on the ground of fraud, even if in a case, where a debtor having made a fraudulent conveyance of personal property, afterwards gives a deed of trust to a creditor who has notice, professing to convey, not his right only in the property fraudulently conveyed, but the property itself without any reserve, could impeach it for fraud. And without going any farther, I think Liggit & Matthews might be safely declared, on this ground, to have the preference over Morgan, if the original deed was fraudulent as to Tate.

104 *But supposing it otherwise, the question first stated occurs: for Tate did not relinquish his rights under the original deed, to any portion of the property, except the surplus of the real property after paying the bank debt; and all the real property has been disposed of, and proved insufficient to pay that debt. As to the personal property the case stands, as if Tate had not been party to the agreement of the 9th July.

A fraudulent conveyance binds the parties, and the donor has no right which he can transfer to another by his own act, except in cases provided for by statute. Our statute of frauds, pursuing in effect the provisions of the English statutes of the 13th and 27th Elizabeth, avoids fraudulent conveyances of real and personal property as to creditors, but only of real property as to subsequent purchasers. A subsequent purchaser of personal property, cannot impeach such a conveyance, otherwise than upon principles of the common law; according to which no such conveyance can be a fraud upon a subsequent purchaser with notice.*

Creditors acquiring, in any way, a lien upon their debtor's property by contract with him, have uniformly been held to be entitled as purchasers, and in no case that I have met with in the English books, as creditors entitled to the benefit of the statute of the 13 Eliz. The seeming exceptions to *this rule, in the case of the assignees of a bankrupt, and the sheriff in case of an insolvent debtor, are not so in reality. They do not claim as

*The words of the Virginia statute, are: "Every gift, grant or conveyance of lands, tenements, hereditaments, goods or chattels, or of any rent, common or profit out of the same, by writing or otherwise, and every bond, suit, judgment or execution, had or made, and contrived of malice, fraud, or covin, collusion or guile, to the intent or purpose to delay, hinder or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures, or to defraud or deceive those who shall purchase the same lands, tenements or hereditaments, or any rent, profit or commodity out of them, shall be from henceforth deemed and taken (only as against the person or persons, his, her or their heirs, successors, executors, administrators or assigns, and every of them, whose debts, suits, demands, estates, interests, by such guileful and covinous devices and practices, as is aforesaid, shall or might be in any wise disturbed, hindered, delayed or defrauded), to be clearly and utterly void, any pretence, colour, feigned consideration, expressing of use, or any other matter or thing, to the contrary notwithstanding."—Note in Original Edition.

purchasers from the bankrupt or insolvent debtor, and so bound, as he was, by his former conveyances, whether fair or fraudulent; but, as standing in the shoes of the creditors, and representing their rights; and in case of bankrupts and of insolvent debtors discharged under the statute, the creditors acquire a lien on the debtor's property, not by force of his assignment, but by operation of law, the legislative provisions in these cases operating as statutory executions. These subjects were fully examined in the case of *Shirley v. Long*, 6 Rand. 735, and need not be discussed here in detail. If a creditor taking a lien, by contract with his debtor, upon his personal property before fraudulently conveyed, could unite to his character of a purchaser, that also of a creditor entitled to claim under the statute of the 13 Eliz. we should probably find many cases to that effect in the english books; but we find none. And the settled rule, that no creditor is entitled to avail himself of that statute, who has not in fact been impeded by the fraudulent conveyance, in his proceeding in a due course of law to procure satisfaction of his debt, seems to negative the proposition. Nor is there any equity as between the creditors in such a case; the preference being due to him who has acquired the advantage by greater diligence in the pursuit of his legal remedies. Nor can the debtor complain, that he has lost the right to prefer one creditor to another by his mere volition, in consequence of his own fraud, although that preference might be incidentally given by confessing a judgment.

The only case conflicting with these views, is that of *Bayard v. Hoffman*, 4 Johns. Ch. Rep. 450, in which a debtor, having conveyed a quantity of public stock to trustees, for the benefit of his wife and children, afterwards assigned all his effects to trustees for the payment of all his debts, and this with the concurrence of many of his creditors, from whom, however, the existence of the prior conveyance of 106 the *stock was concealed. And chancellor Kent held, that the voluntary conveyance was void under the statute, but assigned no reason for this judgment, except to assimilate an assignment by a debtor, of all his effects for the satisfaction of all his creditors, to the case of the assignees of a bankrupt in England; the striking difference between which has been before alluded to, and was more fully examined in *Shirley v. Long*, to which I refer.

Upon the whole, I think the order, in the case of *Liggat & Matthews v. Morgan* and others, dissolving the injunction should be reversed, and the cause remanded, that it may be further proceeded in, and that the marshal of the court, in whom the rights of Deison vested, by operation of law, upon his surrender of his effects as an insolvent debtor, may be made a party.

CARR, J. As to the case of *Tate v. Liggat & Matthews*, I concur with my brother Green, that the chancellor had no jurisdiction of any part of the case, and ought to have dismissed the bill intirely.

As to the other case, *Liggat & Matthews v. Morgan*, I think the marshal should have been a party, as the interest of Deison

vested in him, by the act of insolvency: this can be provided for, when the case goes back. I think *Liggat & Matthews* have a preference over *Morgan*, on this ground, that by the agreement of July and the deed of October 1821, *Settle* contracted for, and the deed conveyed, only the excess after the satisfaction of the debt due the bank, and the debt due *Tate*; and though the debt of *Tate* should turn out to be simulated (a point yet to be tried), that cannot enlarge the operation of the deed. My decision rests on this ground alone. As to the general question, viz. if A. makes a fraudulent conveyance to B. and then a conveyance of the same property to secure C. a fair creditor, and D. subsequently gets a judgment against A. which of these two creditors shall be preferred? this question I do not decide. It is very important: it

is new with us: it is not necessary
107 *to the decision of this case. I think, therefore, we had better hold it open for the present.

COALTER and CABELL, J., also said, that they concurred in the result, but thought it unnecessary to decide the general question, stated by Carr, J., and therefore they gave no opinion upon it.

After these opinions had been announced, a question arose, in the case of *Tate v. Liggat & Matthews*, Whether the decree ought not to be reversed in omnibus? that is, not only that part of it, which affected the appellant *Tate*, by declaring the deeds he claimed under fraudulent and void, and setting them aside, so far as they provided for him, but that part of it also, which decreed to *Liggat & Matthews* against *Deison* (who did not appeal) the debt he owed them.

Stanard said, it was plain, and the whole court had so decided, that the chancellor had no jurisdiction to entertain the bill for any purpose whatever. He had no jurisdiction to give a judgment against *Deison* for debt. The judgment was a mere nullity. Should a judgment rendered by a court without jurisdiction, be allowed to stand, and to avail the creditor, exactly to the same extent as a judgment rendered by a court of competent jurisdiction? and this, in a contest between him and other creditors? Again, the decree was one and intire: the costs are given against *Deison* and *Tate* jointly. He referred to the case of *Lewis v. Thornton*, 6 Munf. 87, 97, in which on an appeal from a decree taken by some of the parties, the court corrected the decree as to parties who did not unite in the appeal.

Johnson answered, that the appellant *Tate* had no manner of interest in the decree for the debt against *Deison*, who had acquiesced in it, and it had been executed. As to the argument, that the chancellor had no jurisdiction to make such a decree, an erroneous judgment of the chancellor on a question of jurisdiction, could no
108 more be reviewed and *corrected by this court, without its being brought hither by appeal, than a judgment on any other point; and none but the party aggrieved could appeal.

PER CURIAM. That part of the decree which adjudges the debt to *Liggat & Matthews* against *Deison*, cannot be reversed. The appellant *Tate* has no interest whatever

involved in that part of the decree, he is nowise aggrieved by it, he has no right to complain of or to appeal from it, any more than if it had been a judgment at law in an action on the bond against Deison alone. If the court of chancery had dismissed the bill wholly as to Tate, on the ground that it had no jurisdiction as to him, it could not have concerned him at all, whether the court had jurisdiction as against Deison, or whether he was a debtor, or whether a decree should be given against him for the debt, or whether Deison should appeal from such a decree, or not. As Tate could not appeal from the decree against Deison, he could not compel Deison to appeal from it: Deison has acquiesced. Neither did Tate appeal from this part of the decree: he was only held to security for costs; whereas if it had been competent to Tate to appeal from the decree as it affected Deison, and he had done so, or if Deison had appealed from it, security must have been required in the appeal bond, to the full extent of the debt decreed against Deison. The court cannot, upon this appeal, judicially take notice that there was any subsequent suit between the parties; it can only know, that a subsequent suit might be founded on the decree against Deison, as it might be on a judgment at law against him. That the decree is against Deison and Tate, jointly, for the costs, is not material to the point: the costs are wholly separate and distinct from the body and matter of the decree; and Tate can receive no injury from the decree for costs, for as to him we reverse that and every other part of the decree. The case of *Lewis v. Thornton* is not in point. There, the parties appealing, and the parties not appealing, all stood on the same ground, and their rights were 109 involved *in the same question and equally affected by the decree. That too was an interlocutory decree, all the parties were still in court, and any errors could be corrected by the chancellor when the cause got back; and it is not unusual for this court, in its decrees in cases of that kind, to call the chancellor's attention to omissions or errors that he may supply or correct them. And that was what was done in *Lewis v. Thornton*: the court said, "according to these principles, the decree in question ought not to prejudice the purchasers under P. and T. R. Rootes; and although they have not appealed from the interlocutory decree in this case, yet these principles will equally apply to them, when a final decree shall be pronounced." The present is a very different case. The two parties, Tate and Deison, stood on distinct and unconnected grounds: the decree is final: and it was executed by a ca. sa. against the one, before the appeal was taken by the other.

Jacksons v. Sanders and Wife and Others.

March, 1830.

(Absent COALTER, J.)

Statute of Descents—Construction of Section 18—Alienage of Ancestor—Case at Bar.—A citizen dies

*Statute of Descents—Construction of Section 18—Alienage of Ancestor.—By 1 Rev. Code, ch. 96, § 18

seized of lands in Virginia, leaving a brother who is a citizen, a sister who is an alien yet living, children of the alien sister, who are citizens, and grand-children of the alien sister, who are citizens, though their fathers as well as their grand-mother are aliens: HELD, under the statute of descents, 1 Rev. Code, ch. 96, § 18, the descendants of the alien sister take by descent, one moiety to be divided among them per stirpes, and the citizen brother the other moiety.

Upon a bill exhibited in the superiour court of chancery of Wythe, by the appellees against the appellant, for partition of the real estate of Thomas Jackson deceased, and for other purposes, the case was:

Thomas Jackson, a native of England, but a duly naturalized citizen of the U.

States died in 1824, intestate, 110 *seized of a large real estate in

Wythe and the neighbouring counties. His kindred, living in the U. States, were his brother John Jackson, also a native of England and duly naturalized citizen of the U. States; this brother's children, John, a native of England, never naturalized, and Michael, Thomas and Robert Jackson, natural born citizens of the U. States; Ann Walton, (wife of Richard Walton) a sister of the intestate, and a native of England, who had never been naturalized; the children of Ann Walton (by her second husband Richard Walton) George Walton and Hannah (the wife of John Sanders) natural born citizens; the children of Mrs. Walton by a former husband, Mary Parkin (the wife of Joseph Parkin) and John, William and Robert Raper, all of whom were natives of England, and had never been naturalized; William Millan, a son of Mary Parkin by a former husband, and a natural born citizen; Robert, Ann, John, Eve, Chary and

Raper, children of the alien John Raper, and natural born citizens; and Mary and Jane Raper, children of the alien William Raper, and natural born citizens of the U. States. Pending the bill for the partition, John Jackson, the brother of the intestate, died, and the suit was proceeded in against his children Michael, Thomas and Robert.

The question was, Whether the whole estate descended to John Jackson, the naturalized brother of the intestate? or whether the natural born citizens, descendants of his alien sister, Ann Walton, who was yet living, were entitled by descent to one equal moiety, to be divided among them, and John, the citizen brother, to the other moiety? The chancellor declared, that the descendants of the alien sister were so entitled, and pronounced an interlocutory decree accordingly. And the Jacksons appealed to this court.

Leigh, for the appellants. According to the common law, title by descent could not be made, from, to, or through, an alien. Alienage was an impediment to descent, lineal or collateral, in all cases, where 111 it affected the person last *seized, or

(Code 1849, p. 523; Code 1887, § 2551.) It is provided: "In making title by descent, it shall be no bar to a party, that any ancestor, through whom he derives his descent from the intestate, is or hath been an alien." This statute removes the bar of alienage in making title by descent through collateral as well as lineal kindred. *Garland v. Harrison*, 8 Leigh 374, citing principal case as its authority. See also, citing principal case, *Hannon v. Hounihan*, 85 Va. 483, 12 S. E. Rep. 157.

the person who would otherwise be heir; or where it attached to a medius ancestor, and so intervened between the person last seized, and him who would otherwise be heir: but if it affected neither party, nor any medius ancestor, it was no impediment to the descent, that the person claiming as heir to another, derived his kindred blood from an alien. Harg. Co. Litt. 8, a. n. 37, 12, a. n. 62; Hale's argument in Collingwood v. Pace, 1 Ventr. 417; 2 Vin. Abr. Alien E. p. 269. The statute of 11 and 12 W. 3, ch. 6, relaxed the rigour of the common law in favour of natural born subjects; and the statute of 25 Geo. II. ch. 39, was enacted to explain and amend the 112 statute of W. III.* *The legislature of Virginia, with the principles of the common law and the provisions of both the english statutes in full view, enacted that, "In making title by descent, it shall be no bar to a party, that any ancestor, through whom he derives his descent from the intestate, is or hath been an alien." 1 Rev. Code, ch. 96, § 18, p. 357.

The statute of W. 3, enables natural born subjects to make, not their pedigrees only, but their title by descent, from any ancestor, lineal or collateral, in express terms, though the parents through whom they make or derive their titles or pedigrees, were or are or shall be aliens; most carefully extending the provision to collateral as well as lineal inheritance. If the legislature of Virginia had had the same design, it would have manifested the same care; it would have adopted some of many expressions of the english statute, that distinctly evince the intent. But it did not do so: it cannot be suspected of carelessness or inadvertency; it avoided doing so. It has

removed the impediment of alienage, only in favor of citizens deriving their descent from the intestate; that is, their pedigree, their blood, from him. Let the meaning of the words title by descent, or of the word descent taken alone, be what it may, the phrase that one person derives his descent from another, means that he derives his lineage from him. The provision, then, is confined to cases of lineal inheritance. And there might, in the view of the legislature, have been good reason for abandoning the commonwealth's title by escheat, in favour of a man's descendants, deriving their descent from him through an alien, and reserving it as against his collateral kindred: the one had certainly less claim than the other, to the favour of the law, since the intestate, if he had disposed of the estate himself, would not have been under the same natural obligation, and would have had less care to provide for them.

The statute of W. 3, enables the natural born subject, to make his title by descent or pedigree from the intestate, through any medius ancestor, though he was or is 113 or shall *be an alien; using the past, present and future tenses. I cannot find, that any case ever arose upon this statute in England.

The statute of G. 2, plainly supposes, that the words of the other statute, authorised a natural born subject to claim title by descent through an alien parent living at the time of the descent cast; for it provides for the case. Our statute, partially adopting the language of the statute of W. 3, in this respect, provides, that the citizen may trace his descent through a medius ancestor who is or hath been an alien, without adopting the explanation or restriction of the statute of G. 2. If, under our statute, which admits males and females and their descendants to the inheritance in parcenary, the citizen co-heirs may claim the inheritance through a medius alien ancestor yet living, much confusion must follow, and difficulties hardly to be surmounted. In the case now before the court, suppose Mrs. Walton shall hereafter have other children, or that her alien sons and daughters shall have many more children, born citizens, during her life; must the descent open to let in these afterborn children for their share of the inheritance? Or, if some of her citizen children and grand-children should die before her, must the descent close and exclude them? Or must partition be suspended till her death? How are the heirs to be ascertained till her death? If only those who are in being and capable to take at the death of the intestate, are to share the inheritance, by what rule shall it be divided between them? It will be found, on examination, that there is no provision in the act of descents, which gives a rule for such a case, and ascertains which of them shall take, her citizen children only, or her citizen grand-children also, or whether they shall take per stirpes or per capita. I cannot think, therefore, notwithstanding those words "is or hath been an alien," that the legislature intended, that citizens might make title by descent through a medius alien ancestor living at the time of the descent cast.

*See 1 Bac. Abr. Allens, C. p. 133; 2 Cay's Abr. Naturalization, III. XXVII. XXVIII. pp. 87, 90.

The words of the statute of W. III. are, "That all and every person or persons, being the king's natural born subject or subjects, within any of the king's realms or dominions, shall and may hereafter lawfully inherit and be inheritable, as heir or heirs to any honours, manours, lands, tenements or hereditaments, and make their pedigrees and titles by descent from any of their ancestors, lineal or collateral, although the father and mother, or fathers or mothers, or other ancestor of such person or persons, by, from, through or under whom he, she or they shall or may make or derive their title or pedigree, were or was, or is or are, or shall be born out of the king's allegiance, and out of his majesty's realms and dominions, as freely, fully and effectually to all intents and purposes, as if such father or mother, or fathers or mothers, or other ancestor or ancestors, by, from, through, or under whom he, she or they shall or may make or derive their title or pedigree had been naturalized, or natural born subjects."

The statute of G. 2, (§ 1.) confines the benefit of the statute of W. 3, to such persons as shall be living and capable to take as heirs at the death of the person last dying seized: "provided (§ 2.) that in case the person who shall be in being, and capable to take at the death of the ancestor so dying seized, and upon whom the descent shall be cast by virtue of this, or of the said act, shall be daughter of an alien: and the alien father or mother, through whom such descent shall be derived, shall afterwards have a son born within any of his majesty's dominions, the descent so cast upon such daughter shall be divested in favour of such son; and such son shall inherit and take the estate as is allowed by the common law of this realm. In cases of the birth of a nearer heir: or in case such father or mother shall have no son, but shall have one or more daughters afterwards born within any of his majesty's dominions, the daughters so born afterwards, shall inherit and take in coparceny with the daughter, upon whom the descent shall be cast at the death of the ancestor last seized."—Note in Original Edition.

114 *Johnson, for the appellees. The criticism by which it is endeavoured to confine the provision of the statute in question, to cases of lineal descents, cannot be maintained. When the statute says, that in making title by descent, it shall be no bar to the party, that any ancestor through whom he derives his descent from the intestate, is or hath been alien, the word descent, where last used, means the title by descent, which the party is to make from the intestate. Neither does the word descent mean pedigree, blood, lineage: it means title by descent. "Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law." 2 Black. Com. 201; Jac. Law Dict. word Descent; Co. Litt. 237, a. The statute of W. 3, is very verbose; and the framers of our statute of descents intended not to depart from the sense of its provisions, but only to condense them into fewer words. We shall look in vain, in the policy of the state, or in the temper of the legislature which enacted the statute of descents, much more of the committee of revisors who framed it, for any reason, that should induce our law givers to be less liberal than the english parliament, in relaxing the unreasonable rigour of the common law.

That the statute of W. 3, enables a natural born subject to claim descent from an intestate, through a medius alien ancestor, living the alien ancestor, is apparent from its words. It is admitted, that the statute of G. 2, proceeded on that interpretation of them. The supreme court of Massachusetts seems to have entertained no doubt on the point; *Palmer v. Downer*, 2 Mass. Rep. 179, in note. And it seems impossible to put any other construction on the statute of Virginia.

The descendants of Mrs. Walton coming to the inheritance in unequal degree, the rule of partition is provided by the 16th section of the statute; 1 Rev. Code, p. 357.

CARR, J. The question depends mainly upon the 18th section of the statute of descents: but before I discuss the
115 *meaning of that provision, I will take a brief view of the doctrines of the common law with respect to alienage, and the changes wrought in them by british statutes, so that we may see distinctly the state of the subject, at the passage of our law.

By the common law, an alien is defined to be, "one born out of the ligeance of the king." Upon such a person many disabilities were imposed. He could take real estate by contract, but he could not hold it against the king; neither could he transmit it by hereditary descent. He was disabled to take by any act in law; for the law, as lord Hale says, *quæ nihil frustra facit*, will not give him an inheritance or freehold by act in law, for he cannot keep it. The law, therefore, will not give an alien the benefit of either descent, curtesy, dower, or guardianship. His incapacity resembles "that of a person attaint, yet with this difference: the law looks upon a person attaint, as one it takes notice of; and therefore the eldest son attaint over-living his father, though he shall not take by de-

cent, yet he shall hinder the descent to the younger son. But if the eldest son be an alien, the law takes no notice of him; and therefore, as he shall not take by descent, so he shall not impede the descent to the younger brother." There is also what lord Hale calls a consequential, consecutive disability, which reflects to an alien from one, that must derive by or through him, though such one be perchance a natural born subject. Thus, if there be a grand-father a natural born subject, father an alien, and son a subject, and the father dies, and then the grand-father dies intestate, seized of an inheritance; the son cannot inherit his grand-father; because he must derive his descent through his father, the medius ancestor, whose alienage opposes an insurmountable obstacle. So, in collateral descents, if there be three brothers, the eldest an alien, and the two younger natural born subjects; one of the younger brothers dies seized of lands, living the other native born, and also a native born son of the alien brother: this son cannot inherit,

116 though he is capable to *hold and to transmit inheritance, and though he would be heir of his uncle who died seized; but he must derive his descent through his father, and he, as lord Hale expresses it, stands as "a block in the way." In *Collingwood v. Pace*, where this whole doctrine is so ably treated, the case was, a father alien, and two sons naturalized, one of whom died leaving a son natural born; and the question was, whether this son should inherit his uncle? He was considered as standing exactly in the shoes of his father, and presenting the question, as between the two brothers, whether they could inherit each other, or were impeded by the alienage of their father? It was adjudged in the exchequer, by seven judges against three, that they could: and the reason given was, that the descent between them was immediate, so that there was no necessity of deriving it through their father.

Whether these doctrines had their root in the feudal tenures, or, as Blackstone thinks, were founded "rather upon a principle of national or civil policy, than upon reasons strictly feudal," it would be useless to inquire. With a change of times and manners, the rigour of them, and the hardships and injustice produced by them, were felt, and the statute of 11 and 12 W. 3, ch. 6, was enacted to correct them. That statute cured the mischief, by removing the bar of alienage both in lineal and collateral descents. I think it clear too, that it contemplated the case of a party claiming through a living ancestor. Those words, "though the father or mother &c. from whom he may derive his title or pedigree, was, is, or shall be born out of the king's allegiance," mean nothing more than though the father &c. through whom &c. was, or is, or shall be an alien. This is clearly the meaning put upon it by the statute of 25 G. 2, ch. 39.

Such was the state of the law, when our committee of revisors came to act upon the subject: the harsh features of the common law had been softened down, and parties permitted to make descent, both lineal
117 and collateral, through "alien ancestors though living. The object of that

committee was to transfuse into our code whatever of sound and wise legislation they found in the english system. With these laws on the subject of alienage before them, they said, that "in making title by descent, it shall be no bar to a party, that any ancestor, through whom he derives his descent from the intestate, is or hath been an alien." It was contended, that this clause was applied to lineal descent only, leaving collateral descents as they stood at common law. It would seem strange, that with the mischief of the common law, and the remedy of the english statutes before them, these law-makers should stop half way, and leave unredressed so material and obvious a part of the evil. The position was rested on two grounds, 1. That having the statute of W. 3, before them, which so carefully provided for collateral descents, they have departed from the language of that statute; 2. that the terms they have used are peculiarly applicable to lineal descents, and inapplicable to collateral. With respect to the first, it is clear, that they have not followed the language of the english statute; but I do not think that evidence that they meant to depart from the substantial effect of it. The english statute is singularly verbose; employing a vast number of words to express a few ideas. It is no wonder that this example should have been avoided in a law, which seems to have been studiously condensed into the smallest possible compass, compatible with clearness. Let us examine the terms of this clause, and see if they are such as would be naturally used to embrace lineal and exclude collateral descents. "In making title by descent:" does this mean pedigree, blood, extraction, lineage? not at all, in my judgment. Title by descent, is a phrase of the largest and most comprehensive sense; purchase and descent are the only modes of acquiring land. In Co. Litt. 237, a., lord Coke says, "this word (Descents) cometh of the latin word descendere, id est ex loco superiore ad inferiorem movere; and in legal understanding it is taken when land &c. after the death of an ancestor, is cast by

118 "course of law, upon the heir, which the law calleth a descent." Blackstone, and all the elementary books use the term in the same sense. The title of our law is, "an act to reduce into one the several acts directing the course of descents;" which I understand to mean, the course in which lands shall descend from one to another: the first section of the act says, "that when a person having title to real estate of inheritance, shall die intestate, it shall descend and pass in parcenary, to his kindred, male and female, in the following course." All going to shew, that wherever in the act the word descent is used, it means the passage of the inheritance, and not the blood, the pedigree. Let us return to the law. "In making title by descent, it shall be no bar to a party, that any ancestor, through whom he derives his descent from the intestate, is or hath been an alien." "It shall be no bar that any ancestor:" could words be more extensive than these? Where the law says it shall be no bar, that any ancestor is an alien, how can we suppose that it means lineal ancestor only?

Any ancestor includes both lineal and collateral. It removes the bar as to both; and how can we restrain it? "Through whom he derives his descent from the intestate:" that is, through whom he derives his title by descent; his claim to the estate; the land; not the blood, the genealogy. "Is or hath been an alien:" is, in the present tense, shews that the law contemplated a claim through a living, as well as a dead alien ancestor. This section then, in my apprehension, is full and complete to remove out of the way the bar of alienage in both lineal and collateral descents, and also to remove any impediment from the life of the ancestor, through whom the descent may be derived.

The objections of the alienage and life of the mother being removed, the case is the common one of a brother of the intestate, and nephews and nieces concurring. He takes per caput; they, per stirpes, the share which their mother would have taken, had she been capable.

The other judges concurred, and the decree was affirmed.

119

*Burfoot v. Burfoots.

March, 1880.

Wills—Construction—Executory Limitation—Case at Bar.—Testator devises and bequeaths to his two grandsons D. and T. B. children of his deceased daughter M. B. sundry real and personal estate, and adds, "all the estate given to my grandsons is to be equally divided between them, each holding his part in fee simple, upon condition that each shall have issue of his body; but if either should die leaving no such issue, then his share shall pass to the surviving grandson; and such survivor shall hold and enjoy in fee simple the whole estate given to both, upon condition that such surviving grandson shall, at the time of his death leave issue of his body; but if both my grandsons shall die, neither of them leaving such issue as aforesaid, and any of the children or grand children of my daughter E. M'T. should be then living, the whole estate given to my two grandsons shall be considered as given for life only, and the same shall, after their death without such issue as aforesaid, be equally divided in fee simple among the issue of my daughter E. M'T. then living, and the children of such of them as may then be dead."

HELD, each of the grandsons took a fee simple in the moiety devised to him, with an executory devise limited and well limited thereon to the other, on the contingency of either dying without leaving issue living at his death.

Daniel Trabue late of Chesterfield, died in 1818, having first made his last will and testament, whereby, 1st, he devised and bequeathed sundry real and personal estate to his wife for life.

2dly. He devised sundry other real and personal estate, and a moiety of the remainder of that which he had given to his wife for life, to his executors, in trust, that they should apply the profits thereof to the support of his daughter Elizabeth M'Tyre and her children, and to her and their exclusive use and benefit, so that her husband Robert M'Tyre, should never have any control over the subject; and then he added: "But it is my will and desire, that, immediately after the death of my said daughter Elizabeth M'Tyre all the trust estate aforesaid be equally divided, in fee simple, among all the issue of her body lawfully begotten and legal representatives of such of them as may then be dead; but if my said daughter Elizabeth should leave no such issue of her

body, then it is my will and desire, that the said trust estate be equally divided, in fee simple, between my grandson Daniel Trabue Burfoot and Thomas Burfoot, children *of my late daughter Mary" (the deceased wife of Matthew Burfoot) "and their legal representatives in the event of the death of either or both of my said grandsons at the decease of my said daughter Elizabeth without issue as aforesaid; but, if one only of my said last mentioned grandsons should then be living, and the other having died without issue, then it is my will and desire that the whole of the trust estate aforesaid should pass to and be held in fee simple by my grandson so surviving.

3dly. He devised and bequeathed sundry other real and personal estate, and the other moiety of the remainder of that given to his wife for life, to his two grandsons Daniel Trabue Burfoot and Thomas Burfoot equally to be divided between them (without any words of inheritance) and then he added: "all the estate, real and personal, given to my two said grandsons, is intended to be equally divided between them, each holding his equal part thereof in fee simple, upon condition that each shall have issue of his body lawfully begotten; but if either of my said grandsons should die leaving no such issue, then that moiety of the estate allotted to him, shall pass to the surviving grandson; in which case, such survivor shall hold and enjoy, in fee simple the whole estate given as aforesaid to my two said grandsons, upon condition, nevertheless, that such surviving grandson shall, at the time of his death, leave issue of his body lawfully begotten: but it is to be distinctly understood, as my will and desire, that if both of my grandsons should depart this life, neither of them leaving such issue as aforesaid, and any of the children or grandchildren of my said daughter Elizabeth should then be living, then and in that case, it is my will and desire, that the whole of the estate given as aforesaid to my two said grandsons, be considered as given to them for life only, and that the same shall, at their death without such issue as aforesaid, be equally divided in fee simple among all the issue of my said daughter Elizabeth M'Tyre, then living, and the children of such of them as may then be dead."

121 *4thly. By a codicil, "in the event of the death of all his said grandchildren before they should arrive at the age of twenty-one years, or without lawful issue," he devised over a large portion of his real estate to his son-in-law Matthew Burfoot in fee, and all the residue of his estate in equal portions to four of his nephews and nieces.

Both the testator's grandsons Daniel Trabue and Thomas Burfoot, survived him; and Daniel Trabue Burfoot died in early infancy, and of course intestate and without issue, his brother Thomas, and his father Matthew Burfoot, him surviving. And then the father Matthew Burfoot died intestate, leaving his son Thomas, and his second wife Julia Lavinia, and Rosabella Burfoot, an infant daughter of his second marriage, him surviving.

In a suit brought in the superior court of chancery of Richmond, by Julia Lavinia Burfoot and Rosabella Burfoot, against Thomas Burfoot, Lawson Burfoot executor of Matthew Burfoot, and William Fendley, administrator de bonis non with the will annexed of the testator Daniel Trabue, for a partition of Matthew Burfoot's real estate and other purposes, the plaintiffs insisted, that the testator's two grandsons Daniel Trabue Burfoot and Thomas Burfoot took by his will, each respectively an estate tail in his moiety of the real property thereby devised to those grandsons, which estate tail was converted into a pure and absolute fee simple, by the statute abolishing entails; that, therefore, on the death of Daniel Trabue Burfoot, his moiety descended to his father Matthew Burfoot, his heir at law by the statute of descents; and that this moiety, upon the death of Matthew Burfoot, descended to his son Thomas and daughter Rosabella, subject to his widow's right of dower. And so the chancellor held and declared, and made an interlocutory decree directing a partition accordingly; from which decree an appeal was prayed on behalf of Thomas Burfoot, and allowed by this court.

122 *The Attorney General and Johnson, for the appellant, contended, 1. That according to the intent the testator, and the true construction and effect of the will, the two grandsons, took, in the first instance, only life estates in the moieties of the lands devised to them, with a series of contingent remainders limited on those life estates, to and between them for life and in fee, and ultimately to the issue to Mrs. M'Tyre; contingent remainders, depending on the contingency of one or both of them leaving issue, or not leaving issue, at his or their death. For, they said, the testator had taken much pains to manifest, and had very clearly expressed, his intent, that neither was to have the fee simple, or any estate of inheritance, in his moiety, but upon the condition of his having issue; and that, if either or both should die without leaving issue, either or both so dying should have only a life estate.

The effect of the devise, as applied to the moiety of the deceased grandson Daniel, according to their construction, was thus: Devise of the moiety to Daniel for life; remainder to himself in fee, in case he should have lawful issue; remainder in case Daniel should not leave such issue, to his surviving brother, Thomas, for life; remainder to Thomas in fee, in case he should leave issue; remainder, in case he also should die without leaving issue at his death, and there should be children or grandchildren of Mrs. M'Tyre then living, to the issue of Mrs. M'Tyre &c.

And Thomas now held the whole, one moiety under the immediate devise to him, and the other under the contingent limitation thereof to him in the event that had actually occurred of his brother dying without leaving issue; but he held only a life estate in the whole, with contingent remainders limited thereon, to himself in fee in the event of his leaving issue, and if he should not leave issue at his death, and any of Mrs. M'Tyre's children or

grandchildren should be living at the time, then to her issue &c.

123 *Such were the dispositions intended by the testator; and there was no principle of law that controlled or interfered with them, to prevent them from having full effect.

But, 2. If they were mistaken in their first view of the devise; if each of the grandsons took an immediate estate of inheritance in the moiety devised to him; they maintained, that that estate was clearly a fee simple. On this point, they argued, the express devise that each should hold in fee simple, was conclusive. This was not like the common case of a devise to one and his heirs, with executory limitations over on a failure of heirs of the first taker, where the context, and the general scheme of the disposition, might evince, that the deviser meant by the word heirs, not heirs general, but heirs of the body, and therefore intended to give the first taker an estate tail. Here, the testator was explicit as to the nature and quantity of the estate he intended to devise: he left no room for construction or implication. He gave a moiety to each grandson in fee simple; and it was impossible to hold, that they took estates tail by implication in their respective moieties, without violence to the language, and an utter disregard of the plain intent of the devise.

Taking it, then, that each of the grandsons took an immediate estate in fee simple in his moiety, the limitations that followed were executory devises limited after a fee. And the question was, Whether, upon the just construction of the will, those executory devises were made to depend on the indefinite failure of issue of the first takers respectively, or on a failure of issue living at their death? If the former contingency was intended, it was too remote. And the executory devises were void in their creation; if the latter, those devises were good and valid limitations, within the well settled principle of *Pells v. Brown*, Cro. Jac. 590; *Butler's Fearn*, 418.

And, they said, the testator had in his mind, the event of the failure of issue of these two grandsons, respectively, living at their death, as the contingency on which the moiety given to each was limited to the survivor: that his language

124 *indicated its meaning, as plainly and distinctly, as the most apt and technical words could have expressed it. The first alternative contingency of either devisee having issue, and of his leaving no issue, naturally imported having issue at his death, and leaving no issue at his death. The limitation over, upon the death of one leaving no issue, to the surviving grandson, evinced, that the survivor was to take at the death of the one first dying; that is, in the event of the failure of his issue at his death. The limitation of the whole estate to the survivor in fee, if he should at the time of his death leave issue, and if both should die leaving no issue as aforesaid, then over, expressly restrained the contingency of the survivor dying without leaving issue, to a failure of his issue living at his death, and evinced, that, in framing the previous contingency

of the first devisee dying leaving no issue, he meant the same thing; a failure, namely, of his issue living at his death. Then, the provision that if both should die leaving no issue, the estate should be considered as given to them for life only, shewed, that the contingency of their leaving no issue, was an event to be ascertained at the termination of their respective lives; in other words, it was the contingency of their leaving no issue living at their death. And the ulterior limitation of the estate, at their death leaving no issue as aforesaid, to Mrs. M'Tyre's issue then living, undoubtedly referred to the time of the death of the two grandsons. Lastly, they averted to the executory limitations of the estate vested in trustees for Mrs. M'Tyre and her family, and to the ultimate limitations contained in the codicil (which were likewise made to depend on a failure of issue) for the purpose of shewing that the testator, in every instance, had never an idea in his mind of a general indefinite failure of issue, but always intended a failure of issue of the previous takers living at their death.

S. Taylor and Leigh for the appellees, said, that the position first taken by the appellant's counsel, namely, that the devisees took, in the first instance, no 125 estate of inheritance *whatever, but only a life estate, in the moieties devised to them respectively, was altogether untenable. That view of the devise rested on the supposition, that the provision, that each should hold his moiety in fee simple, upon condition that each should have issue of his body, but if either should die leaving no such issue, his moiety should pass to the survivor, made the having and leaving issue, a condition precedent to the vesting of the fee in either. Yet, if it was a condition precedent at all, it was a condition precedent to the vesting any estate whatever; of an estate for life as much as of the fee simple. The supposed words of condition applied to the holding of the moiety, as well as to the holding thereof in fee. It was necessary, therefore, in order to give any immediate estate to either devisee, to take the words in question, as words of limitation not of condition. And such words, when used in dispositions of property like the present, had always been taken as words of limitation; for instances of which they referred to *Page v. Hayward*, 2 Salk. 570, and 2 *Preston on Estates*, 507-8.* However, the argument was, that, in this case, the immediate estates given to the two devisees respectively, were restricted or reduced to estates for life, by an express provision of the will to that purpose. But that argument, they shewed, consisted in applying a provision made by the testator for another and future event that had not yet happened, to the case and event that had happened, for which the testator made no such provision: the will did not provide, that if either devisee should die without leaving issue, he should be considered as taking only a life estate; but, that if both devisees should die,

*American Edition of 1828. two volumes bound in one.

neither leaving issue, they should be considered as taking only life estates.

There was no doubt that each devisee took an immediate estate of inheritance in the moiety devised to him. What estate of inheritance? An estate tail? if it was, the executory limitations were contingent
126 remainders, and were defeated by the statute, which converted the estate tail into a pure and absolute fee. Was it a fee simple? if so, the limitations were executory devises limited after a fee: and the question would still remain, whether they were well limited or not?

And considering the case in this view also, they insisted, that the just decision of it depended on those provisions of the devise exclusively, which related to and provided for the event that has actually occurred, out of which the case had arisen without regard to subsequent limitations of the same estate, made in respect of another and future event that might or might not happen? much more without regard to the limitations contained in those other clauses of the will making provisions for Mrs. M'Tyre and her family (which were framed upon a different scheme of disposition, and related to a different subject) or to the ulterior limitations contained in the codicil: That the language of a preceding limitation could not be controlled or explained by different language used in ulterior limitations of the same estate; on the contrary, diversity of language evinced diversity of meaning: That the only words of the will applicable to the event that had occurred, and the only words, therefore, material to the case before the court, were these: "All the estate given to my said two grandsons is intended to be equally divided between them, each holding his equal part thereof in fee simple, upon condition that each shall have issue of his body, but if either should die leaving no such issue, then his moiety shall pass to the surviving grandson." For, that it was under this limitation only, that the surviving grandson now claimed his deceased brother's moiety. The remaining words were intended to prescribe the contingency, on which the estate was to pass over to Mrs. M'Tyre's issue; the contingency, namely, of the surviving grandson, (after having acquired his brothers moiety by force of the previous limitation) dying himself without leaving issue at his death; a limitation, which, in the view of the testator, were equally reasonable, whether
127 the surviving grandson "took his deceased brother's moiety, by way of contingent remainder limited on a previous estate tail, or by way of executory devise limited on a preceding fee simple, devised to the deceased brother.

Then, they said, the only peculiarity of the case was, that the testator instead of devising a moiety to each grandson and his heirs, in the first instance, had devised a moiety to each in fee simple. But the first were the appropriate words of inheritance to pass a fee simple, to which the phrase used by the testator, was merely equivalent; indeed, it was only a substitute for the other and the proper words, which was allowed to supply the place of them only in wills. Co. Litt. 9, b.; 8 Vin. Abr. De-

vise, L. a. 205. There could be no difference in the intent, and consequently none in the effect, of a devise to each grandson in fee simple, and a devise (in the more apt technical words to pass a fee) to each and his heirs.

In the common case of a devise to A. and his heirs, and if he dies without issue or heirs of his body or the like, then over to B. "the devise to A. and his heirs, taken separately, would give him an estate in fee simple; but the subsequent words shew, that he intended to give an estate to B. also, and that that estate was made to depend on A.'s dying without issue. The question naturally arises, why was the interest of B. made to depend on A.'s dying without issue? Was it, that the testator intended it as a mere contingency, on which the estate of A. was to be intirely defeated? or was it, that he intended that if A. died leaving issue, that issue should have the estate, so long as there should be any issue? The courts, whose province it is to expound wills, have, from the beginning, uniformly and invariably, considered that it proceeded from an intention in the testator, to provide for the issue of the first taker, which intention could not be effected without holding that he took an estate tail, and not a fee simple. Therefore, the words if A. die without issue were held to control the previous words A. and his heirs, so as to give him a fee tail, and not a fee simple."

128 Per Cabell, J., in *Jiggetts v. Davis*, 1 Leigh, 419. Then, in the present case, where the devise was to each grandson in fee simple, and if he should die leaving no issue of his body, then to the survivor, was not the testator's intention to provide for the issue of the first takers, respectively, equally apparent? Was there any imaginable difference, as to the manifestation of intention to provide for the issue of the first taker, between the present and the more common forms of such devises? If the intent was to provide for the issue of the first takers, that intent could only be accomplished by giving them estates tail; and to that, the main intent, all particular and subordinate intents must give way.

Each of the devisees, therefore, took an estate tail in his moiety, with a contingent remainder thereon limited to the other, on the failure of issue of the first taker, unless the contingency be restrained to a failure of issue of the first taker living at his death; and distinctly, clearly, indisputably so restrained; for this rule is settled and inflexible, that no limitation shall be construed an executory devise, if it may be construed to be a remainder. See opinion of Green, J., in *Jiggetts v. Davis*, 1 Leigh, 402, 3. Now, the devise here was, in effect, thus: Devise of one moiety to each grandson to hold in fee simple, if each should have issue of his body, but if either should die leaving no such issue, then his moiety should pass to the surviving grandson. The phrase "if each should have issue of his body," was clearly explained by the words immediately following, to mean "if each should have and leave issue;" and the phrase would have imported the same sense, had it stood alone. *Tate v. Tally*,

3 Call, 354; Tidball v. Lupton, 1 Rand. 194; Romilly v. James, 6 Taunt. 263; 1 Com. Law Rep. 379. The limitation over, then, is made to depend, simply, on the contingency of the first taker dying without leaving issue of his body; and, in limitations of real estate, that phrase has always been held to import a general indefinite failure of issue. Forth v. Chapman, 1 P. Wms. 667, approved by this court in Hill v. Burrow, 3 Call, 349; Butler's Fearn, 129 476, 7. Nor *can the limitation over to the surviving grandson, restrain the generality of the contingency; for the phrase surviving grandson as here used, means only the other grandson. See opinion of Carr, J., in Bells v. Gillespie, 5 Rand. 278, 284.

Lastly, supposing that each of the devisees took a fee simple, in the first instance, and that the limitation over was an executory devise limited after the estate in fee, upon the failure of issue of the first taker, still it would be necessary to find some expressions in the will, precisely applicable to the limitation in question, and clearly restraining the contingency on which the executory devise was limited, to a failure of issue at the death of the first taker, or within twenty-one years after, the period indulged to executory devises; otherwise, the contingency was too remote, and the executory devise therefore void.

GREEN, J. The clause in Daniel Trabue's will, upon which the questions in this cause mainly depend, is (dropping the inoperative words) to this effect: after giving to his grandsons, the children of his deceased daughter, Mrs. Burfoot, real and personal property, in general terms, to be equally divided between them, the testator proceeds: "All the estate given to my grandsons is to be equally divided between them; each holding his part in fee simple, upon condition that each shall have issue of his body lawfully begotten; but if either of my grandsons should die leaving no such issue, then his share shall pass to the surviving grandson; and such survivor shall hold and enjoy in fee simple, the whole estate given to both, upon condition that such surviving grandson shall at the time of his death leave issue of his body lawfully begotten: but if both my grandsons shall depart this life, neither of them leaving such issue as aforesaid, and any of the children or grandchildren of my daughter Elizabeth should be then living, the whole estate given to my two grandsons, shall be considered as given for life only, and the same shall, after their death without such issue as aforesaid, be equally divided 130 in fee *simple amongst the issue of my daughter Elizabeth then living, and the children to such of them as may then be dead."

Neither party insists, that the terms upon condition used in this clause, make a common law condition, either precedent or subsequent. If it did, the main objects of the will would be defeated, whether it was considered as a condition precedent or subsequent; in the first case, it would leave the estates given, in express terms, immediately to the grandsons, to descend to the testator's heirs at law until the condition

was performed; and in the other, upon the failure of the condition, the estates would revert to the heirs at law, and the limitations over be defeated, even if they were in all other respects good. They operate only as words of limitation, and are to be construed like any other words of limitation, according to the intent of the testator, to be gathered from his whole will.

The counsel for the appellant admitting this, insists, that the grandsons took, respectively, either estates in fee simple, with limitations over operating as valid executory devises, or estates for life with contingent remainders; and that, whether the words surviving grandson and such survivor, be taken according to their literal import, or as meaning other grandson; such other: while the counsel for the appellees insist, that they took estates tail.

One of the constructions relied upon on the part of the appellant, is, that the grandsons took, in their respective moieties, only estates for their lives, with a series of contingent remainders limited upon them, for life and in fee, to and between them, and to the issue of Mrs. M'Tyre, depending upon the event of one or both of them leaving or not leaving issue living at the time of the death. I do not think there is any foundation for this construction. The estates originally given to each, were declared, in express terms, to be in fee simple, to go over to the other in certain events, and finally, if both should die without leaving issue, to the issue of Mrs. M'Tyre, in which event only did the testator declare, that the whole estate given 131 to both should *be considered as given for life only. That event has not happened; and the estates, whether of fee simple or fee tail, originally given, remain unaffected by that declaration, even if they can be hereafter affected thereby, in the event of the death of both the grandsons without leaving issue. That declaration, however, although inefficient to reduce the estates originally given to estates for life, has some influence in determining the real question in the cause; which is, Whether the limitations over were intended by the testator, to take effect after an indefinite failure of the issue of the grandsons respectively, or only in the event of the failure of issue living at the time of their deaths respectively?

If he meant an indefinite failure of issue, the limitations over would be defeated, whether the original estate in fee simple was or was not converted, by the subsequent provisions of the will, into an estate tail; in the one case, by the limits imposed upon executory devises; in the other, by the operation of our statute converting estates tail into fees simple, and defeating all remainders limited thereon. If he meant a definite failure of issue, then the limitations over would be valid as executory devises, unless it be necessary, in order to effectuate the intention of the testator, according to the law as it was before the statute abolishing entails, by converting the estates in fee simple given in express terms, into estates tail.

Before examining these questions, it may be proper to remark, that whatever

was the intention of the testator, in respect to the period when the limitations over should take effect, or whether the estates given to the grandsons were estates in fee simple or fee tail, it is necessary, in order to effect his obvious intention in respect to the disposition of the property given to his grandsons, to consider the words surviving grandson and such survivor as meaning other grandson and such other. For, taking those expressions of the will in their literal signification, the consequence would be, that if the grandson first dying left issue surviving him, and the other afterwards died without issue

132 surviving him, *the issue of the one first dying could not take the share of the one dying last, either as an executory devise, or as a contingent remainder limited upon an estate tail. If it was an estate in fee simple, it would descend to the heirs at law of the grandson last dying; his father, if living: if an estate tail, it would revert to the heirs at law of the testator. I speak of the law as it was before our statute converting estates tail into fees simple. But, under the operation of that statute, whether an estate in fee simple or fee tail, it would in such a case have descended to the heirs at law of the grandson. Such an event would have been contrary to the manifest intention of the testator; which was to give his whole estate (after providing for the support of his wife and living daughter for their lives, in equal or nearly equal proportions to the respective families of his living and deceased daughter) under such limitations, as to continue the proportion assigned to the family of his deceased daughter in her family, if either of her children had issue, but if not, then to transfer it to the family of his living daughter; and vice versa, to continue the proportion assigned to the family of the living daughter in her family, if she left any issue, and if not, to transfer it to the issue of his deceased daughter. These words, therefore, surviving grandson and such survivor, found in the clause of the will under consideration, give no aid in determining the intention of the testator, as to the period at which the limitations over were to take effect.

The settled construction of the expressions of this will: "upon condition that each shall have issue of his body lawfully begotten;" "but if either should die leaving no such issue;" "if both should depart this life, neither of them leaving such issue;" and "after their death without such issue," is, that they refer to an indefinite failure of issue, unless limited and controlled by some other provision or expression in the will. To justify the construction contended for by the appellant, it is necessary to find in it something shewing satisfactorily, that the testator, in all these expressions, intended to confine them to a failure of

133 the issue of the *grandsons, not at an indefinite period, but at the time of their respective deaths. And, I think, there is enough in the will for that purpose.

The testator repeatedly, and as it seems emphatically, declares, that his grandsons shall, if they have or leave issue, take and

hold in fee simple, as contradistinguished from the life estates only, which in an after clause he declares they shall be considered as taking, if both should depart this life neither of them leaving such issue; a declaration totally inconsistent with the idea of the indefinite failure of issue, and absurd if applied to the case of one of them dying and leaving issue, and that issue inheriting until it failed; but perfectly apt and sensible, if applied to the case of both dying without leaving issue, living at the time of their respective deaths. Again, in providing for the case, in which one of the grandsons dying without issue, the other was to take his share, the testator says: "and such survivor shall hold and enjoy in fee simple the whole estate given to both, upon condition that such surviving grandson shall at the time of his death leave issue of his body lawfully begotten:" thus explicitly providing, in that particular instance, for the case of a failure of issue at the death of the devisee. And there is no imaginable motive, which could induce him to make any discrimination between the limitation in that particular case, and all others contained in this clause of the will.

The effect of the will, therefore, is to give to each of the grandsons an estate in fee, and if either of them died without issue living at the time of his death, to the other in fee, and if both died without issue living at their respective deaths, to the issue of Mrs. M'Tyre then living, in fee.

The other judges concurred, and the decree was reversed.

134 *Smoot v. Doe on Demise of Marshall.
March, 1830.

(Absent COALTER, J.)

Landlord and Tenant—**Ejectment by Landlord**—**Evidence in Defence to Action**.—Ejectment by M. against S. it appeared, that M. claimed under F. and that M. and S. had stood in relation of landlord and tenant for many years, but S. the tenant before the suit brought had disclaimed to hold under M. Tenant offers evidence, that F. by deed recorded in 1778 let the premises to L. for three lives, that L. in writing, but not by deed, had assigned term to H. and H. had in like manner assigned term to S. the tenant, with proof that S. had paid rent to M. but without any proof that any of the three lives on which the term depended were yet in existence. HELD, such evidence is admissible and proper evidence in defence to the action.

Ejectment for one hundred and fifty acres of land, brought by Marshall against Smoot in the circuit court of Fauquier. Smoot filed two bills of exceptions to opinions of the court given at the trial. There was a verdict and judgment for Marshall, from which Smoot appealed to this court.

I. The first bill of exceptions stated, that Marshall having proved that Smoot had occupied and possessed the premises as his tenant, and paid him an annual rent of forty shillings from the time he has so occupied the same until the 1st January 1819, Smoot's counsel thereupon moved the court to instruct the jury, that in order to maintain the action it was necessary Marshall

***Landlord and Tenant**.—See generally. monographic note on "Landlord and Tenant" appended to Mason v. Moyers, 2 Rob. 606.

Ejectment.—See generally, monographic note on "Ejectment" appended to Tapscott v. Cobbs, 11 Gratt. 172.

should prove notice to Smoot to quit. And the court so held; and Marshall's counsel admitted it to be right, in the then state of the evidence; but he proceeded to state, that Smoot had before the institution of the suit disclaimed the tenancy he had theretofore held under Marshall, and held adversely to the title of his said lessor, and thus dispensed with notice to quit; and to prove this, he offered a witness to prove, that in a conversation with Smoot twelve months after the ejectment was brought, the witness asked Smoot what was his contention with Marshall? whether when he purchased his lease, he did not purchase for a term of lives? and whether he did not believe the lives had expired? To which Smoot

135 answered, *that he had purchased for a term of lives; that he did not know or care, whether the lives had expired or not; Marshall said so; but that was not his contention; he did not believe Marshall had sufficient title, and till he proved it to his satisfaction, he did not intend to give up the premises. Smoot's counsel objected to this evidence as improper and inadmissible: but the court overruled the objection, and admitted the evidence as proper to be left to the jury; as evidence from which the jury might infer (if it thought such inference just) that Smoot had, before the institution of the suit, disclaimed to hold as tenant of Marshall, and claimed to hold the premises adversely to him; and the court told the jury, that if the evidence proved this fact to its satisfaction, no notice to Smoot to quit was necessary. Smoot's counsel excepted.

II. The other bill of exceptions stated, that Smoot to sustain the issue on his part, offered in evidence, 1. a deed of lease of lord Fairfax, proprietor of the Northern Neck of Virginia under whom Marshall claimed, to Samuel Luttrell, dated the 1st November 1776, and duly recorded in Fauquier county court; whereby lord Fairfax leased the land in question to Luttrell for three lives, namely, for the lives of Luttrell himself, of his wife Dinah, and of his son Daniel, yielding and paying a yearly rent of thirty shillings sterling, with clauses of distress and re-entry for non-payment of rent or non-performance of covenants, and with divers special covenants, among which was a covenant that Luttrell should not procure or permit any person to occupy or cultivate the land as his sub-tenant for lives, for years or at will, and should not sell or assign his term without the license or consent of lord Fairfax, his heirs or assigns. 2. An instrument of writing, signed but not sealed by Luttrell, purporting to be an assignment by him to Christopher Hitch, of his term for lives in the premises: this instrument bore date the 14th September 1778, and was indorsed on the deed of lease. 3. The will of Christ. Hitch made and admitted to probat in Fauquier county court in the year 1805, 136 *whereby he devised his lease in the land in question, to his three sons, Levin, Elias, and Thomas Hitch. 4. Parol evidence, that Levin Hitch entered and held the premises from the death of his father till 1807. 5. An instrument of writing signed but not sealed by Levin Hitch,

whereby he assigned all his interest in the lease to the defendant Smoot: this instrument was also indorsed on lord Fairfax's deed, and bore date the 11th March 1807. 6. Parol evidence that Smoot immediately entered into possession of the premises, and had thenceforth ever since held the same. And lastly, parol evidence to prove, that Smoot had paid the rent of forty shillings (Virginia currency) to Marshall, yearly, down to the 1st January 1819. To all of which evidence, except that last above mentioned, Marshall's counsel objected as being inadmissible: and the court was of that opinion, and exclude the evidence accordingly. And Smoot's counsel excepted.

I. Briggs for the appellant, argued, that the evidence of what Smoot had said twelve months after the institution of the ejectment, could afford no proof of a disclaimer by him of his tenancy under Marshall, before suit brought: the evidence only shewed the point of contention at that time; the ground on which he then relied as his defence against the action, not the point of contention which led to the institution of the action: therefore, the evidence was irrelevant and consequently inadmissible, since it could only tend to perplex and mislead, as it did in fact mislead the jury.

II. He contended, that the evidence of lord Fairfax's deed of lease to Luttrell for three lives, and the subsequent assignment of his estate by Luttrell to Hitch, and by Hitch's devisee to Smoot, and the parol evidence that Hitch, and his devisee, and Smoot, had successively entered and held under the deed of lease, and under the successive assignments thereof, were improperly excluded. Marshall could only recover by the strength of his own title.

He claimed title under lord Fairfax. 137 Here was a lease of lord *Fairfax for three lives, produced by Smoot, plainly evincing that lord Fairfax himself had title only to the reversion expectant on the three lives, and consequently, that Marshall claiming under him could be entitled to nothing else. And whatever Smoot's rights were, this evidence was sufficient proof, that Marshall had no right, unless he could shew on his part, that the lives had expired.

Leigh, for the appellee, said, I. That the objection taken to the evidence of Smoot's disclaimer of tenancy under Marshall before suit brought, and consequent waiver of notice to quit, was, in truth, an objection to the sufficiency of evidence, not to its competency: that the question as to its competency, depended on the single consideration, whether a party to a suit, in a conversation after suit brought, can disclose, not whether he in fact disclosed, the point of contention prior to the suit, out of which it originated. Smoot was asked, what was the contention between him and Marshall? that is, what was the point of controversy between them? He said, the contention on his part, was a denial of Marshall's title. Now, whether or no this related to the point of contention pre-existing the suit and out of which it grew, whether or no it was an avowal of a disclaimer of tenancy under Marshall before the suit was brought, was

matter of inference from the evidence, and rightly left to the jury.

II. As to the other point, he said Smoot, clearly, did not shew any legal title in himself to Luttrell's lease for three lives. He exhibited a deed of lord Fairfax, and a parol assignment of the lease for lives, from Luttrell to Crist. Hitch, and another parol assignment from one of three devisees of Hitch, to himself; assignments, which if made by deed, had been contrary to the covenants of the deed of lease; parol assignments, which by law could not pass the title; for by express statutory provisions, such title could only be conveyed by deed. 1748, ch. 1, § 1, 5 Hen. stat. at large, 408; 1 Rev. Code, ch. 99, § 1, p. 361; 138 Smoot *then was setting up an outstanding estate in Luttrell for three lives, granted him half a century ago, without offering any proof, that either of the lives was in existence. He insisted, that if a defendant in ejectment may set up an outstanding title in a third person, in bar of the plaintiff's action, he must shew the title, and shew that it is outstanding and existing. Adams on eject. 285, 6.

He observed, that Marshall's title or claim of title was not stated in the bill of exceptions: we were only informed, generally, that he claimed under lord Fairfax, and that Smoot had paid him rent for several years down to the 1st January 1819; that is, that the parties stood in the relation of landlord and tenant. Now, that relation between the parties being established and admitted, it was not competent to the tenant to deny the landlord's title, and put him upon proof of it, though he might have proved, if he could, that the landlord's right had expired. Driver v. Laurence, 2 W. Black. 1259; England v. Slade, 4 T. R. 682. And the circumstance of the tenant having disclaimed tenancy under his landlord, ought not to vary the case; for if it were allowed to do so, the tenants would have it in their power, at all times, by simply disclaiming tenancy, to put their landlords on proof of title, and avail themselves of every flaw or defect in the title.

GREEN, J. The law in respect to notice to quit was correctly laid down by the court as stated in the first exception. But I strongly incline to think, that the evidence allowed to go to the jury, as tending to prove the fact of the defendant's disclaimer of his tenancy before the institution of the suit, had no such tendency, and ought therefore to have been rejected as irrelevant. But in this, I submit to the better judgment of my brethren.

The ground upon which the evidence offered by the defendant, mentioned in the second exception, was rejected, is not stated. If it was that a tenant cannot set up against his landlord in ejectment, 139 an adversary title in a stranger, *the principle of law, although true, was misapplied. The title set up here was a lease for lives, duly recorded, from lord Fairfax, under whom the lessor of the plaintiff claimed, to one under whom the tenant claimed, the validity of which the lessor of the plaintiff had admitted by the regular annual receipt of the rents stipulated by the lease, from the defendant, and those

under whom he claimed, down to a period of 2 months before the institution of the suit. If the evidence was rejected, because the assignment of the lease under which the defendant claimed, not being by deed, did not pass the legal title to the freehold estate created by the lease, and so the defendant was setting up against his landlord a title in Luttrell, the lessee for lives, or his representatives, the answer is, that if the defendant had not the legal title, yet Luttrell was a stranger neither to the lessor of the plaintiff, nor the defendant. The latter being in possession with the assent of Luttrell, had the legal title under the lease, as his tenant at will or at sufferance, and so claimed under him, and that with the assent of the landlord, which was necessary according to the terms of the lease; and such a possession he had a right to maintain against the landlord, without violating any rule of law, as long as the lease continued. If the objection was, that the defendant was in possession, by the authority of one only of three tenants in common or joint tenant, neither was that a valid objection; for that permission gave him a right to hold in common or jointly with the others, and exclusively against all the world except those others. Upon this exception, I think the judgment should be reversed.

The other judges concurring on the last point, the judgment was reversed, and the cause remanded to the circuit court for a new trial.

140 *Robin, and Others, Paupers v. King.

March, 1880.

(Absent COALTER, J.)

Suit for Freedom—Witness—Widow of Person from Whom Defendant Purchased Plaintiff.—In suit by persons held in slavery against their master to recover their freedom, defendant claimed plaintiffs as slaves by purchase of them as slaves from W. K. deceased; and plaintiffs offered K. K. widow of W. K. to prove that W. K. in his lifetime, before sale to defendant, repeatedly declared, in presence of his family, and without injunction of secrecy, that mother of plaintiffs then held by him in slavery, was an Indian woman: **Held**, widow not competent witness to prove such declarations of her deceased husband.

The appellants brought suit in forma pauperis, against the appellee by whom they were held in slavery, to recover their freedom, in the circuit court of Wythe. The proceedings and pleadings are in the usual form.

At the trial, the counsel for the appellants filed exceptions to an opinion of the court; which stated, that they introduced as a witness, Katharine King widow of William King deceased, to prove that she had heard him say, that Ester the mother of the

***Evidence—Witnesses—Husband or Wife.**—It is a pervading principle of the law of evidence, that a husband or wife cannot be a witness in a cause, civil or criminal, in which the other is a party: not for that other, because the law considered them as one person, and their interests as identical: nor against that other, on grounds of public policy, because of the mutual confidence subsisting between them, and for fear of sowing distrust and dissensions and of giving occasion to perjury. *William & Mary College v. Powell*, 12 Gratt. 383; citing principal case. To the same effect, see principal case cited in *Murphy v. Com.*, 23 Gratt. 960, 970; *Kilgore v. Hanley*, 27 W. Va. 453, 456. But see Acts of 1897-98, p. 753; *Pol. Sup.*, § 3346a.

plaintiffs was an indian woman, she the witness being then the wife of King; that these declarations were made in the presence of the family, and they were not requested to keep them secret; and that they were repeatedly made by him. And it was admitted, that the defendant claimed the plaintiffs as slaves by purchase from William King. And the plaintiffs further offered to prove, that William King at the time he made the declarations above mentioned, held the said Esther and such of the plaintiffs as were then born, in his possession as slaves, that those declarations were made long before the sale of the plaintiffs to the defendant. But the court held, that the declarations of William King the husband, were not legal evidence, when disclosed by the wife as a witness. To this opinion the plaintiffs' counsel excepted: and verdict and judgment being rendered for the defendant, an appeal was taken for the paupers to this court.

141 *The case was argued here by Leigh, assigned by the court counsel for the appellants, and Johnson for the appellee.

CARR, J. The question is, whether or no the circuit court erred in rejecting the evidence of William King's widow, as to declarations of her husband in his lifetime? And I have seldom examined a question, about which my mind felt at first more doubt, not about the general doctrine, but as to its application to this particular case.

It is well settled, "that husband and wife cannot be witnesses for each other, because their interests are identical, nor against each other, on grounds of public policy, for fear of creating distrust, and sowing dissension between them, and occasioning perjury." It would also violate that confidence, which from the nature of the relation ought to be regarded as sacred, and would be arming each of the parties with the means of offence, which might be used for very dangerous purposes. So important is this rule, that the law will not suffer it to be broken even by agreement; for in *Barker v. Dixie*, Rep. Temp. Hardw. 264, lord Hardwicke would not suffer a wife to be examined against her husband, though he consented that she might. And this rule is adhered to, though the marriage tie be dissolved by the death of one of the parties, or by a divorce. *Aveson v. Kinnaird*, 6 East. 192; *Monroe v. Twisleton*, Peake's ev. app. lxxxvii. It is very clear from these and other cases, that where either is a party, the other is altogether incompetent.

The difficulty with me, arises from the fact, that in the case before us, neither the husband, nor his representative is a party; nor would the judgment in this case, as I apprehend, be evidence in a suit by the vendee of the slave against the representative of the husband, further than to shew the fact of the recovery. Still this case comes within the class treated of by Starkie in his law of evidence (part IV, p. 708,) under the second head, viz. "Where one of them (husband and wife) not being a party, is 142 interested in a proceeding *between others." For here, though a judgment for the plaintiffs would not charge the

representative, it would lead inevitably to an action against him, while a verdict for the defendant would render him secure. The husband then if alive would feel an interest in this case. But I find several cases in the books, which say that it is not such an interest, as of itself will render the wife incompetent. Thus, in *Williams v. Johnson*, 1 Stra. 504, the action was against the daughter's husband for her wedding clothes: defence, that the goods were furnished on the credit of her father: and to prove this, the mother who was present at the choosing of the goods, was called to charge her husband, and allowed. And this case has not only never been overruled, but other cases are founded on it, and I see it referred to as good law in the latest books. It is this class of cases which has puzzled me. But upon reflection, I think I see a distinction between them and the case at bar, which becomes material, when we look at the reason of the rule, which disqualifies husband and wife from giving evidence against each other. It is not merely the interest, nor indeed, chiefly the interest of the parties, that thus disqualifies them; but the near relation in which they stand, and the unbounded confidence so essential to that relation, that the law will not suffer it to be violated. Thus, in *Aveson v. Kinnaird*, where the declarations of a wife (dead at the time of trial) were sought to be used against the husband, lord Ellenborough, among the reasons for admitting them, says, "No confidence has been violated, nothing extracted from the bosom of the wife, which was confided there by the husband." So, in *Monroe v. Twisleton*, when the wife, then divorced, and again married, was called to prove a contract against her former husband, lord Alvanley said, "to prove any fact arising after the divorce, this lady is a competent witness, but not to prove a contract or any thing else, which happened during the coverture. She was at that time bound to secrecy; what she did might be in consequence of the trust and confidence reposed in 143 her by her husband; and *miserable indeed would the condition of a husband be, if when a woman is divorced from him, perhaps for her own misconduct, all the occurrences of his life, intrusted to her while the most perfect and unbounded confidence existed between them, should be divulged in a court of justice." In the case of *Le Texier v. Margravine of Anspach*, 15 Ves. 165, the wife being made a party with her husband, and charged as his agent, and having documents in her possession, and made a party for discovery only as to her, and relief against the husband, lord Eldon said, "Before a married woman can be made a party, upon the same principle that an agent of a corporation is made a party, other principles must be broken through, long acknowledged by the law; arising out of the relation of husband and wife: a case in which it is almost impossible to represent the degree of inconvenience that will result, from the adoption of this principle; and the particular mischief must be met with the observation, that it must be endured, rather than that a general mischief should be introduced,

which is against all policy, and would break in intirely upon the happiness of private life." These are cases in which the husband was a party, but the principle applies also where he is no party: for, in the one case or the other, it is equally a violation of the confidence reposed, to divulge in a court of justice, what was imparted in the sacred privacy of domestic intercourse. And of this opinion Starkie seems to be (part IV, p. 709,) when he says, "Where neither of them is either a party to the suit, or interested in the general result, the husband or wife is, it seems, competent to prove any fact, provided the evidence does not directly criminate the other, or, as it seems, involve the disclosure of some communication made by the other." Now, the case from *Strange* did not violate this rule: the wife disclosed no communication: but being present when the goods were bought, she was called to prove on whose credit the sale was made. But is not our case very different? I think so. The husband was at the time holding in slavery, the mother and her children: if she

144 was *an indian woman, they were all entitled to their freedom. Can we possibly suppose, that he meant to make such a declaration public? It is stated, that the party offered to prove that the declarations were made repeatedly in the presence of the family, and they were not requested to keep them secret. This could only (I presume) be proved by the wife; and I question the propriety of permitting her thus to qualify herself to disclose such communications. But suppose it proved, that the declarations were so made, and no secrecy enjoined; would it follow, that the husband wished or expected they should be divulged? Are we to say, that every word spoken, in the thoughtless, careless confidence of the domestic circle, is free for public disclosure, unless secrecy be expressly enjoined? Is not the converse of the proposition true? And would it not have a most mischievous effect, would it not seriously break in upon that confidence which is the charm of domestic life, if men should, from our decisions, have cause to fear, that after they were in their graves, their reputation might be injured, and their children ruined, by the declarations they had made in the bosoms of their families? This freedom from restraint or apprehension, in the intercourse of one's own fire-side, seems to me so necessary to the quiet and repose of society, that I am fearful of trenching upon it in the slightest degree.

The case of *Baring v. Reeder*, 1 Hen. & Munf. 154, mentioned at the bar, was not like this. *Baring* had lent Mrs. Claiborne some personal property; her husband made *Reeder* an absolute bill of sale for it, but the possession remained; *Baring* hearing of the bill of sale, took back into his own possession the property he had lent; *Reeder* brought trover against him for it; and Mrs. C. was offered as a witness to prove the loan, and that she had told *Reeder* of it: there was no confidence violated there, nor was her husband's interest involved; and I think with judge Roane, that he, as well as his wife, might have been examined.

The other judges concurring, the judgment was affirmed.

145

*M'Kays v. Hite and Others.

March, 1830.

(Absent GREEN and CARR. J.*)

Injunction—Death of Parties—Dissolution—Erroneous Order.—Four plaintiffs in equity unite in same bill, praying injunction to stay proceedings on four several judgments at law against them, respectively, on grounds of equity common to all; the bill is exhibited against five parties defendants: the injunction awarded; pending suit, two of plaintiffs and three of defendants die; and chancellor makes an order, that unless living plaintiffs, and representatives of deceased plaintiffs, revive the injunction, in name of representatives of deceased plaintiffs, against representatives of deceased defendants, on or before a given day, the injunction shall stand and be dissolved: this order is irregular and erroneous.

There was a bill exhibited in the superior court of chancery of Staunton in 1803, by Andrew M'Kay, Jeremiah M'Kay, Robert M'Kay and William Tyler, against Isaac Hite executor of Joist Hite, James Williams, Jonathan Clarke, and James, Samuel and Moses Green; one object of which was, to injoin further proceedings at law on four several judgments that had been recovered by Williams and Clarke (who are the agents of the other parties) against the four plaintiffs respectively, for large debts due by them on bonds given for the purchase money of lands, which Williams and Clarke had been authorised to make sale of by a private act of assembly. The injunction was awarded. The rights of the grantees and settlers under the grant of 100,000 acres of lands, made in 1731, to Joist Hite and Robert M'Kay (see 2 Rev. Code, app. II, § 15, p. 346,) were involved in the controversy: and the four plaintiffs, though the judgments at law against them were several, relied on the same grounds for relief in equity. The suit was transferred to the superior court of chancery of Winchester in 1812; and there, at the August rules 1812, the deaths of the plaintiff Andrew M'Kay and the defendant Jonathan Clarke were suggested on the record; whereupon

146 all proceeding *in the cause was suspended, for many years, and, in the interval, others of the parties died. At December term 1823, the chancellor made an order in these words:

"It being suggested to the court, that Andrew M'Kay and William Tyler, two of the plaintiffs, are dead, and also that James Williams, Jonathan Clarke and Samuel Green, three of the defendants, are dead; it is ordered, that unless the plaintiffs who are living, and the representatives of those who are dead, shall revive the injunction, against the representatives of the deceased defendants, in the names of the representatives of the deceased plaintiffs, on or before the 5th day of the next term, the injunction shall stand and be dissolved as an act of this day."

And at the next term in April 1824, the court made the following final order: "The injunction in this case having been dissolved at the last term, and no good cause having been shewn for continuing the same, it is therefore adjudged, ordered and

*One was related to some of the parties: the other had decided the cause in the court of chancery.

†See generally, monographic *note* on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

decreed, that the bill of the plaintiffs be dismissed, with costs" &c.

From this decree, the surviving plaintiffs Jeremiah and Robert M'Kay afterwards prayed an appeal to this court.

Wyndham Robertson for the appellants. The orders were wholly irregular. The first of them was a rule nisi not only on the living plaintiffs who were before the court, but on the representatives of the deceased plaintiffs who were not before the court; a rule requiring the living and the representatives of the deceased plaintiffs, to revive the suit against the living and the representatives of the deceased defendants, on or before a given day, without information or inquiry, who were the representatives, or whether there were any representatives of the deceased parties, without any requisition that this rule should be served on the parties, or the representatives of the parties, whom it affected. The regular effect of the deaths of the parties plaintiffs, in case of their representatives failing to revive the suit at or before the second term after their deaths suggested on the

147 record, *was a discontinuance as to them; and the effect of the deaths of the parties defendants, was a revival by scire facias against their representatives, or by their voluntary appearance. 1 Rev. Code, ch. 128, § 38, pp. 497, 8. The court surely could not compel the representatives of the deceased plaintiffs, to revive and prosecute the suit, whether they thought it advisable or no: they had a right to abandon the controversy, if they saw fit: but here is an order, in effect, to compel the living plaintiffs, to compel the representatives of the deceased plaintiffs, to revive and prosecute the suit against the representatives of the deceased defendants, upon pain of having the injunction dissolved as to themselves, and their bill eventually dismissed; and this, when for aught that appeared to the court, there might be no representatives of the deceased plaintiffs, or of the deceased defendants, upon and against whom the living plaintiffs could act. As to the decree of dismissal, that was not a consequence of the previous rule nisi, which indicated not the dismissal of the bill, but only the dissolution of the injunction, in case the parties should fail to revive the suit; and even if the rule nisi were regular, the decree of dismissal is palpably wrong. It is a final decree for and against deceased parties, whose representatives were not before the court, and that because they were not before the court.

Green and Stanard for the appellees. The peculiarity of the case should be considered. Four plaintiffs uniting in the same bill, had obtained an injunction to stay proceedings at law on four several and distinct judgments against each of the plaintiffs respectively. The process of injunction was in effect several. The first order is to be read distributively; and then it will import, that unless each living plaintiff, and the respective representatives of each deceased plaintiff should take the proper steps to revive the suit against the representatives of the deceased defendant, the injunction should stand dissolved as to each living plaintiff and the representatives of each

deceased plaintiff, respectively. The 148 *order was in truth an order to speed the cause; and properly understood, it imposed no other duty on the living plaintiffs but to revive the suit for themselves. If either of the living plaintiffs had sued a subpoena scire facias against the representatives of the deceased defendants, the order would have been discharged as to him. There was no other or more proper method to compel them to proceed. As the chancellor, before he interfered by way of injunction to a judgment at law, may hold parties asking such interference at his hands, to reasonable terms, so he may impose reasonable terms upon them, as the condition of continuing his interference; and no terms can be more reasonable, than to require the plaintiffs to use common diligence in prosecuting their suit. The decree of dismissal is doubtless wrong, and ought to be corrected. It ought to have been only an absolute order of dissolution of the injunction. But this was obviously a clerical mistake, not an error of judgment in the court.

Johnson in reply. Supposing that the order nisi may be read distributively, and that it is to be understood as the counsel for the appellees explain it, yet it is wholly irregular; for it is still an order upon the representatives of the deceased plaintiffs, not before the court, and even not known to be in existence. A discontinuance as to them would have answered every purpose. And the representatives of the deceased defendants might have voluntarily appeared and asked to be let in to defend the rights of their respective testators or intestates. But the order cannot be read distributively as proposed: the four plaintiffs had joined in the bill, asking relief against several judgments at law against them, indeed, but on the same grounds of equity common to them all; and whether or no it was originally proper for them to join in one bill, the process of injunction was one and entire, for all the plaintiffs against joint defendants in equity. The chancellor's order so regards it, and makes the complete revival of the injunction, by all the living and all the representatives of the deceased plain- 149 tiffs, against all the *living and all the representatives of the deceased defendants, the condition on which the injunction should be continued. The chancellor may impose reasonable terms as the condition of continuing his interference by way of injunction, as well as of his interference in the first instance; he may require the party to do what it is his duty to do: but here the objection is, that the terms were unreasonable, since the parties were required to do what it was not their duty to do.

The Court being of opinion, that the order of December 1823, as well as the decree of dismissal was clearly erroneous, reversed them both, and remanded the cause.

M'Kinney v. Pinckard's Ex'or.

March, 1830.

[81 Am. Dec. 601.]

(Absent GREEN, J.)*

Chancery Practice—Avoidance of Contract—Inadequacy of Price.—Inadequacy of price, whether it be so

*He decided the cause in the court of chancery.

gross as to be per se proof of fraud or not, if attended by circumstances evincing unconscientious advantage taken by vendee of improvidence and distress of vendor, will avoid the contract in equity, though it be a contract executed.

Same—Vendor of Expectant Interest—Quere.—Whether every vendor of an expectant interest is not to be regarded in equity as a young heir dealing for his expectancies:

Same—Same.—But clear, that very anxious protection is extended by equity to all persons selling expectant interests, whether they stand in relation of expectant heirs or not, and trivial circumstances, added to inadequacy of price, sufficient to set aside such sales.

The appellee's testator, Thomas Pinckard, being entitled to a share of the reversion or remainder of sundry slaves, expectant on the life of Judith Fauntleroy, conveyed the same, by bill of sale dated the 28th November 1809, to the appellant, Armstrong M'Kinney, for the consideration of 156 dollars cash. This expectant interest of Pinckard was worth, at the time of the sale 150 thereof to M'Kinney, *on a fair estimate, taking Mrs. Fauntleroy's expectation of life to be five years, at least 1300 dollars. Mrs. Fauntleroy was then 56 years old, in very bad health, seldom free from disease, and subject to frequent recurrence of acute diseases; but, contrary to the expectation of her acquaintances, she lived till the 30th January 1817. Pinckard was a young man about 23 years of age, of improvident, extravagant, dissipated disposition and habits, embarrassed in his affairs, and in great distress for money. M'Kinney was a deputy sheriff of the county of Westmoreland, where Pinckard lived; and shortly before the contract, he had had several executions against Pinckard in his hands, which had been satisfied by forced sales of his property; he held one execution against him, for a small amount, at the time of the contract; and other executions were, probably, anticipated by both parties; for early in 1810, two others, on judgments of Westmoreland county court, were issued against Pinckard, one of which was returned no effects: whence it was inferred, that M'Kinney must have been apprised of the embarrassed state of his affairs, at the time of the contract. Mrs. Fauntleroy, the tenant for life, however, did not reside in Westmoreland, but in the neighbouring county of Essex; and there was no direct proof, that M'Kinney was acquainted with her, her time of life or state of health, or with the number or description of the slaves held by her for life.

Pinckard died in the early part of the year 1814; having some short time before his death, offered to redeem the property, by repaying to M'Kinney the money he had received of him, alleging, that there was a secret agreement between them that he should have the right of redemption; upon which, M'Kinney, without denying the fact of any such agreement, refused to permit the redemption, unless Pinckard would pay him other monies which he said he owed him. Shortly after Pinckard's death, his executor tendered to M'Kinney, the purchase money he had paid Pinckard, with interest; and M'Kinney refusing to 151 receive *it, he deposited the amount

in the hands of a third person, and gave notice to M'Kinney, that it would be paid to him whenever he should choose to receive it.

Pinckard's will was admitted to probat, and letters testamentary granted to his executor, on the 23d May 1814. After Mrs. Fauntleroy's death in January 1817, the executor took possession of his testator's share of the slaves in question. And, on the 21st May 1819, he exhibited his bill against M'Kinney, in the superiour court of chancery of Fredericksburg, detailing the facts of the transaction; impugning the contract between him and Pinckard, on the ground that it was a purchase of an expectant interest in property for a grossly inadequate price, from a young heir, with full knowledge of his thoughtless improvident character, his habits of dissipation and extravagance, the embarrassment of his affairs, and his distress for money; charging, that the purchase, under such circumstances, and for such a price, was oppressive and fraudulent; and praying, that M'Kinney on being reimbursed the purchase money with interest, might be compelled to release all claim under the bill of sale of November 1809.

M'Kinney, in his answer, controverted those allegations of the bill, which imputed to him actual fraud, overreaching, and taking advantage of the known improvidence and distress of Pinckard; and strenuously insisted, that the contract was fair in fact, and valid.

The material facts of the case, as above stated, were, in the opinion of the chancellor and of this court, proved by the parol and documentary evidence taken and filed in the cause. There was evidence also, tending to prove, what Pinckard had alleged in his lifetime, that the bill of sale in question, was not intended as an absolute deed, but was, in truth, conditional and defeasible; but that point was not put in issue by the pleadings.

The chancellor decreed, that upon the payment or tender, by Pinckard's executor to M'Kinney, of the sum of 156 dollars, with interest from the 28th November 152 1809 till paid *or tendered (subject to a deduction of the plaintiff's costs in this suit) M'Kinney should release and convey to Pinckard's executor, all his interest and claim under the bill of sale of the 28th November 1809. From which decree, M'Kinney appealed to this court.

Leigh, for the appellant. There never has been any case, in which mere inadequacy of price has been held sufficient ground for refusing specific execution of an executory contract, much more for annulling an executed contract. To set aside a conveyance, the inequality of the contract must be so glaring, as that the bare stating of it shall shock the conscience of any man of common sense; such as affords evidence of actual fraud. The true and only ground of relief, in such cases, is fraud. *Gwynne v. Heaton*, 1 Bro. C. C. 1; *Osgood v. Franklin*, 2 Johns. Ch. Rep. 1, 23, 14 Johns. Rep. 527; S. C., and 1 Fonb. eq. book I, ch. II, § 9, 10, pp. 127, 130,*

*See *Cribbins v. Markwood*, 18 Gratt. 502, where the principal case is cited.

*Second American Edition. Philadelphia, 1820.

Sugd. Law Vend. ch. V, § 1, 2, 3, 4, pp. 189, 194,* where the cases are collected. The present is not the case of a young heir selling his expectancy; as to which there is a peculiar doctrine, grounded on peculiar principles; Sugd. Ibid. Pinckard was not a young heir. But this was a sale of a reversionary interest; and there, in my view, lies the stress of the case. A very anxious protection is extended by courts of equity to all persons selling reversionary or other interests in expectancy; and, in such cases, the burden has been imposed on the purchaser to shew the adequacy of the consideration paid; yet, even in these cases, the courts relieve on the ground of fraud or imposition, expressly proved, or implied from the inadequacy of the consideration. Sugd. ubi supra; Cole v. Gibbons, 3 P. Wms. 290; Gowland v. De Faria, 17 Ves. 20; Roche v. O'Brien, 1 Ball & Beat. 330. These doctrines are, we know, of easy application 153 in England. But it would be very difficult, if not impossible, to apply them here; and very harsh, indeed, to infer actual fraud from the inadequacy of the price given for a reversionary or expectant interest in slaves in Virginia. For, the market value of such property is very fluctuating, and it is liable to casualties that may impair and destroy its value; and, in the practice of the country, there is no method in general use, for estimating the present value of such expectancies. Accordingly, it is every day's experience, that expectant interest in slaves, even when fairly sold at public auction, are always sold at an immense sacrifice. And, in the case before the court, it seems hardly possible to charge the purchaser with fraud, seeing that he knew not, and had no means of knowing, and that the vendor did know, the circumstances on which the value of the subject depended; the number, namely, and quality of the slaves, and the state of Mrs. Fauntleroy's health, and her probable expectation of life. In the present case, too, there has been an acquiescence in the contract for such a length of time, as ought to preclude the executor of the vendor from the relief he is seeking. I do not count the time that elapsed between the date of the sale and the death of Pinckard, because he continued in the same situation in which he was when he made the contract, (Gowland v. De Faria, ubi supra) but, counting from the death of Pinckard early in 1814, to the bringing of this suit in May 1819, more than five years, the legal period of limitation to a claim for slave property, elapsed, during which the executor, who certainly lay under no embarrassments, and was suffering no distresses, that could prevent him from seeking relief, remained silent and inactive. Moth v. Atwood, 5 Ves. 845; Medlicott v. O'Donel, 1 Ball & Beat. 166. Lastly, the chancellor ought not to have decreed the plaintiff his costs; on the contrary, the case of Gowland v. De Faria (following numerous precedents in this respect) shews that the defendant was entitled to have his costs.

154 *Wyndham Robertson, for the appellee. When the court considers the

facts; that the purchaser was deputy sheriff, with process frequently in his hands against the vendor for debt, and that the vendor's improvident and prodigal habits, by which he had wasted his substance, were notorious throughout the country, it is impossible to doubt that M'Kinney was as well and probably better apprised, than any body else, of Pinckard's character, and of his necessities and distress for money. Neither can it possibly be believed, that M'Kinney made the purchase, without inquiry as to the quantity and value of the property he bought, and the state of health of the tenant for life. And if he made any inquiry at all, he must have got such information as satisfied him, that Pinckard was making an utter sacrifice of his property for present relief. There is, indeed, no direct evidence that he made such inquiry or acquired such knowledge; but the inference from the circumstances is irresistible, that he must have had full knowledge, and that he wilfully took advantage of Pinckard's improvidence and distress. There was actual fraud. The consideration paid was not an eighth of the value of the subject upon the lowest estimate: and if this be not, it is hard to imagine what would be, so gross and glaring an inequality of itself to evince fraud, imposition, overreaching, and taking an iniquitous advantage of the situation of another, in a bargain. Add to this, Pinckard was a reversioner or a remainder-man, selling his expectancy, and selling it for relief from present distress: and as I understand the cases on the subject, equity regards him in the same light with an heir dealing away his expectancies, and protects him from the effects of his own improvidence, whether any actual fraud can be brought home to the purchaser or not. Peacock v. Evans, 16 Ves. 512; Gowland v. De Faria, cited by Mr. Leigh; Butler v. Haskell, 4 Desaus. Ch. Rep. 651, 687, 8. Then, as to the effect of the executor's acquiescence to preclude him from relief: 1. the executor did not qualify till the 23d May 1814, and the bill was filed the 21st May 1819, and 155 *the process probably issued before, so that full five years had not elapsed: 2. there was no acquiescence; for both Pinckard in his lifetime, and his executor shortly after his death, insisted that the contract was void, or at least defeasible, and offered to refund the purchase money to M'Kinney: and 3. the property had been in the executor's hands, ever since Mrs. Fauntleroy's death; and, surely, nothing in the nature of a limitation can run against a person in actual possession of the subject. It would even seem that M'Kinney had acquiesced in the claim of Pinckard's executor.

CABELL, J. The question is, Whether the contract between Pinckard and M'Kinney ought to be set aside by a court of equity?

The evidence proves, incontestibly, the improvidence and prodigality of Pinckard, the embarrassment of his affairs, and his pecuniary distress at the time he entered into this hard bargain; and that M'Kinney, of all men, had the best opportunity of

*Ingraham's American Edition, Philadelphia, 1820.

knowing, and doubtless best knew, his disposition, his habits, and his wants. And the circumstances of the transaction leave no room to doubt, that, if M'Kinney was not aware of the exact extent of the advantage he gained, or had not calculated it with all the precision the subject admitted of, he could not but have known, that there was a very great and most unconscionable inequality between the value of the property he bought and the consideration he paid for it.

If the sale had been a sale of property in possession, and not of a reversionary interest, I will not say that the inadequacy of price, considered apart from all the other circumstances of the case, is or is not so gross as to be ipso facto proof of fraud: but I am clearly of opinion, that if it had been a sale of property in possession, the inadequacy of price taken in connexion with the attendant circumstances, would be proof of an unconscientious and iniquitous advantage, taken by cunning and rapacity over improvidence and distress, that must be reprobated by a court of equity. But the case is still stronger, when we consider it as the sale of an expectant interest. It is not necessary, in this case, to decide whether every seller of an expectant interest is to be treated as an expectant heir: on that point, therefore, I give no opinion. But it is very clear, that a very anxious protection is extended by equity, to persons selling expectant interest, although they do not stand in the relation of expectant heirs; and that trivial circumstances, added to the inadequacy of price, will be sufficient to set aside such sales. *Wiseman v. Beake*, 2 Vern. 121; *Cole v. Gibbons*, 3 P. Wms. 290; *Bowes v. Heaps*, 3 Ves. & Beam. 117.

The other judges concurred, and the decree was affirmed.*

157 *King v. Smith and Others.
Porterfield v. Same.

March, 1830.

(Absent COALTER, J.)

Forthcoming Bond—Delivery by Surety to Sheriff as Escrow.—Liability of Surety in Equity.—P. agrees to join H. W. as his surety in a forthcoming bond, and executes and delivers the bond, as an escrow, upon condition that K. shall also join in and execute the bond as co-surety; and K. agrees to join as surety in the bond, and executes and delivers the same, as an escrow, upon condition that O. W. also shall join in and execute the bond as co-surety; but O. W. never unites in the bond: HELD, that upon this state of facts, neither P. nor K. are liable for any part of the debt in equity, any more than they would be liable for any part of it at law, where the facts would amount to proof of non est factum.

King exhibited his bill in the superiour court of chancery of Winchester, setting

*Note.—This court affirmed the chancellor's decree in omnibus, and that decree gave the plaintiff his costs: as to which it is presumed, the decree was made, and approved, on the ground, that the contract was annulled for fraud and oppression practised by the defendant. See *Peacock v. Evans*, *Gowland v. De Faria*, and *Bowes v. Heaps*.—Note in Original Edition.

Bonds—Escrow.—The principal case was cited in *Baylor v. DeJarnette*, 13 Gratt. 172; *Nash v. Fugate*, 24 Gratt. 213; *American, etc. Co. v. Burlack*, 35 W. Va. 653, 14 S. E. Rep. 321; and distinguished in *Gordon v. Jeffery*, 2 Leigh 413.

See generally, monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.

forth, that in July 1823, John Seevers, the deputy marshal of that court, came to his house, with three several forthcoming bonds, taken upon three several executions, sued out by Donald & Ridgely, Smith, and Spalding & Macomb, respectively, against Harrison Waite, which bonds were then signed by Waite the principal, and by J. S. Porterfield as a surety; and Seevers importuned King, who was sick in bed at the time, to execute them also, as a surety; and King at length did agree to sign, and signed the bonds, and delivered them to Seevers, but upon the express condition, that Obed Waite, the father of the debtor, should also sign them as a surety, and if he refused to do so, that the bonds should not be obligatory on King. That the reason of his insisting on this condition, was, that he knew if Obed Waite joined in the bonds, he would not permit his co-sureties to suffer any loss. That Obed Waite never executed the bonds: yet they were returned by Seevers to the court. That the first had been discharged, and part of the second had been paid. That though King delivered the bonds as an escrow, to be binding on a condition which had never been performed, Smith and Spalding & Macomb had recently obtained award of execution on the two bonds taken to them respectively; 158 and, as Harrison Waite the principal, was insolvent, King and Porterfield were thus liable at law for the whole amount. That the reason why this matter was not relied on as a defence against the motion for award of execution on the bonds, was, that King never had any notice of the motion. The bill, therefore, made Smith, Spalding & Macomb, the administrators of Seevers the deputy marshal (who was now dead), Waite the principal, and Porterfield the co-surety, parties defendants; and prayed that Smith and Spalding & Macomb should be enjoined from further proceedings at law upon the forthcoming bonds. The injunction was awarded.

The defendants Smith the creditor in one of the bonds, the administrator of Seevers the deputy marshal, and Waite the principal debtor, filed their answers. Neither of them directly denied the allegations of the bill, as to the condition on which King joined in the bonds. But they all averred their belief, that those allegations were untrue; and they stated several circumstances that seemed inconsistent and irreconcilable with King's account of the transaction.

A son of the plaintiff (who was in his fifteenth year at the date of the bonds) deposed, that he was present when his father signed them; and he testified directly and positively, to the truth of the material allegations of the bill. On the other hand, there were depositions of several witnesses, proving expressions and conduct of King, which evinced, that he regarded the bonds as his deeds after he had been apprised what parties had in fact executed them.

Pending this suit, Porterfield, the other surety, also exhibited a bill in the same court; in which, referring to King's bill, he stated, that he had signed the bonds, upon the express condition that King should join in them as his co-surety, otherwise

they should not be obligatory on him; and that, finding from King's bill, that he had never so executed them as to make them his deeds, if they were not obligatory on King, then neither were they obligatory on Porterfield. Therefore, the bill prayed an injunction to stay further proceedings
159 *at law on the bonds as against Porterfield also. And this injunction was awarded.

To this bill the creditor Smith and Waite the principal, put in their answers. Smith's answer did not respond to the material allegation of the bill. Waite, in his answer, expressly stated that it was exactly true.

On motions made to dissolve both injunctions, chancellor Tucker was of opinion, that whatever might be the fact as to the delivery of the bonds as escrows by King and Porterfield, they both executed them contemplating a liability by reason thereof; King contemplating a liability to the extent of one third at least, and Porterfield, of one half; for which proportions they ought, in equity, to be held liable in any event. Therefore, he dissolved the injunction that had been awarded to King, as to one third of the amount due upon the bonds, and that awarded to Porterfield, as to another third thereof. And he ordered issues to be made up and tried at the bar of the circuit court of Frederick, to ascertain, 1. Whether the forthcoming bonds were executed and delivered by Porterfield, upon the express condition that they should be also executed by King? and 2. Whether they were executed and delivered by King, with a like condition, that they should also be executed by Obed Waite?

King and Porterfield appealed to this court.

The causes were argued here by Leigh for the appellants, and Johnson for the appellees. There was some discussion of the questions of fact, upon the evidence: however, the only point was, Whether, supposing the allegations of the bill true, King, and by consequence Porterfield, ought, in equity, to be held partially bound by the bonds, upon the principle declared by the chancellor, or ought to be intirely discharged from the obligation thereof.

BROOKE, P. The chancellor considered, that King executed the bonds in question, contemplating a liability to pay
160 *one third of their amount at least; and Porterfield executed them contemplating a liability to pay one half their amount at least; therefore, however the facts might be, whether the bonds were delivered as escrows or not, they were liable in a court of equity, to the extent so contemplated by them, when they signed the bonds: in which I think he was intirely mistaken.

The appellants are bound, jointly or separately, for the whole amounts of the debts injoined, or they are not bound to any amount. A surety is not bound in equity, unless he is bound at law. There must be two parties to a contract: unless the understanding of the appellants as to the extent of the demand against them, according to the chancellor's view of their undertaking, was the understanding of the other party also, they are not bound by it, in law or

equity. Had the allegations in the bill been proved in trials at law on special pleas of non est factum, the judgments must have been for the appellants, as to the whole amount of the bonds in question; and equity must follow the law.

The rest of the decree is also imperfect. The issue directed by the chancellor, is not as broad as it ought to have been: it ought to have been, to inquire whether the bonds in question were the deeds of the appellants, or not; as would have been the inquiry at law, on special pleas of non est factum. That I think the proper inquiry to be made, as I do not think the circumstances proved in evidence, though very strong, sufficient to justify a court of equity in decreeing against the positive testimony of one witness in support of the allegations of the bill, who is unimpeached.

The decrees are, therefore, reversed; the injunctions reinstated as to the whole amounts of the claims on the bonds; and the causes remanded, for further proceedings to be had in both cases according to the principles here declared.

161

*Leavell v. Robinson.

May, 1880.

(Absent COALTER, J.)

Bank Stock—Transfer of—Security or Conditional Sale—*Quære*—Question, whether a transfer of bank stock was, under all circumstances of transaction, a security or indemnity provided for the transferee, and therefore redeemable; or a conditional sale, which became absolute by non-performance of the condition?

This was a bill exhibited in the superiour court of chancery of Fredericksburg, by Robinson against Leavell, praying to redeem eight shares of stock of the Farmers' Bank of Virginia, which Robinson had previously transferred to Leavell.

The case was thus: Robinson, being possessed of the eight shares of stock, had obtained from the office of the bank at Fredericksburg, a loan of 560 dollars, on the credit of the stock, that is, on a pledge thereof, by way of security; he executed what is called a stock note for the debt, in the usual form. Stock having afterwards fallen in value, and Robinson's personal security not being good at the bank, he was required to give additional security, as a condition of the continuance of the accommodation; which he accomplished by transferring the stock to Johnson, who thereupon pledged the same stock, and gave his own stock note, for the debt, in lieu of that which had been before given by Robinson. This was done by Johnson for Robinson's accommodation. Some differences having subsequently arisen between Robinson and Johnson, it became materially desirable to them, that Johnson should be relieved from the responsibility he had thus incurred for Robinson. The bank, however, was still unwilling to take a pledge of the stock, and Robinson's own stock note, for the debt, without some farther security; and he was, therefore, compelled to find some other

*The principal case was cited in Moss v. Green, 10 Leigh 287.

Mortgages and Conditional Sales—Distinction.—See foot-note to Robertson v. Wheeler, 2 Call 421.

friend to take Johnson's place. He applied to Leavell. Leavell was very reluctant to involve himself in this responsibility: but he was at length persuaded to take
 162 *a transfer of the stock to himself, and to pledge the same, and give his own stock note, to the bank, for the debt of 560 dollars, in lieu of that which had been given by Johnson, upon an express, clear and definite understanding, between him and Robinson, reduced to writing the day before the note was given, that if at the expiration of 60 days when the note was made payable, Robinson should fail to make arrangements for relieving Leavell from all responsibility on the note, the stock should then be the absolute property of Leavell. Of this agreement, there was also positive and distinct parol evidence.

Sometime before this note of Leavell came to maturity, he called at the bank, to know the terms on which the directors would agree to release him, and take Robinson's note instead of his; and was informed, that this would be done on the debt being reduced from 560 to 480 dollars. A few days before the note became due, Leavell again called at the bank, and left there a power of attorney for transferring the stock to Robinson, or any other person he might appoint; saying, he expected Robinson would be prepared to take up the note. But so far from making any arrangement for that purpose, Robinson did not even offer to pay the discount for the renewal of the accommodation; neither did he ever make an offer to pay either the principal or interest due on the note, or make any demand for the stock, till about twelve months afterwards, when the stock had risen above its par value of 100 dollars the share.

At the time Leavell received the transfer of the stock, it was worth only 64 or 65 dollars the share; that is, less by five or six dollars per share, than the sum he became bound for to the bank: there was, however, some expectation that it would rise. And although by the time the note came to maturity, stock had been sold at Richmond for 76 dollars the share, yet it did not appear, that any such rise had taken place, or was even known, at Fredericksburg: on the contrary, a witness for Robinson, speaking of the price of stock at Fredericksburg, a few days before the note became due,
 163 *as compared with what it had been at the date of the note, said, "Bank stock was a little better, or there was more confidence in the stock."

After the note given by Leavell for the debt came to maturity, it was renewed at bank, from time to time, on Leavell's own account and for his accommodation, he paying the discounts; and the principal was still due to the bank, at the time Robinson's bill was filed. And Leavell received all the dividends that accrued on the stock from the time of the transfer to him.

Chancellor Browne declared, that the transfer of the stock by Robinson to Leavell, was only a pledge or security to indemnify Leavell from loss, in case the former should fail to discharge the stock note executed by the latter to the bank for his accommodation, and that Robinson had

a right to redeem, on payment of the debt of 560 dollars with such interest thereon as Leavell had paid to the bank, subject to a deduction of the dividends which Leavell had received on the stock: and he decreed redemption accordingly. From which decree Leavell appealed to this court.

The cause was argued here by Stanard for the appellant, and Briggs and Harrison for the appellee. There was some controversy as to the facts of the transaction: but, in the opinion of this court, the above was, without doubt, the true state of the case. And then, the question was, Whether the transfer of the stock by Robinson to Leavell was (as the chancellor held it to be) a pledge thereof, to indemnify Leavell from loss by reason of the responsibility he incurred to the bank for Robinson's accommodation, and therefore redeemable? or a conditional sale of the stock, defeasible by the performance, and absolute on the non-performance of the condition stipulated in the agreement between the parties?

CABELL, J. I cannot regard the transfer of the stock in this case, as a mere security for the payment of the note.

164 *The circumstances of the case, and the conduct of the parties, forbid such a construction. The understanding between them, before the execution of the note, as evinced by their written memorandum, and clearly proved by the evidence, compels me to regard the transfer of the stock, as a sale; subject, however, to the condition, that if Robinson should, at any time before the note became due, relieve Leavell from his responsibility to the bank, the stock should be returned to him. Considering the agreement, as at the time it was made, there certainly was nothing in this construction of it, that Robinson could complain of; for although there seems to have been a hope that stock would rise, yet nobody believed it would rise high enough to pay off the note. As to Leavell, he came into the arrangement with great reluctance, and was determined, from the beginning, to extricate himself from it at the end of the 60 days, even at the loss he might sustain by the probable deficient value of the stock.

The other judges concurred, and the decree was reversed, and the bill dismissed with costs.

165 *King William Justices v. Munday.
 May, 1880.

(Absent COALTER, J.)

Mandamus—Never Lies If There Is Another Remedy.—*
Mandamus does not lie for the undertaker of a public bridge, to compel the county court to levy the stipulated reward in the county levy, because

**Mandamus—Function of the Writ.—The office of the writ of mandamus is to compel corporations, inferior courts and offices to perform some particular duty incumbent upon them, and which is imperative in its nature, and to the performance of which the relator has a clear legal right, without any other adequate specific legal remedy to enforce it; and even though he may have another specific legal remedy, if such remedy be obsolete or imperative, the mandamus will be granted. Page v. Clifton, 30 Gratt. 417, 418, citing principal case.*

In relation to courts and judicial officers, the writ of mandamus cannot be made to perform the functions of a writ of error or appeal, or other legal proceedings to review or correct errors or to anticipate and forestall judicial action. It may be ap-

a specific remedy is given him by statute, to recover the same by action of debt against the justices refusing to levy it.
Same—Same.—Mandamus never lies if there is another specific legal remedy for the party complaining.

An order was made by the county court of King William, appointing three commissioners "to meet and confer with commissioner appointed by the county court of King & Queen, and agree on the manner and condition of executing a bridge, to be erected across the Mattaponi river from the land of J. K. in King & Queen to the land of J. H. in King William." But, when this order was made, there were only five justices on the bench, out of seventeen who were in the commission of the peace for the county; and no order had been made or entered of record, at a previous term, signifying the intention of making the above or any other order on the subject, and directing the sheriff to summon the justices of the county to attend at the next term for the purpose.

The commissioners reported to the county court of King William, that in conformity with the orders of the two county courts, they had let the building of a bridge across the Mattaponi, to be kept in repair for seven years, to B. H. Munday, for the sum of 50 dollars; and that the undertaker had built the bridge, according to the contract returned to the clerk of the county court of King & Queen, and had given bond with surety for keeping the same in repair for the term aforesaid.

Munday, the undertaker, applied to the county court of King William (then sitting to make the county levy, and fifteen of the justices being on the bench) to levy the proportion of the price of the bridge, properly chargeable on *that county, and to order the same to be paid to him: which the county court refused to do, by a vote of ten to five of the justices present.

Upon this, Munday applied to the circuit court of King William for a mandamus to the justices of the county court, which was allowed, commanding them to levy the money for him, or shew cause to the contrary.

The county court made return, in which, after reciting the provision of the statute, 2 Rev. Code, ch. 236, § 9, p. 237, that "no order for the erection of any bridge or bridges, shall be made by the court of any county, unless a majority of the acting justices of such county shall be present at the making of such order, or unless the court

of such county shall have signified their intention of making such order, at least one month previous thereto, and shall have caused the same to be entered of record, with directions to the sheriff of the county to summon the justices thereof to attend at the next term for the purpose aforesaid;" the court shewed, that a majority of the justices of King William were not present at the time of making the order appointing commissioners on the part of that county, to meet and confer with those of King & Queen as to the building of the bridge in question, and that no previous order had been made signifying the intention of making such order, and directing the justices of the county to be summoned to attend for the purpose: and that the court refused to levy any portion of the money claimed by the undertaker on the county of King William, 1. because the order, and the whole proceedings, were irregular and contrary to law; and 2. because no evidence was adduced to convince the court, that the bridge was or would be of public utility and convenience.

Munday demurred generally to the return, and the justices joined in the demurrer.

The circuit court sustained the demurrer, and ordered a peremptory mandamus. And to that judgment, this court, at the instance of the justices of the county court, awarded a supersedeas.

167 *Claiborne and Leigh, for the plaintiffs in error, objected, 1. That the mandamus did not lie: that that remedy lies only where there is no other specific remedy; and where the writ lies from a superior to an inferior court, it only lies to compel the inferior court to exercise a jurisdiction, without the exercise of which the party would be deprived of remedy; it never lies where the party has a specific remedy, independent of any exercise of jurisdiction by the inferior court. 4 Bac. Abr. Mandamus C. D. pp. 506, 7. Here, they said, the same section of the statute, which authorises the county courts to build bridges, makes all contracts for the purpose, duly and regularly made, "binding on the justices and their successors so as to entitle the undertaker to his stipulated reward in the county levy, or to a recovery thereof, with costs, by action of debt against the justices refusing to levy the same." The following section gives a mandamus, indeed, but only to the justices of one county against the justices of another, when these being duly required by the others, fail to appoint commissioners to act on their behalf, or to do what on their part ought to be done, towards executing and paying for such works. 2 Rev. Code, ch. 236, § 9, 10. But, 2. Upon the merits they insisted, that the county court was plainly right. They had, in truth, no power to levy money upon the people, to discharge a debt contracted for them without any just authority; *Id.* ch. 191, § 6, p. 63. The provision of the statute set forth in the return of the justices, interdicted the court which appointed the commissioners who made the contract, from making any such order; in effect, it deprived them of jurisdiction to do the act. And it was remarkable, that the order itself did not authorise the com-

properly used and is often used to compel courts to act where they refuse to act and ought to act, but not to direct and control the judicial discretion to be exercised in the performance of the act to be done: to compel courts to hear and decide whether they have jurisdiction, but not to pre-determine the decision to be made: to require them to proceed to judgment, but not to fix and prescribe the judgment to be rendered. Page v. Clopton, 30 Gratt. 418; Richardson v. Farrar, 88 Va. 778, 15 S. E. Rep. 117, both citing principal case.

To the point that mandamus is an extraordinary writ, and lies only in cases where the party has no other specific or adequate remedy, the principal case is cited in *Lowther v. Davis*, 38 W. Va. 134, 10 S. E. Rep. 21. See principal case also cited in *Mitchell v. Witt*, 98 Va. 464, 38 S. E. Rep. 528.

See further, *Ex parte Goolsby*, 2 Gratt. 575, and foot-note; foot-note to *Morris*, *Ex parte*, 11 Gratt. 292; foot-note to *Cowan v. Fulton*, 25 Gratt. 579.

missioners to let the building of the bridge to an undertaker, but only to agree on the manner and condition of executing the work.

Stanard contra, argued, that the 9th section of the statute, which required that the majority of the justices should be present at the making of orders for building 168 bridges, or "that the intention of making such orders should be signified by an entry made of record, and the justices summoned to attend for the purpose, would be found, on examination, to apply only to the county court which originated the proceeding, not to a case like the present, where one county court is required by another county court, to concur in a work of the kind. This case, he said, was provided for by the 10th section of the statute: the county court of King & Queen originated the proceeding: and the effect of the 10th section was to oblige the county court of King William to meet the requisition without delay, and either comply or refuse compliance with it. And as to the objection, that the order of the county court of King William did not in terms authorise the commissioners to let the building of the bridge to an undertaker; that objection was refuted by the words of the 10th section, for the order was precisely in the form therein prescribed, for cases in which the proceeding originates in one county court and is to be concurred in by another. Then, in respect to the remedy by mandamus; surely, if the contract was legally made, binding on the county court, and thus binding on the people of the county, this was the only method of compelling the county, which really owed the debt, to pay it. An action of debt, indeed, was given against the justices who fail to do their duty; but the creditor might not know, or have any means of knowing, which of the justices were chargeable for the omission; which of them to sue. The statute gives the action of debt against the delinquent justices. But the party wants a remedy against the county court and the county; and there is no remedy but mandamus.

CARR, J. The counsel for the appellants took two objections to the proceedings: 1. that a mandamus was not the proper remedy; 2. that there should have been a majority of the justices of King William on the bench, or proof that they had been summoned to attend, when the order was made appointing commissioners to meet 169 those of King & Queen. It will only be necessary to notice the first of these points, if it shall be found decisively settled, that where there is another specific legal remedy, the mandamus will not lie. A brief examination of some of the cases will abundantly shew this. In *Rex v. Barker*, 3 Burr. 1267, lord Mansfield said, "A mandamus is a prerogative writ.—It ought to be used upon all occasions, where the law has established no specific remedy, and where, in justice and good government, there ought to be one." "The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed: if there be a right, and no other specific remedy, this should not be denied." And,

in *Rex v. The Bank of England*, 2 Doug. 526, he said, "Where there is no specific remedy, the court will grant a mandamus, that justice may be done." In the case of *The King v. Marquis of Stafford*, 3 T. R. 651, on an application for a rule to shew cause why a mandamus should not issue to command the defendant, as lord of the manor, to present to the ordinary, one Moreton, nominated by the inhabitants of Willenhall, to be curate of that chapel, lord Kenyon said, "it seems as if the inhabitants have only an equitable right. If so, this court cannot interfere at all; or if they have a legal right, such right may be asserted in a quare impedit. Therefore, quacunqve via data, this rule must be discharged." *The King v. Bishop of Chester*, 1 T. R. 404; *The King v. Archbishop of Canterbury*, 8 East. 213; *Rex v. Commissioners of Dean*, 2 Mau. & Sel. 80. In 4 Bac. Abr. Mandamus, C. p. 506, it is laid down, that it is, in general, sufficient reason with the court to refuse a mandamus, that the party applying for it has another specific remedy; and many cases are quoted in support. It seems an exception to this general rule, that the remedy is obsolete, or inconvenient, or incomplete: in such cases, the court exercises sound discretion in granting or refusing the writ. In our legislation, I find nothing to change this settled course of the law. The statute, 1 Rev. Code, ch. 121, p. 471, merely regulates the mode of proceeding on writs of mandamus, 170 without prescribing when they shall be granted or refused. In *Dew v. The Judges of the Sweet Springs &c.*, 3 Hen. & Munf. 1, the subject is touched upon, but only incidentally, the case there being evidently a proper one for the writ. The law being thus settled, we are only to inquire, whether the petitioner for this mandamus, had a specific legal remedy? And this is answered by the passage cited from the 9th section of the statute, 2 Rev. Code, ch. 236, "and all such contracts made by county courts, or others appointed by them, shall be available and binding upon the justices and their successors, so as to entitle the undertaker to his stipulated reward in the county levy, or to a recovery thereof with costs, by action of debt against the justices refusing to levy the same.

The other judges concurred, and the judgment was reversed, and the mandamus dismissed.

Branch v. Bowman.

May, 1830.

Debt—Plea of Feme Covert—Replication of Abjuration of Realm.—To debt on bond, defendant pleaded, that she was feme covert at time the bond was executed: plaintiff replied, that defendant's husband had abjured the commonwealth, and was not then or now a citizen thereof: on general demurrer to this replication, it was held naut.

Debt on bond, by Taylor Bowman against Elizabeth Branch, in the county court of Prince Edward. The defendant pleaded in bar, that she was, at the time of executing the bond, and yet remained, a feme covert, the wife of Matthew Branch. The plaintiff replied, that at the time of executing the bond, the said Matthew, of whom the said Elizabeth was alleged to be the wife,

and abjured the commonwealth of Virginia, and that he was not then or now a citizen thereof. General demurrer to the replication, and joinder in demurrer. The county court held that the law was for the plaintiff, and gave him judgment for the 171 debt *and costs. The defendant appealed to the circuit court, which affirmed the judgment: and then, she applied to this court for a supersedeas, which was allowed.

Leigh, for the plaintiff in error. Anciently, by the common law, if a husband abjured the realm or was banished forever, he was considered as *civilliter mortuus*, and his wife was regarded as a *feme sole*. Co. Litt. 133, a. But this abjuration of the realm, was an incident to the right of sanctuary, which was abolished in England, by the statute 21 Jac. I. ch. 28, and certainly never at any time existed in Virginia, 1 Vin. Abr. Abjuring the Realm, p. 108; 4 Black. Comm. 332; 2 Hawk. P. C. ch. 9, § 44. In Virginia, abjuration of the commonwealth cannot be, and therefore cannot be pleaded. The modern cases founded on analogy to the old doctrine of abjuration by the husband, apply only where the husband who departs from the country leaving his wife behind, is an alien, and therefore is not presumed to have the intention of returning. *De Gaillon v. L'Aigle*, 1 Bos. & Pull. 8, 357; *Marsh v. Hutchinson*, 2 Id. 226; *Farrer v. Countess Granard*, 4 Id. 80; *Walford v. Duchess de Pienne*, 2 Esp. Rep. 554.

Spooner, contra, endeavoured to maintain, that the replication, justly understood, asserted, in avoidance of the plea, that the defendant's husband had relinquished the character of a citizen of Virginia, and departed from the state, and thereby expatriated himself, and ceased to be a citizen, in the manner prescribed by the statute, 1 Rev. Code, ch. 23, § 5, p. 66. Such an expatriation was, he thought, a most solemn abjuration of the commonwealth; and if the husband had made himself an alien by his own solemn renunciation of citizenship, and abandonment of the state, his wife remaining here, ought to be treated as a *feme sole*.

Leigh replied, that the replication could hardly be tortured into such a meaning: and if it could, it only amounted to an assertion, that the husband had made him-
172 self an alien: *it did not go the length of asserting, that he was not a resident of the state. The wife of an alien, resident with her husband in Virginia, could not contract debts, and be sued for them, as a *feme sole*.

GREEN, J., delivered the resolution of the court. The replication, however understood, is wholly defective. If it intended to rely upon the common law abjuration of the realm; that never existed here, or, if it did, it could only be proved by a record taken by a coroner, and by him certified to the proper court; and the plea should have been verified by the record, instead of concluding to the country. If it intended to rely upon the expatriation of the husband under our statute, it should have been shewn how he expatriated himself, by a recorded declaration by deed, or in open court, and

that he had departed from the commonwealth: and even that would not have been sufficient, without the further allegation, that he resided abroad at the time of the execution of the bond by his wife. Both judgments should be reversed; the demurrer to the replication sustained, and final judgment given for the appellant.

Clarke's Adm'r v. Day.

May, 1830.

Judgment of Sister State—Debt on—Nil Debet.—To debt on judgments of courts of Kentucky, the plea of *nil debet* is not a good plea.

Same—Effect.—Under the provision of const. U. S. art. 4, § 1, judgments of another state of the union, are not to be regarded here as foreign judgments, but have the same effect as judgments of our own courts.

Debt by Fitzhugh administrator of Clarke against Day, in the circuit court of Spottsylvania, for the sums of 694 dollars, 83 dollars 84 cents, 49 dollars 87 cents, and 21 dollars 43 cents, amounting in the aggregate to 849 dollars 9 cents, upon judgments of the circuit court of Jefferson
173 *county in the state of Kentucky and of the court of appeals of that state, recovered by Clarke in his lifetime against Day. And in his declaration, he set forth that Clarke recovered against Day in the circuit court of Jefferson, Kentucky, judgment for the said sum of 694 dollars for damages by him sustained by reason of Day's non-performance of promises, and the said sum of 49 dollars 87 cents for costs; and that the proceedings in that suit, having been carried by writ of error, sued out by Day, to the court of appeals of Kentucky, the judgment was affirmed, and judgment

***Judgments of Sister State—Debt on—Nil Debet.**—In *Kemp v. Mundell*, 9 Leigh 12, it was held that the plea of *nil debet* is not a good plea to an action of debt on a judgment of another state of the Union. TUCKER, P., in delivering his opinion, said (p. 16): "The plea of *nil debet* was, in this case, an improper plea, according to the decision in *Clarke's Adm'r v. Day*, which we are not disposed to disturb, though I do not acquiesce in some of the reasoning of JUDGE COALTER in that case." And BROOKS, J., said (p. 17): "I entirely concur in the opinion of the president. I did not concur in all the reasoning of JUDGE COALTER in *Clarke's Adm'r v. Day*, though I did in the conclusion to which he came, and I said no more. I then entertained the opinion I do now,—that the judgments of our sister states, under the constitution of the U. States and the acts of congress in pursuance thereof, are to be treated as domestic judgments; and that the effect of such judgments in the state from which they came, is a question of law, not a question of fact as in the case of foreign judgments." See also, *Draper v. Gorman*, 8 Leigh 628, 640.

†Same—Effect.—It seems beyond controversy that the validity of the contract upon which a judgment rendered by a court of competent jurisdiction in a foreign state, is established by the judgment, and the judgment must be given the same credit and effect in this state, in which it is sought to be enforced, as it had in the state where rendered. *Vaugh v. Meador*, 99 Va. 573, 39 S. E. Rep. 225, citing principal case, to the same effect. See the principal case cited in *De Ende v. Wilkinson*, 2 Pat. & H. 667; *Coleman v. Waters*, 13 W. Va. 807; *Black v. Smith*, 18 W. Va. 793; *Draper v. Gorman*, 8 Leigh 630, 638, 639; *foot-note* to *Kemp v. Mundell*, 9 Leigh 12. See further, monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

Judgments—Interest on.—In Virginia, interest is generally recoverable on a judgment, both at law and in equity. *Tazewell v. Saunders*, 13 Gratt. 368, citing *Beall v. Silver*, 3 Rand. 401; *Roane v. Drummond*, 6 Rand. 182; *Clarke v. Day*, 2 Leigh 172; *Mercer v. Beale*, 4 Leigh 189; *Laidley v. Merrifield*, 7 Leigh 346.

See further, monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

was moreover given for Clarke, for the said sum of 21 dollars 43 cents for costs, and ten per cent. damages amounting to the said sum of 83 dollars 84 cents; "whereof the said defendant is convicted as by the records and proceedings thereof now remaining in the said circuit court for the county of Jefferson, and the said court of appeals for the state of Kentucky, may more fully and at large appear, which said judgments still remain in full force and effect, not reversed, vacated, annulled, discharged or satisfied; whereby action accrued to the said plaintiff to demand and have of the said defendant the said several sums of money," &c.

Day demurred generally to the declaration, and Fitzhugh joined in the demurrer. And he pleaded, that he did not owe the debt demanded of him or any part thereof, concluding to the country; to which plea Fitzhugh demurred generally, and Day joined in the demurrer.

Neither the record of the proceedings in Kentucky, nor the laws of that state, ascertaining the court that rendered the judgment to be courts of record, and the legal effects of their judgment in that state, were in any wise made part of the record in this case.

The circuit court of Spottsylvania held, that the plea of nil debet was sufficient to bar the action, and that the law on the demurrer thereto was for the defendant; and gave judgments for Day accordingly: from which judgment Fitzhugh appealed to this court.

174 *Briggs for the appellant, said the plea of nil debet was clearly not a good plea to an action of debt in this state on a judgment of a court of another state in the union. He cited const. U. S. art. 4, § 1, Laws U. S. 1790; 1 cong. 2 sess. ch. 11; 2 Bior. 102; Mills v. Duryee, 7 Cranch, 481; Hampton v. M'Connel, 3 Wheat. 234.

Standard, contra. The constitution of the U. States provided, that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state;" and the authorities cited shew, that a judgment of a court of one state is to have the same credit and effect in the courts of every other state, that it has in the state in which it was rendered. This is not controverted. But, in the present case, it does not appear, that the courts of Kentucky which rendered these judgments were courts of record; nor are the laws of Kentucky in any wise made part of this record, so that our courts can judicially know either the character of the courts that rendered the judgments, whether they were courts of record or not, or the legal effect of these judgments, whether or no they are conclusive even in Kentucky, and whether the plea of nil debet would or would not have been a good plea in bar to an action on them there. If the federal courts may judicially take notice of the laws of all the states, their jurisdiction being co-extensive with the union, it does not follow that the state courts may do so too. Neither are the records of the proceedings in the courts of Kentucky made part of this record; and for aught that appears, the judgment of the circuit court of Jefferson, Kentucky, may

have been rendered in the absence of Day, and without his knowing that any such proceeding had been instituted against him; a proceeding, which the laws of some of the states touching foreign attachments are understood to allow. It has never been held that judgments of that kind are conclusive against the absent defendant in his own state, or (it is hoped) even in the state where they are rendered.

175 *Briggs, in reply. The declaration avers, in effect, that the courts of Kentucky are courts of record: it avers that the proceedings are of record there. Day was certainly before the court of appeals of Kentucky, for he carried the case thither by writ of error: he was heard, and the judgment affirmed. For the rest, the state courts of Virginia is to ascertain the effect of a judgment of Kentucky, exactly as a federal court sitting in another state, or the supreme court of the U. States, would do it.

COALTER, J. It was admitted in the argument, that the cases of Mills v. Duryee and Hampton v. M'Connel have correctly decided, that the constitution of the U. States, and the act of congress of 1790, have placed the judgments of the courts of the other states of the union, when sued on in this state, on the same ground, and to have the same effect, as they would have if sued on in the domestic tribunals of the state where such judgments were obtained.

According to those decisions, a judgment of one state of the union is to be considered in the nature of a domestic judgment in every other state; the tribunals of which are to allow to it the same force and efficacy, which it has in the state where it is pronounced. Whether this broad proposition is subject to any exception, as where the party against whom the judgment has been obtained, has had no notice of the suit, though the judgment may be binding where it is pronounced, is a question, which I wish not at present to decide, or to intimate any opinion concerning, inasmuch as it does not arise in this case.

As the judgments sued on in this case are to have the same effect here as they would have if sued on in Kentucky, it follows, that this court must ascertain what would be the effect of them there. But then the question arises, how this matter of law and usage of another state, is to be ascertained by the courts of this state? It is said, that the federal courts, as well supreme as inferior, may adjudge the law in such a case, because, considering their rela-

176 tion *to the states, they may be supposed to have judicial knowledge of the laws and usages of all the states; but that in the state courts, notwithstanding the constitution of the U. States, and the act of congress of 1790 on this subject, the laws of the other states, in this respect, can only be ascertained as any other matter of fact, and in the way in which foreign laws and usages are usually ascertained. But if such a difference does exist between the two sets of tribunals, in deciding in cases of the *lex loci* (concerning which I give no opinion) it does not seem to me to have any important bearing on the question before us. It will be conceded, I pre-

sume, that but for the provision in the constitution and the act of congress, before referred to, a judgment in the state of Kentucky, when sued on in a federal court of this state, would no more be in the nature of a domestic judgment in that court, than it would be if sued on in a state court: in both, it would be equally a suit of foreign judgment. No question concerning the *lex loci* arises in the case: it is merely a question of evidence: and although the weight in which it may be entitled, depends on what weight or effect it has in the state where the judgment was pronounced, according to the laws and usages of that state, I cannot see why a different mode of deciding on such a question should prevail in the state and federal courts. The constitution and law having made the states, as it were, domestic to each other, in this respect, as to both tribunals, it would seem to follow, that both tribunals should take cognizance of the case as though founded on a domestic judgment. Indeed, I cannot see under what form of pleading, known to the common law, this matter of law, that is, the efficacy of this judgment as matter of evidence, can be tried as a matter of fact by a jury. The plea of *nil debet* will not try it. That assumes the matter in dispute, that the judgment is not conclusive; and if issue were taken on that plea, the plaintiff would waive the conclusive effect of his judgment; this he can only assert by a demurrer to the plea, which is an issue of law, and must be tried by that court.

177 If *the plea of *nul tiel* record would try it (of which I am not satisfied) still that tenders no issue to the country. And if the defendant should plead, that the court pronouncing the judgment was not a court of record, and that the judgment is not conclusive evidence, that would be no bar to the action; for debt lies on a judgment which is not conclusive evidence. Suffice it, however, to say, that in his case the plea is *nil debet*, which assumes that the judgment is not conclusive evidence; and the plaintiff, who contends that it is, had no course left for him but to demur. This he has done; and the law arising on this issue must be tried by the court, not by the jury; for it is an issue of law.

The constitution and act of congress, then, having made the states domestic to each other, in regard to this matter, the court of the state must try this issue in the usual way, by informing itself of the law of the state of Kentucky, as the federal courts must do, should there be any doubt about it. In this case, the judgment sued on was affirmed on an appeal to the supreme court of that state; and I presume we can safely say, as the federal court said in a similar case, that such judgment must be conclusive on the parties in that state. I am, therefore, of opinion, that the plea of *nil debet* was bad, and that the demurrer to it ought to have been sustained. The judgment of the circuit court should be reversed, and judgment entered for the appellant.

BROOKE, P. As it is unnecessary, I am not inclined, to say more in this case, than to concur in the opinion, that the

judgment of the circuit court be reversed, and judgment entered for the appellant.

The other judges concurred. But after the opinion of the court was announced, Briggs suggested, that it would be necessary to have a writ of inquiry in the case, in order to get interest on the debt. Whereupon, this court entered judgment, that the law upon the plaintiff's demurrer to the defendant's plea was for the plaintiff; 178 therefore the judgment *of the circuit court was reversed with costs: and the appellant's counsel suggesting a wish to have a writ of inquiry awarded in the cause, the same was remanded to the circuit court for further proceedings to be had therein.

Bolling v. Stokes.

June, 1830.

(Absent COALTER, J.)

Landlord and Tenant—Covenant to Pay Taxes*—Assessment for Paving Street—Liability.—Private act of assembly in 1813, authorises the paving of streets of Petersburg, and ascertains manner of levying expense on proprietors and tenants of lots in town: in 1815, B. lets a lot to S. for term of five years, S. yielding and paying therefor an annual ground rent of \$60 dollars, besides all taxes and other public dues in any manner accruing, and besides taxes and public dues of every kind: in 1817, the street on which the lot lies, is paved according to act of assembly, and the expense of paving apportioned and charged to and paid by S. the tenant, in the first instance: HELD, this expense of paving, is not a tax or public due of any kind, within the meaning of the covenants in the lease, which the tenant is bound to bear, and therefore he has a right to demand and recover the same of the landlord.

In an action of assumpsit brought by Stokes against Bolling, in the circuit court of Petersburg, there was a verdict for Stokes, for 874 dollars with interest from the 15th August 1821 till paid, subject to the opinion of the court on a case stated; which was thus:

A private act of assembly was passed in January 1813, providing or paving the streets of Petersburg (see sessions acts 1812-13, ch. 74, p. 103), by which it was provided: § 1. That the common hall of the town, whenever it should think proper, or whenever a majority of the owners of lots or parts of lots, on any street or square in the town, should by memorial pray the common hall to pave such street or square, might cause the same to be properly paved; 179 provided the funds of the corporation should be liable to no greater *proportion of the expense of pavement, than what should be requisite for such parts of the street as adjoined the public improvements or lands belonging to the corporation; § 2. authorised the common hall to appoint persons to graduate and level the streets, and to superintend the pavement; § 3. made it the duty of the common hall, whenever it should direct the paving of any street or square, to appoint a committee of its body, to measure and ascertain the extent of each person's front thereon, and to apportion and charge the expense to the owners of the lots or parts of lots, according to the extent of their respective fronts,

*See generally, monographic note on "Landlord and Tenant" appended to *Mason v. Moyers*, 2 Rob. 606; monographic note on "Covenants" appended to *Todd v. Summers*, 2 Gratt. 167.

including the expense of paving the inter-sections of the streets, and all other expenses; which committee should make return of its proceedings to the clerk of the common hall; § 4. provided, that when such return should have been made and recorded, the clerk should furnish a copy thereof to the collector of the taxes of the corporation, or other person appointed by the common hall for the purpose; and such collector, after ten days notice published in the newspapers, should and might demand of each owner or occupier of a lot &c. upon the street or square to be paved, the part of the expense apportioned and charged to him, and if not paid on demand, might distrain the goods of the person so charged for the same, in the same manner that distress is made for public taxes; § 5. provided, that when the owner of any lot &c. on any street or square about to be paved, should not reside in the corporation, or should not be in the occupancy of such lot &c. the tenant in possession should be chargeable for the expenses, and should be allowed to deduct the same from the accruing rent payable to the owner, in all cases of the tenant's holding from year to year: that, in all cases of tenants holding lots &c. upon leases for a term over one and under ten years, the expense of the paving, in the first instance, should be borne by the lessee, and the lessor should not be bound to reimburse the same, till the last year of the lease, and then the principal sum only; but if the lessee should prove insolvent, or the premises unoccupied, the lessor

180 *should be chargeable with the expense: that, in all cases of tenants holding lots &c. for a term of ten years or more, or for life, the expense of paving should be borne by the lessee, or his under tenant: and that in case of non-residence of any owner of an unoccupied lot &c. and no property of the owner in the town whereof distress might be made, the part of the expense chargeable to him might be recovered by motion on ten days notice.

Afterwards, but before any proceeding under the act of Assembly, by deed of lease, dated the 1st May 1815, Bolling leased to Stokes a lot on old street in Petersburg, for a term of five years, commencing the 1st May 1815, and ending the 1st May 1820, Stokes yielding and paying therefor, an annual ground rent of 50 dollars, "besides all taxes and other public dues in any manner accruing" upon the premises; "besides said rent should be paid half yearly, "besides taxes and public dues of every kind."

In 1817, the common hall duly ordered the street in front of the lot so leased by Bolling to Stokes, to be paved, in pursuance of the act of assembly; and there was duly apportioned and charged to Stokes, on that account, as the lessee and occupier of the said lot, the sum of 874 dollars, which he was bound to pay in the first instance, and paid.

After the expiration of the lease, Stokes brought this action to recover the same sum of 874 dollars of Bolling. And the question referred to the court, was, Whether Bolling was bound to pay him the money?

The circuit court held that he was, and rendered judgment for Stokes upon the ver-

dict of the jury. And Bolling appealed to this court.

The case was argued here by Nicholas and Leigh for the appellant, and by the Attorney General for the appellee. The argument turned intirely on the question, Whether the assessment and charge for the paving of the street, was a public due in any manner accruing on the leased premises, or a public due of any kind, within the meaning of the covenants

181 *in the lease, which the lessee Stokes thereby stipulated to pay, besides the annual ground rent of 50 dollars.

BROOKE, P. There can be no doubt upon the construction of the act of assembly: its obvious meaning gave to the tenant a demand on the landlord, at the expiration of the lease, for the expense paid by him, of paving the street opposite the lot.

Upon the terms of the lease, there is more question. The words in the covenant are very strong: yielding and paying an annual rent of 50 dollars, besides all taxes and other public dues in any manner accruing &c. But they may be satisfied by the application of them to the ordinary and usual taxes and public dues. To extend them to an expense unknown by the parties, incalculable as to amount, uncertain as to time, and in which the lessee could have no certain interest, would be to disregard all the circumstances under which the contract was made. It is impossible to suppose, that a sum so uncertain in amount, and which might be as large as the sum that was in fact paid, could have been taken into the calculation of the value of the lot, at the time the lease was made. There was nothing by which it could be estimated, like the usual and customary taxes and public dues; nor does it come intirely within any correct definition of the terms taxes or other public dues. It was an uncertain and extraordinary assessment. The act under which it was made, had been in force two years, and having never been acted on, it was doubtful, whether within the term of five years it would be put into operation. That depended on the proprietors of the lots and not on the lessees. It was not a charge on the lot, but on the person of the proprietor (the appellant), having no reference to the value of the lot, but to its front on the street, and it was limited to a particular object and occasion. If intended to be included in the lease, it is improbable, that it would have been left to the general construction of the terms, taxes or other public dues. When collected, it was not applicable to the ordinary pur-

182 poses *of revenue, of the state or corporation, but to individual objects and purposes, in which three fourths of the owners of lots on the same street might have no interest.

In the case of Southall v. Leadbetter, 3 T. R. 458, the tenant covenanted to pay a rent, and also from time to time and at all times during the lease, the land tax and all other taxes, rates, assessments, and impositions whatever, by act of parliament or otherwise whatsoever. During the lease, a party-wall became necessary, and the tenant, under an act of parliament, had to pay his proportion of the expense, which

by the act he was empowered to deduct out of the rent. And the question was, whether the tenant was not bound by the terms of the lease, to pay this expense, it being, as was contended, an imposition by law. The court was clearly of opinion, that he was not: lord Kenyon said, "neither is the tenant concluded by his covenant to pay taxes, assessments, impositions &c. for that only extends to the land tax and all other taxes ejusdem generis: but this is not a tax." I think that a strong case: the party-wall was no more beyond the covenant there, than the paving here; the expense of it was more certain, and more calculable; and the tenant had a more immediate interest in it.

The other judges concurring, the judgment was affirmed.

183 *Vizonneau v. Pegram and Others.

June, 1830.

Equitable Separate Estate—Power of Disposition.—A feme covert, quoad property settled to her separate use, is a feme sole, and has a right to dispose of all her separate personal estate, and the profits of her separate real, in same manner as if she were feme sole, unless her power of alienation be restrained by the instrument creating the separate estate.

John Stewart, late of Petersburg, by a nuncupative will duly made and proved, according to the statute of wills, in the hustings court of Petersburg, bequeathed to his natural daughter Mary Ann Vizonneau, the wife of Andri Thomas Vizonneau, "all the money he then had in the bank, to be held in trust by major Edward Pegram junior, for her benefit, so that her husband, A. T. Vizonneau, might have no manner of control over or right to the same."

Administration with the will annexed, was granted to Edward Pegram; and he finding about 19,000 dollars of his testator's

money deposited in bank, received the same, and held it in trust for Mrs. Vizonneau, and applied it to her use, so long as he lived; but he died a few years after, and the money went into the hands of John Pegram, his administrator.

Hereupon, Mrs. Vizonneau, by her next friend, exhibited her bill in the superior court of chancery of Richmond against John Pegram, the administrator of Edward Pegram, the trustee named in her father's will, setting forth the facts, and praying the court to appoint another trustee for her, in place of Edward Pegram deceased, and that his administrator should be directed to pay over the trust fund, to such trustee as the court should substitute. The administrator of Edward Pegram promptly answered the bill, declaring his readiness to account for and pay over the trust money, as the chancellor should direct. The chancellor appointed John B. Bott trustee for Mrs. Vizonneau, requiring of him bond with approved surety for the faithful discharge of the trust; and decreed, that the administrator of the former trustee, should pay the trust money in 184 his hands belonging to Mrs. Vizonneau, to Bott the trustee so appointed by the court. And the money was paid over to him accordingly.

There were, afterwards, various proceedings in the cause, against the trustee Bott, the object of which was to have an account of his execution of the trust, and to substitute another trustee in his place, to receive and manage the fund for Mrs. Vizonneau. As no person could be found willing to accept the trust, upon the terms which the chancellor required, namely, that the trustee should give bond with approved surety for the faithful discharge of the trust; the chancellor, at length, substituted and appointed the marshal of his court to act as trustee, and ordered Bott to pay and deliver over to him, the fund and all the securities he held for the same.

The marshal in the course of his administration of the trust fund, paid over to the cestui que trust Mrs. Vizonneau, upon her demand thereof, a part of the principal of the trust fund, and reported the fact to the court. Mrs. Vizonneau insisted, that she had a right not only to have the profits of the fund, but to dispose as she pleased of the principal also. But the chancellor was of a different opinion; and, declaring that she was entitled only to the profits of the fund, he disapproved of the advances which the marshal had made her, over and above the profits, and ordered, that the future profits which should accrue, should be applied to reimburse so much of the principal, as had been, in his opinion, thus improperly paid her by the marshal.

Hereupon, Mrs. Vizonneau (who still remained a feme covert, though from the commencement of these proceedings she had been separated from her husband) presented a petition to the chancellor, in due form, claiming a right to dispose of the fund, principal as well as interest; and praying the court to direct the marshal, instead of applying the profits as they should accrue to reimburse the advances of principal previously made to her, to pay all the

***Equitable Separate Estate—Power of Disposition.**—It is the established doctrine in Virginia, that a married woman, as to property settled to her separate use, is to be regarded as a feme sole, and has a right to dispose of all of her separate personal estate and the rents and profits of her separate real estate, in the same manner as if she were a feme sole, unless the power of alienation be restrained by the instrument creating the estate. *Burnett v. Hawpe*, 25 Gratt. 486, citing principal case; *West v. West*, 3 Rand. 373; *Woodson v. Perkins*, 5 Gratt. 346. To the same effect, the principal case is cited in *Christian v. Keen*, 80 Va. 572; *Radford v. Carwile*, 18 W. Va. 649, 650; *Justis v. English*, 30 Gratt. 571; *Coatney v. Hopkins*, 14 W. Va. 365; *Dulin v. McCaw*, 39 W. Va. 724, 20 S. E. Rep. 683. See also, *foot-note* to *Lee v. Bank*, 9 Leigh 200. The mere fact that the estate is put in the hands of a trustee to be used for the wife does not effect in any degree the *ius disponendi*; and the trustee's assent is not necessary to a valid alienation or charge by the wife, unless it is required expressly or by strong implication in the instrument under which the property is derived. *Burnett v. Hawpe*, 25 Gratt. 487; *Patton v. Merchants' Bank*, 13 W. Va. 608; *Haymond v. Jones*, 33 Gratt. 388; *Coatney v. Hopkins*, 14 W. Va. 365.

But, in Virginia, the right to restrain or interdict the power of the wife to dispose of her separate estate has been expressly recognized and affirmed in several cases. *Nixon v. Rose*, 12 Gratt. 481, citing principal case; *West v. West*, 3 Rand. 373; *Williamson v. Beckham*, 8 Leigh 20; *Lee v. Bank of U. S.*, 9 Leigh 200. To the same effect see principal case, cited in *Radford v. Carwile*, 18 W. Va. 652.

See further, on this subject, monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 150.

As to the effect of one mode of alienation being prescribed in the instrument creating a wife's equitable separate estate, see discussion in *foot-note* to *Lee v. Bank of U. S.*, 9 Leigh 201. See also *foot-note* to *Williamson v. Beckham*, 8 Leigh 20.

accruing profits to her, or at least so much thereof as was necessary for her immediate maintenance and support.

185 *The chancellor, adhering to his former opinion, rejected the application. And Mrs Vizonneau applied by petition to this court for an appeal; which was allowed.

Stanard and S. Taylor, for the appellant, insisted, that she took, under her father's will, a separate property in the money bequeathed, and was, in regard thereto, a feme sole to all purposes, with full power to dispose of the whole subject; and, they said, there could be no difference between her interest in the profits, and her interest in the principal, of the fund. They cite *Hearle v. Greenbank*, 3 Atk. 709, 1 Ves. sen. 303; *Fettiplace v. Gorges*, 3 Bro. C. C. 8; *Duke of Bolton v. Williams*, 2 Ves. jun. 150; *Hales v. Margerum*, 3 Id. 299; *Wagstaff v. Smith*, 9 Id. 520; *Witts v. Dawkins*, 12 Id. 501; *Sturgis v. Corp*, 13 Id. 190; *Browne v. Like*, 14 Id. 302; *Heatley v. Thomas*, 15 Id. 596; *West v. West's ex'rs*, 3 Rand. 373. [Brooke, president: Ought not the husband to be a party?] Stanard: We think not; he has no interest in the subject; but if he ought, the court can settle the principle of the case, and that done, it will be easy to supply this formal defect, if it be one.

CABELL, J., delivered the opinion of the court. It is established, in England, by a long course of uniform decision, that a married woman is, as to property settled to her separate use, a feme sole; and, as a consequence of this principle, and an incident to the right of enjoyment, that she has a right to dispose of all her separate personal property, and the profits of her separate real estate, in the same manner as if she were a feme sole, unless her power of alienation be restrained or restricted by the instrument creating the separate estate. The same principle has been sanctioned by this court, in the case of *West v. West's ex'ors*.

The will of John Stewart gave the appellant, an estate for her separate use and benefit, in the money thereby bequeathed, and imposed no restraint on her power of alienation. 186 *It follows, therefore, that so far from her being confined, in her own enjoyment of it, to the use of the interest of the fund during her life, she is to be regarded as the absolute owner of both principal and interest, and should be permitted to make any disposition thereof that she may desire to make.

The decree is reversed, and the cause remanded to be proceeded in according to the principles now declared.

Lockridge v. Carlisle.

June, 1880.

Deeds—Acknowledgment in Another State—Who May Take.—The provision of the statute of conveyances of 1792, Rev. Code of 1794, ch. 90, § 5, was repealed by the 5th and 7th sections of the revised statute of 1819, 1 Rev. Code, ch. 90, so that, now, a

*The principal case was cited in approval in *Hassler v. King*, 9 Gratt. 120, 122; *Grove v. Zumbro*, 14 Gratt. 511.

For further information, see monographic note on "Acknowledgments" appended to *Tallaferro v. Pryor*, 12 Gratt. 277.

deed of lands in Virginia made by a party residing in another state of the union, cannot be recorded here, upon acknowledgment thereof by the party before a court of such state where he resides, but only on such acknowledgment before two justices of the peace of such state.

This was a bill exhibited by Lockbridge against Carlisle, in the superior court of chancery of Greenbrier, the principal object of which was to injoin and suspend the proceedings of Carlisle, on a judgment he had recovered at law against Lockridge, for the purchase money of land in the county of Bath, sold by Carlisle to Lockridge, until the vendor should get in and convey to the vendee, a good and perfect title to the land. At the time of the sale, the legal title of the land was in Carlisle and his brothers and sisters, as devisees and tenants in common claiming under their father's will. These co-devisees of Carlisle resided in the state of Kentucky: they all, by several deeds, in due form, executed in 1824 and 1826, conveyed their rights and interests in the land, to Carlisle the vendor; but most

of these deeds were acknowledged by 187 the grantors before the county courts of Campbell, Fayette &c. in Kentucky, and by those courts certified to the clerk of the county court of Bath in Virginia, where the land lay, to be there recorded. And one question that arose in the cause was, Whether these deeds were duly registered or not?

The statute of conveyances of 1792 (Rev. Code of 1794, ch. 90, § 5, Pleasants' ed. p. 157,) provided, that if the party executing a deed should not reside in Virginia, the acknowledgment by the party of the sealing and delivery thereof, before any court of law, or mayor, or other chief magistrate of any city, town or corporation of the country wherein the party should dwell, certified by such court &c. in the manner such acts are usually authenticated by them, and offered to the proper court in Virginia to be recorded, should be as effectual as if it had been in this last mentioned court. And the deeds in question were duly acknowledged and certified to be recorded, according to the provisions of that statute. But the revised statute of conveyances of 1819 (1 Rev. Code, ch. 99, § 5, 7, pp. 362, 3,) provides, that in case the party executing the deed, reside not in the U. States or any territory thereof, then the deed may be acknowledged and certified for registry, in the manner prescribed by the statute of 1792; and that deeds may be admitted to record, upon the certificate of the acknowledgment thereof, under the seals of any two justices of the peace for any county or corporation within the U. States, or any territory thereof, or the district of Columbia. So that the real question was, whether the latter statute superseded and repealed the former, in respect of the mode of acknowledging and certifying deeds of lands in Virginia, made by a party in another state of the union, for registry here?

The chancellor held, that the two statutes might well stand together, and that the provision of the statute of 1792 was not repealed by that of the revised statute of 1819; that, therefore, the deeds in this case were duly registered. And he made an interlocutory decree founded on that prin-

ciple: from which Lockridge appealed to this court.

188 *Johnson for the appellant; Leigh for the appellee.

BROOKE, P. It is very probable, that the legislature, by the provisions of the statute made in 1819, on this subject, intended only to facilitate the acknowledgment of foreign deeds, by extending the authority to take acknowledgments of such deeds, to two justices of the peace, where the party executing the same resided in any of the U. States, or the territories thereof, and not to repeal the 5th section of the statute of 1792, which gave the authority to any court of law, mayor or chief magistrate &c. in every case in which the party executing such deeds did not reside in Virginia. But, as the authority, in such case, was by the statute of 1819 restricted to the case, in which the party executing the deed resided without the U. States, and the territories thereof; and as also all laws of a general nature, not published in the new code, were repealed by the 9th section of the statute providing for the re-publication of the laws (1 Rev. Code, ch. 1, p. 16,) the 5th section of the statute of 1792, and all the subsequent statutes on the subject, must be considered as repealed by the statute of 1819. The objection to the authentication and registry of the deeds in question, cannot be got over. So much of the decree, therefore, as declares them duly registered, and dissolves the injunction, is erroneous, and must be reversed.

189 *Walthall's Ex'or v. Robertson and Others.

June, 1890.

(Absent COALTER and CABELL, J.)

Will—Construction—Emancipation of Slaves—Case at Bar—Testator, by will in 1819, bequeaths and provides—"If it be agreeable to the laws of this state Virginia, that after death of my wife, it is my will, that the following slaves owned by me, viz. Joan &c. shall, as soon as they attain the age 31 years, be freed; and I appoint my friends J. M. and E. H. H. trustees for the liberation of said slaves, and for them to make the necessary application to court, on said slaves' behalf, both as to their freedom and their remaining in the state. If the laws of the state be against such procedure, then my will is, that said slaves be equally divided among my children &c." **HOLD**, upon construction of this will, that it was not testator's intention to emancipate these slaves, unless by change of law they might be permitted to remain as free persons in Virginia; and as by the law at date of will and of testator's death, and at death of his widow, these slaves, if emancipated, could not be allowed to remain in Virginia, they are not entitled to their freedom, but pass to testator's children.

Francis Walthall, late of Buckingham, who died in 1819, by his last will and testament, duly made, published and recorded, devised and bequeathed his whole estate to his wife Mary for her life; and that after her death, the whole estate, excepting specific legacies afterwards bequeathed, should be sold by his executors, and the proceeds divided among six of his grandchildren named in the will. And after sundry specific legacies of slaves, he bequeathed and provided as follows: "Item, if it be agreeable to the laws of this state, Virginia, in which I live, that after the death of my said wife Mary, it is my will and desire, that the follow-

ing slaves owned by me, viz. Joan senior, Gary, Jack, Tom and Peter, shall as soon as they attain the age of thirty-one years, shall be freed; and I appoint my friends J. Morris and E. H. Hendrick, trustees for the liberation of said slaves, and for them to make the necessary application to court on their the said slaves' behalf, both as to their freedom and their remaining in the state. If the laws of the state be against such procedure, then my will and desire is, that the said slaves shall be equally divided among my children *who shall be living at the time and the heirs of those that be dead."

It appeared that the testator himself was an illiterate man, perhaps unable to write; for instead of signing his name to his will, he made his mark.

The testator's widow being dead, and the slaves Joan, Gary, Jack, Tom and Peter, having all, before her death, attained to the age of thirty-one years; the testator's children and grandchildren exhibited their bill against Morris, the executor, in the county court of Buckingham in chancery, insisting, that under the testator's will, and according to the laws of Virginia at the time of his death and of the death of his widow, these slaves were not entitled to their freedom; and praying a decree that the executor should divide them among the testator's children and descendants. The executor in his answer, insisted, that the plaintiffs were not entitled to the slaves, and that they were entitled to their freedom; and submitted this question to the court.

The county court was of opinion, that the slaves were not entitled to their freedom; and decreed a division of them among the plaintiffs. The executor appealed to the superior court of chancery of Richmond, which affirmed the decree: and then he appealed to this court.

Leigh for the appellant. The law of Virginia, as it stood at the time of the testator's death, and as it continued and stood till and at the death of his widow, authorised any owner of slaves to emancipate them by will; providing, however, that if any emancipated slave, being of full age, should remain in the commonwealth, more than twelve months after his right to freedom accrued, such freedman should be sold into slavery again, by the overseers of the poor; unless the freedman had been emancipated for some act of extraordinary merit, in which case the county court, upon his application, and on satisfactory proof of the act of merit for which he was emancipated, and of his general good character and conduct, was empowered to grant

191 him *leave to remain in the state.

1 Rev. Code, ch. 111, § 53, 61, 62, pp. 433, 6, 7. The principal object of the testator here, was, to emancipate these persons, at his wife's death, if the laws should continue to allow of emancipation at that time: if it should be agreeable to the law of Virginia, his will and desire was, that, after his wife's death, and their attaining to the age of thirty-one, respectively, they should be freed. But he intended them another subordinate benefit; that leave should, if practicable, be

obtained for them to remain in the state. The main design which was lawful, ought not to be sacrificed to the subordinate one, which turned out, in the event, to be unlawful, and therefore impracticable; for it must be admitted, that these slaves, not having been emancipated for any acts of merit, the county court had no power to give them leave to remain here. But the legislature had such power, and has often exercised it. It was only in case "the laws of the state should be against such procedure," that these persons were not to be emancipated, and were bequeathed to the testator's children and their descendants. If the laws should be against what procedure? Against the emancipation, which was the main procedure; not against their remaining in the state, which was a subordinate object; not against the asking leave for them to remain, of the county court, which was only the form and manner of procedure for obtaining that subordinate object.

Daniel for the appellees. As the laws of the state, at the time the testator made his will, authorising him to emancipate his slaves, gave them the benefit of the act of manumission on condition of their leaving the state, his reference to the state of the law on the subject, which should exist at the time of his wife's death and the slaves' attainment to thirty-one years of age, clearly evinces his knowledge that the law, as it stood in his own time, would not allow his object to be accomplished, and that he looked to a possible or probable change of the laws, which would give effect to his purpose. What object was it, which
192 required a change of *the law to give it effect? The manumission of these slaves, with the right of remaining and enjoying freedom in Virginia. Their freedom and their residence here, were purposes so blended in his mind as to make one intire purpose. The procedure of emancipating slaves upon condition of their leaving the state, was one which it required no change of the laws to allow: the procedure of emancipating slaves to remain here, could only be allowed by a change of the policy and the laws of the state, which might or might not take place, in the interval between his own death and that of his wife. This consideration explains the import of those words of condition, "if it be agreeable to the law of the state," and "if the laws of the state be against such procedure;" which are correlative and alternative conditions, both looking to such a change of the laws, as should allow of the accomplishment of the testator's whole purpose, namely, the emancipation of these slaves to reside in Virginia.

CARR, J. It is an observation as trite as it is true, that, in construing a will, we are to look to the whole and to every part, in order to ascertain what the testator meant by any clause, sentence or expression. We are to inquire, what this testator meant in that clause of his will, which relates to the freedom of these five slaves. Did he mean, that they should be free, provided the laws, at the period appointed by him, should allow them to be free, and if

not, that they should pass to his children? Or did he mean, that they should remain slaves, and pass to his children, unless the laws would permit both their freedom and residence in the state? The chancellor thought he meant the latter. I cannot concur with him. It is evident to me, that these slaves did not enter into the arrangement of his property, which the testator was making among his descendants. It is fair to conclude too, that they were favourites, as they were selected from among his slaves. Reasoning a priori, we should hardly suppose, that the testator who wished to confer the boon of freedom on his slave,

193 would make that dependent *on his residence in this or that quarter of the globe. But all reasoning of this kind must yield to the actual expression of his will. Let us analyze the words to ascertain what that is. "If it be agreeable to the laws, it is my will, that after the death of my wife &c. my slaves Joan &c. shall, as soon as they attain the age of thirty-one, be freed." Here is a clear, definite, complete purpose expressed; the freedom of these slaves, after the death of his wife, as they attained to thirty-one, if the laws would permit. Is this purpose afterwards changed? "And I appoint my friends J. M. and E. H. H. trustees for the liberation of said slaves:" this, so far from changing, provides the means for effecting his purpose; he appoints trustees for the liberation of the slaves. "And for them to make the necessary application to court, both as to their freedom, and their remaining in the state." Do these words indicate any change of the purpose? Not to my mind. They prove still farther, the solicitude of the testator as to the object in view. They are means employed to insure the end, the freedom of the slaves. He was an ignorant, illiterate man: he had an idea, that some application to court was necessary as to their freedom: he directs his trustees to make this: and wishing still further to provide for their comfort, he directs his friends also to make the application to court necessary for their remaining in the state. It is clear to my mind, that this last application was never meant by the testator, in restraint of the freedom before given; that he had no idea of saying that their freedom should depend on obtaining permission for them to remain in the state. Both the words he has used, and the reason of the thing, forbid this. They are to make application, in behalf of the slaves, "both as to their freedom, and their remaining;" shewing that, in the testator's mind, they were two distinct and independent things; the freedom first, the residence afterwards. And this is true too, on the law of the case: no application for remaining in the state, could be made to the court, but for slaves already freed. The testator proceeds, "If the laws of the state be against this procedure:" what
194 *procedure? I answer, the freeing his slaves. He had just before said, if it be agreeable to the laws of the state, I wish these slaves to be freed, and had provided the means to secure their freedom; then he adds, if the laws of the state be against the procedure, then I give them to

my children. Do we not see here, clearly, each alternative? If the laws will suffer it, I free these slaves; if they will not suffer it, I give them to my children.

GREEN, J. The only question in this case, is, Whether the testator intended, that the slaves in question should be freed (to use his own expression) upon his wife's death, at all events, unless the law in force when that happened, should prohibit emancipation upon any terms? or that they should be freed, only in the event, that the laws should then permit emancipation, and those emancipated to remain in the state, by leave of the courts or otherwise? This last was the construction adopted by both the courts below, and, I think, the correct one. The expression "if the laws of Virginia be against the said procedure," refers to all which the testator had directed to be done, both to the emancipation of the slaves, and procuring permission to them to remain in the state, for which purposes trustees were appointed.

The laws in force when the will was made, permitted emancipation, but imposed upon those emancipated, the condition of leaving the state within a twelve month after their right to freedom accrued, or if infants, after they attained their age, under the penalty of being sold as slaves by the overseers of the poor, unless they were permitted to remain by an order of a county or corporation court, in cases in which the emancipation was founded upon the extraordinary merit of the slave, and the court was satisfied by proofs of his general good conduct and character. In the exercise of this power, the courts had a considerable latitude of discretion, which was restrained by the act of 1819, which was passed a few months before, and which was to take effect a few months after, this will

195 was made, by the requisition that *the act of extraordinary merit, for which the slave was emancipated should be stated in the record. These laws, or at least those in force when he made his will, were obviously in the mind of the testator, and dictated the provision under consideration. He could hardly have doubted, but that, at his wife's death, the laws would allow emancipation upon some terms; but he might very reasonably have doubted, whether they would allow the courts to give leave to the slaves he wished to emancipate, to remain in the state, or not. If they should, he desired to emancipate them; if not, to distribute them amongst his children. Under these laws, no court has power to permit the slaves in question, if emancipated, to remain in the state, for they are not suggested to have done any act of extraordinary merit. I think the decree should be affirmed.

BROOKE, P., concurred with GREEN, J., and the decree was affirmed.

Peasley v. Boatwright.

June, 1830.

Promissory Note—Scroll—Effect.—Debt on an instrument, which is in its form a promissory note for

*Sealed Instrument—Scroll—Necessity for Recognition in Body of Instrument.—In cases of contracts which may be indifferently simple contracts or sealed instruments, the fact that a scroll is affixed,

money, concluding "witness the hands" of the parties; but scrolls by way of seals are set to their signatures: this instrument is rightly described in the declaration as a promissory note.

Same—Action of Debt—Declaration—Averment of Consideration.—In debt on promissory note; HELD, plaintiff need not aver in declaration, or prove, consideration; though defendant may go into evidence touching consideration.

Joint Action—Judgment.—In joint action of debt against two, there is judgment by default against one; the other pleads to the action, and there is trial, and verdict against him: HELD, there should be one and the same joint judgment against both.

Debt by Boatwright against Montague and Peasley, in the county court of Cumberland, on a written instrument, which the declaration described as a promissory note, for \$188 dollars 93 cents.

Montague made default, and judgment by default was entered and confirmed against him. Peasley appeared, and pleaded nil debet.

At the trial, three bills of exceptions were filed to opinions of the court:

1. The first stated, that the plaintiff to support the issue on his part, exhibited the paper on which the action was brought, which was of the following tenor: "On or before the 25th day of December 1824, we W. Montague and G. B. Peasley promise to pay D. Boatwright, the sum of 188 dollars 93 cents lawful

the name of the maker does not make it a sealed instrument unless there be a recognition of the seal in the body of the instrument. *Bradley Salt Co. v. Norfolk, etc., Co.*, 36 Va. 462, 28 S. E. Rep. 567, citing principal case. To the same effect, see principal case cited in *Cromwell v. Tate*, 7 Leigh 306; *Clegg v. Lemessurier*, 15 Gratt. 112; *Keller v. McHuffman*, 15 W. Va. 78.

For further information on this subject, see discussion in *foot-note* to *Parks v. Hewlett*, 9 Leigh 511; *foot-note* to *Clegg v. Lemessurier*, 15 Gratt. 108; *monographic note* on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801; *monographic note* on "Deeds" appended to *Flott v. Com.*, 12 Gratt. 554.

As to the admission of proof alunde of the sealing of an instrument, see principal case cited in *Parks v. Hewlett*, 9 Leigh 516; *Clegg v. Lemessurier*, 15 Gratt. 114, 115.

Promissory Note—Action of Debt—Declaration—Averment of Consideration.—By statute, 1 Rev. Code, p. 484, § 4 (Code 1849, ch. 144, § 10, p. 582; Code 1887, § 2852), an action of debt may be brought on a promissory note, and in such action it need not be averred or proved that there was a consideration for the note, though the defendant may go into evidence touching consideration. The principal case was cited in support of this proposition in *Hollingsworth v. Milton*, 8 Leigh 52; *Jackson v. Jackson*, 10 Leigh 452, 453; *Snead v. Coleman*, 7 Gratt. 302; *State v. Harmon*, 15 W. Va. 121, 122 (quoting with approval from *JUDGE CARR's* opinion); *Cheuvront v. Bee*, 44 W. Va. 104, 28 S. E. Rep. 751.

The drawing and delivery of a check implies the indebtedness of the drawer to the payee to the amount of the check, and, in an action upon the check, it is unnecessary to aver in the declaration any further consideration. *McClain v. Lowther*, 35 W. Va. 299, 13 S. E. Rep. 1003, citing principal case, *Ford v. McClung*, 5 W. Va. 156, and *Terry v. Ragsdale*, 33 Gratt. 342.

See further, *monographic note* on "Consideration" appended to *Jones v. Obenchain*, 10 Gratt. 259; *monographic note* on "Bills, Notes and Checks" appended to *Archer v. Ward*, 9 Gratt. 622.

Joint Action—Judgment.—To the point that in a joint action upon a contract, the plaintiff must have a joint judgment against all of the defendants, or he can have judgment against none, the principal case was cited in *Early v. Clarkson*, 7 Leigh 83, 86, 91, and *foot-note*; *foot-note* to *Baber v. Cook*, 11 Leigh 606; *Snyder v. Snyder*, 9 W. Va. 421; *Hoffman v. Bircher*, 22 W. Va. 542, 547, 548; *State v. Hays*, 30 W. Va. 111, 3 S. E. Rep. 180. See further, *monographic note* on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

To the point that the release of one joint promisor is a release of all, the principal case is cited in *Maslin v. Hiett*, 37 W. Va. 25, 16 S. E. Rep. 440.

money of Virginia. Witness our hands this 11th September 1822.

"Wm. Boatwright [seal]

"Gabriel Peasley [seal]."

Upon which the defendant, by his counsel, moved the court to exclude the paper from going in evidence to the jury, which motion the court overruled. The plaintiff then proceeded to prove by two witnesses, who had seen Peasley write, that they believed the signature of his name to the paper, was in his handwriting. And this being all the evidence, the defendant's counsel moved the court to instruct the jury, that the law was for the defendant, and to instruct the jury, whether the law was for the plaintiff or defendant. The court refused to give the instruction that the law was for the defendant, and instructed the jury that the law was for the plaintiff. The defendant excepted.

2. He then moved the court to exclude the instrument above set forth, from the evidence, on the ground, that it was variant from that described in the declaration as a promissory note. The court overruled the motion: and the defendant excepted.

3. He moved the court to instruct the jury, that as the note itself did not import a valuable consideration, the production of it did not exempt the plaintiff from the duty of proving a consideration; and that, unless he proved a consideration *by other proof than the exhibition of the note alone, the law was for the defendant. This motion also the court overruled: and the defendant excepted.

The jury found a verdict for the plaintiff; upon which the county court entered a separate judgment against Peasley, judgment having been previously entered against Montague. Peasley appealed to the circuit court of Cumberland; which reversed the judgment, only because separate judgments were entered against the two defendants in this joint action, but proceeded itself to enter a joint judgment against them both. And then Peasley applied to this court for a supersedeas; which was allowed.

S. Taylor for the plaintiff in error; Forbes for the defendant.

CARR, J. It is not easy to perceive, in the first bill of exceptions, what was the exact point of law, on which the defendant's counsel wished to obtain the opinion of the court. As the attempt to exclude the note, and the motion for an instruction on the law of the case, are blended together, and form the matter of one exception, with the evidence going to prove the handwriting spread out; I conclude, that the defendant intended to ask the court to instruct the jury, whether (taking the evidence for true) the note ought, according to law, to go to the jury in support of the declaration? And understanding the motion thus, I think the court was right: for if the jury believed the evidence, the handwriting was clearly proved, and the note being properly described in the declaration, ought to have gone to the jury. The motion itself was not only awkwardly put, but improper, because it involved fact with law, and demanded the opinion of the court on the whole mass. *Smith v. Carrington*, 4 Cranch 71; *Brooke v. Young*, 3 Rand. 106. There would have

been no error in overruling it for that reason alone. Nor did the court, as I understand it, err in the opinion it gave.

198 *Of the other exceptions, the third only need be noticed. We know that at common law, an action of debt could not be maintained on a promissory note, as of itself importing a debt; but the plaintiff must declare upon the contract, as an assumption, stating and proving the real consideration at large. The note, though it could not be declared on, might be given in evidence in support of the contract stated, as (for instance) on a count for money lent. As commerce advanced in its progress, it was found convenient to resort to a less complicated instrument than bills of exchange; and this brought promissory notes very much into use. It was attempted to place them on the footing of bills of exchange, and to bring debt upon them, as of themselves importing a consideration: this was opposed by lord Holt, totis viribus, who (as lord Kenyon observes in *Brown v. Harraden*, 4 T. R. 151,) most pertinaciously adhered to his opinion, that no action could be maintained on promissory notes as instruments, but that they were only to be considered as evidences of debt. He insisted, that actions upon notes as such, were innovations upon the rules of the common law; and that declarations upon them amounted to setting up a new sort of specialty unknown in Westminster. *Clerke v. Martin*, 2 Ld. Raym. 757; *Story v. Atkins*, Id. 1430; *Trier v. Bridgman*, 2 East. 359; *Pearson v. Garrett*, Comb. 227. To put an end to this controversy, the statute 3 & 4 Anne, ch. 9, § 1, enacted, that all notes signed by a person, promising to pay to another, his order or bearer, any sum of money, should be construed to be, by virtue thereof, due and payable to any person, to whom the same is made payable. One effect of this statute was, that an action of debt might be maintained on a promissory note without alleging a consideration, and of consequence, without proving any. Not very long after this change was effected by the statute of Anne, our assembly passed a law resembling that statute very strongly, as respects promissory notes; 4 Hen. Stat. at large, May 1730, ch. 5, p. 273-5. It enacts, that "to the end the recovery of money upon promissory notes, and other writings without seal, may *be rendered more easy &c. if any person shall sign any note, or by any other writing shall promise and oblige himself, to pay any sum of money, or quantity of tobacco, to any other person, such person to whom the money &c. is payable, shall and may commence and maintain an action of debt, and recover judgment for what shall appear to be due thereupon, with costs." By the same act such notes were made assignable, and the assignee enabled to sue in his own name, allowing all discounts against the assignor. These provisions, from that day to this, have continued to be law. It seems to me, that the object and effect of this legislation was to put promissory notes on the same footing here, which they occupied in England, except giving to them the character of bills of exchange, which was prevented by the clause allowing discounts.

There can be no doubt, that our act meant to enable the holder of such notes to bring debt on the note itself, without laying or proving any consideration; the defendant having it always in his power, from the nature of the instrument, to go into the consideration. If the act did not mean this, it is impossible to conceive what was its object. It expresses the intention of rendering the recovery on such notes more easy: how? not by giving debt on the contract, for that lay at common law; but by giving debt on the note itself, and thus dispensing with the necessity of laying a consideration. That such is the meaning of the law, is further proved by this, that in suits on such notes, no writ of inquiry is necessary, and unless the office judgment be set aside, the clerk is by law directed to issue execution for the full amount of principal and interest due on the note, just as on an instrument under seal. This, then, being the just interpretation of the law, strengthened by the universal practice of the country, the court was perfectly correct in overruling the motion. The judgment is correct throughout.

The other judges concurred, and the judgment was affirmed.

200 *Orndoff v. Turman and Others.

June, 1830.

[21 Am. Dec. 608.]

(Absent COALTER, J.)

Estate Tail—Statute Abolishing—Effect on Estate Tail in Abeyance.—Tenant in fee tail general aliens in fee, by deed of lease and release with general warranty, in 1769; and tenant in tail lives till 1816, and then dies leaving issue: HELD, that the statutes of 1776 and 1785 abolishing entails, barred the issue, and converted the estate tail, even though it were in abeyance, into a pure and absolute fee, and confirmed the fee simple to the tenant in tail's alienee in fee.

This was a formedon in descender, brought in the circuit court of Jefferson, by Turman and others against Orndoff, for 306 acres of land with the appurtenances.

The demandants in their count, claimed as heirs of the body of Prudence Harbour, daughter and sole heir of the body of Magdalena Pusey, who was a daughter of John Vanmeter; and declared, that, the said Vanmeter being in his lifetime seized in his demesne as of fee of the land demanded, made and published his last will and testament, which was after his death, in the year 1745, duly proved and recorded; whereby he devised the land demanded to the said Prudence and the heirs of her body begotten; by virtue of which gift the said Prudence entered into and upon the land demanded, and was seized thereof, in her demesne as of fee and right, according to the form of the gift aforesaid, by taking the caples to the value of one dollar, till 1769, when she conveyed the said land to Jacob Vandever in fee simple, and bound herself and her heirs of warrant and defend the same to the said Vandever and his heirs forever; and the said Prudence died in the year 1816; and from her the right to the said land, according to the form of the gift aforesaid, descended to the

demandants, as issue of the body and heirs of the said Prudence.

The tenant put in a general demurrer to the count, in which the demandants joined. And he also pleaded the general plea, defending his seizin, as of fee and right

&c. and putting himself on the grand assize, and praying recognition *to be made whether he had greater right to hold as he held, or the demandants to have &c. And the demandants in like manner put themselves on the grand assize, and prayed recognition to be made &c.

The parties agreed that the assize should be empaneled, and should find a special verdict, before the judgment of the court should be given on the demurrer. Whereupon the assize was empaneled, and found a special verdict, stating this case:

John Vanmeter was, in his lifetime, seized of the land in fee, and died so seized in August 1745, having first duly made and published his last will and testament, whereby (inter alia) he devised as follows: "I devise to my son Abraham Vanmeter and his heirs lawfully begotten, a certain tract of land &c. provided there be no heirs male or female of my said son or sons hereafter mentioned, live to arrive to the age of twenty-one years, that then after the decease of my said son or sons aforesaid, or their heirs, that then their part of land to be equally divided among my surviving devisees hereafter mentioned." And "I give and bequeath unto my daughter Magdalena the sum of twenty shillings as her full legacy &c. And I do devise unto her heirs lawfully begotten of her body a certain tract of land [which was the land demanded in this action] to be held and enjoyed by the heirs of my said daughter, under the limitations and restrictions, according to the devise to my son Abraham Vanmeter's heirs."

The testator's daughter Magdalena, the wife of one Pusey, had issue at the date of the will one daughter, named Prudence, and died leaving this and no other child. Prudence entered upon and held the land, under the above recited devise thereof to her in her grandfather's will. She married Elijah Harbour in 1763, who died in 1768. And she, then, a widow of full age, by deed of lease and release, dated the 1st and 2d September 1769, bargained and sold and conveyed the land to Jacob Vandever, with a covenant that she was seized of an estate of inheritance in fee simple,

202 *and general warranty against her and her heirs and all persons whatsoever.

The tenant claimed under Vandever.

Prudence Harbour died in 1816. The demandants were the issue of her body, and her heirs in parcenary according to the existing law of descents of Virginia.

And the question referred to the court was, Whether the law upon this case, was for the demandants or for the tenant?

The circuit court held, that the law on the demurrer, and on the special verdict, was for the demandants, and gave them judgment for the land demanded in the count, and ascertained by a previous survey. The tenant appealed to this court.

Wickham for the appellant, submitted the question to the court, Whether Prudence

*The principal case is cited in *Watts v. Cole*, 2 Leigh 668.

Pusey took an estate tail under the will of her grandfather? His argument proceeded on the supposition that she did.

Supposing the right stood unaffected by the statute abolishing entails and converting them into estates in fee simple, and the statute repealing all english statutes, and especially the statute de donis; and supposing the formdon to be the proper remedy; these demandants are not entitled either to the right or the remedy. They are the heirs of Prudence, the donee in tail, only by force of the statute of descents of 1785; and that statute makes them heirs only of that to which she had title at her death; of that which descended from her. Now, the very ground on which the demandants claim right, must be that she had no title in her at her death; that she had parted with all her estate and interest; and that her issue are entitled per formam doni. The statute of descents does not recognize descents in tail, which had long before been abolished, but only descents and heirs in fee simple. The heir in tail, if any such there can now be, must be the heir in tail at common law, or by the statute de donis; the eldest son, namely, of the donee in tail; he alone, if any body, has the right, and is entitled to this remedy of formdon in descender.

203 *But the right and the remedy were both given by the english statute de donis; and that statute was repealed along with the whole of the english statute law, by our statute of 1792. 1 Rev. Code, ch. 40, § 3, 4, 5, p. 137. The 4th section of this statute does indeed provide, that all rights arising under any english statute, at any time before the commencement of that act, shall remain in the same condition in all respects as if the act had never been made; but this proviso cannot save the right claimed here, as a right arising under the statute de donis before the commencement of the repealing act. In whom was the right now claimed in 1792? Not in the donee in tail (as the demandant's counsel will say) for she had parted with every scintilla of her right: not in Vandever her grantee, as they must also contend: and surely not in the heirs of the body of the donee in tail, for she was then living, and nemo est hares viventis. The right, it will be said, was in abeyance. If so, when did it commence or arise, within the meaning of the proviso of the general repealing statute? When it accrued; when the donee in tail died; that is, after the commencement of the repealing act, for she lived till 1816. Neither does the saving, in the 5th section of that general repealing act, of all writs remedial and judicial given by the english statutes, save this remedy by formdon to these parties; for the saving of the writs remedial and judicial, can only be co-extensive with the rights such writs were given to enforce. If the right was not saved, neither, of course, was the remedy. Suppose the demandants had died before their mother; one cannot imagine any right, which they could have died entitled to, in fact or in contemplation of law. Surely, therefore, neither the right nor the specific remedy given by the statute de donis, was saved to

these demandants, as a right preexistent to the general repealing statute of 1792.

At any rate, formdon did not lie. It never lay where the party had a right of entry. The conveyance by the donee in tail, passed only what was her own to dispose of; what she had a right to convey.

This the demandants themselves
204 *are bound to maintain: they must maintain, that she had no right to convey away the interest of her issue in tail; in other words, that her conveyance enured to assure the estate to the vendee only during her life. Their rights, then, accrued at her death. If, therefore, they have any title, they had also a right of entry, at the time they brought the formdon. If it be supposed, that the conveyance of the donee in tail with general warranty, worked a discontinuance; yet the warranty could only work the discontinuance, when it descended upon the heirs. The warranty of the donee in tail descended on her heirs in tail, and their right accrued, at one and the same instant of time. Here is a supposed discontinuance, coeval with the supposed accruing, of a right. If a general warranty works a discontinuance, it is only because it descends on the heirs. The warranty here descended on heirs, made heirs, not by the statute de donis, or performam doni, but by the statute of descents of Virginia; heirs in fee simple: and descending on such heirs, and working a discontinuance of the estate tail, it bound those heirs: it estopped and barred them.

The demandants have no manner of right. The statute of 1776, abolishing entails, annihilated every right to which they could possibly pretend; and if that statute did not, the statute of 1785 did.

The statute of 1776 provides, that any person who now hath, or hereafter may have, any estate in fee tail in lands in possession, or who now is, or hereafter may be, entitled to any such estate tail, in reversion or remainder, expectant on any estate for life or lives, howsoever created, shall from henceforth, or from the commencement of such estate tail, stand seized in fee simple &c. Acts of October 1776, ch. 26. § 2; 9 Hen. stat. at large, p. 226. The argument, on which the appellees rest their hopes, I suppose, is this: that the statute uses only the present and future tenses, not the past; it speaks only of every person who now hath (that is, at the time of the enactment) or hereafter may have, an estate tail; the donee in tail, in the present

205 instance, had no *estate tail in her, at the time the act was passed, having conveyed in fee simple by deed with general warranty several years before; the estate tail was at that time in abeyance: therefore, the statute applies not to her, or any person in her situation, or any estate tail in the situation this was. The argument is a mere verbal criticism. That is not the way to expound such statutes as this. The object and policy of the statute was to abolish all estate tail; to prevent perpetuities of property, and to that end to cut off the issue in tail. Can it be reconciled with such an object and such a policy, to preserve an estate tail, which happened

to be, as this is supposed to have been, in abeyance? The statute abolished all estates tail without exception, or it stopped short of its purpose.

Here the donee in tail conveyed the fee simple, when she had not the fee to convey; and, afterwards, during her life, the right she claimed to convey, she was empowered by the statute to convey. This is the true view of the case. If tenant for life convey in fee, and afterwards the reversioner convey the reversion to him, this enures to the benefit of the grantee of the tenant for life. So, if a mortgagor sells and conveys, and then obtains a defeazance of the mortgage, this enures to the benefit of the purchaser from the mortgagor. These cases, to be sure, are not the same with the present: they are only analogous; but the same principle of justice equally applies to both.

If the demandants have the right they claim, on the ground on which they claim it, on the only ground on which they can pretend to it, namely, that an estate tail in the particular circumstances in which this was placed at the time of the enactment of the statute of 1776, is not within the act; then the provisions of that statute never touched it, and never can reach it. They must recover it as an estate tail, hold it as an estate tail, and so continue to hold it forever. A like verbal criticism of the statute will preserve to them a perpetual estate tail: for, adhering to the letter, the words "hereafter may have any estate tail,"

206 import the having such "estate by conveyance or gift hereafter made; and the entails already created and then existing, which were to come to the tenants hereafter, are, in the literal meaning of the statute, such as come in the way of reversion or remainder, not such as come by descent. If we adhere to the letter, the statute affects not any estate tail that should come by descent; and it will leave these demandants an estate tail, to hold as such; and as to them the policy of the statute will be wholly defeated. Their counsel may say, that so soon as they get it, the statute will convert it into a fee simple in their hands. But why? not because the letter of the statute, but because the policy of it extends to the case. The policy of the statute extends to the whole case, as well as their part of it: the policy of the statute cuts them off. Why should their right, supposing it was in abeyance, be less an object of reprobation and destruction, that the rights of issue in tail that were not in abeyance?

The statute of 1785 removes all doubt. 1 Rev. Code, ch. 99, § 22, p. 368. This statute does not, like that of 1776, speak of the "persons who now have or hereafter may have estates tail:" it enacts in the broadest terms, that every estate which was, on the 7th October 1776, an estate in fee tail, shall be deemed from that time to have been, and from thenceforward to continue, an estate in fee simple." Now, was the estate tail here claimed, in existence in October 1776 or not? The demandants are obliged to maintain that it was in existence: but then they will say, it was in existence only in contemplation of law; it was in abeyance. Yet the statute of 1785 makes no distinction between estates tail existing in

contemplation of law, and estates tail existing in fact; between estates tail in abeyance, and estates tail any otherwise existing or circumstanced. Its words are broad enough to embrace all; its policy condemns all estates tail alike; it converts all estates tail into fees simple; it annihilates the rights of all issue it tail, and unfetters the property.

It will be said, in respect to this statute likewise, that it did not operate immediately upon this estate, which was 207 *then in abeyance, but waited till it ceased to be in abeyance; and when the demandants, as heirs in tail, shall recover it, then and not till then the statute will convert it into a fee simple in their hands. But, clearly, the only future estates tail, which are provided for as such by this statute, are those limited since October 1776; so that this statute converted this estate tail into fee simple, as one existing in October 1776, or it never can so convert it at all.

When an estate tail is in abeyance, where and how does it exist? We are told, it lies in expectancy till the issue of the tenant in tail becomes by his death his heirs of the body; then it ceases to be in nubibus; then it becomes a material sensible object. Still the question recurs, what, where and in whom, is its present existence? I say, in the tenant in tail, who has in himself, during his life, all those his heirs, in expectancy of whom the estate tail is lying in abeyance. Therefore, in the present case, the estate tail was converted by the statutes, into a fee simple in the donee in tail: and then this statutory enlargement of her rights, enured to the benefit of her alienee in fee; and her warranty descended upon and barred her heirs claiming to the heirs under the statute of descents, that is, only as heirs of a fee simple inheritance.

The case of Nelson v. Harwood, 3 Call, 394, is not exactly like this; but I think it a stronger case for the issue in tail; and the reasoning of the court, certainly, is applicable to the present and all like cases. Cases of the same kind with that, and with this, cases without number, have occurred. My experience enables me to say, with intire confidence, that the effect of the statutes to cut off the issue in tail, never was doubted till now: the grantee of tenants in tail aliening in fee before 1776, have held the property without question: and to affirm this judgment, were to unsettle numerous titles hitherto regarded as indisputable.

P. C. Pendleton, Stanard and Leigh, for the appellees, said this court had decided, that Prudence Pusey took under 208 *the devise in her grandfather's will, but declined to decide, whether she took any or what estate of inheritance. Pendleton v. Vandever, 1 Wash. 381. They should assume, for it was perfectly clear, that she took an estate tail under the devise, and was tenant in tail, when in 1769 she aliened to Vandever, under whom the tenant claims.

The rights of the issue in tail were preserved by the laws then in force, against all alienations of the tenant in tail. In England, the issue might be barred, by fine or by common recovery, or by lineal war-

ranty descending on the issue with assets, or collateral warranty without assets. 7 Wils. Bac. Abr. Warranty, F. G. H. pp. 232, 3, 4. But, in Virginia, by a statute of 1705, re-enacted in 1710 and 1748, the issue could only be barred by a special act of assembly, except as to estates tail not exceeding £200 sterling in value, for the barring of which a particular mode was provided, in the nature of a writ ad quod damnum. Acts of 1710, ch. 13, § 4; 3 Hen. stat. at large, p. 517; 1748, ch. 1, § 14, 15, 16; 5 Id. 414.

Different modes of alienation by tenant in tail, had different effects in regard to the rights, and, by consequence, the remedy, of the issue. A mere bargain and sale, or lease and release, did not take away the entry of the issue; and, as he might enter, when upon the death of his ancestor his right accrued, so he might maintain ejectment. But a feoffment with livery of seisin, or a deed of bargain and sale or lease and release with warranty, worked a discontinuance, took away the entry of the issue, turned his interest into a right, and put him to his formedon in descender, called his writ of right. Harg. Co. Litt. 330, a, note 1.

It is material to ascertain the precise effect of the conveyance of Prudence, the tenant in tail, to Vandever, by her deed of lease and release with warranty in 1769. The effect of the conveyance, by the common law, is so well settled by authority, that there can be no question about it. The conveyance divested the tenant in tail of all her interest in the land; worked a discontinuance of the estate tail, 209 *which thenceforth till the death of the tenant in tail, remained in abeyance; and passed to the alienee Vandever, not an estate for the life of his grantor, nor the fee tail, but a fee simple defeasible by the issue in tail. Harg. Co. Litt. § 649, 650, fo. 345, a. Id. 330, a, note 1; Gilb. Ten. 119; Pig. on Recov. 9, 10; Case of Fines, 84; Seymour's case, 10 Rep. 95; Stone v. Newman, Cro. Car. 429; Machell v. Clark, 2 Ld. Raym. 779; S. C. Com. Rep. 119, and 7 Mod. 18; Tyrrel v. Mead et al., 3 Burr. 1703; Neville v. Rivers, 7 T. R. 276; 1 Wms. Saund. 250, note 1. As to Walsingham's case, Plowd. 547, the case itself (if, indeed, it did not turn on a mere default in pleading) only establishes, that feoffment by tenant in tail of the gift of the crown, could not divest the estate tail as against the crown, or bar or divest the reversion of the crown; and the dictum there, "that there is no ancient book that warrants the opinion of Littleton, that the entail is in abeyance," seems to be the objection to Littleton's opinion referred to by Coke in his commentary on Littleton, § 649, and said to be of no weight; and the authority of this case of Walsingham, is denied in Sheffield v. Radcliff, Godb. 300; S. C. Hob. 334. The dictum, ascribed to lord Holt in Salkeld's report of Machell v. Clark, 2 Salk. 620, "that if tenant in tail convey in fee, the estate tail is not in abeyance, but in the alienees," is a mere verbal mistake: what lord Holt said was, that the inheritance was not in abeyance, as appears plainly from the other reports of the case, before cited. If it be supposed, that the

common law was altered, in respect to the effect of alienations in fee by tenants in tail, by the statute of 1748, ch. 1, § 14, prohibiting fines and recoveries and all other acts of tenants in tail, whereby to cut off or defeat the entail; that statute will be found on the least examination, not to interfere at all with the effect of alienations by tenants in tail, except so far as to prevent them from cutting off the issue or defeating the entail; and the case of Gleeson's heirs v. Scott, 3 Hen. & Munf. 278, is directly in point and conclusive, that, notwithstanding that statute, 210 *alienations in fee by tenant in tail, divested all his estate, and passed a base fee to the alienee defeasible by the issue in tail.

Seeing, then, that Prudence, the donee in tail, had by her alienation in fee with warranty, divested herself of her estate tail and all manner of estate in the land, discontinued the estate tail, and vested in Vandever, the alienee, a fee simple defeasible by the issue in tail; and that the estate tail was in abeyance, awaiting the vesting thereof in the heir in tail at the death of the tenant in tail; the question remains, Whether either the statute of 1776 or that of 1785, for abolishing entails and converting them into fees simple, could have had any effect to enlarge the estate of the donee intail for the benefit of her alienee, when she had no estate whatever in herself, or to convert the estate of her alienee from a base defeasible fee simple into a pure and absolute fee?

The statute of 1776 provides, that "any person who now hath or hereafter may have an estate in fee tail in lands in possession &c. shall from henceforth, or from the commencement of such estate, stand ipso facto seized in fee simple." The expressions "any person who now hath an estate tail in possession," plainly import, in common acceptation, the having, at the present, an estate tail in possession, or what is the same thing, an unobstructed right to the estate and to the possession thereof; and the legal import of the words is the same. The phrases "have an estate," "has an estate," and the like, occur frequently in our own statute book, and, in every instance, import an actual, vested, subsisting interest. 1 Rev. Code, ch. 98, § 1, p. 359; ch. 113, § 29, p. 453. So the english statute of wills provides, "that every person having manors &c. shall have power to give &c." and it has been adjudged, that an estate which has been turned to a right is not devisable. 4 Wils. Bac. Legacies and Devises, B. p. 248; Brett v. Ridden, Plowd. 343. So, the statute of uses provides, "that all and every person and persons that have or shall have any 211 use in fee *simple &c. shall from henceforth stand and be seized, and be deemed and judged in lawful seizin estate and possession, of and in the same manors &c." And Bacon, in his reading on the statute, says, the word seized excludes chattels and rights; Law tracts, 335. Seizin, estate and possession, imply not a possession in law only but a seizin in fact, not a title to enter into the land but an actual estate; Id. 338. Uses suspended

by disseisins, at the time of the passage of the statute, were not executed till a regress of the feoffees; Id. 332, 5. The words of our statute of 1776, are particularly clear and strong: any person who now hath an estate tail in possession, shall henceforth stand ipso facto seized in fee simple. How could any person who did not then have an estate in fee tail, who did not then stand seized in fee tail, thenceforth stand ipso facto seized in fee simple? A mere right is not an estate; the word estate implies right and seizin conjoined. If, therefore, we are to gather the meaning of this statute from its words, it is quite obvious, that it did not operate to enlarge the estate tail in Prudence, the former tenant in tail, for she had no estate tail and no estate of any kind in her at the time, and could never after have the same estate tail with which she had parted, re-vested in her; and that it did not directly affect the estate held by her alienee, Vandever, since the estate he held certainly was not an estate tail, but a base defeasible fee simple. And how the statute could operate through the tenant in tail, upon or in respect of an estate which she had not, to enlarge or convert the estate of her alienee from a fee tail to a fee simple, when he held no fee tail, and already held a fee simple, passes our comprehension. The words of this statute are not at all ambiguous; but if they were, they should receive a construction as near to the rule and reason of the common law as may be, and by the course which that observes in other cases. 6 Wils. Bac. Abr. Statute, I. 4, p. 383. Now, by the rule and reason and course of the common law, Prudence, the tenant in tail, after her conveyance in 1769, was incapable of taking a release of

212 the reversion *in fee which remained in the heir of the donor. Co. Litt. § 455, 6, 7, fo. 268, a. And, pari ratione, this statute of 1776, which may with great propriety be considered as a release of the reversion of the donor to the tenant in tail, could not give her the fee simple absolute: she had no estate which the statute could act upon: she could not thenceforth stand seized, possessed and entitled, as the act required.

It is said this argument consists in a mere verbal criticism. We own, that it rests on the supposition, that the language of the statute is the surest and best expositor of its meaning. But, is the present case within the statute, upon any fair or allowable equitable construction? or within its policy? "By an equitable construction a case not within the letter of a statute, is sometimes holden to be within its meaning, because it is within the mischief intended to be remedied: the reason for such construction is, that the lawmaker could not set down every case in express terms." The question ought to be, Did the lawmaker intend to comprehend the case? If he did, the court applies the statute to it; if he did not, it can never be a question, whether or no, the law ought to have provided for the case. 6 Wils. Bac. Abr. Statute, I. 6, p. 384. The judicial power of giving an equitable construction to a statute, especially an equitable construction enlarg-

ing the statute, is a very delicate one, and ought to be exercised with caution: it extends not to the length of justifying the judges, under colour of expounding the law, to make law, or even to provide for a casus omissus of the lawgiver. If the case now before the court, did occur (as most probably it did occur) to the framers of the statute of 1776, and they had really intended to comprehend it, they would have used words that would comprehend it; and the use of words that exclude it, shews that it was excluded by design: if such cases did not occur to them at all, the most that can be said, is, that here is casus omissus in the statute. But, is the present case within the policy of the statute? within the mischief intended to be remedied? In

213 other *words, was there the same reason for giving the fee simple to the alienee of tenant in tail, who had aliened in fee before the statute was passed, that there was for giving the fee simple to the tenant in tail in possession, in reversion or in remainder, at the time? and was the omission to do so only an oversight? The policy of the act of 1776, the mischiefs it was intended to remedy, are declared in the preamble; that the perpetuation of property in families by gifts in tail, tended to deceive fair traders, who gave credit on the visible possession of such estates, discouraged the holders thereof from taking care and improving the same, sometimes did injury to the morals of youth, by rendering them independent of and disobedient to their parents, and had employed very much of the time of the legislature in docking them. Now, none of the reasons for enacting the statute, have any more application to the case of persons to whom tenant in tail had previously aliened in fee, than to any other defeasible estate whatever; and the legislature could have had no motive to embrace the case within its enactment, which would not have induced it to make all manner of defeasible estates indefeasible in the hands of the holders. On the other hand, the motive for excluding such cases, is very obvious. In Virginia, alienation in fee by tenants in tail, not looking to the legislature for sanction or confirmation, were on the face of them very suspicious transactions. It was not so in England, because there the tenant in tail was master of the inheritance, in fee, by reason of his power to dock the entail at pleasure. But the case was different here: the tenant in tail could by no act of his own, make good his conveyance in fee: his issue could only be barred by special act of assembly; and that could only be obtained by settling other lands or estate on the issue. And such having been the law of the land from 1705, and being (we must presume) universally known to be the law; the parties to a conveyance in fee by tenant in tail, without authority of a special act of assembly, must have known, that the estate of the vendee was defeasible after the death of the

214 vendor; *and the inference was unavoidable, either that the consideration was regulated according to the imperfection of the title, or that the conveyance (especially if covenants for good title in fee and general warranty were su-

peradded) was made to assume that shape by some unfair practice, or for some sinister purpose, or in contempt and disregard of the existing laws and policy. Here was reason enough, presenting itself at the first blush to the mind of the legislature, so to frame the statute of 1776, as to leave all such cases to the regular action of the laws under which they arose.

It is objected, that if the demandants be now entitled to recover this estate per formam doni, because the statute did not apply to an estate tail so circumstanced as this was at the time of the enactment, the statute will not apply to it in the hands of the demandants when they shall have recovered it, and it will remain an estate tail, unalterably, forever; for that the provision of the statute, that any person who hereafter may have any estate tail, shall stand seized in fee simple, relates to gifts in tail by future conveyance or devise. But the words embrace all estates tail that should be afterwards acquired, without reference to the manner of acquisition: and thus, in order to found this objection, it is endeavoured to restrict and narrow the meaning of these words, with the same violence, which is to be exerted in stretching other words beyond their fair import. Suppose Prudence, the tenant in tail, after having aliened in fee to Vandever, in 1769, and thus discontinued the estate tail, had died before the statute of 1776 was enacted: can it be doubted, that her heir in tail might have recovered the estate, after the statute was passed? that he could have so recovered it, only as heir in tail, per formam doni? as an estate tail, upon which the statute would operate to convert it into a fee simple in his hands, so soon as it was recovered?

The provisions of the statute of 1785 are supposed to go beyond those of the statute of 1776. Yet the president Pendleton, in *Carter v. Tyler*, 1 Call, 184, comparing the statute of 1776 with that of 1785
215 and the revised act of *1792, and in answer to an argument which rendered the comparison necessary, said, "I am of opinion, that these acts [of 1785 and 1792] make no alteration, but only express in other words, and those not so strong, what is in the former law [of 1776]."

The statute of 1785 provides, that "every estate in lands and slaves, which, on the 7th day of October 1776, was an estate in fee tail, shall be deemed from that time to have been, and from thenceforward to continue, an estate in fee simple." In whom? not in a person, who, though once tenant in tail, had parted with every scintilla of estate and right before 1776; not in a disseisor or discontinuee; not in a person, who, by the alienation in fee of the tenant in tail, held a fee simple, base and defeasible indeed, but still a fee; but, in the hands of such person as on the 7th October 1776, held the estate in fee tail an estate in possession, reversion or remainder. In our case, Prudence, the donee in tail, had no estate tail in her in 1776, and no estate of any kind; for she had divested herself of all estate and interest: Vandever had no estate tail in him, but a defeasible fee simple; the estate tail had been discontinued; it was in abeyance. The mere right which

remained to the issue in tail, in expectancy till the death of the tenant in tail, was not an estate in 1776 or in 1785, on which the statutes could operate: neither can those statutes operate till the seizin shall be recovered to the right, by the issue in tail.

The statute of 1785 further provides, that "all estates, which before the 7th day of October 1776, by the law, if it had remained unaltered, would have been estates in fee tail, and which now, by virtue of this section, are and will continue estates in fee simple, shall from that time and henceforth be discharged of the conditions annexed thereto by the common law &c." Now, suppose the law had remained unaltered; then, no fee tail would have been in Prudence, the donee in tail in October 1776, and the same fee tail never could have been re-vested in her; no fee tail would ever have been vested in Vandever, her alienee;
216 and the *estate tail never could be vested in any one, till it was recovered by the heirs in tail.

The statute of 1785, then, in respect to the present case at least, if not (as president Pendleton thought) in respect to every possible case, was exactly tantamount to the statute of 1776.

The case of *Nelson v. Harwood*, 3 Call, 394, is not an authority to govern the decision of this case. (Here the counsel entered into a minute examination of that case.) There has been one case of the same kind with the present, adjudged in North Carolina, *Wells v. Newbolt*, Cam. & Norw. Rep. 375, and another in New Jersey, *Denn v. d. Hinchman v. Clark & al.*, 1 Cox's Rep. 340, in both of which the decisions sustain the arguments for the demandants in our case, that the rights of the issue in tail are not affected by the statute abolishing entails.

If the heirs in tail of Prudence the donee in tail have right, the demandants, who are the issue of her body and her heirs according to the course of descents at the time of her death in 1816, and not the eldest son who would have been the heir in tail according to the course of descents at common law, are the persons entitled to the right. The precise idea of an estate in tail general, is "an estate that shall go, upon the death of the donee or tenant, to his heirs being at the same time the issue of his body;" arg. in *Shelley's case*, 1 Rep. 103, b. It is a mutilated or truncated inheritance from which the heirs general are cut off; 2 Black. Comm. 112, note m. Blackstone (Id. 201), says, "All the rules relating to purchases whereby the legal course of descents is broken or altered, perpetually refer to the settled law of inheritance, as a datum of first principle universally known, and upon which their subsequent limitations are to work. Thus, a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly understood, without a previous knowledge of descents in fee simple. One may well perceive, that this is an estate confined in its descent, to such heirs alone of
217 the donee, as have *sprung or shall spring from his body; but who those heirs are, whether all his children, both male and female, or the male only, and among the males, whether the eldest,

youngest or other son alone, or all the sons together, shall be his heirs; this is a point that we must result back to the standing law of descents in fee simple to be informed of." And as it is an inflexible rule, that *nemo est hæres viventis*, this settled law of inheritance, this standing law of descents in fee, necessarily refers to the law of descents in fee simple, at the time of the death of the tenant in tail, as ascertaining who are the issue of his body that are also his heirs. Thus we find, that if lands in Kent are entailed, they go to all the sons in parcenary; if lands held in borough-english are entailed, they go to the youngest son. 1 Wils. Bac. Abr. Borough-English, p. 532; 3 Id. Gavelkind, p. 364, 9. Again, if gavelkind lands be disgavelled, they afterwards descend to the heir by the common law, being the issue of the donee in tail. *Burridge v. Earl of Sussex*, 2 Ld. Raym. 1292. True, it does not appear in the report of that case, that the lands entailed had been disgraived subsequently to the entail; but the circumstance that nothing is said on that head, shews that it was regarded as immaterial. By statute 34 & 35 Hen. 8, c. 26, § 91, 127, it was provided, that "all lands &c. in Wales should be english tenure, and not partible among heirs male according to the custom of gavelkind," which it seems prevailed in North Wales. Gavelkind descent of lands in Ireland, existed as an incident to the custom of tanistry till the 5th year of James I. In the reign of Anne, there was an Irish statute making the lands of papists descendible according to the custom of gavelkind; but by another statute 17 & 18 Geo. II. the descent of the lands of papists was again reduced to the course, of the common law. *Harg. Co. Litt.* § 265, p. 175, b, note 4, 176, a, note 1. But we nowhere find even a suggestion, that entails created during one law, continued after the change of the law, to descend according to the course of the law at the time of their creation.

218 The absence of cases to *that effect seems conclusive; for it cannot be, that there are entailed estates in Wales or Ireland, that descend to all the sons, by reason of their having been created at a time when gavelkind was the course of descent. It would be too remarkable not to appear in the books of reports, or in the works of writers on the law.

It is said, the course of descent of this entail is no wise affected by the statute of descents of 1785, re-enacted in 1792 and 1819, which provides, that "where any person having title to any real estate of inheritance, shall die intestate as to such estate, it shall descend," &c. (1 Rev. Code, ch. 96, § 1, p. 355.) That Prudence, the donee in tail, had no title at the time of her death: that it is obvious, that the statute has no reference to descents in tail, but only to descents in fee simple: and, therefore, that the descent in tail in this case can only be governed by the common law, which makes the eldest son heir in tail. We answer; if it were important, it might well be denied, that the statute of descents provides exclusively for descents in fee simple: for, suppose Prudence had died before the statute of 1776 abolishing entails,

it is clear her eldest son would have been entitled, and might have recovered the fee tail, as heir in tail, and then the statute would have converted the fee tail into a fee simple in his hands: but if the eldest son had died after the statute of descents took effect in 1787, without having recovered the land, we apprehend there can be no doubt, that all his children would have been entitled, and must have joined in a formedon to recover the estate tail. To put this idea in another light, let us suppose the statutes of 1776 and 1785 docking entails, had never been passed (and our argument supposes what is tantamount, that those statutes do not operate on his case); no one, we presume, would contend, that the statute of descents of 1785, did not alter the descent of the entailed estate; that the demandants here would not be the persons entitled to recover: no one would attempt to draw a distinction from the statute of descents, between a case where the ancestor had 219 discontinued and where he had *not.

But grant that the statute of descents provides solely for the descent of estates in fee simple; the conclusion would be a non sequitur. The effect of that statute is, to ascertain that the demandants here are the heirs at law of Prudence, the donee in tail; and being so, and being at the same time the issue of her body, they come within the clear legal operation of the words creating this estate; they are the heirs of her body entitled per formam doni. If the eldest son only had sued, it would have been objected, and the objection would have been insurmountable, that though he was the issue of the body of Prudence, he was not and never had been her heir.

Formedon was clearly the proper remedy. The estate tail had been discontinued; turned to a right; the right of entry taken away; and therefore, the issue was put to his formedon in descender, which is his writ of right. *Harg. Co. Litt.* 330, a, note 1, before cited.

It is objected, that the statute of 1792 repealing all english statutes, repeals the statute *de donis*, under which the demandants claim; and that this case is not within the proviso of that statute, which saves all rights arising under english statutes before its commencement. As to the first branch of this objection, so far from its being true that the statute *de donis* is repealed, the statutes for docking entails preserve it in force, for the purpose of ascertaining what is an estate tail, in order that it may be converted into a fee simple. Then, as to the time when the right here asserted commenced, nothing seems clearer, than that it commenced with the creation of the entail by Vanmeter's will in 1745; that the estate tail was discontinued by the alienation in fee by the donee in tail in 1769; that the fee tail was in abeyance, thenceforth till the death of the donee in tail in 1816; and that, therefore, though it accrued to these particular demandants, only upon the death of the donee, it had commenced long before the general repealing statute of 1792.

If the right was saved by the proviso contained in the 4th section of that act,

it cannot be doubted, indeed it is not
220 denied, *that the remedy by for-
medon is saved by the 5th section. And
it is remarkable, that the revised statute
of limitations of 1819, as well as that of
1792, recognizes the formedon as a subsist-
ing remedy, and limits it to twenty years
next after the title or cause of action ac-
crued. 1 Rev. Code, ch. 128, § 1, p. 487.

CARR, J. This cause was argued with
a research and an ability worthy of its im-
portance and its novelty; for to us it is
new, though to our forefathers, both the
legal doctrines and the form of action,
were of common and familiar use. I shall
not attempt to discuss the whole subject;
but shall consider those leading points
only, which seems to me, to govern the case.

Prudence, it is admitted, was tenant in
tail. The demandants claim as her issue per
formam doni. It is obvious then, to ex-
amine how that claim stands affected by
the statutes which our legislature has passed
on the subject. It may not be amiss, how-
ever, to premise a few remarks as to estates
tail.

At the common law, when lands were given
to a man and the heirs of his body, he
was considered as having a fee simple con-
ditional, which would revert to the donor,
if the donee had no heirs of his body; but
if he had, this was such a performance of
the condition, is rendered his estate abso-
lute; at least, he could alien; he might
forfeit; he might charge the land with rents,
or other incumbrances, which would bind
the issue. But if he did none of these
things, the course of descent was regulated
by the form of the gift; the land would go
to the heirs of his body, and in default of
such, would revert to the donor. To pre-
vent this, it was usual for such tenants, so
soon as they had performed the condition
by having issue, to alien the land, and
afterwards re-purchase, taking an absolute
estate which would descend to their heirs
general. To put a stop to this practice,
the nobles and great barons, anxious to
perpetuate their possessions in their own
families, procured the passage of

221 *the statute of Westminster 2nd, 13
Ed. 1, ch. 1, de donis conditionalibus;
which gave birth to estates tail. That
family law, as Pigot calls it, produced
many and serious mischiefs, as we are told
by writers on the subject, and also by
some of the most eminent judges of the
english bench. Thus Blackstone (2 Comm.
216,) says, "children grew disobedient,
when they could not be set aside: farmers
were ousted of their leases, made by tenant
in tail: creditors were defrauded of their
debts: innumerable latent entails were pro-
duced, to deprive purchasers of the lands
they had fairly bought: treasons were en-
couraged: so that these estates were justly
branded, as the source of new contentions,
and mischiefs unknown to the common
law, and almost universally considered, as
the common grievance of the realm." Still
the power of the nobles prevented the repeal
of the statute; and after suffering under it
long, common recoveries first, and then
fines, were brought to bear upon it; and
these, together with some other causes,
have so weakened, its force, and narrowed

its range, as almost to bring back the sub-
ject to the ground it occupied under condi-
tional fees at the common law. In the case
of Martin v. Strachan, Willes' Rep. 451, 2,
lord C. J. Willes (in 1744) delivering the
opinion of all the judges to the lords, and
speaking of common recoveries, says, "a
common recovery is a conveyance on record,
invented to give tenant in tail an absolute
power to dispose of his estate in fee simple
—I beg your lordships' patience a moment
longer, to give you an account of the true
origin and nature of these recoveries. As
I said before, entailed estates, by the statu-
te de donis, were made unalienable, and
neither the issue, nor the remaindermen
could be barred, and this was at first con-
sidered as a very wise provision, and great
encomiums were made upon this statute.
But it was found by experience in a very
little time, that this statute had pro-
duced very great inconveniences; in-
conveniences to the crown; inconven-
iences to the public; and to many
private persons: to the crown, as it pre-
vented forfeitures, and greatly in-

222 creased the power of the *barons: to
the public, as it was prejudicial to
trade and commerce, to have estates always
continue in the same families, without even
a power of raising money upon them; and
to private persons, to have their estates so
fettered, that they could not make provision
for younger children, nor raise money on
their estates, though their necessities were
never so great." He then goes to speak of
the mode of bringing in recoveries in the
time of Edward IV. In Atkyns v. Horde, 1
Burr. 60, 115, lord Mansfield, speaking on
the same subject, says, "The sense of wise
men, and the general bent of the people of
this country, have ever been against mak-
ing land perpetually unalienable. The
utility of the end, was thought to justify
any means to attain it. Nothing could
be more agreeable to the law of tenures,
than a male fee unalienable. But this
bent, to set property free, allowed the
donee, after a son was born, to destroy the
limitation, and break the condition of his
investiture. No sooner had the statute de
donis repeated, what the law of tenures
said before, that the tenor of the grant
should be observed, than the same bent
permitted tenant in tail of the freehold
and inheritance, to make an alienation
voidable only, under the name of a discon-
tinuance. But this was a small relief. At
last, the people having groaned for about 200
years, under the inconveniences of so much
property being unalienable; and the great
men, to raise the pride of their families,
and (in those turbulent times) to prevent
their estates from forfeitures, preventing
any alteration by the legislature: the same
bent threw out a fiction in Taltarum's case,
by which tenant in tail of the freehold and
inheritance, or with consent of the free-
holder, might alien absolutely. Public uti-
lity, adopted and gave a sanction to the
doctrine, for the real political reason, to
break entails; but the ostensible reason,
from the fictitious recompense, hampered
succeeding times, how to distinguish cases,
which were within the false reason given,
but not within the real policy of the in-

vention." I cite these authorities (and might adduce many more) to shew, that at an early period, the mischiefs of the 223 statute had been *felt, and remedies found to mitigate them, which had become settled rules of law, long before the establishment of this colony; so much so, that the right to suffer a recovery or levy a fine, was considered one of the inseparable incidents of an estate tail; and an attempt to create such estate, divested of that power, would have been as impotent, as the effort to divest tenant in fee of the power of alienation.

In *Carter v. Tyler*, 1 Call, 182, Mr. Pendleton says, the fine and recovery at an early period was sanctioned by the courts of England, "and so became as much a law of that country, as the statute itself. Our ancestors [he continues] brought hither with them, both laws as a rule of property; and the fine and recovery might have been used here, if the forms could be preserved, until the legislature should interpose to prohibit them." This it did by an act passed in October 1705, and again in 1710, reserving to the legislature the sole power of docking entails. This power was exercised by acts passed on each particular occasion: these acts gave a real recompense, instead of the fictitious one by fine and recovery; and were rather a change of the land on which the estate tail was to operate, than a destruction of that estate. There are several other acts of the colonial assembly shewing the spirit of that body for preserving entails; of these, Mr. Pendleton, in the case of *Carter v. Tyler*, gives a succinct but clear account. It may seem a little strange, at first sight, that our assembly should be inclined to cherish what had been found so mischievous in the mother country: but we must recollect, that we were then a recent people, forming a distant province of the empire; that the spirit of commerce had never visited our shores; nor was that loftier spirit yet awakened which afterwards gave birth to our revolution. In the case already referred to, Mr. Pendleton says, "In the revised law of 1748 the prohibition of fines and recoveries, and permission of writs of *ad quod damnum*, were continued till the revolution. That event having produced a new order of things, this great subject came before the legislature, in

224 October 1776, *under a view of all its legal circumstances, from the common law and the statute *de donis*, down to that period. The subject of discussion was, whether they should restore the fine and recovery, which was objected to on account of its fictitious nature, and the trouble and expense attending it; but the principal objection was, that it would permit the tenants to continue what was considered as a mischief; and that those who possessed the large estates, would have an inclination to continue them in their families. They, therefore, resolved to cut the gordian knot at once, and *ipso facto* to vest the fee simple in those who then had, or should in future have, an immediate beneficial interest; that is to say, an estate in fee tail in possession, or a remainder or reversion in tail, after estates for life or lesser estates, unfettering the estates of all future

interests, depending in creation, upon these estates tail." Let it be recollected, that Mr. P. is speaking here of matters with which he was familiarly acquainted; that he was a prominent actor in the busy and eventful scenes of the revolution; a member of the assembly which passed the act of 1776 docking entails, and also one of the three revisors who drew the law of 1785 on the same subject.

We will look now more particularly at this act of 1776. It seems to my mind very difficult to read it, and resist the conviction, that it was meant to cut up estates tail, root and branch; to make them all *ipso facto* estates in fee; to destroy "all rights, title, interest and estate, claim and demand of the issue, remainderman and reversioner;" "unfettering the estates (as Mr. Pendleton strongly expresses it) of all future interests depending in creation upon those estates tail." And this conviction is much strengthened, when we look at the nature of the subject, and the state of things at the passage of the law. We had just cut ourselves loose from a monarchy, and established a republican form of government. This was the first assembly which met under the new constitution, and it became its duty, to remodel the laws, and adapt them to the genius of our infant re- 225 public. In this *labour, it was natural that the law of entails should attract the earliest attention; a law, mischievous in its effects upon the general interests of society, and peculiarly hostile to the experiment we were then making.*

*JUDGE CARR read the following extract from the memoir of Mr. Jefferson (Vol. I. p. 80, of the work lately published). It is, without doubt, a just account of the policy which induced the act of 1776, and of its history; and in that view is applicable to the question under consideration: but, besides, it is thought very fitting, that the striking character Mr. J. has drawn of the late president Pendleton of this court, should be preserved among the reports of its decisions.

"On 12th October 1776, I obtained leave to bring in a bill, declaring tenants in tail to hold their lands in fee simple. In the earlier times of the colony, when lands were to be obtained for little or nothing, some provident individuals obtained large grants; and desirous of founding great families for themselves, settled them on their descendants in fee tail. The transmission of this property, from generation to generation, in the same name, raised up a distinct set of families, who being privileged by law in the perpetuation of their wealth, were thus formed into a patrician order, distinguished by the splendour and luxury of their establishments. From this order too, the king habitually selected his councillors of state: the hope of which distinction devoted the whole corps to the interests and will of the crown. To annul this privilege, and instead of an aristocracy of wealth, or more harm and danger than benefit to society, to make an opening for the aristocracy of virtue and talent, which nature has wisely provided for the interests of society, and scattered with equal hand through all its conditions, was deemed essential to a well ordered republic. To effect it, no violence was necessary, no deprivation of natural right, but rather an enlargement of it by a repeal of the law. For this would authorise the present holder to divide the property among his children equally as his affections were divided; and would place them, by natural generation, on the level of their fellow citizens. But this repeal was strongly opposed by Mr. Pendleton, who was zealously attached to antient establishments; and who, taken all in all, was the ablest man in debate. I have ever met with. He had not, indeed, the poetical fancy of Mr. Henry, his sublime imagination, his lofty and overwhelming diction: but he was cool, smooth and persuasive: his language flowing, chaste and embellished; his conceptions quick, acute and full of resource:

226 *Look at the preamble, and note the object and policy of the statute, as there declared: Can we suppose, that wise and patriotic legislators would intentionally leave a single fragment existing, of a law, the evils of which they so strongly depict? In *Willion v. Berkley*, Plowd. 232, 11 Rep. 73, 6 Bac. Abr. 384, we are told, that "such construction ought to be put upon a statute, as may best answer the intention which the makers had in view, for qui hæret in litera, hæret in cortice." Again, under the same head in *Bacon*, and vouched by the highest authorities, it is said, "The intention of the makers of a statute, is sometimes to be collected from the cause or necessity of making a statute; at other times, from other circumstances. Whenever this can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter of the statute." Again, in *Stowel v. Zouch*, Plowd. 366, 10 Rep. 101, "A thing which is within the intention of the makers of a statute, is as much within the statute, as if it were within the letter." Now, the statute in question makes tenant in tail, in possession, reversion or remainder, ipso facto, tenant in fee simple. In the act of 1785, which equally bears on this case, which was the work of the same hands, and which one of its makers says was not more extensive than the first law, the idea is thus expressed: "Every estate in lands or slaves, which on 7th October 1776, was an estate in fee tail, shall be deemed from that time to have been, and from thenceforward to continue an estate in fee simple." Much of the learning and ability of the argument were employed to prove, that Prudence, by her conveyance with warranty, had divested herself of the estate tail; that it was not vested in Vandever, because from the nature of the

227 estate it could not *be, and because also the deed to him purported to convey the fee; that it could not be in the issue, because they could have no right whatever during the life of their mother, for *nemo est hæres viventis*; but that, in truth and in law, the conveyance and warranty of Prudence operated a discontinuance, and put the estate tail in abeyance: and the conclusion from the whole was, that neither Prudence nor Vandever, nor the issue, having an estate tail in possession, reversion or remainder, the case was not reached by the statutes of 1776 and 1785, and must be considered as if they had never

never vanquished: for if he lost the main battle, he returned upon you, and regained so much of it, as to make it a drawn one, by dexterous manoeuvres, skirmishes in detail, and the recovery of small advantages, which, little singly, were important all together. You never knew when you were clear of him, but were harassed by his perseverance, until the patience was worn down, of all who had less of it than himself. Add to this, that he was one of the most virtuous and benevolent of men, the kindest friend, the most amiable and pleasant of companions, which ensured a favourable reception to whatever came from him. Finding that the general principle of entails could not be maintained, he took his stand on an amendment, which he proposed, instead of an absolute abolition, to permit the tenant in tail to convey in fee simple. If he chose it: and he was within a few votes of saving so much of the old law. But the bill passed finally for its abolition."—Note in Original Edition.

passed. I have examined this whole doctrine with my best care; and though I feel the highest respect for the counsel who so ably and zealously laboured these points, I must say, that taking all the premises as established, it is clear to my mind, that the conclusion does not follow. I concede, therefore, that the conveyance of Prudence at once worked a discontinuance, and put the estate tail in abeyance; that is, there was no person who could claim title, but the estate still existed, "in the intelligence, remembrance and expectation of the law." If the laws destroying entails did not reach it, it must be either because an estate in abeyance cannot be barred, or because, the legislature did not mean to bar it, or because, meaning to do it, they have not used words, which will effect their meaning. As to the first; in *Chudleigh's case*, 1 Rep. 135, b, 135, a, Gawdy, justice, said, "That in divers cases, a thing in abeyance may be barred and destroyed; as if tenant in tail be disseised, and releases to the disseisor; now, Littleton says, the estate tail is in abeyance; yet it may be barred by common recovery, in which tenant in tail is vouched." In *Mildmay's case*, 6 Rep. 42, a, it is said, "So, Hil. 14 Eliz. it was resolved by all the justices of the common pleas in *Copwood's case*, that if there be tenant in tail, the remainder to the right heirs of J. S. and tenant in tail suffers a common recovery, J. S. being then alive, it shall bar the remainder which was in abeyance and consideration of law." 2 Roll's Rep. 217, 221, and Palm. 139. Thus it is clear, 228 that in England, an *estate tail, though in abeyance, might be barred and destroyed by a common recovery; a fictitious proceeding founded on no statute law, but growing out of public convenience, and the decisions of the courts; a proceeding to which the issue, the remainderman, or the reversioner, were no parties, and which gave them no recompense. Can it then be doubted, that such estates may with us be destroyed by a solemn law enacted by the sovereign authority? Assuredly not.

But, if the legislature had this power, did it intend by its laws to exercise it? With respect to estates tail in possession, reversion or remainder, it is admitted that it did. These were the prominent points, the great interest; and these are cut up by the roots; but it is contended, that here the law stops, and that the possibility of a future interest in the issue, on which the demandants, in the case before us, stand, was either not seen, or, if seen, permitted to remain undisturbed. On the same ground, in *Carter v. Tyler*, it was insisted, that a contingent remainder was not within the operation of these acts. What was the answer of the court? The president says, "And what is the general aspect of Mr. Washington's reasoning? The issue, who have the first and most important interest, are defeated; and a contingent remainder, which may never take effect, and which I call an estate in the clouds, is preserved. I believe it may be truly said, that no statute ever proceeded upon such a system." But passing by the absurdity, which such a construction would fix on the wise lawgivers and profound statesmen, who, laid

the foundations of our government, it seems to me, that these laws themselves furnish the strongest evidence that was intended to destroy every possible interest of the issue. In the preamble, one of the mischiefs stated as the "injury to the morals of youth, by rendering them independent of, and disobedient to, their parents;" this has direct reference to the issue. Another part of the preamble states, that "the former method of docking estates tail by special laws, employed very much of the time of the legislature, and was burthensome to the public, and to individuals;" this shews, *that the intention

was, to perform by one general law, the office of those special acts. And what was that office? to turn the estate tail into a fee simple, and bar the issue, remainderman, and reversioner; and in many of these special acts, we find that the estate tail was already in abeyance, the tenants having executed and recorded deeds of conveyance with warranty to the purchasers, which are recited in the preamble of the act. It is true, these acts gave the issue &c. a recompense: but that was a mere creature of the legislative will; they had just the same power to bar them without such recompense. Again, if we look into those special acts (of which I have examined some thirty or forty) we shall find in every one of them, a saving of the rights, interests, title &c. of all persons, other than those claiming under the will, or deed creating the estate tail. So, in this act of 1776, we find a saving to all persons &c. other than the issue, and those in reversion, and remainder, all such right, title, interest, and estate, claim and demand, as they might claim if this act had never been made. Now, I ask, why except the issue from this saving, if it had not been intended to bar their right, title, interest, claim and demand? words, which cover every possibility of interest. It is clear to me, then, that the intention of the law was utterly to destroy the interests of the issue.

But can we give this intention effect? I have already shewn from authority, that intention is the governing principle, the essence of the law. "Every estate [says the statute] which, on 7th October 1776, was an estate tail, shall be deemed from that time to have been, and from thenceforward to continue, an estate in fee simple." Now, I ask, was not the estate, in the case before us, an estate tail on 7th October 1776? You tell me it was in abeyance: admitted, but that did not extinguish it, nor change its nature; it still existed in contemplation of law, and was still an estate tail though in abeyance. Littleton, Coke, all the books, speak of estates tail in abeyance. In the extract from Chudleigh's case before cited, it is said "if tenant in tail be disseised, *Littleton saith, the estate tail is in abeyance."

This estate tail then was within the operation of the act; which destroyed it, extinguished the right of the issue, and thereby enured to the benefit of Vandever, the vendee of Prudence. Is this effect too much to claim for a law, which has been appropriately called a great general common re-

covery, when we see by the cases cited, that a special and individual common recovery will destroy an estate tail though in abeyance? and when we know, that these recoveries are mere inventions to convert estates tail into fees, which was the direct object of our laws?

But, suppose it were admitted, that an estate tail in abeyance, is not within the express letter of our laws; is it not within the equity? We are told, "By an equitable construction, a case not within the letter of a statute, is sometimes holden to be within the meaning, because it is within the mischief for which a remedy is provided. The reason of such construction is, that the lawmaker could not set down every case in express terms." Co. Litt. 24, b, 6 Bac. Abr. 386. Now, all will agree, that the great mischief which our law meant to remedy, was the fettering, the tying-up of property. We do not know, whether the cases were many or few, but every case like the one before us, would thwart the policy of the law, and continue the fetters on the land, at least one generation longer, when it was meant to cut them all loose at once. Look at the effects in the case before us. The law passed in 1776; the tenant died in 1816; and it is contended, that during all this time the land was tied up; nay, that it is so to this hour, for the demandants, if they recover, must recover an estate tail.

There are several other points, which were urged with great force against the claims of the demandants, as 1. that the repeal of the statute de donis in 1792, during the life of the tenant in tail, when the issue had no vested interest, swept from under them the foundation of their claim: 2. that they claim as issue in tail, and yet all the heirs of the body are joined; 3. that they claim under our statute 231 of descents, and *yet claim an estate unknown to and unprovided for by that statute. On these points I give no opinion, choosing to place the case solely upon the abolition of the right by the statutes.

I think the judgment should be reversed, and judgment entered for the tenant.

CABELL, J. The question is, Whether the entail of the lands in controversy was docked by the statute of 1776, so as to bar the issue of Prudence Harbour?

If the entail be not thus docked, it must be owing to the effect of her deed to Vandever, upon the estate tail which she held in the land before the execution of that deed; for, were it not for that deed, the case would come within the strictest letter of the statute, and the issue would, unquestionably, be barred. I shall endeavour, therefore, to ascertain the effect of the deed, before I inquire into that of the statute. And this will, necessarily, lead me into a brief view of the origin of estates tail.

Estates tail grew out of the operation of the act of Westminster the second upon fees conditional at the common law; which were estates given to a man and the heirs of his body, and so called, because of the condition expressed or implied in the gift, that the land should revert to the donor, if the donee had no heirs of his body, but if he had,

that it should then remain to the donee. And, as in other cases, when a condition is once performed, the condition is thenceforth intirely gone, and the thing to which it was before annexed becomes absolute and unconditional, so in this case, as soon as the grantee had any issue born, his estate was supposed to become absolute by the performance of the condition; so far, at least, that he might alien it, and thereby bar not only his own issue, but the reversioner. 2 Black. Comm. 110, 111. And the birth of the issue was not held to be a condition which suspended the fee from vesting, immediately, by the gift; for if he aliened before the birth of issue, it was not only no forfeiture, but, if he afterwards had issue, it was a bar to them. Plow. 239; 2 Inst. 333; Harg. Co. Litt.

232 *326, b, note 1. The statute de donis was made for the purpose of taking away this power of alienation. It declared that the will of the donor should be observed, and that tenements given to a man and the heirs of his body, should, at all events, go to the issue, if there were any; or if none, should revert to the donor. 2 Black. Comm. 112. Blackstone remarks, that "upon the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee simple, which became absolute and at his own disposal, the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a fee tail; and investing in the donor, the ultimate fee simple of the land, expectant on the failure of issue; which expectant estate is what we now call a reversion. And hence it is that Littleton tells us, that tenant in fee tail is by virtue of the statute of Westminster the second."

This statute, however, was eluded by the effect which the courts, in the reign of Edward IV. gave to the fictitious proceedings in common recoveries, which, when suffered by tenants in tail, were held to be an effectual destruction of estates tail. "And these recoveries, however clandestinely reduced, are now," says Blackstone, (Ibid, 117,) "become a most common assurance of lands; and are looked upon as the legal means by which tenant in tail may dispose of his lands and tenements." And the effect of such conveyance is to bar, not only the issue, but the remaindermen and reversioner. And, in the reign of Henry VIII. it was enacted, that a fine, duly levied by tenant in tail, should bar the issue and all claiming under such entail. But there are other conveyances by tenants in tail, which do not bar the issue; and it is important to our present purposes, that their precise effect should be ascertained.

Conveyances by grant, by bargain and sale, lease and release, covenant to stand seized, and by release and confirmation in enlargement of an estate, only operate on the right of the party conveying. They, therefore, transfer only the
233 *right, that is, the estate which the party has a right to convey. Hence they are called rightful conveyances, (Harg. Co. Litt. note 1, § 1,) and sometimes innocent conveyances, because, in the language

of Littleton, (§ 600,) "they do no hurt or damage to other persons who have right therein." It was formerly doubted, whether the alienation of tenant in tail, by any of these conveyances, passed any thing more than an estate during his life. But it is now definitively settled, by the authorities cited in the argument for the appellees, that such alienation by tenant in tail, passes to the grantee, bargainee &c. an estate of inheritance, a base fee simple, which is unimpeachable during the life of tenant in tail, and which will moreover last as long as the estate tail shall continue, unless it shall be avoided by those who have right to avoid the same; and that until it shall be so avoided, such estate has all the incidents of a fee simple. See also Thomas's Co. Litt. p. 92, note A. and p. 124, note G. 1. The estate of the grantee, although it be unimpeachable during the life of the tenant in tail, and may last as long as the estate tail shall continue, may, nevertheless, be avoided at any time after the death of tenant in tail, by the mere entry of the issue; and it determines absolutely and ipso facto, by the failure of the issue in tail, under the rule, cessante statu primitivo, cessat derivativus. 1 Prest. on estates 436, 7, 2 Id. 462, 3. But a conveyance by feoffment is attended with livery of seizin. It therefore operated on the possession, and effected a transmutation thereof; and as possession and freehold were synonymous terms, no person being considered to have the possession of lands but he who had himself, or held for another, at least an estate of freehold in them, a conveyance which transferred the possession, must necessarily be considered as transferring an estate of freehold, or, to speak more accurately, the whole fee. A feoffment, therefore, conveying the whole fee, and not merely the right or estate which a party had a right to convey, was called a tortious conveyance. Harg. Co. Litt. 271, b, note 1, § 1. But tenant in tail had an estate of inheritance
234 *(although a particular estate) even after the statute de donis. "Hence, [says Butler], if he made a feoffment, it did not, during his life, effect or prejudice the issue. Thus his alienation was, primarily, a lawful transfer; the alienee came in by right, and his estate could not be impeached during the life of the donee. In conformity to the established rule of the common law, that wherever any person acquired a presumptive right of possession, his possession was not to be defeated by entry, however slender or unlawful the title of the grantor himself might be, the statute de donis did not nullify the alienations of the donee in tail, but enabled the issue to defeat them by the formedon in the descender." Harg. Co. Litt. 326, b, note 1. The estate transferred by the feoffment of the tenant in tail, is therefore, something more than that which was transferred by his mere bargain and sale, lease and release &c. It is not a base fee that may be defeated, at any time after the death of the tenant in tail, by the mere entry of the issue, and must necessarily determine on the failure of issue; but it is a fee simple defeasible

only by the action of the issue, or of those in remainder or reversion. For the estate of the tenant in tail, and of those in remainder and reversion, is turned, by the feoffment, into a right of action. And this effect of the feoffment of tenant in tail, upon the estate tail, turning it into a right of action, so that it cannot be regained by mere entry, is what is called a discontinuance; and while the discontinuance remains in force, the new estate, the fee simple which passed to the feoffee, will subsist until avoided by the action of the issue &c. or until the remitter of the issue in tail &c. or the determination of the discontinuance. (Preston on estates, *ubi supra*). Fines and recoveries, when they operate as mere assurances, without barring the entail, effect a discontinuance. And although the bargain and sale, or lease and release of tenant in tail, without warranty, does not affect the interest of the issue &c. and cannot, therefore, work a discontinuance, yet a warranty annexed to such a conveyance, will, in the general,

235 work a discontinuance as *effectually as a feoffment. Co. Litt. 328, a, 329, b, 330, a, note 1, and Doe v. Prestwidge, 4 Mau. & Selw. 178. The expression of Coke (Co. Litt. 329, a,) "it is not a warranty only that maketh a discontinuance, but the warranty and the descent upon him that right hath together," induced me to think, at one time, that the discontinuance did not take place until the actual descent of the warranty, and, of course, until the death of tenant in tail. But farther examination and reflection have caused me to change that opinion, and I am now inclined to believe, that the warranty operates an immediate discontinuance in all cases, where, if the tenant in tail were to die at the moment of making the conveyance, the obligation of the warranty, and the right to the estate tail, would devolve upon the same person. I think so, because, in all such cases, the warranty operates as wrongfully in relation to the issue, as the mere feoffment of tenant in tail, and, indeed, more so: for while the feoffment only drives the issue to his action, the warranty goes farther, and will rebut him, if he have assets by descent. This opinion seems to derive strength from the consideration, that all the cases put by Littleton, to shew that warranty alone will not effect a discontinuance, are cases where, at the time of the conveyance, the heir to the warranty, and the heir to the estate tail, were not the same persons. In the case now before us, at the time of the execution of the deed from Prudence Harbour (she then having issue) the same person would, unquestionably, have been heir to the warranty, and to the estate tail. I am, therefore, of opinion, that that deed operated a discontinuance, immediately; or, in other words, turned it to a right; or, to speak more accurately, to a right of action.

Thus far, it will be seen that, I agree intirely to the preliminary propositions of the counsel for the appellees.

How far the right to the estate tail, is, after a discontinuance, and during the life of tenant in tail, placed in abeyance, I

feel myself unable to decide. The books are very contradictory on this point.

Littleton § 649, 650, and Coke's 236 *commentary on them, seem to me to indicate, that it is in abeyance. But there are strong opinions to the contrary. In *Sheffield v. Ratcliffe*, Hob. 335, it is said, that "the feoffment of tenant in tail, gives away all the estates the tenant in tail feoffor had, as concerning himself, or any benefit that he may receive. But, as concerning his issue inheritable to the entail, and for their good, there remains in him a right of that entail, by force of the statute of Westm. 2, for the good of those that are saved by that statute against his alienation." Again (*Ibid.* 336,) "a tenant in tail hath the whole estate tail and all the right of it in himself, and may finally and totally bar it, as well against the issue, as against himself, by a common recovery, notwithstanding this statute; but by a feoffment he could not, by reason of this statute. And, therefore, that chief and mere right [which though it be discontinued is not barred by the feoffment] remains where it was not aliened; for it is not in his power by that kind of conveyance." Again (*Ibid.* 338,) "that there is still a right in the tenant in tail against this feoffment, appears in that he hath still power to bind it more finally and totally, by his fine or recovery, if he pursue them rightly." And (*Ibid.* 339,) "Littleton was confounded in himself that made an abeyance of a tenant of totum statum suum, and yet made it but an estate for life." And in the case of *Stone v. Newman*, in the exchequer chamber, Cro. Car. 427, six of the judges of England said, that "although a feoffment by tenant in fee simple gives all estates, interests and rights, yet it is not so in case of a feoffment made by tenant in tail; because the estate tail is an incident inseparable to his person and blood, and cannot be transferred to any other."

But whether the right to the estate tail, after a discontinuance, and during the life of tenant in tail, be in abeyance, or lie dormant in the tenant in tail, it is absolutely certain, that the tenant in tail, after such discontinuance, has the right and the power, with the assistance and co-operation of his alienee, to suffer a common recovery, which will enure

237 to *corroborate and confirm the estate of his alienee, and will bar the issue &c. *Sheffield v. Ratcliffe*, Hob. 334; *Lincoln College case*, 3 Rep. 58, b; *Chudleigh's case*, 1 Rep. 135, 6; per Gawdy justice; 1 Prest. Con. 138.

Thus stands the law in England, and thus stood the law in this country, before the act of 1776; except that fines and recoveries were prohibited as early as 1705, and were never afterwards tolerated. But, although estates tail were not permitted to be barred by fines and recoveries, other modes were introduced for accomplishing that effect; namely, writs of *ad quod damnum* where the estate was of less value than £200. sterling; and private acts of assembly, in each particular case, where the estate was of greater value. An examination of our statute book will shew,

that these private acts were applied to docking estates tail, in every variety of circumstance or situation, in which a common recovery could be resorted to in England, for that purpose. Sometimes the entail was docked in favour of the tenant in tail himself, by vesting the entailed lands in him in fee simple; Nov. 1769, ch. 73, 8 Hen. stat. at large, 448. Sometimes it was docked in favour of a person to whom the tenant in tail had previously contracted to sell it; February 1772, ch. 77, 78, Id. 641, 643. The act of Nov. 1769, ch. 77, Id. 455, presents a very striking case, bearing a strong resemblance to the case before us. It is as follows: Richard Johnson, being seized of lands in tail, with divers remainders over, conveyed the same by indenture bearing date June 7, 1744, to John Robinson, who, with others claiming under him, remained in possession until November 1769. It being then discovered that Johnson had only an estate tail in the lands, and that the purchasers were likely to be disturbed in their title, and the said Johnson and his family involved in law suits on that account (from which it is manifest that he sold with warranty) an application was made to the legislature, in the year 1769, (twenty-five years after the sale, and while the discontinuance worked by the warranty was still in force); whereupon an act was passed docking
238 *the estate tail, and vesting the entailed lands in the purchasers under Johnson.

I come now to the construction of the statute of October 1776, docking entails. Its title is "an act declaring tenants of lands or slaves in tail, to hold the same in fee simple;" and its preamble shews, that it was enacted in lieu of the former methods of docking such estates tail. The counsel for the appellees contend, that this statute does not embrace the case of an estate tail that was discontinued, so long as the discontinuance remains in force. They say that the words of the statute "hath, or hereafter may have an estate tail in any lands or slaves in possession," and the subsequent words, "shall from henceforth, or from the commencement of such estate tail, stand ipso facto seized," &c. require that the tenant in tail, in whose favour the statute is to operate, should, at the time, be seized of an estate tail in possession &c. If I felt myself bound to give the statute a strict and technical construction, I confess I could not deny the correctness of this position. But what would be the consequence of such a construction? If it be adopted, it will not only exclude the case of a tenant in tail who had discontinued the entail, and the case of an estate tail abated by the entry of a stranger, on the death of tenant in tail, but it would also exclude the case of a tenant in tail who was disseized. For, a tenant in tail disseized is certainly not seized of the estate tail. Strictly and technically speaking, even his estate is turned to a right: a right of entry. 1 Prest. est. 20, 21; Goodright v. Forester, 1 Taunt. 578. And if the statute did not operate on the estate of tenant in tail, who had discontinued or who was disseized, so as to turn it into a

fee simple at the very moment of the enactment, when did it operate on it so as to produce that effect? It was contended in the argument, that the estate tail must be restored by the entry of the tenant in tail, in case of disseizin, or by the formedon of the issue or remainderman, in the case of a discontinuance, and that when it was thus restored as a fee tail, the statute would instantaneously act upon it and convert it *into a fee simple. I can perceive nothing in the statute to justify this pretension. It alludes to two periods only for its operation; namely, the time of the passage of the act, and the commencement of the estate tail. But according to the construction contended for, it did not operate, at the time of its passage, upon an estate tail that was, at that time, turned into a right of entry or a right of action. And if it did not operate on it at that time, it cannot operate on it at the time the fee tail is restored by entry or action; for that is not the commencement of the estate tail. It had commenced long before, and was never annihilated. The most that can be contended for is, that it was suspended or in abeyance, by the discontinuance. The removal of the discontinuance is the restoration, or reanimation of the estate tail, not its commencement. It, certainly, is not the "commencement" of the estate tail, according to a strict construction of the statute; and the advocates of a strict construction, have no right to insist upon it as to one clause, and upon a liberal construction as to another. Here then, would be two classes of estates tail, those restored by entry, and those restored by action, on which the statute would never operate; to which we might add those cases where the estate tail was under a mortgage at the date of the act. Can any man read the preamble of this statute, and believe that this was the intention of the legislature? It is a law founded on great principles of national policy. It is a highly remedial statute, intended to remove great political and moral mischief. So far from being restricted to a rigid technical construction, according to the letter, I feel myself compelled to construe it according to its spirit, and thus to bring within the scope of its operation all cases that come within the mischief intended to be provided against. The division of estates, into estates in possession, remainder and reversion, comprehends every estate whatever; so far at least as relates to the time at which they confer the right of enjoyment. 1 Prest. est. 23. When, therefore, the legislature declared that all persons having any of these descriptions of es-
240 tates tail, should *from thenceforth be seized thereof in fee simple, it thought not of technicality; it thought not of the particular situation in which persons having rights to estates tail, might be accidentally placed, in relation to those estates: it was contemplating, in all their extent, the various mischiefs which it was its object to remove; it intended, that all estates tail should be thenceforth converted into fee simple.

Mr. Pendleton, than whom no man was better acquainted with the history of our legislation, informs us, in *Carter v. Tyler*,

that "the great subject of discussion, in the legislature in the year 1776, was, whether they should restore the fine and recovery, which was objected to on account of its fictitious nature, and the trouble and expense attending it; but the principal objection was, that it would permit the tenants to continue what was considered as a mischief; and that those who possessed the large estates, would have an inclination to continue them in their families." It cannot be supposed, that the legislature was ignorant of the nature of common recoveries, and of the power of the donee in tail who had discontinued the estate tail, to suffer a common recovery with the assistance and co-operation of the person who had the freehold; and that such recovery would operate to corroborate and confirm the estate of his alienee, and to bar the issue in tail, and the reversioner and remainderman. It cannot be believed, that it had forgotten its own practice of docking estates tail, by private acts, in favour of the persons to whom the tenants in tail had sold with warranty; and that the effect of such docking was to vest the fee simple in the alienee. When, therefore, we perceive, in the preamble of the statute of 1776, the deep conviction of the legislature of the evils of estates tail, and its strong determination to annihilate them, even in opposition to the wishes of those interested in them, can we believe, that the new mode of docking estates tail, which they adopted in preference to all former modes, was intended to be less extensive in its application, and less efficacious in its operation, than the former modes were? To my mind it is impossible. 241 *I cannot doubt but that this statute was intended to operate as one great universal recovery, and to dock all estates tail whatever; those created before the enactment, instantar and ipso facto; those to be thereafter created, from the moment of their commencement. And such was the construction given to the first statute of 1776, by the legislature, in the revised statutes of 1785 and 1792. For, in these, they drop all the expressions of the act of 1776, which gave rise to any doubt on the subject, and adopt the broadest term known to our language: "Every estate in lands or slaves which on the 7th October 1776, was an estate tail, shall be deemed from that time to have been, and from thenceforward to continue an estate in fee simple."

But, it is said, there are consequences resulting from this construction, which the legislature could not have intended; and it is thence inferred, that the construction is unsound. The premises must be established, before we can be required to assent to the conclusion. Those, who urge this argument, suppose the following case, namely, that tenant in tail had discontinued, and then died before the statute of 1776; or that he had been disseized and then died after the right of entry was tolled, but before the passing of the statute; or that a tenant in tail had died, and that a stranger had abated, before the enactment: and they then assert, that, if these rights to estates tail were converted by the statute of 1776, into rights to estates in fee simple, neither the

issue in tail nor the remainderman entitled to them, could recover them by formedon in the descender or remainder; and that they could not recover them by writ of right, because they could not count upon their own seizin, or that of their ancestors, in their demesne as of fee.

I cannot subscribe to the correctness of the position as to the writ of formedon. Coke says, "the writ of formedon, a forma donationis, is so called because the writ doth comprehend the form of the gift." It has no reference to the nature of the estate which it seeks to recover; for, it is applied as well to the recovery of estates 242 in fee simple, as of *estates in fee tail. Formedon in the reverter lay at common law for the donor, after the failure of the issue of tenant in fee conditional at the common law; and after the statute de donis, it lay for the reversioner, after the failure of issue in tail. Plowd. 235, a. Booth, 154, 3 Tho. Co. Litt. p. 118, note D, and page 214, note N. And both at common law, and since the statute de donis, the estates recovered by the formedon in the reverter, were estates in fee simple. Formedons in remainder were unknown to the common law, but were given by an equitable construction of the statute de donis; and they are given as well to a remainderman in fee, as to a remainderman in tail. Fitzherbert says, "the writ of formedon in the remainder lieth where a man giveth lands to one in tail, the remainder unto another in tail, and afterwards the first tenant in tail dieth without issue of his body, and a stranger doth abate and deforce him in the remainder; he in the remainder or his heirs shall have that writ of formedon in remainder. And so, if the first tenant in tail alieneth in fee, and dieth without issue of his body begotten, he in the remainder in fee, shall have a writ of formedon in remainder, to recover his estate &c." F. N. B. 217. As to formedons in descender, it is true that since the statute de donis they have not been used in England, except for the recovery of estates tail; the reason of which is very obvious, namely, that none but the issue in tail can claim by descent per formam doni, and they always take an estate tail: yet there was one instance, at common law, in which even the formedon in the descender lay for the recovery of a fee simple. "As, if a man had issue a son, and his wife died, and afterwards he took another wife, and land was given to him and his second wife, and the heirs of their two bodies begotten, and they had another son, and the wife died, and afterwards the father died, and a stranger abated; there, before the statute, the son could not have a mort d'ancestor; for one part of the writ is to inquire if the demandant be next heir to his father, and that, he is not, but the eldest son is the next heir; for which 243 reason, such *writ would not serve upon his title, and therefore, before the statute he should have a formedon in descender, which was no other than a writ founded on his case." Plowd. 239, b.

Thus we see, that every species of writs of formedon has been used for the recovery of fee simple estates. There is no incompatibility, therefore, in resorting to them.

now, for the recovery of estates in fee simple, (made such by the statute of 1776), in all those cases where they would have been the appropriate remedy, had the estates remained estates tail. The enlargement of the estates into fee simple, makes no difference. In the language of the case in Plowden, the formedon is still "no other than a writ founded on his case." And so the legislature must have understood it; for it has, since the statute of 1776, continued to prescribe the limitation of all the writs of formedon; thus shewing its opinion, that they are actions which may still be brought. It has enlarged the estate, but left the remedy unchanged. If the parties in the supposed cases, could recover by writs of formedon (as, I think, is evident) it is unnecessary to inquire, whether, if they could not thus recover, they might recover by writ of right founded on the statute.

If this view of the subject be correct, the argument drawn from the supposed consequences of our construction, falls to the ground.

Upon the whole, I am of opinion, that the statute of 1776, docked the entail of the land in controversy, and that, as the saving clause saves the rights of all persons other than the issue in tail and those in remainder and reversion, such docking of the entail enured to corroborate and confirm the fee simple which passed by the deed of Prudence Harbour; and that the judgment of the circuit court should be reversed with costs, and judgment entered for the appellant.

BROOKE, P., concurred.

244 *GREEN, J., dissented. He said, no other question like that presented in this case, would ever, in all probability, occur hereafter; and differing with his brethren, but with great diffidence, he should, therefore, not discuss at large, the questions which had been so elaborately argued at the bar, but state the result of his examination of them as succinctly as possible.

The deeds of lease and release with warranty, made by Prudence, the ancestor of the appellees, in 1769, divested her of the estate tail, and of all right present or future: she had no longer *jus in re* nor *jus ad rem*: she was, thereafter, incapable of receiving an effectual release of the reversion, and under no circumstances could she be remitted to the estate tail. Her estate being a fee tail general, and necessarily to descend with the warranty to the issue in tail, that warranty operated as an immediate discontinuance, converting the estate tail into a mere right, and putting that in abeyance, necessarily to remain, upon her death, to the issue in tail if any, and if none to those in reversion, not as an estate to be reduced to possession by entry, but a right to be asserted by a writ of formedon only, unless that right was barred, in her lifetime and before it vested, by some lawful means. That might be done in England, in such a case, by a common recovery with double voucher, both as to the issue and those in reversion and remainder; and, as to the issue, by a fine only; neither of which passed any new or additional inter-

est from the tenant in tail, but only operated as estoppels, corroborating the first conveyance incidentally, by barring the right of the issue &c. as the case might be, even although the recoveree in the recovery, or cognizee in the fine were utter strangers to the first conveyance. But in Virginia, those rights could not be barred by either of those methods, that being expressly prohibited by statute, and there were no means of barring them but by special act of assembly.

That is said to have been the effect of our statutes of 1776 and 1785 converting estates tail into fee simple, or of 245 *the statute of 1792 repealing the statute *de donis* with all other english statutes.

The statute of 1776, in terms, applies only to estates tail in possession, or in reversion or remainder after an estate for life or a lesser estate. And neither Prudence, nor Vandever, or indeed any other person, had any such estate in possession, remainder, or reversion, at the passing of the statute, or at any time since. The saving of the rights of all persons other than the issue in tail and those in reversion or remainder, is an exception in favour of the rights of strangers, in the cases embraced in the enacting clause, leaving it to operate in the cases provided for, as to the issue and those in reversion or remainder, as if there were no saving whatever, or as if the enacting clause had been concluded by a declaration, that in all such cases the issue in tail and those in reversion and remainder should be absolutely barred of all right. The present case certainly does not come within the literal terms of that statute.

The act of 1785 is in more general terms. It provides, "That every estate which on 7th October 1776, was an estate tail, shall be deemed from that time to have been, and thenceforward to continue, an estate in fee simple: and every estate, which since hath been limited, so that, as the law aforetime was, such an estate would have been an estate tail, shall also be deemed to have been and to continue an estate in fee simple: And all estates which before 7th October 1776, by the law, if it remained unaltered, would have been estates in fee tail, and which now by virtue of this act, are and will be estates in fee simple, shall from that time [Oct. 1776] and henceforth be discharged of the conditions annexed thereto by the common law, restraining alienations before the donee shall have issue; so that the donees, or persons in whom the conditional fees vested, or shall vest, had and shall have the same power over the said estates as if they were pure and absolute fees." In strictness, the right in question was not an estate tail in October 1776, the estate having been divested and turned

246 to a mere right by the *conveyance of 1769. And the absolute power over such estates (as over a pure and absolute fee) is declared to have been, or thereafter to be, in him in whom the estate was vested in October 1776, or in him in whom it had since been or might thereafter be vested. The right in question was not vested in Prudence, in October 1776, or at

any time thereafter; and if such a right was converted by the statute into a right of fee simple, it remained in this new character, as in its former, a right vested in no one during the life of Prudence, and vested upon her death in her children, converted into a fee simple. But I do not think, that either statute, in its terms, affected any estate or right not vested in some one, nor until it was vested; and then and then only operated upon the vested estate, and converted it into a fee simple. If it had been intended to affect rights in abeyance, the language of the statutes would not have left that doubtful.

Nor do I think that the case comes within the equity of the statutes. The purpose of the legislature was to suppress an extensive public mischief, the perpetuation of property in particular families by entails; a practice greatly encouraged by our previous legislation. This object was completely effected, by giving an unlimited power of alienation, prospectively, to those then or thereafter possessed or entitled to entailed property, without ratifying their acts already done, which when done were unlawful, and which could not be rendered valid, by any act in their power without the aid of a legislative act. These cases were, moreover, very rare; and in those which existed, the fee simple right and power of alienation would be suspended only during a life in being; within the period universally allowed for executory limitations in favour of family settlements. And general laws are usually considered as providing for those cases which most frequently occur.

It was objected, that if the appellees are entitled, they are entitled as fee simple owners; and, therefore, cannot maintain a writ of formedon. My brother Cabell has shewn that a writ of formedon in 247 descender as well as in reverter *would lie at common law for the recovery of a fee simple estate, whenever a writ of right would not lie. And here, if the appellees were entitled in fee simple, they could not maintain a writ of right, as they could not allege a seizin in demense as of fee, either in themselves, or their ancestor from whom they claim by descent as heirs. They can claim only per formam doni. So that, whether the right cast upon them was a right in fee tail, or fee simple, it could only be asserted in a writ of formedon.

The statute of 1792, abrogating the english statutes, expressly saves all rights arising under any such statute at any time before the commencement of the act, in the same condition in all respects as if the act had never been made. The saving is not confined to vested rights, but extends to all of every possible description; and, consequently, to the right in this case then existing and in abeyance.

As to the question, whether the heir of Prudence at the common law, or her heirs under our statute of descents, would be entitled, if either; the settled doctrine is, that the estate tail goes to the heir of the body who would inherit the land entailed, if his ancestor held the same land in fee: as, if gavelkind land is entailed, it goes to all the sons; if borough-english, to the young-

est; and if the tenure of the land so entailed, is changed to the common law tenure, it goes, afterwards, to the heir at the common law, the eldest son. So here, whoever by our general law of descents, would be entitled to inherit the land, if the ancestor held in fee, are entitled to claim as heirs in tail per formam doni, if the heirs in tail have any right.

Upon the whole, if left to my own judgment, I should be of opinion to affirm the judgment of the circuit court, but with considerable doubt, much increased by the strong opinions of my brethren to the contrary.

Judgment reversed, and judgment entered for the tenant.

248 *Commonwealth v. Hudgin.

June, 1880.

Administrators—Appointment—Jurisdiction. *—A resident of Kentucky dies intestate there, having no estate in Virginia but a claim on this commonwealth for money: *Held*, the circuit court of Henrico county, wherein is the seat of government, has jurisdiction to grant administration of such decedent's estate.

Hudgin applied to the circuit court of Henrico, for administration of the estate of Walter Graham deceased, who died in the state of Kentucky intestate, leaving no other estate in Virginia but a claim against the commonwealth, for compensation for military service rendered by him, as an officer of the state line, during the war of the revolution. Hudgin produced a written instrument executed by the widow of the intestate, in due form, relinquishing her right to the administration. The attorney general contested the grant of administration to Hudgin, on the ground, that the circuit court had no jurisdiction to grant administration in such a case; and that the jurisdiction appertained solely to the general court. The circuit court held that it had jurisdiction, and granted the administration to Hudgin. And, there being many similar applications to the circuit court for administration, in like cases, the attorney general, in order that the question as to the jurisdiction of that court in such cases, might be definitively settled, appealed to this court.

The case was argued by the attorney general for the commonwealth, and Green and Leigh for the appellees. The question depended intirely on the construction and effect of the statutes, 1 Rev. Code, ch. 67, § 10, p. 222, ch. 104, § 12, 16, 32, pp. 377, 378, 382.

PER CURIAM. The jurisdiction of our courts of probat and administration, is prescribed with so much precision by our statutes, that there is no occasion to resort to the english doctrines on that subject, except so far as to ascertain the meaning of the phrase in our statutes, referring, 249 in certain cases, *to "the county or corporation, in" which the estate of the intestate, or the greater part thereof, shall be," as a criterion of jurisdiction. That is the rule to be applied to this case. There is no case in point in the eng-

*See generally, monographic note on "Executors and Administrators" appended to *Rosser v. De-priest*, 5 Gratt. 6.

lish courts, the supreme power there residing in a natural person. But, resorting to the analogies of the english law, we may safely say, that the place, where a debt, constituting the whole of the estate, must be demanded and paid or prosecuted, and where all the documentary proofs constituting the foundation of the claim are found, is that in which the estate is; and, therefore, that the administration in question was duly granted. The order is affirmed.

Sharp v. Sharp and Others.

June, 1880.

Wills—Handwriting of Testator—Evidence of.—B. is appointed adm'r of S. at a time when S. was supposed to have died without a will: a will is afterwards found: B. had never seen S. write; but acquired a knowledge of his handwriting from examination of his papers after his death, and testifies from his knowledge of the handwriting thus acquired, that the will is wholly in S.'s hand: **Held**, this is competent evidence of the handwriting in the court of probat.

Same—Question.—Whether an instrument is a complete will, or only a note, memorandum, or plan of a will to be afterwards made?

"A writing alleged to be the last will and testament of Thomas Sharp deceased, was presented for probat by Alexander Sharp, in the circuit court of Augusta; and Joseph Sharp and James Black and wife appeared to contest the 'probat. The instrument was written on a small piece of paper, mutilated and torn, which had been cut off, apparently, from a leaf of a blank book, on a part whereof something else had been written, which it was wished to preserve; and the following is a copy of it, and as accurate a description as can be given without a fac simile:

250 "My brothers and sisters as followeth
My sister Lettiss Clark my oldest sister 2 dol-

lars
Peggy Weir 2 dollars Herson Hugh — dollars..30 s
My brother John Sharp 2 dollars
Fanny Porter 2 dollars x June 15 1817, Thos. Sharp
Joseph Sharp 2 dollars x My Extors Andrew
Robert Sharp 2 dollars x Thompson and old
Ann Henry 2 dollars x Matthew Willson
Jean Black 2 dollars x
Lettiss Clark's son John Sharp — dollars..

James Blacksons — Sam — the blacksmith 30 s.
My lands to Alexander Sharp son of Robert Sharp

x Here were cross marks nearly resembling the letter x.

Wills—Handwriting of Testator—Evidence of.—See the principal case distinguished in *Hanriot v. Sherwood*, 82 Va. 14.

Same—What Writings Are Testamentary.—A paper is not to be established as a man's will merely by proving that he intended to make a disposition of his property similar to or even identically the same with that contained in the paper. It must satisfactorily appear that he intended the very paper to be his will. Unless it does so appear, the paper must be rejected, however correct it may be in its form, however comprehensive in its details, however conformable to the otherwise declared intentions of the party, and although it may have been signed by him with all due solemnity. In *McBride v. McBride*, 26 Gratt. 481, *STAPLES, J.*, speaking for the court, quoted this language from the opinion of *JUDGE CABELL* in the principal case, and said: "This doctrine is sound in principle, is commended by its intrinsic justice and wisdom, and is fully sustained by the authorities. *Sharp v. Sharp*, 2 Leigh 249; *Hocker v. Hocker*, 4 Gratt. 277; *Waller v. Waller*, 1 Gratt. 454; *Pollock & Wife v. Glassell*, 2 Gratt. 439." See the principal case also cited on this point in *French v. French*, 14 W. Va. 472, 479.

For further information, see discussion in monographic note on "Wills."

Same—Signing by Testator—Place of.—In discussing this subject, *Waller v. Waller*, 1 Gratt. 475, cites the principal case. For further information, see monographic note on "Wills."

sister Lettiss' first husband entailed to him and his heirs forever and Loose and children my slaves entailed as above and two of my best horses. The rest of my personal property after my just debts paid and funeral charges a tombstone to be engraved my name age and year of my departure set at my head and foot. The rest of my personal estate divided equally among my sisters children My executors

THOS. SHARP [seal]"

This brought the testator to the very bottom of the paper, so that there was no room even to insert the date, which was inserted with the testator's name, above, in the blank left on the right hand of the small legacies, with a different pen and ink, apparently, from that with which the body of the instrument was written. On the other side of the paper was written the following words:

"And my wife Mary the half of the land I live on if she dont mary if she maryes her liveng and her choice of my slaves her lifetime.

THOS. SHARP Feb. 12. 1825."

The blank between the words "Hugh" and "dollars" in the 3d line was produced by blotting out something that had been there written; and the figures "30 s." at the end of that line, seemed to have been written with the same pen and ink with which the figures "30 s." and "5 s." were written at the end of the 10th and 11th lines. The blank between the words "John Sharp" and "dollars" in the 10th line, was also produced by blotting out something that had been there written. The words of the 11th line were, originally,

"James Black's sons Sam and John
251 ——— dollars *each of them;"

but the final s was struck from the word "sons," and the words "and John — dollars each of them," were struck out with a pen and "5 s." inserted at the end of the line. Instead of the words "Loose and children my slaves," in the sequel of the instrument, the testator had first written "Loose and George my slaves;" but the name "George" was struck out, and the word "children" interlined above it, with the same pen and ink (it seemed) with which the codicil was written; the testator having, as it was proved, sold the slave George after June 1817, the date on the face of the paper. After the words "my executors" at the end of the instrument, and before the testator's signature, he had at first inserted the names of three executors, viz. Little Matthew Willson, Robert [surname illegible] and James Black, which he afterwards obliterated with his pen. The date and signature (viz. June 15, 1817, Thos. Sharp) inserted in the blank on the right hand of the small legacies, appeared to have been written with a different pen and ink from the body of the instrument, and with the same pen and ink as the words "the blacksmith 30 s." in the 11th line. And the words "my extors Andrew Thompson and old Matthew Willson," appeared to have been written with the same pen and ink with which the codicil of February 12, 1825, by which he made the provision for his wife, was written.*

*This description of the instrument was extracted substantially, from the opinion of *COALTER, J.*, who delivered the opinion of the majority of the court.—Note in Original Edition.

The testator died in the early part of the year 1826.

It was proved, 1. That the testator married some years after the first date on the face of the will; and the marriage gave occasion to the codicil whereby provision was made for the wife.

2. That the day after the interment of the testator, several respectable neighbours were called on by James Black his brother-in-law to examine his papers, to see whether he had left a will; and they found the 252 paper in question in an *old pocket book in the desk of the deceased, with some other papers, namely, clerk's tickets and sheriff's receipts; but it was not examined very critically by the persons then present, who regarding it as a paper of no importance, put it back where they found it: and that Joseph Brown who was not present on that occasion, and who believed there was no will, took administration of the estate of the deceased, as an intestate: but he being apprized of the existence of the paper in question, on the day of the appraisement, some search was then made for it; however it was not then found; he found it shortly after, and thought it his duty to produce and take advice upon it.

3. That the paper in question, every word and letter of it, was in the proper handwriting of the testator. This was proved by a witness, Joseph Ewing, who testified that he had seen the testator write twice, and he believed the paper in question was wholly in his handwriting; and by another witness, Joseph Brown, (the person who had administered on the estate of the deceased) who testified, that he had not been acquainted with the testator's handwriting before his death, but having, since the administration of his estate was granted to him, obtained possession of his books, papers and accounts, he felt no hesitation in believing the paper offered for probat to be in his handwriting. And there was other evidence, but more vague, touching the genuineness of the handwriting.

4. There was much parol evidence on both sides, detailing conversations held by the testator with his neighbours and acquaintances, about his will, and bearing on the question, Whether or no he regarded the paper in question as his will? In the opinion of a majority of the judges of this court, the weight of evidence established, very clearly, that he considered himself as having a will by him, whereby his estate would pass after his death, and the principal part of it to Alexander Sharp, according to his uniform intentions in his favour; and that though he might have sometimes 253 wished to have it drawn out in better form, he yet intended *this paper to be his will, in case he should die without altering or amending it. The other judges were of opinion, that the testator's declarations in conversation with others on the subject, as detailed by the witnesses, were contradictory in themselves, and inconsistent with the provisions of the paper now produced as his will, and, therefore, gave it no support whatever.

The circuit court was of opinion, that the instrument was "not a sufficient will," and refused to admit it to probat: From

which sentence, Alexander Sharp appealed to this court.

The cause was argued here, by Stanard for the appellant, and Johnson for the appellees.

I. The first question was, Whether the instrument was well proved to be in the handwriting of the testator?

Upon this point, Stanard referred, 1st, to the evidence of Ewing; 2ndly, to the evidence of Brown the administrator of the deceased; and though that witness had not been acquainted with the testator's handwriting before his death, and had formed his acquaintance with it from an examination of his papers since, yet he contended that his evidence of the handwriting was competent evidence before a court of probat; and he cited Stark. on ev. part IV. 653-8, and the cases there collected.* M'Corkle v. Binns, 5 Binney, 349; Bowman v. Plunkett, 2 M'Cord, 518; Redford v. Peggy, 6 Rand. 316. 3rdly, He examined the other parol evidence and the circumstances of the case, which he relied on as strongly corroborating the direct proof of the genuineness of the handwriting.

Johnson answered, that this being a will of lands, and the proof relied on as to the due execution and publication, consisting intirely in the fact of the will being 254 wholly written *by the testator, that fact ought to be proved by two witnesses at the least; 1 Rev. Code, ch. 104, § 1, p. 375. That this paper was proved to be in the handwriting of the supposed testator by only one witness, namely, Ewing: that as Brown had never been acquainted with the testator's handwriting during his life, in other words, had never seen him write, and so must have formed his judgment only by a comparison of the writing in question with other writings of the testator, his testimony was not competent evidence of the handwriting: and the other parol evidence and the circumstances, relied on as corroborative of the direct evidence, were too vague to justify a court of justice in inferring from them the genuineness of the handwriting. He cited Rowt's adm'r v. Kile's adm'r, 1 Leigh 216.

II. But the main question was, Whether the testator designed this as a will, or only as a note, memorandum, project, or plan of a will to be afterwards made? And this question was argued upon the circumstances apparent on the face of the paper itself, and upon the parol evidence of the conversations of the testator with his neighbours and acquaintances, in relation to his will. The only authority cited in the argument was Matthews v. Warner, 4 Ves. 186.

COALTER, J. The first question is, Whether the paper has been proved to be in the handwriting of the deceased by two competent witnesses? It is admitted, that there is one full and complete witness on this point; but it is said the other witnesses are incompetent, and if so that one witness is not enough. Waiving this last question, and saying nothing of the other witnesses, or of their competency, especially in a court of probat, I think, that according to the

*Ingraham's American Edition, Boston, 1828. The passages referred to are in the second volume.

opinions of all the judges in the case of *Redford v. Peggy*, Ewing and Brown are both competent witnesses to the handwriting. It is not pretended, that it is in the handwriting of any one else; nor was any one acquainted with his hand, examined on the other side, to throw any doubt on this subject. It is like his hand, all the witnesses say. It was found

255 *preserved in a pocket book in his bureau, the day after his interment; and if placed there by himself, as we have every reason to believe, he would hardly preserve it as an ingenious specimen of the forgery of his own hand. The controversy seems not to have turned on this point; and hence the witnesses seem not to have been particularly examined as to their belief. The controversy seems to have turned mainly on the question, Whether this is a testamentary paper, or merely a memorandum to make a will by? On that point the witnesses were examined and cross examined, with great minuteness and care; not so as to the handwriting. Brown who administered on the estate of the deceased, and possessed himself of his books and papers, and thus became well acquainted with his hand, had no hesitation in believing the paper in question to be in his hand. Ewing had twice seen him write notes of hand. He was also one of those, who, after the funeral, searched his papers for a will. This examination of his papers gave him a further opportunity of seeing and becoming acquainted with the character of his hand. He believed the paper was in the testator's handwriting. On the whole, I feel no hesitation in saying (especially as the court below which heard the testimony of the witnesses, which may have been more full than the minute taken of it by the clerk, was satisfied as to that matter) that the paper in question is in the handwriting of the deceased.

The next and principal question is, Whether this is a testamentary paper? A question, which, it seems to me, ought to be considered and decided, if that can be done, on the face of the paper itself. The object of the law in requiring wills to be in writing, and, where not wholly written by the testator, to be published by him in the presence of witnesses, subscribing their names in his presence, and providing that a will so published and preserved, shall not be abrogated by parol proofs, is to prevent those perjuries, by which wills might either be set up, or revoked, contrary to the intention of the deceased.

256 *This paper is, certainly, very informal: but no one would say, that if this identical paper had been published in the presence of two witnesses according to the provisions of the statute, it would not be a good will. But our law has supposed, that a paper wholly written by a deceased person, subscribed by him, and bearing on its face evidence of a disposition of property in contemplation of death, especially where such disposition of property is made in such form as to shew, that he has completed all the dispositions intended to be made, and this is evidenced by making executors and signing the paper, has every guard thrown around it, which would be

necessary to make it a will, if published in the presence of witnesses: that writing and signing such a paper (unless a suspended intention appear on its face, or that it is incomplete, by breaking off in its provision, want of signature &c. so as to shew, that it is only a disposition in part, and that something further was intended, whereby it would appear that the paper, in that form, was not intended as a will) is as much a publication of a will, as a publication in the presence of witnesses.

[Here the judge read the paper, and marked and described, with minute accuracy, all the peculiar circumstances appearing upon its face, as above detailed; and thence inferred, that it appeared on the face of the paper itself, that the testator had recurred to it frequently after it had been originally written, and made sundry alterations, amendments and additions, according to changes of circumstances or of inclination, and put his hand to it for the last time on the 12th February 1825. He also adverted to the length of time during which he had carefully preserved it, and the place and manner in which he had kept it.]

And then he proceeded: Let us suppose the case stopped here. Would or would not such a paper, containing a full disposition of his whole estate, thus repeatedly revised and changed, at different times, according to the alteration of his circumstances (for it appears he had sold his slave George after the first writing, and had also 257 married) closing with a *provision for his wife, making his executors &c. be considered as a disposition of his whole estate to take effect after his death? And being written by himself, and carefully put away, must we not have considered it as a will? Unless, indeed, a will, when written by a testator, must be in more ample form than this, and bear on its face stronger evidence of a final testamentary intent.

It has been likened to the paper made mention of in the case of *Matthews v. Warner*, 4 Ves. 186. But that paper professed, on its face, to be "a plan of a will proposed to be drawn out," and which, although it contained a disposition of his estate, that would have made it a will but for this internal evidence that it was a mere plan proposed to be drawn out, was not considered a will. That paper also contained these expressions, which were relied on to shew that the paper itself was not intended for a will: "Must pray my burial may be plain"—"I must not forget my good friends Miss Mary and Miss Charlotte Howell, who desire will accept 5 guineas &c." and, finally, it was indorsed, "a plan for the last will and testament of William Matthews &c." It was moreover written on a piece of official paper (he was a store-keeper of the king's dock-yard at Deptford) intersected with lines, containing (printed at the top) the different articles of which he had care; and was found loose in his desk in his office in the dock-yard with some official papers. In that case also, there was another paper, written four years afterwards, which began, "Finding myself in a very precarious state of health, the following is the plan I propose to draw

will from, abrogating all the others I have already drawn out:" Going on to make several bequests, but breaking off in the middle of one. This was written on the back of a letter, but was found in his bureau, in the parlour of his dwelling house, in a bundle of letters and papers. Many witnesses were examined as to the declarations of the deceased; one set speaking of positive declarations, that he had made a will, and others as positively to declarations that he had not, and would not. The

258 lord "chancellor said: "It is always so, whether the evidence is to rebut a resulting trust, or to explain a will, one never fails to see, that the witnesses come with the party." This part of the evidence, he says, he lays out of the case, as in perfect contradiction. He went upon the face of the paper; the place where it was found; the other paper &c. but, above all, on the evidence of the paper itself. He said, "It is not, it cannot be denied (the argument presses so strong) that upon the perusal of this paper the natural conclusion is, that it was his intention to make a more formal paper than this. The inference cannot possibly be avoided. Then, *ex hypothesi*, this paper, at the time he subscribed it, was not the law, the testament. When then, at what period, did the *voluntas testandi* exist quoad this instrument? If it is admitted as it must be, that when he subscribed his name, he was looking to some future act, the decision that this is his will would destroy the most general maxim I know of, *voluntas testatoris ambulatoria est usque ad mortem*. No man can answer the question at what time that intention existed in his mind. I know there was a period when a contrary intention existed. He has given that evidence under his own hand by the paper of 1789." That paper, though at first admitted to probat as a will, was finally decided against by the court of commissioners. 5 Ves. 23.

But, in our case, there is nothing in the writing itself, that is, there are no expressions tending to shew, that this paper was a mere plan or memorandum to draw a will by. We must infer this fact, if we so decide, from the shape and size of the paper, and the form in which it is written. Trying this case upon the paper itself, and supposing the deceased to be unlearned as to the form of wills, but to know, that if written by his own hand, and in a way to be understood, it would be a will, though not attested by witnesses, can we say, that a paper, containing on its face evidence of repeated revision, amendments and additions, and carefully put away in his pocket books, is not to be considered testamentary?

259 *Catherine Lloyd's will, mentioned in a note, 4 Ves. 200, was, in fact, a letter written by an old lady to James Browning esq. in which, among other things, she says, "But in case of my demise I desire you will draw up and leave some blanks for some small legacies, that after my funeral charges are defrayed &c. then except some legacies, I give and bequeath to J. B. my lands and tenements &c. If my assets will afford it to pay in the burrow of Southwark — £; and to Miss J.

P. £30." &c. [going on with several bequests]: but please not put this rigmaroli in, till I send it correct. This only by way of memorandum in case I should go off suddenly." She lived three or four months after this. The prerogative court pronounced against this paper as being conditional, in case she died suddenly, whereas she had time to make a formal will: and parol evidence was admitted. But the court of delegates reversed the sentence, and pronounced the paper as the last will.

So in the next case, James Savage's will, in the same note; the objection to which was that it was written by the testator, disposing both of real and personal estate, and concluded with a clause of attestation, but there were no subscribing witnesses. It was considered imperfect by Dr. Calvert, on account of the clause of attestation not being witnessed; and he admitted parol evidence, on which he set aside the paper. The delegates were of opinion that, it being a will both of real and personal estate, it was, *reddendo singula singulis*, a good disposition of personals, and they rejected parol testimony against it.

Roberts, in his treatise on Wills, ch. 1, part 17, p. 198,* cites a case to this effect: a will had been fully drawn out and approved, and the attorney had directions to make a fair copy, and to bring it the next morning to be executed: but the testatrix died that night. It was held as conclusive of her having made up her mind, and was admitted as a will of personals.

260 *It seems to me to result from all the cases, when we are deciding on a paper, whether on its face it is testamentary or not, that it is the mind, not the words, the intention, not the manner, which is to be looked to; unless, indeed, the words or manner shew a suspended mind and intention.

The substance of the doctrine as laid down in *Coles v. Trecothick*, 9 Ves. 249, seems to be, that to begin a will thus: "I, A. B. do make this my will," if attested by three witnesses, makes it a good will of lands, though there is no signature at the end of it. This publication, and the name thus written, seems, then, to be considered a good signing; but, I believe, that is not held to be enough here, inasmuch as without a signature to an olograph will of lands, there would be no sufficient evidence of a concluded and final act. But it is there said, "The observation is just, that, as to personal estate, if it appears, upon the will, that something more is intended to be done, and the party was not arrested by sickness or death, that (*viz.* beginning the will as above) is not held a signing the will; which purports that there is to be a further act." The paper before us, was signed and sealed when first written: it afterwards, received some alterations when it was dated, and again signed; and, finally, it underwent farther alterations, in which provision was made for the testator's wife, his executors were changed, and it was again dated and signed. Taking it on its face then, how can we say, that any further act was intended unless the want of

*London edition of 1800.

form shall be a ground on which we shall infer such intention? And I again ask, if the parol evidence as to intention, had never existed, or had been rejected, and was not in the record, could we infer, from this paper, an intention to write a will more at large, and so reject it? The paper disposes of his whole estate, names his executors, provides for his funeral and tombstone. There is nothing doubtful about it.

It was said, he intended the land and slaves were to be entailed; and hence it is inferred, that if he had known he could not do this, he might have made other provisions. *This is very true: but, surely, such ignorance is not sufficient to set aside a will otherwise good. The words, "my land to be entailed," are said to be words of direction to a scrivener; but they were to be entailed, not to him and the heirs of his body, but to him and his heirs forever. Whether he had any definite notions of the distinction between estates tail or in fee, it is hard to determine. These words, perhaps, would carry a fee, even if it had been lawful to create an estate tail. But he may have thought that he was giving the property in tail; and if from the circumstances apparent on the face of this paper, and independent of this clause, we are bound to consider him as writing a testamentary paper, surely, the form of words by which he creates an estate tail, is not, in itself, enough to found a belief, that he was merely writing directions. We often feel ourselves bound to construe a will as giving an estate tail, when we believe no such thing was intended; but we do not therefore say, that if the testator had been well advised, he would not have made such a will, but would have inserted other provisions, and that therefore such a paper is not "the law and the testament," and something further was intended.

If, however, there be a well founded doubt, arising from the face of this writing, whether it was intended as a testamentary paper or not, then, it is said, parol evidence may be admitted against it. How stands the case upon the parol evidence? [Here the judge stated and examined the whole of the parol evidence very fully and minutely.] He concluded: The weight of the evidence, I think, goes clearly to prove, that the testator considered he had a will, by which his estate would pass after his death, and the bulk of it to Alexander Sharp, according to his uniform intentions in his favour, always expressed to those to whom he made known his wishes. He may have wished to draw it, or have it drawn, in better form: but he clearly intended this paper to be his will if he should die without altering it. If a will is once made, no expression of an intention to have it drawn in some proper form, or even to alter it, if the testator does *not do so, but, on the contrary, says he has a will, which is found carefully put away, clear of all suspicion of fraud or management, can have the effect of setting the will aside. The evidence, in this case, so far from proving an intestacy, I think, supports the paper before us as a will.

In this opinion, GREEN and CARR, J., concurred, so that the sentence of the circuit court was reversed, and the writing in question was ordered to be admitted to probat, and recorded, as the perfect last will and testament of the deceased.

CABELL, J. I concur in the opinion that the paper in question is sufficiently proved to have been wholly written by Thomas Sharp. But I cannot agree that he intended it to be his will.

A paper is not to be established as a man's will, merely by proving, that he intended to make a disposition of his property similar to, or even identically the same with, that contained in the paper. It must satisfactorily appear, that he intended the very paper to be his will. Unless it appear, that the very paper was intended to be his will, it must be rejected; however correct it may be in its form, however comprehensive in its details, however conformable to the otherwise declared intentions of the party, and although it may have been signed by him with all due solemnity. In the case of *Matthews v. Warner*, the paper offered as a will, began thus: "2 Nov. 1785. A plan of a will proposed to be drawn out at the last testament of William Matthews, storekeeper of his majesty's yard at Deptford." After the usual preludes, being in health, sound in mind &c. it proceeded; "Imprimis. I give unto Miss Isabella Johnson, &c." and then proceeded with several other specific legacies; and after disposing of the residue of his estate, concluded thus: "I appoint my good friend Mr. Edw. L'Epine and my good friend Mr. Edw. Johnson, my executors, to see this my last will and testament
263 complied with. Dated at Deptford, 2d Oct. 1785;" and was signed "Wm. Matthews." There then followed a codicil; "I must not forget my good friends Miss Mary and Miss Charlotte Howell, who desire will accept of five guineas each, for rings to wear in remembrance of me. 6 Oct. 1785. Wm. Matthews." It was indorsed, "A plan designed for the last will and testament of Wm. Matthews, storekeeper of his majesty's yard, Deptford." Lord Eldon held this not to be a will, because it appeared, as he conceived, from the expressions in the beginning of the paper, and in the indorsement upon it, "A plan &c." that Matthews did not intend that paper to be his will, but only the plan, according to which, a will was to be afterwards drawn out. And I understand it to be now definitively settled in England, that even where a paper purports to be a will, and is signed in such manner as would be sufficient to give it effect as a will, yet if it appears on the face of the paper, that something more was intended to be done, and the party was not arrested by sickness or death, it shall not be a will. *Roberts on Wills*, ch. 1, part 17, p. 198-202. Roberts, in summing up the law upon the subject, says, "The later determinations at Doctor's commons, seem tending to establish a more discriminative doctrine," than that which formerly prevailed. "It now appears to be agreed, that if a testator leaves an instrument, which upon the face of it, carries evidence of an intention in the framer to perfect it by some

further solemnity, which he died without having superadded, having had afterwards sufficient time and health and recollection to complete it, such paper may be inferred not to have been intended to operate as it stood; and the omission to finish may ground a presumption of a change of mind in the deceased." After reciting some cases in confirmation of this principle, he says, "The same doctrine is recognized by lord Eldon, in the late case of *Coles v. Tricothick*, 9 Ves. 249, who thus expresses himself on this point. 'The observation is just, that as to personal estate, if it appear upon the will, that something more 264 was intended to be done, and the party was not arrested by sickness or death, that is not held a signing of the will.' It seems therefore to be now understood that not every scrap of paper which a man writes in contemplation of death, making mention of intended dispositions of his personal property, will be received in the ecclesiastical courts as testamentary."

Let us apply these principles to the paper before us. The whole of the first side of it, (judging from the colour of the ink, the stroke of the pen, and the character of the handwriting) was written at the same time, except the words "my extors." &c. and perhaps the date, and some fee alterations. This side of the paper constitutes the body of the will, if will it may be called. But what is it? It bears on its face, intrinsic and (to my mind) irresistible evidence, that this paper was not, when it was written, intended to be his will. It is not, in the beginning, end, or any other part of it, recognized or spoken of by the writer, as a will, or even as the memorandum for a will. There is not a word in it, from which it can even be inferred to be a memorandum for a will, except the part where mention is made of funeral charges, a tombstone, and executors. There is not from the beginning to the end, one word commonly used in giving or disposing of property, by deed or will. Did ever man, however ignorant, sit down to write a will, and finish the work in this form, and upon such a mutilated piece of paper! And it is evident, that Sharp, although of secluded habits, is no where represented as an ignorant man. On the contrary, he is said to have done all his own writing, and to have kept his accounts very accurately. It is clear to my mind that this paper was, on its face, no more than a mere memorandum of the manner in which he intended to give his property, by a will thereafter to be made.

This result, deduced from the intrinsic evidence of the paper itself, is fortified by the positive testimony of witnesses. [Here the judge recapitulated the testimony of three of the witnesses, which, he said, left no doubt with him, that Sharp did not consider or intend this paper to be his will.]

265 "That part of the paper, relating to his wife, dated February 12, 1825, does not mend the matter. There are no words of disposition there, giving the lands to his wife; there is no recognition of the paper as his will. It is itself, a mere mem-

orandum, and cannot change the character of what had been previously written on the other side, which was also nothing more than a memorandum. It was no will and not intended to be so when it was written.

I do not deny, that this paper, originally written as a mere memorandum for a will, might have become his will, provided he had afterwards published it as such. But this he never did.

It is said, however, that he afterwards considered it as his will. I do not believe that that, even if it were clearly proved, would make it his will. But there is no satisfactory proof, that he ever afterwards considered or wished this paper to be his will. The evidence, on this point, is very contradictory, and preponderates, in my opinion, against the proposition: at any rate, the declarations ascribed to him by the several witnesses, are so contradictory in themselves, and so inconsistent with the provisions of the paper now brought forward as his will, that they can give it no support whatever; even if a paper purporting, on its face, not to be a will, but a mere memorandum for a will, could, in any case, become a will, by general declarations of the testator, that he had made a will containing dispositions similar to those indicated in the memorandum. But I do not think, that such a paper ever could become a will, without proof of a subsequent publication thereof as such. The evidence of such publication, is not to be found in this record.

If Sharp intended this paper to be his will, it is very strange that, conversing with so many persons, and with such unreservedness, on the intended disposition of his property, he should never have shewn it to any of them; particularly, when we recollect, that the most, if not all of these conversations, took place at his own house, where the paper was kept. It is passing

266 strange, even if he intended to make *the very disposition of his property, indicated by this writing, that he should have been satisfied to make it on such a small, torn, defaced, mutilated fragment of paper. If it had been written when he was in extremis, and in a situation where a more suitable piece of paper could not be had, this remark would be entitled to no consideration: but this writing was commenced at least nine years before his death, and was revised by him about one year before his death. Under these circumstances, I repeat, that it is passing strange, if he intended it, on the 12th Feb. 1825, to be his will, that he did not, at some period between that and his death, transfer it to a different paper. A man who wrote with the facility with which he appears to have done, might have copied it, at any time, in less than ten minutes.

But, it is said, this paper was preserved with care, and was found, after his death, in the place where it was reasonable to expect he would deposit his will. I answer, that, if it were intended as a mere memorandum for a will, to be afterwards made, it would have been preserved with care, and would have been found, probably, in the same place.

No man could be more disposed than I

am, to construe, with liberality, the wills which men have actually made. But wills must be made, before they can be construed. Every man, having property, must feel an interest that his property should pass, after his death, to the persons whom he would wish to have it. If he fails to make a will, having time and opportunity to do so, it must be presumed that he wishes those to have it, whom the law may designate as his heirs or distributees. I fear this reasonable intent would be frequently disappointed, if we decide, that "such a thing as this" (I use lord Eldon's language in a like case) is to be established as a will. I think the sentence of the circuit court ought to be affirmed.

BROOKE, P., concurred in this opinion. But by a majority of the court, the sentence was reversed &c.

267

*Haxall v. Lee.

June, 1830.

Administrators—Appointment—Persons Preferred.—A person dies intestate in 1825; and in 1830, a distributee and a creditor come, at the same time, to ask administration: HELD, the court has no discretion to choose between them, but must prefer the distributee.

Thomas Bennett late of Petersburg, died there, intestate, in the year 1825. No application for administration of his estate, was made by any person, till February 1830, when Haxall, a creditor of the intestate, applied to the hustings court of Petersburg for the administration; and, thereupon, Lee, the husband of a daughter and distributee of the intestate, and in favour of whom (and of him only) the intestate's widow had relinquished her right to the administration, appeared and opposed the grant thereof to Haxall, and prayed that it might be granted to him. It appeared, that both parties were respectable and responsible persons. The hustings court gave the administration to Haxall. Lee appealed to the circuit court, which reversed the order, and gave the administration to Lee. And then Haxall appealed to this court.

M'Farland for the appellant; Allison for the appellee. The provisions of the statute concerning wills, intestacy and distributions, 1 Rev. Code, ch. 104, § 32, 3, 4, pp. 382, 3, and the cases of Cutchin v. Wilkinson, 1 Call, 1; Hendren v. Colgin, 4 Munf. 231; Bohn v. Sheppard, Id. 403, were cited.

PER CURIAM. The statute gives the right of administration, first, to the husband or wife, and then to those next entitled to distribution, or such of the distributees as the court shall most approve: and, although it authorises the court, in case no such person apply for the administration within thirty days, to grant it to a creditor or creditors who shall apply for the same, or any other fit person, in its discretion; yet it provides, that if, after the grant of the admin-

***Administrators—Appointment—Persons Preferred.**—The principal case was cited in Bridgeman v. Bridgeman, 30 W. Va. 219, 3 S. E. Rep. 583. See further, monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

other distributee shall apply for it, the same shall be granted in like manner as if the former had not been obtained. If, therefore, in the present case, administration had been granted to Haxall, and Lee had come, at any time afterwards, to demand it, the court must have revoked the grant thereof to Haxall, and given it to Lee. But the creditor and distributee came both together: and both were trust-worthy. The court had no discretion to withhold the administration from the distributee, and give it to the creditor. The order of the circuit court is affirmed.

Coutts v. Walker.

June, 1830.

(Absent CABELL, J.)

Judgments—Relation.—A judgment has relation to the first day of the term at which it is rendered, and this relation is allowed in equity as well as at law.

Same—Lien—Equitable Estate.—A judgment creditor has a lien in equity on the equitable estate of the debtor, in like manner as he has a lien at law on his legal estate.

Same—Same—Same—Case at Bar.—Real estate is vested in a trustee by deed of marriage settlement, in trust to pay the wife an annuity out of the profits, and, subject to the annuity, in trust for a son of the grantor; while the annuitant is yet living, a creditor of the son recovers a judgment against him, and exhibits his bill in chancery, to subject the son's equitable interest in the estate to the debt: HELD, 1. that such an equitable interest cannot be taken in execution at law; 2. that it is bound by the judgment in equity, which will apply it to the satisfaction of the debt; but 3. as the annuitant is yet living.

***Judgments—Relation.**—A judgment or decree entered during a term of court relates back to the first day of the term, when—and only when—the cause in which it was rendered was in such a condition on the first day of the term that it could have been tried on that day if it had occupied the first place on a docket. The principal case—which is a leading one on this subject—has often been cited to sustain this rule, than which there is hardly a proposition of law more firmly established. See, citing principal case, Skipwith v. Cunningham, 8 Leigh 272, 278, and *foot-note*: Withers v. Carter, 4 Gratt. 418, 419; *foot-note* to Jones v. Myrick, 8 Gratt. 179; Brown v. Hume, 16 Gratt. 466; Brockenbrough v. Brockenbrough, 31 Gratt. 600; Yates v. Robertson, 30 Va. 477; Hockman v. Hockman, 98 Va. 456, 25 S. E. Rep. 594; Dunn v. Renick, 40 W. Va. 360, 23 S. E. Rep. 70; First Nat. Bank v. Huntington Distilling Co., 41 W. Va. 583, 23 S. E. Rep. 793; *note* to Lane v. Ludlow, 14 Fed. Cas. 1082, and in Womer v. Ravenswood, etc., R. Co., 37 W. Va. 290, 291, 16 S. E. Rep. 489, it is said: "At common law, for certain purposes, the term was considered but one day, and all judgments and decrees entered during the term bore date as of the first day. In Virginia this legal fiction, though at first combated, because firmly established, and has always prevailed, until, as with us, it has become ingrafted upon the Code of the state. Code Va. 1887, § 3567; Society v. Stanard, 4 Munf. 599; *Coutts v. Walker*, 2 Leigh 268; Skipwith v. Cunningham, 8 Leigh 271; Withers v. Carter, 4 Gratt. 409; Brockenbrough v. Brockenbrough, 31 Gratt. 599. In the leading case of *Coutts v. Walker*, 2 Leigh 268, affirming the case of Society v. Stanard, 4 Munf. 599, the point was elaborately argued by counsel of great ability and learning; and the opinion of the court, delivered by JUDGE GREEN, contains all the substance of what has since been written on the subject, inasmuch that in the latter case of Skipwith v. Cunningham, *supra*, JUDGE TUCKER regretted that the court had allowed a reargument of the question. All the cases, however, from the leading English case of Wynne v. Wynne, 1 Wils. 39, down, recognize as an exception 'where it appears that the plaintiff's case was not in a condition for a judgment on the first day, if the court had been prepared to hear it, and some further proceeding was indispensably necessary to mature his case for judgment.' Withers v. Carter, 4 Gratt. 407."

See further, monographic note on "Judgments" appended to Smith v. Charlton, 7 Gratt. 435.

***Same—Lien—Equitable Estate.**—At law an equitable interest cannot be extended upon an elegit: but

and is not compellable to take a gross sum in satisfaction of the annuity, and as the trustee is to hold the subject and pay the annuity out of the profits, the court of chancery ought not to direct the sale out and out of the debtor's equitable interest subject to the annuity, but ought only to direct the application of the surplus of profits as they accrue, after paying the annuity, to the debt.

By deed of marriage settlement, dated the 10th September 1799, between Reuben Coutts, Jane New the intended wife, and Samuel M'Craw and others, trustees, Coutts conveyed to the trustees, sundry real estate, consisting of *lots and lands in Richmond and Manchester, with some slaves and other personal property, in trust, that they should hold the same to the use of Coutts till the marriage; and from and after the marriage, in trust to the use of Coutts and his wife, to hold the subject, and apply the rents and profits thereof, to and for their support, and that of Coutts's children, Lewis, Patrick, Elizabeth, Polly, and Elvira Coutts, and of any children which should be born of the intended marriage; and if Coutts should survive the intended wife, then upon trust to support him out of the rents and profits during his life; and if she should survive him, then to pay her out of the rents and profits, an annuity of £150; and after the death of Coutts, to divide the trust subject, as follows, viz. to divide equally between the grantor's two sons, Lewis and Patrick, the ferry lot in Manchester number 312, the ferry lot in Richmond number 324, the sandy bar and fishery, being 44 acres of land, two islands in James river numbers 313 and 315, and four lots in Manchester numbers 306, 307, 308, 309; and to divide the residue of the real subject, being a lot in Richmond number 355, and all the personal property, equally between all the above named children of Coutts, and the children, if any, of the intended marriage; and the whole subject was charged with the annuity of £150. provided for the wife, and the trustees were to see that it should be paid

for that very reason. relief may be had in equity which gives a lien upon it in favour of judgment creditors by analogy to the lien at law upon the legal estate, and amongst several judgment creditors, adopts the legal rule of priorities according to the order of time. Withers v. Carter, 4 Gratt. 417, citing principal case and Tinsley v. Anderson, 8 Call 520. And, in Findlay v. Toncray, 2 Rob. 377, BALDWIN, J., said: "I think there is no reason to doubt that the plaintiff's decree in October, 1836, was a lien upon the debtor Soule's equity of redemption under his deed of trust: for though the equity of redemption could not be sold under a *f. fa.* and was not extendible, yet the decree constituted an equitable lien thereupon, entitled to priority over subsequent liens by judgment or otherwise. 1 Sugd. on Vend. 542: Hales v. Williams, 1 Leigh 140: *Coutts v. Walker*, 2 Leigh 268."

To the point that, although an equity of redemption cannot be taken in execution at law, it is, on the general principles of a court of equity, bound by the judgment in equity, as it would have been bound at law: if it had been a legal estate, the principal case is also cited in *Micheaux v. Brown*, 10 Gratt. 617; *Nickell v. Handly*, 10 Gratt. 889.

To the point that an equity of redemption cannot be taken in execution at law, the principal case was cited in *First Nat. Bank of Salem v. Anderson*, 75 Va. 267.

See also, citing the principal case, especially in regard to the propositions contained in the last headnote, *Nickell v. Handly*, 10 Gratt. 841; *Mayo v. Carrington*, 19 Gratt. 98; *Bain v. Buff*, 76 Va. 375; *French v. Waterman*, 79 Va. 625; *Track v. Berkeley (Va.)*, 40 S. E. Rep. 907.

See further, monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 426.

her out of the rents and profits, and apportioned and charged equally among and upon the children; so as to divide the burden justly and equitably among them.

The marriage took effect. Coutts, the husband, died, leaving his wife Jane him surviving; whereby the children became entitled to the trust property, to be distributed among them according to the provision of the deed of settlement, subject to the annuity to the wife, and the trust provided by the settlement for assuring the payment thereof to her.

Afterwards, Walker recovered two judgments against Patrick Coutts (the son of Reuben, the grantor in the deed of marriage settlement above mentioned) in the 270 hustings *court of Richmond, for 500 dollars each, with interest and costs: these judgments were rendered upon the confession of Coutts, on the 2nd March 1821, but the quarterly term of the court at which the judgments were so recovered, commenced the 21st February preceding.

Patrick Coutts, by deed executed in the interval between the commencement of the term and the day on which Walker's judgments against him were rendered, namely, on the 28th February 1821—reciting that Mrs. Coutts had become bound as his surety for a debt of 1661 dollars, the amount of a writ of ca. sa. which had been sued out by R. Burton against him and executed upon him, and that she had incurred sundry other engagements for him as his bail and otherwise, and that he was also indebted to Samuel M'Craw for expenses incurred by him as trustee under the deed of marriage settlement, and for arrearages of the annuity of £150. thereby provided for Mrs. Coutts—in consideration thereof, conveyed to T. T. Bouldin and D. Roper, trustees, the ferry lot in Manchester number 312, the sandy bar and fishery of 44 acres, the two islands in James river numbers 313 and 315, and the four lots in Manchester numbers 306, 307, 308, 309, being parcel of the subject mentioned and described in the deed of marriage settlement: upon trust, 1. to indemnify Mrs. Coutts against loss by reason of her suretyship for the debt of 1661 dollars due to Burton; 2. to indemnify her against loss by reason of any other suretyships or engagements by her incurred for the mortgagor; and 3. to pay M'Craw, any balance that might be found due him, for expenses incurred by him as trustee under the marriage settlement, and for arrearages of the annuity of £150. due Mrs. Coutts.

And, by another deed, executed on the same 28th February 1821, Patrick Coutts, for the consideration, as expressed on the face of the deed, of 8777 dollars, cash paid, conveyed directly to Mrs. Coutts, all his interest in the lot number 355 in Richmond, which also is parcel of the trust subject mentioned in the marriage settlement.

271 *These two deeds of the 28th February 1821, were admitted to record in the office of the hustings court of Richmond, on the same day on which Walker's judgments against Coutts were rendered in the same court, namely, on the 2nd March 1821.

Walker sued out executions on his judg-

ments against Coutts, which proved unavailing; and then he exhibited his bill in the superior court of chancery of Richmond, against Patrick Coutts, Jane Coutts, Samuel M'Craw (who was the surviving trustee named in the marriage settlement) and Bouldin and Roper, the trustees in the first mentioned deed of the 28th February 1821; setting forth the facts as above stated; insisting, that Coutts's two deeds of the 28th February 1821, were fraudulent in fact as against him; and that, whether fraudulent in fact or not, his judgments related back to the first day of the term of the hustings court at which they were rendered, and thus overreached those conveyances; and praying, that the subject thereby conveyed, or so much thereof as should suffice for the purpose, might be sold for the satisfaction of the debts due him with interest &c.

The defendants Patrick Coutts, Jane Coutts, and M'Craw, filed their answers, averring that the deeds of the 28th February 1821, were fair in fact, and claiming the benefit of them; and insisting, that Walker's judgments, as against them, could not be considered, on the principle of relation, as taking date from the first day of the term of the court at which they were rendered, but that, on the contrary, they took date only from the day they were entered.

As to the other defendants, the bill was regularly taken pro confesso.

There was no evidence whatever, touching the charge of actual fraud alleged in the bill: so that the only questions presented to the chancellor, were, as he stated them, Whether, supposing Patrick Coutts to have only an equitable right in and to the property comprised in the marriage settlement of 1799, and the legal title

thereof to be outstanding *in the trustee M'Craw, Walker's judgments had priority over the two deeds of the 28th February 1821? and if so, Whether they constituted a lien on P. Coutts's equitable title in the subject? And the chancellor, holding the affirmative on both points, decreed, that the marshal should sell all of Coutts's interest in the property, at public auction, subject to Mrs. Coutts's annuity, and bring the proceeds of sale into court, to be applied to the satisfaction of Walker's demands by future order.

This court, upon the petition of Mrs. Coutts, allowed her an appeal from the decree.

S. Taylor and R. G. Scott, for the appellant, contended, 1st, That Walker's judgments constituted no lien on the property in question. For, they said, the lien of a judgment on the real estate of the defendant, arises from the capacity of the creditor to extend it by elegit; and if that capacity to take the subject in execution has never existed, or has determined, the creditor, in the one case, loses the lien he once had, and, in the other, never acquired one at all. *Eppes v. Randolph*, 2 Call, 186. Now, here the legal estate of the property was in M'Craw, the trustee, under the marriage settlement of 1799, charged with Mrs. Coutts's annuity of £150. and P. Coutts had only an equitable estate, which could

not be extended on an elegit, any more than an equity of redemption which certainly was not extendible. 2 Cruise's Dig. Tit. 15; Mortgages. ch. 3, § 22, p. 139; Id. Tit. 14, Estates by Statute Merchant &c., § 77, p. 72; Scott v. Scholey, 8 East. 467. If Walker had no lien by his judgment, Mrs. Coutts must prevail in equity, since her deed certainly gave her a lien. She had equal equity, and the legal advantage.

2ndly, That Walker's judgments did not take date from the first day of the term, but only from the day they were actually rendered. The doctrine of the relation of a judgment to the first day of the term, was manifestly unjust, when carried to the

length of giving a posterior judgment
273 *priority over a previous bona fide conveyance; and ought not to be allowed to prevail at law, much less in equity, unless the law imperiously required it in all cases. This whole doctrine of relation was a fiction of the law. The president Pendleton said, in *Eppes v. Randolph*, that a legal fiction, contrived to support justice, is never to be permitted to do an injury to a third person. So, in 18 Vin. Abr. Relation, K. pl. 4, p. 293, it is laid down, as a general rule, that relation shall not do a wrong to strangers. The only date to the judgment-roll in England being the first day of the term; and thus every judgment of the term having the same date, namely, the first day; the reason was apparent, why judgments there all related back to the first day of the term, the record, in general, shewing no other date. But this was only the general rule; for if there be any thing on the judgment-roll, as a memorandum or the like, which shews the true date, the principle of relation which dates the judgment from the first day of the term, is not allowed, per Holt, C. J., 3 Salk. 212; *Wynne v. Wynne*, 1 Wils. 39; *Swann v. Broome*, 3 Burr. 1595. The general principle, then, of the relation of all judgments to the first day of the term, they said, could not justly obtain in Virginia. For the reason of the general principle in England, was, that there, the whole term, in intendment of law, is but one day, and the record shews but one date, the first day of the term; so that to hold all the judgments of the term as judgments of the first day, is consistent with and required by the record. But this reason would not hold in Virginia, where, by positive provision of the law, the business is arranged for several days of the term, and the orders and proceedings of each day are drawn up and signed by the judge; where office judgments are declared to be judgments of the last day of the term at which they are confirmed; where the record shews the precise date of every judgment and proceeding; where the law recognizes, and the record shews, a first and a last day and intermediate days of the term: where, consequently, to intend that every judgment of the term is a judgment of the first day of it, would contradict the record. They referred to the case of *The Mutual Assurance Society v. Stanard*, 4 Munf. 539, in which a judgment was held to relate to the first day of the term; but they said the point did not appear to have

been argued there, and ought not, therefore, to be considered as settled by that adjudication.

And, if this doctrine of relation ought to be allowed to prevail at law, in this country, where the reason on which it was founded in England never existed, yet, they contended, it ought not to obtain in equity. *Anon. 2 Eq. Ca. Abr. 684, pl. 5.* The rule was certainly a very harsh one, and very unjust in its operation, if it could be made to deprive a fair purchaser for valuable consideration actually paid, of the property he has bought.

3dly, That, supposing Walker's judgments related back to the first day of the term, overreached the two deeds of the 28th February 1821, under which Mrs. Coutts claimed, and constituted a lien on the subject; a lien resulting from the liability of the subject to extent on an elegit; then Walker's proper remedy was to take out his elegit, and extend the property; and as he had thus a complete remedy at law, the court of chancery had no jurisdiction of the case. There was no allegation that the profits would have been insufficient to pay the debt.

4thly, They suggested, that so far as the deed of trust of the 28th February 1821, was intended to indemnify Mrs. Coutts for her suretyship for P. Coutts to Burton, who was a judgment creditor, she ought to be placed in the place of Burton, and if his judgment was prior to those of Walker, she ought at least to be allowed a priority over Walker, to the extent of the debt due to Burton.

5thly, They said the decree was, in one respect, certainly erroneous: that the chancellor ought to have directed an inquiry to ascertain, whether the trusts created by the marriage settlement of 1799, had been all executed, and the amount due

Mrs. Coutts on account of her annuity; *and if it was found proper to decree any sale of the subject at all, he should have directed the sale of so much thereof as would suffice to satisfy Walker's demand, instead of selling the whole of P. Coutts's interest. And the chancellor should have subjected the property mortgaged by the deed of trust to the satisfaction of Walker's claims, before he touched that conveyed by the absolute deed to Mrs. Coutts.

W. F. Wickham and Bacchus for the appellee, agreed that P. Coutts's interest in the subject was only an equitable estate, and such an equity as was not liable to extent under an elegit. But, they said, a judgment creditor acquires a lien in equity on the equitable estate of the debtor, as he acquires a lien at law on a legal estate held by his debtor. *Sugd. law vend. ch. 9, § 5, p. 337; Haleys v. Williams, 1 Leigh, 140.* And this consideration alone was sufficient to sustain the jurisdiction of the court.

As to the question, Whether in this country a judgment should be held to relate back to the first day of the term at which it was rendered? They said, the affirmative was held by this court, in the case of *The Mutual Assurance Society v. Stanard, and*

could hardly have passed without consideration. It is a settled principle of the common law. 4 Com. Dig. Execution, D. 1, p. 246. In *Wynne v. Wynne, 1 Wils. 39*, the rule was stated in the argument, with the reason of it: "the general intendment of the law is, that every judgment has relation to the first day of the term; the reason is, because the court cannot determine every suitor's case in one day." The principle, in truth, is necessary to place the suitors on a fair footing of equality; in other words, to the administration of equal justice. This reason holds here, as well as in England, and in equity as well as at law. Neither can any good reason be given for the distinction suggested by the counsel for the appellant, that, although in a court of law, a judgment shall relate back to the first day of the term, and give a lien from

that date on a legal estate in 276 *lands held by the debtor; yet, in equity, the judgment shall have no such relation, and its lien on the equitable estate of the debtor shall take date only from the day of the term when the judgment was rendered. If such a distinction should be allowed, and several creditors should recover judgments against the same debtor, at the same term, they would be entitled in equity (though equity always favours of quality) to satisfaction out of their debtor's estate, in the order of their judgments; that is, according to the accidental arrangement of their causes for trial.

GREEN, J. The principal question is, Whether Walker's judgments overreached the deeds under which the appellant claims? This precise question was determined in the affirmative in *The Mutual Assurance Society v. Stanard*; but it is said, that, in that case, the point passed sub silentio, and without discussion; and that, although at the common law, the whole term was considered as but one day, and all the judgments therein related to the first day thereof, and overreached all intermediate conveyances of and charges upon the debtor's lands; yet that was because the time when the judgment was actually rendered, never appeared on the record, all being enrolled as of the term generally, or as of the first day of the term: that in consequence of our statutes, requiring that the proceedings of all our courts shall be signed by the presiding judge, either daily at the adjournment of the court, or the next morning at its sitting, and that all office judgments, not set aside during the term, shall be entered as judgments of the last day of the term, the actual time of the entering of every judgment necessarily appears on the record, and consequently takes away the foundation of that rule of the common law. This general principle of the common law, like many others, is of such remote antiquity, and so long recognized without dispute, that the reasons and policy on which it was founded, are, in a great degree, left to conjecture. One reason is assigned arguendo in the case of *Wynne v. Wynne*, cited at the bar: that all the suitors 277 whose cases are in such a *situation as to entitle them to a judgment on the first day of the court, ought to be in the same situation, and none to have any

advantage over another, and as it is impossible for the court to give judgment in all such cases in one day, the only means of putting them upon a footing of equality, is to refer all given in the same term to the first day, and give them the same effect as if they were really so. Another reason may have been to prevent debtors from withdrawing their property from the effect of judgments against them, by alienations made after it was known that in the course of the term a judgment would pass. Whatever was the foundation of the rule, it operated uniformly as between different creditors, and the creditors of and purchasers from the debtor, without any exception, so far as I have been able to discover, until the case of purchasers was provided for by the statute 29 Car. 2, Ch. 3, § 14, which required, that the true date of all judgments should be noted on the margin of the roll, and provided that they should bind, as to purchasers, only from such date. Before that statute, judgments confessed in vacation, under powers of attorney previously given for that purpose, related to the first day of the preceding term, and overreached intermediate alienations. To remedy this mischief, of allowing judgments confessed upon powers of attorney, when no previous suit was depending, to overreach intermediate alienations, was the chief object of the provision of the statute on that subject, as appears by its preamble. An attempt was made to remedy this mischief, partially, before the statute, by the power of the court, in an anonymous case in Sid. 222, in which a judgment, entered in vacation, upon a warrant of attorney given in vacation, was set aside, because, relating to the first day of the preceding term, it would be a great danger to purchasers; although it was insisted, that it might be held to be good against the party, and void as to purchasers, which was denied, and the judgment was set aside, because if it remained and bound the party, it must also bind purchasers from him. The courts in

278 England, always had the *means of ascertaining the dates of all proceedings in the suits depending in them, as appears from the frequent questions which have been made as to the effect of those proceedings. Thus, a statute acknowledged the 22d January, after the first day of the term, was overreached by a judgment on the 23rd. *Standford v. Cooper*, Het. 72; *Cro. Car.* 102; *Hutt.* 95; *Garrard v. Norris*, Latch. 53. So, in *Jenk.* 250, cited 18 Vin. Abr. *Relation*, D. pl. 3, p. 293, a case is stated, where a fine levied after a statute acknowledged in the same term, overreached the statute. But cases might occur, in which judgments might be rendered during a term, which could not by possibility relate to the first day; as where it appears, that the plaintiff's case was not in a condition for a judgment on the first day, if the court had been prepared to hear it, and some further proceeding was indispensably necessary to mature his case for judgment. As, in the case of a common recovery, the præcipe being returned to the first day of the term, and the tenant appearing and vouching to warranty, and a summons ad

warrantizandum awarded returnable to a future day in the term; if the vouchee die before the return day, the recovery is void; *Wynne v. Wynne*, 1 Wils. 42. Or, if the return day be Sunday, which is not dies juridicus, and the vouchee dies on that day, and a judgment is afterwards given, it is void, because no judgment could lawfully be given on Sunday. But if the return day had been a juridical day, upon which a valid judgment could have been given, the subsequent judgment would have related to the return (essoign) day, and been good, notwithstanding the death of the vouchee on the return day; *Swann v. Broome*, 3 Burr. 1596. In these cases, there was an impossibility that the judgments should have been given on the first day of the term, the vouchees not appearing gratis, and upon that impossibility the judgments turned. *Tidd's prec.* 376. These are the only adjudged cases I have met with, in which exceptions have been allowed to the general rule; and they are founded upon obviously good reasons, that might

279 very well apply to all cases, in which it appeared that the plaintiff's case could not be matured for judgment on the first day of the term. There is a dictum of lord Holt in 3 Salk. 212, repeated by counsel arguendo, and admitted by the court, in *Miller v. Bradley*, 8 Mod. 190, that the relation does not exist, if there is a memorandum to the contrary; as where there is a continuance of the cause until another day in the same term. But the occasion or circumstances, under which this dictum fell from lord Holt, or the purpose to which it was applied, is not stated by Salkeld. It is hardly sufficient to overturn the common law doctrine, applied particularly to the lien of judgments, that the whole term is in law but one day, and that the first day.

Our legislature, in incorporating into our statutes, such of the English statutes as it thought fit to adopt, and abrogating all others, has omitted the provision of the statute 29 Car. 2, in respect to the effect of judgments as to purchasers, probably for this reason, that the chief mischief intended to be remedied by it, the confession of judgments upon warrants of attorney when no previous suit was depending, could not exist here, because our statutes had long prohibited such judgments.

Our statutes directing the daily proceedings of the courts to be signed by the presiding judge or justice, declare the purpose of that requisition to be, to prevent errors in entering up judgments, and can hardly have intended to abrogate, incidentally, the rule of the common law, which considers the whole term as one day. I think, we ought to adhere to the decision in *The Mutual Assurance Society v. Stanard*.

The interests of P. Coutts, and of the purchasers from him claiming under the deeds of the 28th February 1821, were purely equitable, the legal title being in the trustee under the marriage settlement of 1799, who held it upon such terms, for the use of the appellant and the others interested in the property, that his right to retain the possession and controul, and to receive the profits of the property, necessarily continued, until the proportions of the per-

280 sons *entitled thereto, after the death of the grantor, were ascertained, and their due shares of the charge of the annuity payable to the appellant, were also ascertained, and properly charged upon their respective proportions of the property. This was not such a trust as could be taken under our statute subjecting trusts to legal executions; 1 Rev. Code, ch. 99, § 30, p. 370. That was taken from a similar provision in the statute of frauds of 29 Car. 2, but is more extensive in its operation, including trusts of personal as well as real property, whilst the english statute only embraces trusts of real property; and our statute binding the trusts to all intents and purposes, as if they were legal estates, from the date of the judgment, whilst the english statute bound them only from the date of the execution. *Hunt v. Coles*, 1 Com. Rep. 226. But in respect to the quality of the estate there is no difference between the effect of the statutes; and in England, their statute has been held not to extend to an equity of redemption. *Plucknet v. Kirk*, 1 Vern. 411; *Sawley v. Gower*, 2 Id. 61; *Plunket v. Pen-son*, 2 Atk. 290, Sudg. law vend. 337, nor to a trust to sell and pay debts, Sudg. 339, and, a fortiori, not to such a trust as this, not for the debtor only, but for him and another entitled paramount to him.

But although this equity of P. Coutts could not be taken in execution at law, it was, upon the general principles of a court of equity, bound in equity, as it would have been bound at law, if it had been a legal title; and the judgment creditor has a right to insist upon the execution of the trust for the satisfaction of his judgments, precisely as the debtor would have had a right to have it executed for his own benefit, if there had been no judgment. Thus a judgment creditor has a right to redeem a mortgage, or any other incumbrance. And amongst incumbrancers, where all having nothing but equities, and none the legal title, their equities being equal, they are entitled to satisfaction according to the priority of their incumbrances in point of time, upon the maxim *qui prior est in tempore, potior est in jure*. *Churchill* 281 *v. Grove*, Nels. *Ch. Rep. 89; 1 Ch. Ca. 35; 2 Ch. Rep. 180; *Mackreath v. Symmonds*, 15 Ves. 353; *Haleys v. Williams*, 1 Leigh, 140.

It only remains to inquire, whether, admitting that judgments relate to the first day of the term, and overreach intermediate conveyances at law, in cases where they can be executed without the aid of a court of equity, the same rule ought to be applied to the case of a judgment creditor, who is under the necessity of resorting to a court of equity for its aid? It is said, that relations are not favoured in equity, and never allowed to operate to the prejudice of third persons. It is true, that fictions of law operating to the prejudice of third persons, are less favoured in courts of equity than of law; yet the same maxim, that relations ought not in general to be allowed to prejudice third persons, prevails at law, but it was never applied there to restrain the operation of a judgment upon the debtor's property, in favour of a pur-

chaser, until that was done by statute. And a court of equity, considering a judgment as operating a lien in equity upon the equitable rights of the debtor, as it would operate upon them at law if they were legal, seems to have followed the law in all its consequences; unless in cases of purchasers of the equity together with the legal estate, without notice of the judgment; in which case, the equity being equal, and the purchaser having the advantage of the legal title, a court of equity leaves the parties to their legal rights. I think the judgment overreached the conveyances in equity, as they would at law, if the estate of P. Coutts in the property in question, had been legal.

But that did not authorise the court to sell P. Coutts's interest in the property, out and out, subject to the annuity, as was directed by the chancellor's decree in this case. It is true, that there being two contemporary judgments, the whole of his interest was bound; a moiety by each: and, if there had been a previous mortgage or other incumbrance, under which the creditors entitled to them could have had the property sold, the appellee could have 282 insisted upon such sale, *and the satisfaction of the prior incumbrances out of the proceeds, and of his judgment out of the surplus, that being the effect of his right to redeem the prior incumbrances. But the annuity charged in this case, upon the property, not only did not charge it so as to subject it to sale, being payable out of the profits of the property only, but was in its nature irredeemable, for the annuitant could not be compelled to take a gross sum in lieu of the annuity. The only course, therefore, left for the court, was to decree that the trustee M'Craw, or a receiver appointed by the court, if that should appear to be proper, should take possession of the whole property, and receive the rents and profits thereof, and out of the net proceeds, first pay Mrs. Coutts her annuity of 500 dollars as it shall accrue, and the arrears thereof if any; next pay whatever may be found justly due to the trustee M'Craw, if any thing, for his fees, commissions and necessary expenditures as trustee under the marriage settlement of 1799, not by force of the deed of trust of the 28th February 1821, but of his original rights under the deed of 1799; then, dividing the surplus according to the rights of the parties entitled under the deed of 1799, pay the proportion thereof ascertained to belong to P. Coutts, to the appellee Walker, from time to time, until his judgments with interest and costs, and his costs in this suit, shall be fully satisfied; and, lastly, the residue to the parties who may be entitled thereto. And to this end, all persons entitled to claim any interest in the property under the deed of 1799, should be made parties.

In the deed of trust for the benefit of the appellant, one of the purposes is stated to be, to indemnify her against a bond executed by her with P. Coutts, and as his surety, to Burton, for the amount of an execution of ca. sa. in his favour against P. Coutts, and which had been executed. And it is suggested that the lien of the decree upon which the ca. sa. issued, and which had precedence of Walker's judgments,

should be considered as still subsisting as to her, and that she should, by substitution to Burton's rights, have the 283 *benefit of it as against the appellee. But no such claim is set up in the bill; and if it were, I do not think it could be supported. The very act by which she became bound as surety, destroyed, and was intended to destroy, the lien of the decree, and from that moment the plaintiff could take no further execution upon it, or enforce it in any other way. It is like the case of a surety engaging as such, upon condition of the creditor's releasing a lien upon the debtor's property, and such a release executed contemporarily with the instrument by which the surety becomes bound. This is not at all like the case of *Fox v. Rootes* (decided in this court, Dec. 15, 1828, MS). There a ca. sa. was executed upon a decree against an administrator, who swore out of jail surrendering nothing: the surety in the administration bond paid the debt, and procured an assignment of the decree, and was substituted to the original lien of the decree against other creditors, who had a deed of trust of a subsequent date upon the debtor's land, before he swore out, but that very deed of trust provided for the satisfaction of the decree, together with other debts: and the court held, that the decree creditor ought not to lose his original preference over the deed of trust, by his unavailing effort to procure satisfaction out of other property of the debtor, and thus to benefit the other creditors provided for by that deed. No such reason exists in this case, for reviving in equity, the lien of a judgment or decree extinct at law, and barred by matter of record, and that at the instance and with the privity of the surety, and the intended consequence of the very act of becoming surety.

284 *Foreman v. Loyd and Others.

June, 1830.

Case Overruled.—The question in *Jackson v. Helskell*, 1 Leigh 257, reconsidered in a full court, and decided contrary to the decision in that case.

Ca. Sa.—Elegit—Priority of Liens.*—Case at Bar.—Several creditors recover judgments against N. and sue out writs of ca. sa. upon which he is taken and charged in execution: then F. recovers judgment against the same debtor, and sues out an elegit, on which his lands are extended, and a moiety delivered to F. and then the debtor is regularly discharged from custody under the writs of ca. sa. as an insolvent debtor, putting into his schedule the whole of the lands which had been extended under F.'s elegit: HELD, the lien of the writs of ca. sa. executed, given by the statute 1 Rev. Code, ch. 134, § 10, does not overreach and avoid the extent under F.'s elegit.

In the circuit court of Berkeley, at May term 1821, Loyd recovered three judgments against Nadenbousch, upon which he sued out writs of *capias ad satisfaciendum* in July following, and Nadenbousch was taken and held in custody under them. The Bank of the Valley recovered a judgment against

the same debtor, at the August term of the county court of Berkeley, and immediately sued out a ca. sa. which was served upon him. And, at the October term of the circuit court of Berkeley, The Bank of Conococheague recovered a judgment against him, and sued out a ca. sa. in November following, which was likewise served upon him. Afterwards, at May term 1823 of the same circuit court, Foreman recovered a judgment against Nadenbousch; and, in June following, he sued out an elegit thereupon, on which a moiety of a house and lot in Martinsburg was extended and delivered to Foreman. Nadenbousch had remained in custody from the time he was arrested at the suit of Loyd, till the execution of Foreman's elegit, and was then in custody, charged in execution at the suit of Loyd, of The Bank of the Valley, and of The Bank of Conococheague. And in July 1824, while he yet remained in custody, he confessed a judgment (as it seemed) to Janney, upon which he was prayed in custody and charged in execution; whereupon he delivered in a schedule of his effects, and was

regularly discharged as an insolvent 285 debtor. The house and *lot, which had been extended on Foreman's elegit, was mentioned in his schedule, without any reference to Foreman's interest therein. The sheriff of Berkeley, claiming the moiety of the house and lot, extended in Foreman's elegit, as part of Nadenbousch's estate, subject to the claims of the creditors at whose suit the debtor had been held in execution, at the instance of the ca. sa. creditors, proceeded to advertise the whole tenement for sale, to satisfy the debts due them.

Foreman exhibited his bill in the superior court of chancery of Winchester, stating the facts, claiming priority over the ca. sa. creditors, and praying an injunction to restrain the sheriff from selling the moiety of the house and lot which he claimed and held as tenant by elegit. And the injunction was awarded, on the ground that the case presented a question of novelty and difficulty, which it was important to settle, in order to prevent the sacrifice of the property and loss to all parties concerned, which might result from the sale of a doubtful title. But the chancellor, afterwards, holding that Foreman's elegit, and the extent under it, gave him no rights, as against Loyd and the other ca. sa. creditors, at whose suit Nadenbousch had been previously taken and was then held and charged in execution, dissolved the injunction. Foreman appealed to this court.

The case presented the same question, which was decided, by a court consisting of only three judges, in *Jackson v. Heiskell*, 1 Leigh, 257, as to the construction and effect of the 10th section of the statute concerning executions, introduced at the late revision, 1 Rev. Code, ch. 134, which provides, "That every sale, conveyance and transfer of any lands or tenements, made by any person charged in execution for any debt or damages, shall be absolutely null and void, as to the creditor or creditors at whose suit he is so charged in execution, unless such sale, transfer or conveyance be absolute and bona fide, and be made for the payment of the

*Ca. Sa.—Elegit—Priority of Liens.—As overruling *Jackson v. Heiskell*, 1 Leigh 257, the principal case is cited in *Rogers v. Marshall*, 4 Leigh 432; *Evans v. Greenhow*, 15 Gratt. 159; *Charron v. Boswell*, 18 Gratt. 226. In this last case, it is admitted that the principal case settles the law as to the question therein discussed.

The principal case was also cited in *Findlay v. Tomcra*, 2 Rob. 877, 880; *Erskine v. Staley*, 12 Leigh 426, and distinguished in *Charron v. Boswell*, 18 Gratt. 226.

debt land damages due to such creditor or creditors, and the proceeds of such sale, conveyance or transfer, *be paid or secured to be paid within a reasonable time to such creditor or creditors: and that all executions of *capias ad satisfaciendum*, levied after the commencement of this act, shall bind the real estate of the defendant from the time when they shall be levied."

The question now came before a full court; and Leigh for the appellant, and Johnson for the appellees, referring to their respective arguments on the point, reported in *Jackson v. Heiskell*, submitted it without farther discussion.

CARR, J. This case brings under review the decision in *Jackson v. Heiskell*, as to the extent of the lien given to a *capias ad satisfaciendum* executed, by the 10th section of the revised statute of executions of 1819. The court decided in that case, that the provision contained in that new section of the statute, was not restricted merely to settling priorities between ca. sa. creditors, but was general in its operation: in so much, that if A. levy a ca. sa. on B. and while he is in execution under it, C. gets a judgment against him, and extends his land, and then B. is discharged as an insolvent debtor; the lien of A.'s ca. sa. overreaches C.'s elegit, and takes the land. But that case being decided by a court of three judges, and the question being new and important, we declared that we should be willing to hear it reargued before a full court, if any subsequent case should bring it up. In the case now before us, the point was not re-argued; but we were referred to the former argument, now in print; and to a more abundant source of light we could not have been referred, for it is an argument which exhausts the subject. I have again read it, both in the printed form, and in my notes, and have re-examined my former opinion, with my best care, and with the advantage of conferring with my brethren, and hearing their opinions: still I have found nothing to change, in the view before taken. The law, however harsh, however unwise, is, to my understanding, expressed in terms too

plain to be changed by *construction, or judicial action in any form. I must, therefore, adhere to my former opinion on the question, to which I refer.

GREEN, J. This case presents precisely the same question, in respect to the lien of an executed ca. sa. upon the lands of the debtor, which was lately decided in a court of three judges; and it is peculiarly fit for a reconsideration in a full court. But, upon reconsideration, my opinion remains unchanged, and I have but little to add to the observations I formerly made on the question.

The main object of the new section, introduced into our statute of executions at the late revision, was, obviously, to secure the property of the debtor for the satisfaction of the creditor at whose suit he was in execution; a preference certainly not unjust in respect to subsequent judgment creditors, who, if no ca. sa., had been executed, would have been postponed. And the only question is, Whether the provision was in-

tended to give this preference to the ca. sa. creditors, only as against the alienations of the debtor, or as to all others who had not acquired a right of some sort in the debtor's property, anterior to the execution of the ca. sa.? The declaration at the end of the section, as to the binding force of a ca. sa. executed, is in its terms unlimited, and would have effected the object in both its branches, without any thing more; overreaching not only all alienations of the debtor, made after the service of the ca. sa. and all judgments against him subsequent to the same period, and giving priority to the creditors at whose suit he was in execution, according to the dates of the service of their respective executions. It is, therefore, difficult, and, indeed, impossible, to ascertain for what purpose the previous provision of that section was introduced: for if the effect of the ca. sa. was frustrated by any means (the death or escape of the debtor) that provision would not in any degree strengthen the rights of the creditors, since they would have been

remitted to the original lien of their judgments, precisely as *if the writs of ca. sa. had never been executed.

If, on the other hand, the ca. sa. was consummated by the debtor's taking the oath of an insolvent, the last provision of the section would effect every thing embraced in the former, and more; as it would determine the priorities among the creditors, which the former part of the section would not. If we say, that it was the whole purpose of the last clause of the section, to determine those priorities, then, in effect, we frustrate intirely the design of the whole section; and the debtor will be enabled to give a preference to his creditors, other than those at whose suit he is in execution, to the whole extent of this property, not indeed by direct conveyances, but by confessing judgments to them, and thus enabling them to take his whole property in execution, to the exclusion of those creditors at whose suit he is in custody; and this, in opposition both to the letter and spirit of the statute. How it happened, that this new section of the statute of executions, terminated with a provision which rendered all that preceded it nugatory, we cannot know. I conjecture, however, that it was introduced as an amendment in the senate, with a view to extend the operation of the clause, according to the literal import of the terms of the amendment, without adverting to its effect upon the previous provisions.

COALTER, J. In construing a remedial statute, the rule is to see how the law stood before, then what was the mischief, and, finally, what remedy has been enacted.

At common law, the execution of a ca. sa. was a satisfaction of the debt, unless indeed the debtor escaped, in which case, it seems, even before the statute 8 and 9 Will. 3, ch. 26, a *scire facias* lay to have execution against him. 2 Bac. Abr. Escape, C. p. 515, and the cases there cited. It was intirely reasonable, that this act of the debtor should not deprive the plaintiff of his remedy. But if he died in jail, the remedy was at an end, until it was provided,

by stat. 21, Jac. 1, ch. 24, that, in that case, a new execution *might go

against the lands, goods and chattels, in the same way as if he had never been taken in execution, provided that such execution against the lands shall not extend to charge any lands, which shall, at any time after the judgment, be sold bona fide for the payment of any of his creditors, and the money paid or secured to be paid to any of his creditors, with their privity and consent. A similar provision was made here, by act of 1748, ch. 12, § 3, 4, 5 Hen. stat. at large, 531, with this difference, that in the proviso, the subsequent sale and conveyance which are to be protected, are to be made bona fide for the payment of any of his creditors at whose suit he shall be in execution, and the money paid or secured to be paid to any such creditors, with their privity. This was re-enacted, by act of 1792, (edi. of 1794, ch. 5, § 7, 8,) and forms the 8th and 9th sections of the revised statute of executions of 1819. We have no provision similar to that of 8 and 9 Will 3. But, I presume, the common law rule, existing before that statute, would be fortified here, by the policy which runs through all our acts, viz. to continue to give executions until complete satisfaction is made. Even when a party, so far from escaping, surrenders all his estate, execution may afterwards be obtained, in case he shall again acquire property. So, too, when he dies in prison. Besides, the sheriff here, is not liable except for a voluntary or negligent escape. It would be out of the question, then, to suppose, that a tortious escape should prejudice the creditor, or that a voluntary one should deprive him of all remedy except against the sheriff, who may be insolvent. I take it, then, that either where the debtor escapes, or dies in jail, the plaintiff may have any new execution which he could have had if the ca. sa. had never been executed. If the debtor, before he escapes, has sold his lands, to pay his creditor at whose suit he is in execution, which the creditor has assented to and received the money; of course, such purchase would be protected, even without a provision by law similar to that "provided in the case of his dying in jail. 290 It would be, in either case, a sale, in fact, by the creditor.

Thus stood the law, as it appears to me, when the legislature took up the subject in the year 1819. The mischief which existed, and was intended to be provided against, was this: the debtor might sell his lands for their value; and might prefer to remain in the prison bounds or in jail, until he had spent the money, and then obtain a discharge as an insolvent debtor. In this case, if he lived to be so discharged, and did not escape from jail, the creditor would be deprived of his original lien by the judgment on his lands. The object of the 10th section, was to prevent this. By that section, every sale, conveyance and transfer of any lands or tenements made by any person charged in execution, &c. shall be null and void, as to the creditor or creditors at whose suit he is charged in execution, unless it be absolute and bona fide, and made for the payment of the debt or damages due to such creditor or creditors, and the proceeds be paid,

or secured to be paid, within a reasonable time, to such creditor or creditors. In this clause, the words, with their privity, used in the preceding section, are dropped. It may be, that the legislature intended, that a debtor, intending to take the oath of insolvency, might be able to make a better sale, especially on a reasonable credit, than could be made by the sheriff; and if he did this, bona fide, and secured the proceeds to the creditors, so as to pay more of his debts, than by a sale made by the sheriff for cash, subject too, to his commissions, he might do so, without consent of the creditors. But, unless done in this way, the sale, it is said, is void, and the title to the property would pass to and vest in the sheriff, whether it was put into the schedule or not, in the same way, as though no sale had been made. But, if the debtor had sold before he was charged in execution though after the judgment, suing out a ca. sa. being (except so far as this statute provides) an abandonment forever of the creditor's right to charge the land, in case the debtor should not die or escape 291 (as before *mentioned) but should take the oath of insolvency, such intermediate sale (it is said, and I have no doubt) would stand good.

But there is also another case, in which, it is said, the creditor cannot, under this clause, affect his debtor's lands, though not aliened by him: the case of a subsequent judgment creditor taking an elegit, and having the lands extended subsequent to the execution of the ca. sa. It is contended, that, in such case, the ca. sa. creditor, or the sheriff for him, can only take the other moiety, and the moiety extended subject to the extent. There is no doubt, I believe, that this would be the case, if the extent was before ca. sa. levied. Thus, if A. recovers a judgment against B. and afterwards C. recovers a judgment against him, and has his lands extended; and then A. sues his ca. sa. which is executed, and B. swears out; the schedule will only convey to the sheriff the moiety that is unextended, and the other moiety subject to the extent. But if B. dies in jail, or escapes, then A. can resort to his elegit, and will have half the land extended; and if, in doing this, he necessarily interferes with C. he will only be displaced until A. receives his debt, and will then hold until his is paid also. This, it seems to me, would be the inevitable consequence, because the last clause of the section, which declares that all executions of ca. sa. shall bind the real estate of the defendant from the time they shall be levied, could not have the effect to alter the course. This, I believe, is not contended for by any one. But, if A. had levied his execution of ca. sa. before C. had obtained his judgment, and extended the lands; then, if B. the debtor, had either escaped or died in prison, A. could resort to his elegit as aforesaid, and, in that way, no doubt he could affect C.; but, it is said, if B. is discharged as an insolvent, the schedule will convey to the sheriff the whole land clear of C's tenancy by elegit, and the sheriff must sell the whole as though no such extent had taken place.

This, I presume, no one will contend could

be done under the first member of the section. That is intended, according to its words, merely to avoid conveyances by the debtor, so as to obviate the mischief above noticed. It says not a word about avoiding liens created altogether by law. If that had been the object, is it to be supposed, that, when the debtor died in jail, or escaped, they would only give the prior judgment creditor an *elegit*, which at most could only displace the subsequent judgment creditor for a time, and frequently not at all, the other moiety being still there, and subject to be extended, but that when the debtor swore out, the *ca. sa.* creditor would be permitted to sell the whole, and forever disappoint the other creditor? His want of power to do this, it seems to me, never could have been considered by the legislature as an evil; and, therefore, there is no provision in the first member of the section in relation to such a case. Does the last member of the section necessarily produce this effect?

This, as it seems to me, would be to construe the first member as something in the nature of a preamble, and the second as the enacting clause, extending beyond the principal mischief recited in the preamble. Had the legislature intended by that clause, that liens created by law, as well as sales &c. made by the party, should be avoided, I think it would not only have used more appropriate and explicit words, but would have made some provision for the subsequent judgment creditor, who is thus put in a situation so much worse than he would have stood, had the prior creditor taken his *elegit* in the first instance. There would have been some provision to give him the residue of the purchase money; so as to place him at least in as good a situation as though he also had sued a *ca. sa.* To give the law the construction contended for, seems to me not only to hold out a premium to creditors to imprison their debtors, but to impose a penalty on those who will not do so. This is precisely the reverse of the common law. Its original rigour against a creditor suing out a *ca. sa.* has been relaxed in the cases above noticed, and still further by the provisions in the first member of the section: but, surely, there was no mischief which required the legislature to go farther: and if the latter member of the sentence can receive a construction, which will satisfy its terms, without producing such consequences, I think we ought to give it.

It seems to me, that it is a mistake to suppose, that this member of the section was intended to create a lien in favour of the creditor, on the land. Every man who took a debtor in execution, had, *ipso facto*, and before this act, so far a lien on his land, as well as personal estate, that if he conveyed them in any way, fraudulently, or otherwise contrary to law, so as unlawfully to defeat the creditor, the property, though not in the schedule, passed to the sheriff for the benefit of the creditor. Fraudulent conveyances, for instance, being void as to the creditor, the title accrued to the sheriff. So here, when the statute avoids conveyances by the first member of

the section, it was unnecessary to go farther, in order to vest the title in the sheriff for the benefit to the creditor or creditors. So it was as to personal property sold, however *bona fide*, after a *fi. fa.* delivered to the sheriff. It is the declaration of the law, that the sale is void, which gives the right to the creditor. Whether the last member of the section, then, was intended merely to declare the time, after which sales made by debtors in execution should be void, so as to remove any doubt which might exist on that subject under the first member, or to establish a priority, unknown before, between creditors, where their debtor swore out, I do not think it material, nor is it proper, perhaps, to decide at this time, inasmuch as if it was intended either for the one or the other, or both, I think the clause in question merely related to that kind of lien or disability, which was created by the first member of the section.

The question as to the preference between the *ca. sa.* creditors is not before us. If it was, it might be said, that the debtor whose sale was made under the 9th section, although formerly it would be protected, if made for the benefit of any of his creditors, would not now be protected, if made for the benefit of any of them except in the order of priority now insisted on; and also, that although formerly (and under precisely the same words as are now found in the statute) when a debtor swore out, all the creditors shared *pro rata*, they should now be paid according to priority; and that even similar words in the clause under consideration, which protects a sale made for the payment of the debt due the creditor or creditors, and paid or secured to be paid to him or them, shall be exercised subordinate to the priorities supposed to be established by the latter clause of this section. That may, however, have been its intention. All I mean to say at present, is, that I do not think it necessary or proper to decide that point.

The section says, that all executions of *ca. sa.* shall bind the real estate of the defendant from the time when they shall be levied. It is not even the beginning of a new sentence. If we can, therefore, fairly construe it to mean, that they shall bind the land, because no sale can be made, after the world has notice by a *ca. sa.* levied, that the party is in custody, unless made *bona fide* to pay the creditor or creditors, it seems to me, every mischief which existed is remedied.

If it be said, that it was unnecessary to enact this clause, in order to fix the time when the disability to convey should begin, because the first part of the section declares, that every sale &c. made by any person charged in execution, means any sale made by him after he is taken in execution; still I say this may not have been considered intirely clear. Some may have doubted, whether, after execution delivered to the sheriff, though the party had not then been taken, he might not be considered, in some sense, as charged in execution, so as to be unable to convey, should he afterwards be surrendered or surrender himself in execution (something like the case of a *fi. fa.* delivered to the sheriff) and

so the legislature. *ex abundante cautela*, may have thought proper more explicitly to declare what might have been a fair inference from the preceding words; or it may have been intended also to establish the priorities supposed. Be this *as it may, however, I am not satisfied, that the legislature intended to create a lien by the *ca. sa.* so as to overreach rights acquired otherwise than as specified in the preceding member of the sentence. I can see no reason for extending it farther; no mischief to be obviated; but many which will be the consequence of such construction, evidently calling for legislative interposition: and being enabled, as it seems to me, to confine the construction as above, I think we ought to do so.

CABELL, J. The question decided by a court of three judges in *Jackson v. Heiskell*, is now presented for the consideration of a full court. The counsel who argued that case, are the same who are retained in this, and they have referred us to that argument for their full views of the subject. I was one of the judges who decided that case; and although I acquiesced, after the best consideration I could give to the subject, in the opinions delivered by the other judges, yet it is manifest, from the manner in which I expressed my assent, that my mind, even then, was not intirely free from doubt. The publication of Mr. Leigh's first volume of reports, exhibiting the able argument of the bar, on both sides, much more fully than my own brief and hasty notes had done, has enabled me to estimate their force more correctly; and I have had the benefit of a conference with the other judges who did not sit in that case. The effect of these advantages has been to convince me that I was in error; and I take pleasure in acknowledging it.

It was admitted by the judges who decided *Jackson v. Heiskell*, that the construction given to the 10th section, as to the lien of a *ca. sa.* executed, would have, in practice, a harshness of operation, which was probably not foreseen, and, therefore, not intended by the legislature. It was also admitted, that that section could apply only to those cases where debtors should be voluntarily discharged under the insolvent laws. I think the circumstance, that the section was probably intended

only to operate on such cases, affords
296 *a clue to its true construction. Before the introduction of this provision, there was no limitation to the debtor's power of alienation previous to his discharge, except that it should be an honest alienation. He might not only give a preference to one out of many creditors, at whose suit he was in execution, but he might apply the proceeds of sale to those who had not sued at all. And it was to creditors of the latter description that the preference was most frequently given. Moreover, the power of alienation by the debtors, was frequently perverted to the most fraudulent purposes. It was the object of this 10th section to remedy these evils. That section declares, "that every sale, conveyance and transfer of any lands or tenements, made by any person charged in execution for any debt or damages, shall

be absolutely null and void, as to the creditor or creditors at whose suit he is so charged in execution, unless such sale, conveyance and transfer be absolute and bona fide, and be made for the payment of the debt or damages due to such creditor or creditors, and the proceeds of such sale, conveyance and transfer, be paid, or secured to be paid within a reasonable time, to such creditor or creditors." It is obvious, that if the section had gone no farther, the debtor, although his power of alienation was much curtailed, might still have aliened for particular *ca. sa.* creditors, to the exclusion of the others; or, at least, that he might have aliened for the benefit of them all, *pari passu*. But even these were evils which the legislature determined to prevent. They determined, that whether the lands were sold by the debtor himself previous to his discharge, or by the sheriff after his discharge, the proceeds should be applied to the satisfaction of the creditors, according to the time at which their respective writs of *ca. sa.* should have been levied. They, therefore, added to that part of the 10th section, already quoted, the clause with which it is concluded, viz. "and that all executions of *capias ad satisfaciendum*, levied after the commencement of this act, shall bind the real estate of the defendant from the time when they shall be levied." I
297 think the sole *object of this declaration as to the lien of a *ca. sa.* levied, is to regulate the order in which the creditors are to be paid out of the proceeds of the sale of an insolvent debtor's lands, whether the sale be made by the debtor before his discharge, or by the sheriff afterwards. This inference seems to be irresistible, when we advert to the place and manner in which the declaration is made by the legislature: in the member of a sentence, which speaks of nothing else but of the sale of an insolvent debtor's property, and of the application of the proceeds. If the legislature had intended it to have a more general operation; if it had intended it to overreach rights acquired by act of law, it would, I think, have made it the subject of a separate and independent section. In construing a remedial statute (such as this evidently is) we are bound to construe it liberally, so as to advance the remedy, and suppress the mischief; but we are not at liberty to construe it so as to go beyond that object, and by doing so, to introduce new mischiefs which will call for new legislation to remove. In construing this section so as to overreach only the voluntary alienations of the debtor, and to apply the proceeds of a sale by the debtor or the sheriff to the payment of the different creditors according to the order of the respective levies of their executions, we remove all the evils which the legislature intended to remove. But in giving it a more extensive operation we go beyond the mischiefs which the legislature designed to remove, and we give rise to new ones which it is admitted they did not foresee, and therefore could not intend.

I am of opinion that the rights acquired by Foreman, under his *elegit*, are unaffected by the 10th section of the statute of execu-

tions; and consequently, that the order of the chancellor dissolving the injunction ought to be reversed.

BROOKE, P. Waiving the question of jurisdiction, the controversy turns on the construction of the 10th section of the statute concerning executions. In construing a statute, the first object is so

to construe it as to make it work a
298 *remedy for the mischief intended to be prevented. If all its words can be satisfied by such a construction, we need not carry them farther, however general they may be; especially, if by so doing we are met by inconveniences which we cannot be sure were overlooked by the legislature. The words in the first clause of this section, certainly do not, in terms, embrace the case before us: they make void all sales, conveyances or transfers of the lands of the debtor, after he shall be in execution by the service of a ca. sa. These terms "sales, conveyances or transfers," certainly do not embrace judgments, though if by confession with a view to defeat the object of the statute, they might be brought by construction within the mischief intended to be prevented. That mischief was, that debtors, to defeat the claims of their creditors at whose suit they were in execution, either fraudulently or bona fide as to others, sold, conveyed away, or transferred their land, the lien of the judgment of the creditor being released by suing out the ca. sa. That this was the mischief intended to be remedied, is made more manifest by the succeeding words of the section viz. "unless such sale, conveyance or transfer shall be absolute and bona fide, and be made for the payment of the debt or damages due such creditor"), thereby, I think, limiting the operation of the first member of the clause; in terms, to sales, conveyances or transfers, made by the debtor himself, and excluding involuntary judgments &c. Nor, though the words of the last clause of the section are still more general, do I think they were intended to do more than to effectuate the intention of the first clause. The terms of the last clause are, "Every execution of ca. sa. levied after the commencement of this act, shall bind the real estate of the defendant, from the time that it shall have been levied;" that is, the real estate so sold, conveyed away, or transferred, by the defendant, contrary to the provision in the first clause of the section. To carry it farther, would extend it to real estate subjected to the payment of the debts of other creditors, without any act of the debtor in execution, against
299 *which only it certainly was the object of the first clause to provide. It would carry the remedy greatly beyond the mischief, which does not consist with any sound rule of construction; especially, in a case, in which, I think, it clearly appears, that the provision in the first clause against sales &c. by the debtor, would have been ineffectual, without the aid of the last clause, empowering the officer to seize and sell the real estate sold &c. by the debtor in execution, contrary to the provision in the first.

In this view of the section, I can see

nothing to justify the opinion, that its last clause was intended to settle priorities among creditors, at whose suit the debtor was in execution. There is certainly nothing in any part of the statute, to which to refer for this construction. Though the clause may have that effect, I cannot perceive that that consideration was in the view of the legislature, and much less that it alone was the object of the clause.

I concur in the opinion, that the decree of the chancellor be reversed, and the injunction perpetuated.

Decree reversed, injunction reinstated and perpetuated &c.

300

*Thrift v. Hannah and al.

June, 1830.

Instrument of Emancipation—Ineffectual Until Full Probate Be Made*—Case at Bar.—A feme sole, owner of slaves, makes a written instrument of emancipation of them in November 1798, to take effect in futuro: this instrument is attested by two witnesses; it is partly proved by one of them, and continued for further proof, in April 1799, in the county court of Fluvanna, where the emancipator then resided: in November 1799, the emancipator, holding the persons named in her instrument of emancipation in her possession, marries T. who is ignorant of the execution of the instrument: then, T. removes with his wife to Albemarle, carrying the persons named in the instrument of emancipation with him as slaves: the wife dies in 1811; the husband continues to hold the persons in question, as his slaves: in 1819, the instrument of emancipation is fully proved by the other attesting witness, in the county court of Fluvanna; and, afterwards, the persons therein named, bring a suit against the husband, to recover their freedom: HELD, under the statute of Virginia, an instrument of emancipation is ineffectual to confer freedom, till full probat thereof be made according to law, and takes effect only from the date of the complete probat: and, as the rights of the husband, in this case, attached to the property long before full probat was made, the subsequent full probat did not divest or affect those rights or give any right to freedom.

Same—Where It May Be Proved—Case at Bar.—Semble, an instrument of emancipation being partly proved in the court of the county where the emancipator resides at the time, may be fully proved in the same county, though before full proof made, the emancipator removes to another county.

This was a suit in forma pauperis, brought by Hannah and Kate against Thrift, in the county court of Albemarle, to recover their freedom. The pleadings were in the usual form, and the issue joined on the question, whether the plaintiffs were bond or free. The parties, at the trial, agreed the facts of the case:

Rachel Magruder, on the 25th February 1796, being then a feme sole, residing in the county of Montgomery in Maryland, and holding the plaintiffs as her slaves, executed the following instrument of writing:

"To all to whom these presents shall come: Know ye, that I, Rachel Magruder, of Montgomery county and state of Maryland, for divers good causes and considerations me hereunto moving, have manumitted, enfranchised and set at lib-

***Instrument of Emancipation—Ineffectual Until Full Probate Be Made.**—To the point that an instrument of emancipation is ineffectual to confer freedom, till full probat thereof be made according to law, the principal case and *Givens v. Manns*, 6 Munf. 191, were cited in *Manns v. Givens*, 7 Leigh 710. The principal case was also cited in *Wood v. Humphreys*, 12 Gratt. 357; *Manns v. Givens*, 7 Leigh 697, 704, 706, and distinguished in *Manns v. Givens*, 7 Leigh 707, 717.

erty, and by these presents do manumit &c. one negro girl named Hannah, from and after the 1st March 1807; and all the increase whatever, male or female, issuing from her during the said time, I hereby declare to be manumitted &c. as they severally shall attain to the age of twenty-five years, both mother and children, from me, my heirs, executors and administrators, and from all persons whatsoever. In witness whereof I have hereto set my hand and seal this 25th February 1796.

Rachel Magruder, [seal]

Signed sealed and delivered
in presence of
William Smith."

This instrument of writing was, on the day of the date, acknowledged by her as her act and deed, before William Smith, a justice of the peace of the county of Montgomery, Maryland, and, the next day, admitted to record there.

At the time this instrument of emancipation was executed, there was a statute of Maryland in force, enacted in 1752, the provisions of which, so far as they affect this case, were in the following words—"Be it enacted, that it shall not be lawful for any person or persons within this province, by any verbal order, or by his, her or their last will and testament, or by any other instrument of writing in his, her or their last sickness, whereof he, she, or they shall die, to give, or grant freedom to any slave or slaves: and in any person, after the time aforesaid, shall, by any verbal order, or by his, her or their last will and testament, or by any other instrument, in his, her or their last sickness, whereof he, she or they shall die, give freedom to any slave or slaves, such order, will, or other writing, shall be void and of no effect, so far as relates to such freedom or emancipation only. And to the end, that hereafter there may be an uniform and regular manner of granting freedom to slaves, Be it likewise enacted, that where any person or persons, possessed of any slave or slaves within this province, who are or shall be of

302 healthy constitutions, and sound in mind *and body, capable by labour to procure sufficient food and raiment, with other requisite necessities of life, and not exceeding fifty years of age, and such person or persons, possessing such slave or slaves as aforesaid, and being willing and desirous to set free and manumit such slave or slaves, may by writing under his, her or their hand and seal, evidenced by two good and sufficient witnesses at least, grant to such slave or slaves, his, her or their freedom; and that any deed in writing, whereby freedom shall be given or granted to any such slave, which shall be intended to take place in futuro, shall be good to all intents, constructions and purposes whatsoever, from the time such freedom or manumission is intended to commence by the said deed or writing, so that such deed and writing be not in prejudice of creditors, and that such slave at the time such freedom or manumission shall take place or commence, be not above the age aforesaid, and be able to work and gain

a sufficient livelihood and maintenance, according to the true intent and meaning of this act; which instrument of writing shall be acknowledged before one justice of the peace of the county wherein the person or persons granting such freedom shall reside; which justice shall indorse on the back of such instrument, the time of the acknowledgment, and the party making the same, which he or they, or the parties concerned, shall cause to be entered among the records of the county court, where the person or persons granting such freedom shall reside, in six months after the date of such instrument of writing."

After the execution of the above recited instrument of emancipation, in December 1796, the legislature of Maryland passed another statute, repeating the provisions of the statute of 1752, with some alterations and additions: it enacted, "That where any person or persons, possessed of any slave or slaves within this state, who are or shall be of healthy constitutions, and sound in mind and body, capable by labour to procure to him or them sufficient food and raiment, with other requisite necessities of life, and not exceeding 303 *forty-five years of age, and such person or persons possessing such slave or slaves as aforesaid, and being willing and desirous to set free or manumit such slave or slaves, may by writing under his or their hand and seal, evidenced by two good and sufficient witnesses at least, grant such slave or slaves, his, her or their freedom; and that any deed or writing, whereby freedom shall be given or granted to any such slave, which shall be intended to take place in futuro, shall be good to all intents, constructions and purposes whatsoever, from the time that such freedom or manumission is intended to commence by the said deed or writing, so that such deed and writing be not in prejudice of creditors, and that such slave, at the time such freedom or manumission shall take place or commence, be not above the age aforesaid, and be able to work and gain a sufficient livelihood and maintenance, according to the true intent and meaning of this act; which instrument of writing shall be acknowledged before one justice of the peace of the county wherein the person or persons granting such freedom shall reside; which justice shall indorse on the back of such instrument, the time of the acknowledgment, and the party making the same, which he or they, or the parties concerned, shall cause to be entered among the records of the county court where the person or persons granting such freedom shall reside, within six months after the date of such instrument of writing; and the clerks of the respective county courts within this state, shall, immediately upon the receipt of such instrument, indorse the time of his receiving the same, and shall well and truly enrol such deed or instrument in a good and sufficient book in folio, to be regularly alphabeted in the names of both parties, and to remain in the custody of the said clerk for the time being, among the records of the respective county courts; and that the said clerk shall, on the back of every such instrument, in a full legible hand, make an

indorsement of such enrolment, and also of the folio of the books in which the same shall be enrolled, and to such instrument *set his hand, the person or persons requiring such entry paying the usual and legal fees for the same."

And in 1810, another statute of Maryland was passed, concerning servants and slaves, so much of which as affects the present case, was in the following words: "Be it enacted that any deed heretofore executed for the manumission of any slave or slaves, who by law might have been manumitted or set free by deed, and which had been acknowledged and recorded in the manner directed by the act entitled an act relating to negroes, and to repeal the acts therein mentioned, shall be valid and effectual in law, to give freedom to any such slave or slaves and their issue, although such deed of manumission or writing as aforesaid may not have been evidenced by two or more good and sufficient witnesses. And be it enacted, that a copy of any such deed of manumission or writing as aforesaid, taken from the records of the county, and duly attested under the seal of the court, shall, at all times hereafter, be deemed to all intents and purposes, good evidence to prove such deed of manumission: provided always, that nothing in this act contained, shall be so construed as to affect or destroy the right of any person, who before the passage of this act, was a bona fide purchaser of any slave or slaves, claiming his, her or their freedom, under such deed of manumission; and provided also, that notwithstanding such deed of manumission, no slave shall be entitled to his or her freedom under the provisions of this act, who has heretofore been adjudged to be a slave, by any court of law in this state."

Rachel Magruder, being still a feme sole, and having the plaintiffs in her possession, sometime between the 26th February 1796, and the 25th November 1798, removed, and brought the plaintiffs with her, to the county of Fluvanna in Virginia, where she resided, with the plaintiffs in her possession, till her intermarriage with the defendant Thrift; upon which, she and her husband removed to the county of Albemarle, carrying the plaintiffs with them, and continued to reside there, till the death of Rachel, the wife, in 1811.

305 *But, on the 25th November 1798, before her marriage with Thrift, Rachel Magruder, then residing in Fluvanna, with the plaintiffs in her possession, executed the following instrument:

"Know all men by these presents, that I, Rachel Magruder of Fluvanna county and state of Virginia, for divers good causes me thereunto moving, do set free, manumit and release from slavery, the following negroes at the periods hereafter mentioned, viz. negro Toney, one year from the date hereof; negro Pharo, one year from the date hereof; negro Hannah, eight years from the date hereof, and her future increase, males at the age of twenty-five, and females at the age of twenty-one years; negro Kate, nine years from the date hereof, and her increase, males and females, at the age of twenty-five years; and do hereby declare the said negroes named as above, as soon

as the periods as above mentioned arrive, to be free, and released from all claims against them as servants, both from all persons claiming under them, or to claim by, from or under me, as well as from myself. As witness my hand and seal this 25th November 1798.

Rachel Magruder [seal]

Teste, J. B. Magruder,
T. D. Boyd."

This last instrument of emancipation was partly proved, by one of the subscribing witnesses, in the county court of Fluvanna, at April term 1799; and at June term 1819, it was further proved by the other; and was, thereupon, admitted to record.

The plaintiffs were the same persons mentioned in the deeds of emancipation, by the names of Hannah and Kate: and they were, and always had been, sound and healthy; capable, at the institution of this suit, of maintaining themselves by their own labour; and, on the 1st March 1807, not above forty-five years of age.

306 *The marriage of Rachel Magruder with the defendant Thrift, took place the 7th November 1799; she being still in possession of the plaintiffs, and having always continued in possession of them, as before stated. Thrift held continual possession of them, from the time of his marriage till the institution of this suit. And Thrift, at the time of his marriage, had no knowledge of either of the instruments of emancipation, unless notice of them may be imputed to him, from the previous proof of the Virginia instrument, by one of the subscribing witnesses, in the county court of Fluvanna, in April 1799.

This being the agreed state of the case, the counsel for the plaintiffs moved the court to instruct the jury, that the two instruments of emancipation of February 1796 and November 1798, were both good in law, and competent to give the plaintiffs their freedom. The county court was of that opinion, and so instructed the jury; and Thrift filed exceptions to the opinion.

There was a verdict and judgment for the plaintiffs; from which Thrift appealed to the circuit court of Albemarle, which affirmed the judgment; and then he appealed to this court.

The cause was argued here, by Stanard for the appellant, and by Johnson assigned counsel by the court, for the appellees.

I. The first question was, Whether the Maryland instrument of emancipation of 1796, was duly executed and perfected to confer freedom on Hannah, according to the laws of that state? Whether the statute of Maryland of 1752, did not require, that all instruments of emancipation, as well those intended to confer freedom in future as those which conferred it presently and immediately, should not only be acknowledged before a justice of the peace and recorded, but attested by two good and sufficient witnesses at least? See *James v. Gaither*, 307 2 Har. & Johns. 176, *which was decided in 1807, and probably gave occasion to the Maryland statute of 1810.

II. Then, as to the instrument of emancipation of 1798, executed in Virginia, Stanard referred to the statute, 1 Rev.

Code, ch. 111, § 53, p. 433,* and to *Givens v. Manns*, 6 Munf. 191, and *Lewis v. Fullerton*, 1 Rand. 15, as settling the construction of the statute, that the probat is essential to the perfection and efficacy of such instruments. He remarked, that the statute does not call these instruments of emancipation deeds, but only instruments in writing: neither were they nor could they be deeds, for they were not contracts; there could be no contract between master and slave; and as there was nobody capable to receive delivery, so there could be no delivery of them. The legislature, mindful of this, had appointed the court to receive probat of instruments of emancipation; had substituted the agency of the court to perfect them by taking the proof or acknowledgment of them, in lieu of the agency of the parties in perfecting deeds by making and receiving delivery. An instrument of emancipation, then, depending for its consummation, and for all its efficacy, upon the probat, could only take effect from the probat, and was not binding on the party who made it, till the probat: he might decline or refuse to acknowledge it, or let it be proved, in court; hold it in his own possession; revoke, cancel or destroy it, at pleasure; and if, in the mean time, the rights of third persons in any way attached to the subject as property, the subsequent probat could not divest those previously vested rights. It would be most

308 strange, and of most pernicious *consequence, if these instruments of emancipation might be held up for any indefinite period of time, and then, upon being proved, should be allowed to overreach rights accrued and vested in the interval; and the vested rights too of purchasers without notice. In the present case, the property of these slaves was vested in Thrift by his marriage with Rachel Magruder in 1799, and the instrument of emancipation, under which they claimed freedom, was never proved, and therefore never of any efficacy, till 1819. It was never proved till twenty years after the marriage, and till eight years after the death of the maker of it. And as her marriage, and her death, each, annihilated her power to acknowledge or have it proved in court, so they were, each, the most effectual revocation of it imaginable. In fine, the instrument was not proved, at last, before a court of competent jurisdiction to receive the probat; for the statute requires, that the probat shall be made in the court of the county where the party resides; and this instrument was finally proved in 1819, in Fluvanna, whence the party had removed twenty years before, and thenceforth till her death resided in Albemarle.

Johnson insisted, that though the probat of such instruments was essential to

the efficacy of them to confer the right of freedom, that did not affect the question, what was the legal operation and effect of them after they were proved. It was not decided in *Givens v. Manns*, that such instruments take effect from the probat, but only that the probat must be in the county court; and *Lewis v. Fullerton* established nothing more than that a deed of emancipation executed in Ohio to operate in Virginia, must be perfected and proved according to our laws: neither of those cases touch the question in this case, which is, whether the act of emancipation, when duly proved, should take effect from the date of the probat, or from the date of its execution? The distinction attempted between deeds and instruments of emancipation, he said,

309 was too nice; there *was no policy of law that required any such rigour in regard to those instruments. In principle, they ought, like other deeds, to take effect the moment they were delivered to the party himself, or to any body else for him; the moment the maker of them put them out of his own possession, with intent to divest himself of all farther controul over them, and to have them proved according to the provisions of the statute. For, he said, the manifestation of the maker's will, was as complete by this act, as he could make it by any act. In this case, the owner of the slaves, having executed the instrument of emancipation in due form of law, delivered, or caused or allowed it to be delivered, into court, in order that it should be proved; and it was proved in part soon after it was executed: thenceforth, it was in the possession and custody of the court: she could in no manner recover possession of it: how could she revoke the act which put the instrument out of her hands, and gave it to the court? how could she cancel or destroy it? And if no express revocation of the act was possible, how could revocation be implied from her marriage? If the argument for the appellant were just, it would lead to strange consequences; it would prove, that after the owner of a female slave has executed a deed of emancipation, after he has delivered it to another to be delivered into court and proved, even after he has himself acknowledged it or had it proved, her children born between the execution and the probat of the instrument, are slaves. As to the probat being completed in Fluvanna, where it was commenced, though the party had long before removed to Albemarle, he said, if the statute required, that an instrument of emancipation, when proved by witnesses, should be proved in the court of the county where the party resides, (which he did not admit) still the proper court was that where the party resides at the date of the execution of the instrument, not of the probat: especially, when, as in this case, the probat has already been commenced, and properly commenced, it ought to be finished in the court where it was begun.

310 *CARR, J. The deed of emancipation of Hannah, executed in 1796, by Rachel Magruder, then a feme sole residing in Maryland, purports to give the slave her freedom not presently, but after some years. It was executed under a statute of

*The words of the statute are. "It shall be lawful for any person, by his or her last will and testament, or by any other instrument in writing, under his or her hand and seal, attested and proved, in the county or corporation court, by two witnesses, or acknowledged by the party in the court of the county where he or she resides, to emancipate and set free his or her slaves, or any of them: who shall thereupon be intirely and fully discharged from the performance of any contract entered into during servitude, and enjoy as full freedom as if they had been particularly named and freed by this act."—Note in Original Edition.

Maryland of 1752; a statute very darkly and clumsily penned. That statute speaks of deeds giving freedom in presenti, and deeds giving freedom in futuro; and, to my understanding, requires that the former shall be evidenced by two witnesses, but that the latter shall be good if acknowledged before a magistrate and recorded. The deed before us is so acknowledged and recorded. I, therefore, should have considered it good and valid, but that we find it decided by the court of appeals of Maryland, in *James v. Gaither*, that a deed giving future freedom, must be evidenced by two witnesses, as well as acknowledged before a magistrate, and recorded. Yielding my opinion to the construction given to this statute of Maryland by her own courts, I shall proceed to consider the next and much more important question, arising under our own laws, and affecting a numerous class of cases.

Was the county court right in its instruction to the jury, that the deed of emancipation of 1798, executed by Rachel Magruder, then a feme sole residing in Fluvanna, was good and effectual? Against the validity of this deed several objections were taken at the bar. It was insisted, that it was a nullity until it was fully proved in court: that it must take its date as a deed from the time of such final proof: that the delivery of the deed, if delivered to the witness or another, was no delivery in law, but a mere authority to have it recorded; an authority revocable by the grantor, at any moment before full proof in court; and revoked in this case, by her marriage and death before such proof was exhibited: and that the probat was not in the proper county. At common law, we know, the sealing and delivery of a deed make it binding at once on the grantor, and irrevocable by any after act of his; and this delivery may be either by word or act, and

either to the grantee or a third person; *and any thing which amounts to evidence that the act or word was meant as a delivery, will constitute one. The delivery being the perfection and consummation of the deed, throws the proof of any restriction or condition upon it, on the grantor. All this will be admitted, as to deeds between parties capable of contracting; but it was insisted, that as slaves are not so, none of these rules apply to deeds of emancipation. But do not these rules apply to deeds of gift, and may not such deeds be executed to many who have a capacity to receive deeds, though not to contract? In truth, is not every deed, as a common law instrument under seal, governed by the same rules? Does not the execution of the deed, in all cases, take from the grantor the power of revocation? When the statute gives every owner the right to emancipate his slave by instrument in writing, under his hand and seal, it describes (to my mind) a deed; and to this deed we must annex (unless the statute forbid it, which it does not) the common law incidents and attributes of deeds, with the principles which govern them. As, then, slaves may be emancipated by deed, such deed may be delivered; for a delivery is necessary to its completion, and such delivery binds the

grantor from its date; for such is the rule of the common law. It is true, this rule is so far controuled by the statute, that the deed is not effectual, unless proved by two witnesses, or acknowledged by the party in the court of the county where he resides; but when so proved or acknowledged, it is a deed from the date of its execution. And it will be remarked, that though in other cases, eight months are given, as the general period within which deeds shall be recorded, in deeds of emancipation no time is limited. It was contended at the bar, that there could be no delivery of this deed of emancipation, but to the court which received the final proof; and that, of consequence, it could not, till such probat, be consummated. But the statute itself shews that this is a mistake. It says, "the instrument may be proved in the county court by two witnesses." Now, 312 to what would they testify? *Why,

that on some prior day, they saw the grantor sign, seal and deliver the deed, or heard him acknowledge the same. The delivery, then, in all such cases, must be out of court, and prior to the probat.

It was considered (in the argument) monstrous, that a deed should thus be held back for twenty years, and when at length proved, have relation to its execution, and thus intercept rights which had grown up in the meantime. But, 1. the law has limited no time within which, if the deed be not recorded, it shall be void; and 2. this tardiness of the second witness can hardly be charged to the paupers; for on their rights it has operated most injuriously. By the deed, one of them (if entitled at all) was entitled to be free in 1806; the other in 1807: yet they remained in slavery, and the deed unproved, till 1819; and if this last witness had died, they might have lost wholly the benefit of it. By this delay in the proof, then, they had every thing to lose; the appellant, every thing to gain.

But it was said, that the decisions of this court have settled the doctrine, that the deed is a nullity until fully proved according to the statute; and *Givens v. Manns* and *Lewis v. Fullerton*, were referred to. I have examined these cases, and do not think they go so far. In *Givens v. Manns*, all the court said on the point, is this: "the court is further of opinion, that the alleged deed of emancipation (made part of the record in this bill of exceptions) not being acknowledged or proved in the court of the county or corporation, as the law directs, was not so authenticated as to make it evidence in the trial, nor ought to be received as such evidence, until it shall be proved or acknowledged before the proper court."

Here we see, the deed, so far from being treated as a nullity, expressly considered as an existing deed; not so authenticated, to be sure, as to make it evidence; but still capable of being made so, by proof in the proper court. In *Lewis v. Fullerton*, the deed of emancipation was executed in Ohio, by Rogers, styling himself a citizen of Virginia: it looked to this state for 313 its operation and effect, *but was not proved according to our laws: and the court said, "In that case, it must, to

have its effect, conform to the laws of Virginia. It is insufficient, under those laws, to effectuate emancipation, for want of a due recording in the county court, as was decided in *Givens v. Manns*, in this court." Thus we see, that in neither of those cases, was the deed pronounced null and void, but in each, the deed was treated as a deed defectively proved.

With respect to the third objection, that the deed was not proved in the proper county; the grantor resided in Fluvanna, when the deed was executed, and also when it was proved in the court of that county by one witness: and it is clear to me, that that was the proper court to receive the full proof.

Upon the whole, I am of opinion, that the instruction of the county court was right as to the Virginia deed, and that both judgments should be affirmed.

GREEN, J. But for a decision of the court of appeals of Maryland in 1807, I should have thought that the deed of emancipation, executed and recorded in that state in 1796, would have effectually emancipated the appellee Hannah, from the time appointed by the deed; there being an obvious distinction in the authentication required by the Maryland statute of 1752, for instruments giving immediate freedom, and those giving it in futuro. The statute of Maryland of 1810, repudiates the decision of the court, by confirming all instruments authenticated as this is, saving the vested rights of strangers, and those affirmed by previous adjudications: and if this case was not to be decided by a Maryland court, Hannah would necessarily prevail by force of the instrument of 1796. But, as the Maryland statute of 1810 never attached upon this case, we ought to yield to the construction given to the statute of 1752, by the supreme judicial tribunal of that state.

The case turns, then, on the effect of the instrument executed in Virginia in 1798, which the appellant insists was
314 *not duly recorded, either as to the place or time where and when it was recorded.

If this paper could be recorded any where, so as to give it effect after the marriage and death of the owner who executed it, I think the county in which she resided at the time of its execution, was the proper place in which to record it, although she no longer continued to reside there. The literal terms of the section of our statute authorising the emancipation of slaves, do not require, that the instrument of emancipation, when recorded upon the proof of witnesses, shall be proved in any particular county or corporation court. It is only when it is authenticated by the acknowledgment of the owner, that it is required to be acknowledged in the court of the county in which he resides. According to those literal terms, in the first case of proof by witnesses, it is sufficient if that be made in the court of any county or corporation of the state. But this is probably not the true construction of the statute, as it might counteract its policy in requiring the instrument to be proved or acknowledged in a court: whatever was the

object of that requisition, it will be best promoted by confining the proof or acknowledgment to the county, in which the owner resided at the time of the attestation of the witnesses, or of the acknowledgment of the owner in court; for that is the place, in which all who have any interest in the existence of the instrument, would most probably look for it; especially in the cases where the emancipation was to take effect immediately; which, indeed, were the only cases in the immediate contemplation of the legislature, as is manifest from the concluding terms of the section, "who shall thereupon be intirely and fully discharged &c." And although when the emancipation is to take effect in futuro (as in this case) which has been repeatedly held to be valid, some other rule, as to such a case, in the event of the removal of the owner, or of any one claiming under him, with the slave, to another county in the state, might be more desirable, the court cannot prescribe such a rule as it may
315 think expedient, *but must apply the rule prescribed by the statute, to all cases indiscriminately.

Did the full proof of the instrument, made after the marriage and death of its author, give it validity? Such an instrument has no effect in giving freedom, until it be proved or acknowledged, in the manner prescribed by the statute, as was held by this court in *Givens v. Manns*: and it is therefore insisted, by the appellant's counsel, that not being a contract between parties capable of contracting, and a pure emanation of the will of the owner, he may revoke it at pleasure, at any time before it shall be consummated and take effect by the proof or acknowledgment required by the statute; and that in this case, the instrument was revoked by the marriage, and especially by the death, of its author. It is not necessary to inquire, whether the party might, under such circumstances, actually revoke such an instrument with effect, since there has not been any such actual revocation, either by the original owner or her husband, after her marriage, or death; and, in the absence of any evidence of an intention to revoke it, the question is, whether the marriage or death of the owner executing the instrument, has that effect? This depends upon the common law doctrines of relation, according to which, when several acts are necessary to the consummation of any purpose, and all are done, the last act relates to the first, and the whole takes effect from the date of the original act; especially, when the object of the transaction would be frustrated by a contrary construction—ut res magis valeat quam pereat. And this being the chief object of such relations, they are generally confined to that object, and not allowed to operate to the prejudice of third persons, and not even of a party beyond the necessity of preventing the total frustration of the main purpose of the transaction. Without going at large into the cases on this subject, I refer, generally, to those cited in *Viner's title Relation*. Thus, to give only one instance, an escrow delivered upon condition, does not become the deed of the party, even as between the parties

316 *themselves, until the performance of the condition and the second delivery, and only operates from the latter period. 13 Vin. Abr. Faits, O. 3, pl. 1, p. 29. Yet if it be made by a feme sole, and she marry before the condition performed or the second delivery, or if the grantor or obligor die in that interval, the deed is valid, by relation to the first delivery as an escrow. 18 Id. Relation, E. pl. 1, 2, p. 290. I can see no distinction between those cases and that at bar, the relation being resorted to in each, for the sole purpose of giving effect to the intention of the party. And this could prejudice no stranger to the transaction, if it was not allowed to extend (as I think it ought not) to affect the creditors of or purchasers from either the wife or husband. But there is none such in this case. A husband is not a purchaser of his wife's property by the marriage: he only thereby acquires the marital rights of a husband, and takes her property as she held it, to all intents and purposes, unless something has been done in contemplation of the marriage, in fraud of those rights. In this case, there is nothing of that sort. I think the judgment should be affirmed.

CABELL, J. The requisites to an instrument of emancipation, under our statute, are, that it be "under the hand and seal" of the party making it, and that it be "attested and proved in the county or corporation court, by two witnesses, or acknowledged by the party in the court of the county or corporation, where he or she resides." It is not necessary that it should be by deed. If the legislature had intended it to be by deed, it would have been so declared, either by speaking of it expressly as a deed, or by the use of equivalent expressions. Thus we find, in the first section of the statute of conveyances, (1 Rev. Code, p. 361,) where it was meant to declare, that the title to lands shall not pass but by deed, the expressions are, as follows; "no estate of inheritance or freehold, or for a term of more than five years, in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing, *sealed and delivered." And even if the instrument of emancipation be accompanied with all the forms and requisites of a deed; be in writing, signed, sealed and delivered; yet it is manifest, that the law attaches no importance to the circumstance of its being a deed; for it would be just as effectual without being delivered as a deed, as it would be when delivered in the most solemn form. The statute nowhere calls it a deed: it speaks of it only as the instrument of emancipation.

But it is important to consider the analogy between a deed at common law, and an instrument of emancipation under the statute. A deed is a writing sealed and delivered. All these requisites, writing, sealing and delivery, are essential to give it efficacy as a deed. Although it be attended with all the requisites, except the final one, delivery, it is no deed; and the party who has signed and sealed, does not thereby impose on himself any obligation to complete it by delivery: he retains full power over the instrument: he may withhold its

delivery, or may obliterate and destroy it. He retains, moreover, full power over the subject of the instrument, and may make any other disposition thereof he may think proper. And even when a deed is completed by delivery, the delivery has no relation back, so as to give it effect from the time when it was written, or when it was signed, or even when it was sealed. It operates as a deed only from the time when it was delivered. Let us apply these principles to the case before us.

An instrument of emancipation, like a deed at common law, has many requisites; writing, signing, sealing, attestation and proof or acknowledgment in the court of the county or corporation where the party resides. Proof or acknowledgment in court is to an instrument of emancipation, what delivery is to a deed at common law. It is the final requisite, without which all others stand for nothing. This is established by *Givens v. Manna* and *Lewis v. Fullerton*. And I think it perfectly clear, on principle, that this final requisite, proof or acknowledgment before the proper court,

can no more have relation back to 318 the date of *the instrument of emancipation, than the delivery of a deed at common law, has relation back to the date of the deed; for the party has, at all times before this final act, the same power over the instrument and its subject, that the party to a writing signed and sealed but not delivered, has, at common law, over the instrument, or the subject of the instrument. He has even greater power; for, in some cases, a writing signed and sealed, but not delivered, may operate as a contract, although it may have no effect as a deed. But an instrument of emancipation, not completed by proof or acknowledgment in court, can never operate as a contract: there can be no contract between master and slave.

By the marriage of Rachel Magruder, in this case, she ceased to be owner of the slaves, which thereby became the property of her husband; and as that event happened before the proof of the instrument, and of course before it had taken effect as an instrument of emancipation, it could not take effect as such afterwards; since none but the owner of slaves can emancipate them.

The silence of the legislature, as to the time within which an instrument of emancipation may be recorded, affords a strong argument against its having relation back to any period prior to the probat. If it had intended any such relation, it would not have permitted the party to hold the instrument up to an indefinite period, to the destruction of rights intermediately acquired.

Upon the question, what is the proper court in which to record an instrument of emancipation, I give no opinion; it not being necessary to be decided in this case.

I think the county court erred in giving the instruction excepted to by the appellant.

COALTER, J., concurred in this opinion.

BROOKE, P. The construction given to the law of Maryland by the decision of the court of that state, puts the Maryland deed of emancipation out of the case. The only question, then, is as to the validity

319 of the Virginia "deed of emancipation; and that depends on the construction of our own statute authorising emancipation of slaves, and prescribing the mode.

I do not think, that, in considering this question, any light is to be borrowed from the doctrines of the common law, applicable to deeds of conveyance of property, to which the party has a perfect right, and over which he has full dominion. Such deeds are consummated by delivery alone, and they take effect from their date, unless there is something in them to the contrary. Independent of the statutory provision, an instrument of emancipation of a slave, from its nature, from the relation in which the grantor and grantee stand to each other, could confer no right, though delivered to the grantee or to some one for him: he is still a slave and incapable of receiving such right, if the grantor had the power to convey it, which is not admitted, since it is one of the highest acts of sovereignty, to elevate a slave from his degraded state to the rank of a freeman. Although it had been the practice of owners to emancipate their slaves, before the act of 1691 forbidding such emancipation except on certain conditions, that practice gave no perfect right to owners, of their own will, to emancipate their slaves; nor did the permission under that act, or the subsequent statutes down to the present time, to emancipate slaves, confer more than an imperfect right, to be exercised by the owners in the manner prescribed by those laws. No equivalent for the requirements of the statutes, no constructive proof of the recording or delivery, of the deed of emancipation, founded on any supposed right in the owner or his grantee, could be resorted to. This was the principle which governed the decision in *Givens v. Manns*. The question of emancipation, is a question of statutory law, and can only be dissolved by referring to the terms of the statute. The statute, after prescribing the mode of emancipation, with great particularity, provides, that the persons so emancipated, "shall thereupon" (from the time the requirements of the statute shall have been complied with, in all its particulars,)

320 "be intirely and fully *discharged &c. and enjoy as full freedom, as if they had been named in this act:" that is to say, by force of the specific provisions of the statute, and not by virtue of any general, undefined power or right, supposed to exist in the owner, independently of the statute, to emancipate them. Therefore, there can be no relation to the date of the deed to fix the period of emancipation: until the terms of the statute be complied with, they are slaves to all intents and purposes: they cannot be emancipated by a fiction of the common law invented to protect existing rights. The statute having made no provision for the proof and recording of deeds of future emancipation, such deeds ought, perhaps, never to have been established; yet as they have been sanctioned by the decisions of this court, in this spirit of humanity, rather than in the spirit of the law, I do not mean now to question them. But if such deeds as the one before us, are brought within the statute, they must be subject to all its requirements, like deeds

of present emancipation. They cannot be put on higher ground.

In the present case, the grantor in the deed had married, removed from the county, and was dead, before the deed in question, was attempted to be consummated by proof in the court of the county in which the grantor had formerly resided. The marital rights of her husband, had attached upon the property in her slaves. His will and not her's was to be consulted. His right to the slaves could not, without his own consent, be overreached by the proof and recording of the deed, even if it were a question of property merely. But it is enough, that the grantor had, by her marriage, lost her power to emancipate the slaves before the requirements of the statute had been complied with; that she was dead before the deed was proved and recorded; and that, in either view, the requirements of the law could not be complied with.

Both judgments are reversed, and the cause remanded for a new trial, in which no such instructions as those excepted to, are to be given to the jury.

321

*Thompson v. Cumming.

June, 1830.

Bills of Exchange*—Action against Indorser—Proof of Notice of Dishonor Necessary.—In an action, by holder against indorser, on a bill of exchange, whereof the drawee has refused acceptance when it was presented, and afterwards refused payment when demanded at maturity: *Held*, not enough, to charge the indorser, to prove protest for non-payment and due notice thereof to the indorser: it is necessary to prove due notice to him of the dishonor of the bill by the non-acceptance.

Appellate Practice—Instructions—Bill of Exceptions Indefinite.—Where a bill of exceptions to an instruction of a court to a jury, states the instruction so vaguely and imperfectly, that its import and bearing on the case cannot be ascertained with precision, it is the course of this court to reverse the judgment and remand the cause for a new trial.

Declaration—Failure to Show Good Cause of Action—Statute of Jeofails—Quere—If plaintiff omits to aver in his declaration matter necessary to shew good cause of action, and defendant, instead of demurring, pleads the general issue, whether, upon the construction of the new statute of Jeofails, 1 Rev. Code, ch. 128, § 103, p. 512, the plaintiff is bound to prove the matter at the trial of the issue, which he has not averred in his declaration.

Debt under the statute, 1 Rev. Code, ch. 126, § 2, p. 485, brought by Thompson, the holder of a foreign bill of exchange, against Cumming, the last indorser thereof, in the circuit court of Petersburg.

The declaration set forth, that the bill

***Bills of Exchange.**—See monographic note on "Bills, Notes and Checks" appended to *Archer v. Ward*, 9 Gratt. 632.

Appellate Practice—Bill of Exceptions Indefinite.—It has been held repeatedly that when a bill of exceptions is so indefinite as not to show whether an instruction or evidence was proper or not, the judgment should be reversed. *Strader v. Goff*, 6 W. Va. 264, citing principal case; *Barrett v. Tazewell*, 1 Call 215 (see also, *foot-note* to this case); *Beattie v. Tabb*, 2 Munf. 254; *Brooke v. Young*, 3 Rand. 106; *Bowyer v. Chesnut*, 4 Leigh 1. To the same effect the principal case was cited in *Bowyer v. Chesnut*, 4 Leigh 4; *McDowell v. Crawford*, 11 Gratt. 368; *Hall v. Hall*, 12 W. Va. 22. But see monographic note on "Bills of Exception" appended to *Stoneman v. Com.*, 25 Gratt. 887, where it is shown that the later decisions sustain the rule that a bill of exceptions must clearly and distinctly point out the error complained of, otherwise the exception will be unavailing.

The principal case was also cited in *Danks v. Rodeheaver*, 26 W. Va. 278.

was drawn by Benj. Tucker, in favour of John & William Bell, upon William & John Bell & Co. of London, for £400. sterling, payable sixty days after sight; that the payees, John & William Bell, indorsed the bill to Cumming, and Cumming indorsed it to Thompson; that the bill was presented to the drawees, William & John Bell & Co. of London, for acceptance, and they refused to accept it; and that in due time after the presentation of the bill for acceptance, namely, the 26th October 1811, it was again presented to the drawees for payment, and payment being refused, it was thereupon duly protested for non-payment; of all which Cumming had notice: without averring any protest of the bill for non-acceptance, or any notice to Cumming of such protest and dishonor of the bill. Plea, nil debet.

Several points of law arose at the trial; and upon one of them, which arose upon the peculiar circumstances of the
 322 *case, as they appeared in evidence, the circuit court gave an instruction to the jury, under the influence of which a verdict was found for Cumming: the court gave judgment for him, and Thompson appealed to this court. But the opinion of the circuit court on the point decided in favour of Cumming, was so imperfectly stated in the record, that this court could not ascertain, with precision, its import or bearing on the case; and the judgment was for that reason reversed, and the cause sent back for a new trial. The only point, which it is necessary to state here, since it was the only point decided by this court, was one which the circuit court decided in favour of the appellant Thompson. It was this: Cumming's counsel moved the court to instruct the jury, that it was incumbent on Thompson to prove, that he had used due diligence in giving Cumming notice of the non-acceptance, as well as of the non-payment of the bill; but the court instructed the jury to the contrary, that notice to Cumming of the non-acceptance of the bill, was not necessary to sustain the action, though due notice of the protest for non-payment was.

Spooner and Leigh, for the appellant, endeavoured to sustain the judgment of the circuit court upon this point, as being in conformity with the custom of merchants in this country, recognized and settled by judicial decisions. They mentioned the case of *Stott & Donaldson v. Alexander & Co.*, 1 Wash. 331, which, they owned, was decided upon the construction of our statute of 1748, ch. 33, § 2, (6 Hen. stat. at large, p. 85, 6,) which was repealed in 1792. They relied on the cases of *Brown v. Barry*, 3 Dall. 365; *Clarke v. Russell*, Id. 415; *Read v. Adams*, 6 Serg. & Rawle, 356. These, they said, were decisions on the law merchant of the country not influenced by any statutory provision; and they were direct authorities for the opinion of the circuit court on this point.

322 *The Attorney General, contra, shewed, that, in England, the law was settled by a train of authorities, that protest for non-acceptance, and notice of such dishonor to the drawer and indorsers, were necessary to charge them; that the

same rule prevailed in most of the states of the Union, and those the most commercial; and that all the reasons for requiring notice of dishonor require notice of the first dishonor of bills by refusal of the drawees to accept them.

CARR, J. As to the instructions given by the circuit court to the jury, which were excepted to by the appellant, and of which he complains, there has been much difference of opinion among the members of this court as to the meaning of them; and, without discussing the grounds of this difference, or stating the interpretation to which I incline, I concur with my brethren, that instructions which have so perplexed and divided us, must be too ambiguously and imperfectly expressed to be submitted to a jury. For this defect, the judgment must be reversed, and the cause sent back for a new trial. And here, I think, we might very well stop. But my brethren think we ought to give an opinion on the point, which the circuit court decided for the appellant, as to the necessity of protest of the bill for non-acceptance, and due notice of such dishonor to the drawer. The doubt with me was, whether this question was regularly before us, since the verdict was in favour of Cumming, against whom this instruction was given, and the appeal taken by Thompson, in whose favour it was given. I will, however, as briefly as possible give my impression on the subject.

It is doubtful, whether the court meant to say, that protest and notice of non-acceptance of a foreign bill of exchange, are in no case necessary to be proved in an action against the indorser, or not necessary in this action, under the particular pleadings. It was discussed at the bar, upon the hypothesis, that the court meant to declare the general law on the subject, and several cases were cited in sup-

324 port of *the opinion. The cases were *Stott & Donaldson v. Alexander & Co.* in this court, *Brown v. Barry*, and *Clarke v. Russell*, in the supreme court of the United States, and some others which I shall not notice. The first of those cases this court decided expressly under the act of 1748, which declares, that "no person shall pay more than 18 months interest from the date of any bill, to the time it shall be presented protested, to the drawer or indorser." The court said, that the legislature, contemplating the circumstances of the parties, and the countries between which the exchange was to be made, "seemed to have thought eighteen months a reasonable time for the negotiation, and for the giving of notice, by allowing full damages if the notice be given within that time." This the court considered, under that law, a general rule, to be departed from only when particular circumstances rendered it reasonable and proper. We know that the circumstances, the relations and the facilities of intercourse between us and England, are wholly changed since the statute of 1748; and this no doubt was the reason that, in the revision 1792, this clause of the statute of 1748, on which this court decided, was omitted, and the subject left to stand upon the general law merchant. The case of *Brown v. Barry* originated in

the circuit for the district of Virginia, and was carried by writ of error to the supreme federal court. It was an action of debt on a bill of exchange, brought on the statute of 1748. That it was brought on that act, and decided under it, is evident from one of the grounds assigned in the circuit court, in arrest of judgment, viz. that the action was founded on a statute not in force, when the bill was drawn. Chief justice Ellsworth, in considering this point, states, that the bill was drawn in February 1793, that an act passed at the session of 1792, repealing the act of 1748, but that at the same session, another act passed suspending the repealing act till October 1793; and, as these two acts being of the same session, must be supposed to speak at the same time, they only amount to this, that the act of 1748 should stand repealed

325 *from October 1793. Another exception to the declaration, taken in arrest of judgment, was, "that there was no averment of a protest for non-acceptance of the bills." To this the chief justice answered, 1. "that it does not appear, that the bill was not accepted, so that there could have been such protest;" and this certainly seems to be a satisfactory answer to the exception; but, not contented with that, he added 2. "as to bills drawn in the United States and payable in Europe, of which this is one, the custom of merchants in this country, does not ordinarily require, to recover on a protest for non-payment, that a protest for non-acceptance should be produced, though the bills were not accepted." This remark seems to have been thrown out carelessly, and is very loosely and indefinitely expressed. We have no authority cited, no case referred to, no ground stated, on which the assertion rests. Whence did the chief justice derive the information he gives us, as to the custom of merchants? And what did he mean by the custom of merchants in this country? Did he mean the United States? I apprehend there is no custom of merchants of the United States. The law merchant is a part of the common law; and, like that, must prevail in each state, just so far, and with such modifications, as each state has established. By this country, did the chief justice mean the place where he delivered the opinion, Philadelphia? If so, their custom of merchants does not bind us. And if he meant Virginia, whence the cause he was deciding came, he spoke of a custom influenced by our statute of 1748, which, we have seen, was changed, with the change of times and habits, in 1792. Thus, I think, there is nothing binding us to this exploded state of things; but we are free to follow, the rule of the law merchant, as long settled in England, and in most of the states of the Union. That the rule, as thus settled, requires protest and notice of non-acceptance, I will not cite cases from the english books to shew: they are every

where to be found. In New York, 326 see *Miller v. Hackley*, *5 John. Rep. 375, in Massachusetts; May v. Coffin, 4 Mass. Rep. 341; Maryland, *Philips v. M'Curdy*, 1 Harr. & John. 187; North Carolina, 1 Hawk. Rep. 195; South Carolina, 1 Bay's Rep. 177; 1 Rep. Const. court

100; Kentucky, 2 Marsh. 264. These are a few of the states, to whose reports I have had an opportunity of referring. I doubt not, there are many others. The rule too, is in itself most just and reasonable. In commercial affairs, every thing depends on punctuality and dispatch. A drawer or indorser may have thousands in his power to-day, by which he could save himself, with notice, but which to-morrow, may pass from his hands. Another consideration is, that it is due to our merchants, to place them on equal ground with the rest of the mercantile world.

But if the court below meant to say, that though protest and notice of non-acceptance, be generally necessary to be proved, yet it was not necessary here, because there was no such averment in the declaration, and you cannot hold a party to prove what you have not held him to aver; then (as some of my brethren think) it would give rise to an important question under our statute of jeofails. I do not think myself, that such a question can arise: but, however that may be, we waive it at present, as not being necessary to the decision of this case.

GREEN, J. After pointing out the ambiguities of the exception taken by the appellant, Thompson, to the instruction of the circuit court, and shewing the difficulty and impossibility of collecting the import and bearing of the opinion complained of, with sufficient certainty to enable this court to judge of its merits, and concurring with Carr, J., that the judgment should for that reason be reversed, and the cause remanded for a new trial, proceeded to consider the point which the circuit court decided against the appellee, Cumming, viz. that notice to Cumming of the non-acceptance of the bill, was not necessary to sustain the action, though notice of the protest for non-payment was.

327 *He said: The declaration stating the refusal of the drawees to accept the bill, does not aver, that it was protested for non-acceptance, or that notice thereof was given to the defendant. It does not appear, whether the instruction on this point proceeded upon the abstract principle of law, as to the necessity of a notice of non-acceptance in general, to entitle the holder of a bill which was not accepted to recover, or upon the opinion that it was unnecessary to prove such notice in this case, because the fact was not alleged in the declaration.

If the instruction proceeded upon the first ground, it was in conformity with the decision of this court in *Stott & Donaldson v. Alexander & Co.* of the supreme court of the U. States in *Brown v. Barry* (a case arising under the laws of Virginia) of the same court in *Clarke v. Russell* (a case arising under the laws of Rhode Island) and of the supreme court of Pennsylvania in the case of *Read v. Adams*; but contrary to the settled doctrine in England, New York, Massachusetts and Maryland, which requires not only a notice of, but also a protest for, non-acceptance. It is to be remembered, that the two cases occurring under the laws of Virginia, above mentioned, arose under our act of 1748, which limited

the recovery of interest on a protested foreign bill, to eighteen months from the date of the bill until it should be presented protested to the drawer or indorser thereof. This was construed by this court as giving a general, though not inflexible rule, that notice of the protest of a bill was sufficient, if given within eighteen months of the date; and, consequently, if notice of a protest for non-payment was given within that time, a case could not arise where notice of non-acceptance within the same time could be of any value. This provision of the act of 1748, was dropped and repealed at the revival of 1792; and the rule of the law merchant as to protest and notice, both in cases of non-acceptance and non-payment, left to operate uninfluenced by any statutory provision. I think we are at liberty and ought to adopt the settled rule

prevailing in England, *and in the most commercial states of the Union, not only in justice to our merchants, and to put them on the same footing with others, but because every reason which leads to the requisition of a protest and notice of non-payment, applies with equal force to the case of non-acceptance; the great object, in both cases, being to enable the parties responsible, to guard, by timely measures, against the consequences of the dishonor of the bill.

If the circuit court proceeded upon the ground, that, although, in the abstract, notice of the non-acceptance of a foreign bill was necessary to entitle the plaintiff to recover, yet that no proof of such notice was necessary, or could be required, to enable the plaintiff to recover in this action, as he had not averred it in his declaration; it brings into view an important question, as to the effect of the provision of our late statute of jeofails (which prohibits the arrest of judgment in any case after verdict, for any defect in the pleadings, which might have been taken advantage of by demurrer, and was not) in respect to the proofs necessary to be given, to support the action or defence at the trial. As this question may not again occur in this case, I think it is better to pass it by for farther consideration in a full court, whenever a case shall occur in which it may be necessary to decide it.

COALTER and CABELL, J., concurred.

329 *Chapman v. Doe, e. d. Bennett.

October, 1830.

(Absent BROOKE, P.,* and COALTER, J.)

Ejectment—Error in Patent—Evidence—Case at Bar.—In ejectment for land in Wood county, lessor of plaintiff claims under grant of land described in the patent as lying in Monongalia; defendant shews by the statute of 1784, dividing Monongalia and establishing Harrison county, and other evidence, that the land described in the patent, at the date of the patent, lay not in the then county of Monongalia, but in that of Harrison, and that no part of the present county of Wood was then part of Monongalia; HELD, competent to plaintiff to prove, that the land in Wood was the same land granted by the patent, notwithstanding the error of the patent as to the county it lay in.

*He was prevented by sickness from taking his seat at the beginning of this term.

*Ejectment.—See generally, *monographic note on "Ejectment"* appended to *Tabscott v. Cobbs*, 11 Gratt. 172.

Same—Defendant Claims under Tax Sale—What He Must Show.—Defendant in ejectment claims under a sale made by a sheriff in 1815, under the statute of 1814, for taxes in arrear, and shews the return of the land as delinquent, and the sale made by the sheriff, without shewing that the sheriff had strictly pursued the statute in the steps preparatory to the sale: HELD, this is not enough to divest the title of the original owner. **Tax Sale—Who May Make.**—Under the statute of 1813-14 for sale of lands forfeited for non-payment of taxes, the deputy sheriff as well as the high sheriff is competent to make such sales.

Ejectment by Bennett against Chapman, in the circuit court of Wood, for 500 acres of land in that county. At the trial, Chapman took three exceptions to opinions of the court:

1. Bennett adduced in support of his title, a grant from the commonwealth, dated the 21st April 1785; founded on a survey of the 2d August 1784, granting the land in question to Smith Slaughter, under whom Bennett claimed, and describing it as lying in the county of Monongalia. Whereupon, Chapman offered to prove, by the act of assembly of the 24th June 1784, for dividing the county of Monongalia and establishing the county of Harrison, and the subsequent act for establishing the county of Wood, and other evidence, that, at the date of the grant of April 1785, no part of the present county of Wood lay within

the boundaries of the then county of Monongalia. But the court allowed the grant to be read in evidence to the jury, being of opinion, that it was competent to Bennett to shew by evidence, that the land claimed was the same land thereby granted to Slaughter, though it did not lie within the boundaries of the county of Monongalia as established by the act of June 1784, but within the boundaries of the county of Harrison as established by that act, and within the county of Wood, after that county was laid off and established. Chapman excepted.

2. The grant to Slaughter having been read in evidence, Bennett shewed a conveyance of the land by Slaughter to him, dated the 1st August 1797. And then Chapman shewed, on his part, that the land had been returned as delinquent, in the name of Bennett, for non-payment of the land tax in 1812 and 1813, and that, in the list of sales of delinquent lands and lots in Wood, made in 1815, under the act of assembly of the 9th February 1814, 499 acres of this tract of 500 acres were reported as sold to Chapman for one dollar and seventy-four cents; and he proved by Taverner, a deputy sheriff of Wood county for the year 1815, that he had sold the 499 acres to Chapman, he being the highest bidder, at auction, on a court-day, at the court-house; and, without offering any proof that the particular provisions of the act of February 1814, prepar-

***Tax Sales—What Purchaser Must Show.**—As holding that, under a sale made by a sheriff under the statute of 1814 for taxes in arrear, the one claiming under the sheriff's deed must show that the sheriff strictly pursued the statute in the steps preparatory to the sale, the principal case was cited in *Hays v. Heatherly*, 36 W. Va. 629, 15 S. E. Rep. 229. See, in accord, *foot-note to Wilsons v. Bell*, 7 Leigh 22. But see *foot-note to Flanagan v. Grimmet*, 10 Gratt. 421.

***Same—Who Must Make Deed to Purchaser.**—See, citing principal case, *Flanagan v. Grimmet*, 10 Gratt. 429, 430, 431. See also, *foot-note to Wilsons v. Bell*, 7 Leigh 22; *foot-note to Flanagan v. Grimmet*, 10 Gratt. 421.

atory to such sales had been complied with, Chapman prayed the court to instruct the jury, that if it should be satisfied, that the 499 acres were parcel of the tract of 500 acres granted to Slaughter and by him conveyed to Bennett, then Bennett's title to the 499 acres was divested by the act of February 1814, and the sheriff's sale to Chapman in 1815. But the court refused to give such instruction to the jury; and Chapman excepted.

3. Then Chapman, to shew title on his part, offered in evidence, a deed executed by Taverner, deputy of Spencer, sheriff of Wood for 1815, dated the 12th August 1815, and duly recorded in the county court 331 in September following; *whereby,

Taverner, the deputy sheriff, reciting, that he had, on the 8th August 1815, being a court day, at the court-house, after advertisement duly made according to law, sold to Chapman 499 acres parcel of the tract of 500 acres, returned delinquent, in the name of Bennett, for non-payment of the land tax of 1812, and 1813, conveyed the 499 acres to Chapman. But the court would not permit this conveyance to be read in evidence to the jury, on the ground, that the deputy sheriff was not authorised by law to make such conveyance: to which opinion Chapman excepted.

Verdict and judgment for Bennett; from which Chapman appealed to this court.

R. G. Scott, for the appellant, made no objection to the opinions of the circuit court on the points stated in the first two exceptions; but he contended that the court erred in holding that the deputy sheriff was not authorised by law to make sale and conveyance of lands forfeited for the land taxes. He referred to the statute of February 1814, directing sales of delinquent lands, 2 Rev. Code, app. IV. ch. 24, § 20, 24, 25, p. 547, 9. And he said, that the proceedings being merely ministerial throughout, the deputy sheriff was as competent as the principal, to every act, and among the rest, to the making of the conveyance. 6 Bac. Abr. Sheriff. H. 3, p. 154, 5; Wroe v. Harris, 2 Wash. 126; Rockbold v. Barnes, 3 Rand. 473.

No counsel for the appellee.

GREEN, J. The opinions of the court below stated in the first two exceptions were unquestionably correct, and indeed are not seriously questioned by the appellant's counsel.

The third exception presents the naked question, Whether under the act of February 1814, a deputy sheriff was competent to sell and make a valid conveyance of lands, returned delinquent for the non-payment of taxes accruing in 1812 and 1813?

332 *In 1781, the first act was passed authorising the sale of land for taxes. 2 Rev. Code, app. IV. ch. 1, p. 508. That act authorised the sheriff or collector appointed in his place, under certain circumstances, to distrain and sell for all taxes, lands as well as slaves, goods and chattels. It continued in force until 1790, the mode of selling lands distrained for taxes, being variously modified and controlled by several subsequent statutes, the most material of which, and the only one that touches

the question under consideration, is that of Oct. 1787, 12 Hen. stat. at large, ch. 42, p. 564, reciting that various oppressions had been practised in the sales of land for taxes, provided, among other things, that all such sales should be made by the high sheriff or collector in person, and not by deputy. In 1790 an act was passed repealing all laws authorising the sale of lands for taxes, and declaring all lands, upon which the taxes shall remain unpaid for three years, to be forfeited and vested in the commonwealth, and liable to be taken up as waste and unappropriated lands might be. 2 Rev. Code, app. IV. ch. 6, p. 517. This right to locate such lands, was taken away by the act of 1807 (Id. ch. 16, p. 530,) by which, and various other acts, both before and after, time was given for the redemption of such forfeited lands, up to the end of the session of assembly of 1813-14. By an act passed in that session, (Id. ch. 24, § 45, p. 553,) the sheriffs were directed to collect all the arrearages of taxes upon lands, due before 1814, and to proceed therein, by distress, by sale of the land, and in every respect whatever, to perform the same duties as if they were part of the arrearages of the year 1814, changing only the form of his advertisements and returns, so as to suit the case. The same act (§ 23, 24,) directed, that, in the year 1815, and in every year thereafter, the sheriff of each county should be charged with the collection of the delinquent land taxes of the preceding year, and that he should advertise the sale of all delinquent lands, at the May, June and July courts, to take place on the first day of the succeeding August court. The act gives the literal terms of the advertisement, thus: "Notice is 333 hereby *given, that &c. I shall sell" &c. to be signed, "A. B. sheriff of — county, or A. B. deputy for — sheriff of — county." And it directs that the sheriff shall, on behalf of the commonwealth, execute a deed to the purchaser &c. This act also repeals all other acts coming within its purview.

If the question depended upon this last act only, I think there could be no doubt but that the sale and conveyance of such lands might be made by deputy. Such was the practical construction of the former laws, giving the power, in such cases, to the sheriff or collector by those names only, to sell and convey, which occasioned the provision of the act of 1787, requiring the sheriff or collector to act in person and not by deputy upon such occasions. And the construction was in conformity to the rule properly laid down by the court in Wroe v. Harris, that all ministerial duties of the sheriff (of which this is one, as much as the execution of a writ of elegit or of ad quod damnum, both of which require the seal of the sheriff, as well as his conveyance under a sale for taxes) may be executed by deputy, while his judicial duties can only be exercised in person, they being incapable of deputation. Besides, the act of February 1814, obviously contemplated, that the deputy is authorised to sell, and consequently to convey, by giving the terms of an advertisement of sale to be made by him as deputy.

Then, the only inquiry is, Whether the effect of the act of 1814 is controlled by the general provisions of the act of 1787? I think not. The act of 1787 was virtually repealed by that of 1790, which repealed all laws authorising a sale of lands for taxes; or, if not by that act, by the act of 1814, which conflicts in this particular with it, and repeals all prior acts coming within its purview.

The rejection of the deed mentioned in the third exception, upon the ground therein stated, was erroneous, and the judgment ought for this cause to be reversed.

The other judges concurring, judgment reversed, and cause remanded for a new trial &c.

334

***Norris v. Hume.**

October, 1880.

[21 Am. Dec. 631.]

(Absent BROOKE, P., and COALTER, J.)

Chancery Jurisdiction—Relief against Judgment—Defence Available at Law.—In an action of debt, defendant pleads, a special plea in bar, and the issue joined thereon is found against him, and judgment rendered for plaintiff: then defendant exhibits bill in chancery, stating, that though he was unable to prove the matter of his plea on the trial at law, he is now able to prove it, without suggesting fraud, accident, mistake, or other circumstance which prevented him from establishing his defence at law, and praying relief against the judgment: **HOLD**, the court of chancery has no jurisdiction to grant relief in such a case.

The appellant, Norris, executed his bond for 112 dollars, to one Polly Threlkeld, then a feme sole; and she, while yet single (as it appeared) assigned the bond to the appellee Hume, and two days after the assignment, intermarried with one Davis. Norris paid the full amount of the bond to Davis, the husband, and took an acquittance thereof from him; but Davis not having the bond in his possession to deliver up, Norris, by public advertisement posted in the neighbourhood, forewarned all persons from taking an assignment of it, stating that it had been discharged. During all the time of these transactions, all the parties, Norris, Davis and his wife, and Hume, resided in the county of Culpeper. Davis and wife afterwards removed to Kentucky; and, many years after their removal, Hume, claiming as assignee of the bond, instituted a suit upon it against Norris, in the county court of Culpeper. To this action Norris pleaded, 1. that he had paid the debt to Davis, before notice of the assignment thereof to Hume; and 2. that the assignment to Hume was in fact an assignment to him in trust for the assignor, to whose husband the debt had been fully paid. And issues hav-

ing been taken on these pleas, the jury found a verdict for Hume upon both, and judgment was rendered for him accordingly.

Hereupon, Norris exhibited his bill to the county court in chancery, against Hume and Davis and wife, praying an injunction to stay farther proceedings at law, 335 and relief *against the judgment.

But the grounds laid in the bill for relief in equity, consisted in the denial of any notice of the assignment of his bond to Hume, before the payment of the debt to Davis, and the allegation, that Norris was unable, at the trial at law, to prove his plea that the bond had been assigned to Hume in trust for the assignor; but that he had it now in his power, as he verily believed, to prove, that the assignment, if ever actually made to Hume, was made without any consideration whatever passing from him, in trust for the use of Polly Threlkeld, the assignor; and that, independently of Davis's right, as her husband, to receive the debt, he expected to prove the wife's assent to the payment made to Davis. But no reason was assigned in the bill, why Norris was unable to prove, the alleged trust upon which the assignment was made to Hume (of which his plea shewed he was apprized) or any of the other facts alleged in the bill, at the trial at law; or why he could not then command that evidence of the facts, which he alleged he had in his power at the time he exhibited his bill. Neither was there any suggestion in the bill, that a discovery from Hume, or from Davis and wife, was necessary to enable him to establish those facts, or any of them.

Hume, in his answer, admitted, that the bond had been assigned to him by Polly Threlkeld, in trust for herself, and in order to preserve the money to her separate use, after her intended marriage with Davis; but he alleged, that this assignment was made with the privity and approbation of Davis, and that Norris had early notice of the assignment, and of the motive that induced it: he also questioned the fairness of the payments made by Norris to Davis: but he mainly insisted, that the whole controversy had been tried and determined in the action at law, where Norris had pleaded the very same matters in his defence, which he now presented for relief in equity; and that, therefore, the case was not properly relievable in equity.

As to Davis and wife, the bill was taken pro confesso.

336

*There were several depositions taken and filed on both sides; but the cause turned, eventually, on the question of jurisdiction alone.

The county court perpetuated the injunction. Hume appealed to the superiour court of chancery of Fredericksburg, which reversed the decree, dissolved the injunction, and dismissed the bill with costs. And then Norris appealed to this court.

The cause was argued here by Stanard for the appellant, and by the Attorney General for the appellee, upon the merits, as well as on the question of jurisdiction, Whether this was a case properly relievable in equity?

GREEN, J. As the bill does not state,

*See monographic note on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425; monographic note on "Jurisdiction" appended to Phippen v. Durham, 8 Gratt. 457.

Bill of Discovery—Time of Filing.—In Faulkner v. Harwood, 6 Rand. 125. It was decided that a bill of discovery to obtain evidence which might have been useful in a trial at law, must be filed pending the suit at law, unless some sufficient excuse is shown why it was not filed at that time. JUDGE CARR said that the bill must be filed as soon as the party discovers the necessity of appealing to the conscience of his adversary. In Green v. Massie, 31 Gratt. 300, it is said that JUDGE GREEN, in the principal case, expressed his entire concurrence with the views of JUDGE CARR.

See further, monographic note on "Bills of Discovery" appended to Lyons v. Miller, 6 Gratt. 427.

that a discovery from Hume or from Davis and wife, was necessary to enable Norris to establish the facts relied on in his bill, as the ground of relief, the question does not arise. Whether such a suggestion, well founded, would give jurisdiction to a court of equity, after a trial at law upon issues involving those very facts? That is a question, therefore, which it is not necessary now to discuss: if it were, I should strongly incline to concur in the views taken of it by my brother Carr, in *Faulkner's adm'rx v. Harwood*, 6 Rand. 125. The present case is nothing more or less than an appeal from the judgment of a court of law, to a court of chancery for a new trial there of the same issues that had been tried at law, without any suggestion of fraud, accident, mistake, or any other circumstance, which prevented the party from making his defence at law, upon exactly the same proofs which he now exhibits in chancery. Upon this ground, I am of opinion, that the chancellor's decree ought to be affirmed.

The other judges concurred. Decree affirmed.

337

***Ewing v. Ewing.**

October, 1830.

(Absent BROOKE, P., and COALTER, J.)

Bill of Exceptions—Certification of Evidence—Reversal of Judgment.—A bill of exceptions to an opinion of a court, overruling a motion for a new trial, sets forth all the evidence adduced by both parties; but the evidence thus set forth, shews that there was no conflicting evidence, and that excluding all the evidence of the party against whom the verdict was found, and admitting the truth of all the evidence adduced for the party for whom the verdict was found, the verdict was contrary to the evidence, and to justice: HELD, such exceptions, in such a case, are well taken, to enable an appellate court to review and reverse the judgment overruling the motion for a new trial.

Same—Same—Cases Approved.—The principle of *Bennett v. Hardaway*, 6 Munf. 125, and *Carrington v. Bennett*, 1 Leigh. 340, explained and approved.

***Bill of Exceptions—Certification of Evidence—Reversal of Judgment.**—In *Bennett v. Hardaway*, 6 Munf. 125, a motion was made in the lower court for a new trial on the ground that the verdict was contrary to the evidence, and the motion being overruled, a bill of exceptions was taken which certified all the evidence given to the jury, instead of the facts which appeared to the court of trial to be established by the evidence. The evidence, as it appeared on the record, was conflicting and contradictory. It was held by the appellate court that the bill of exceptions was not properly taken, that it ought to have stated only the facts appearing to the court to have been proved, and that the judgment of the lower court refusing a new trial could be reversed only upon a certificate of the facts proved. The principle upon which this decision was based is that an appellate court will not undertake to decide on the credibility of witnesses. While this principle has been approved by subsequent cases, the rule laid down in *Bennett v. Hardaway* has, to a great extent, been modified. Thus, in the principal case, while the decision in *Bennett v. Hardaway* is approved, it was held that though a bill of exceptions to an opinion of the court overruling a motion for a new trial spread the whole evidence, instead of the facts, on the record, yet, if the evidence is not conflicting, the bill is well taken and will enable the appellate court to review the judgment of the inferior court; for no question as to credibility of witnesses can arise. But it is further laid down that the appellate court will not reverse the judgment of the lower court unless after excluding all the (parol) evidence of the exceptor and admitting the truth of all the evidence of the adverse party, the judgment still appears to be wrong. Other cases have gone even further than the principal case and held that the appellate court will review the judgment of the lower court on a bill of exceptions certifying the evidence even though the evidence is conflicting; but the rule laid down in the

Gift of Personality—Delivery.—A verbal gift of a chattel, without any actual delivery, does not pass the property to the donee.

Debt, in the county court of Prince Edward, by Mary Ewing, assignee of C. Woodson and S. Venable, executors of her deceased husband, James Ewing the elder, against James Ewing the younger, upon a bond for £100, executed by the defendant and one Baldwin (since dead) to James Ewing the elder, in his lifetime. The declaration set forth the execution of the bond, and the assignment thereof by the executors of the obligee to the plaintiff, in usual and regular form. The defendant pleaded four pleas in bar: 1. that he had paid the debt to the plaintiff; 2. that the obligee, in his lifetime, for a good and legal consideration, gave the bond to the defendant; 3. that, for a like consideration, he gave him the money secured by the bond; and 4. that, for a like consideration, he gave him the money and the bond. Issues were made up, on these pleas. The jury found a verdict "for the defendant," in general terms. The plaintiff moved for a new trial, on the ground, that the verdict was contrary to evidence. The court overruled the motion, and gave judgment for the defendant. The plaintiff filed a bill of exceptions to the opinion of the court refusing the new trial, and appealed to the circuit court; which reversed

principal case as to when the appellate court will reverse the judgment on a bill certifying the evidence, seems to have been. In the main adhered to. The modification of *Bennett v. Hardaway* which is effected by the principal case and the rule therein laid down as the one observed by the appellate court in reversing the judgment of the lower court where the evidence is certified has been approved by a long line of subsequent cases. See, citing the principal case, *Jackson v. Henderson*, 3 Leigh 214; *Green v. Ashby*, 6 Leigh 141, 142, 143, 145, 146, 148, 150; *Rohr v. Davis*, 9 Leigh 30, 33, and *foot-note*; *Fatteson v. Ford*, 2 Gratt. 80; *Pasley v. English*, 5 Gratt. 28; *Willard v. Overseers of the Poor*, 9 Gratt. 30; *Bell v. Snyder*, 10 Gratt. 353; *McDowell v. Crawford*, 11 Gratt. 387; *Pryor v. Kuhn*, 12 Gratt. 618; *Vaiden v. Com.*, 13 Gratt. 726; *Wickham v. Lewis*, 13 Gratt. 431; *Gimmi v. Cullen*, 20 Gratt. 453; *McClung v. Ervin*, 22 Gratt. 528, 529; *Read v. Com.*, 22 Gratt. 528; *Danville Bank v. Waddill*, 31 Gratt. 475; *Payne v. Grant*, 81 Va. 169; *Goodman v. R. & D. R. Co.*, 81 Va. 583; *Cloverius v. Com.*, 81 Va. 864, 865, 866, 868; *Moses v. Old Dominion, etc.*, Co. 82 Va. 24, 25, 26, 28, 29; *Muse v. Stern*, 82 Va. 36, 37; *Newlin v. Beard*, 6 W. Va. 197; *Morgan v. Fleming*, 24 W. Va. 194; *State v. Flanagan*, 26 W. Va. 19; *Travis v. Ins. Co.*, 38 W. Va. 600; *Glimmer v. Sydenstricker*, 42 W. Va. 57, 24 S. E. Rep. 568.

The rule laid down above as to when the appellate court will reverse the judgment of the lower court on a bill of exceptions certifying the evidence is known as the "old rule" in Virginia. Pol. Sup. § 3484, provides that the rule of decision in the appellate court, where the evidence and not the facts, as certified "shall be as on a demurrer to the evidence by the appellant." See further, *foot-note* to *Gimmi v. Cullen*, 20 Gratt. 439; *foot-note* to *Vaiden v. Com.*, 13 Gratt. 717; *foot-note* to *Dean's Case*, 32 Gratt. 913; *monographic note* on "Bills of Exception" appended to *Stoneman v. Com.*, 25 Gratt. 887.

Though a bill of exceptions is in form a certificate of the evidence, yet, if there is no inconsistency or conflict in the evidence thus certified, the appellate court will regard and treat it as the equivalent of a certificate of the facts. *Morgan v. Fleming*, 24 W. Va. 196, citing the principal case and *Green v. Ashby*, 6 Leigh 135.

***Gift of Personality—Delivery.**—It is now and always has been held by the courts, that, to make any gift of personality valid, delivery of possession is absolutely necessary. Until such delivery, the gift is inchoate and revocable; indeed a mere nullity. There is no difference in this respect between donation *mortis causa* and *inter vivos*. The same kind of delivery of possession which is necessary to make good the one, is necessary to make good the other. To this effect, the principal case was cited in *Lee v. Boak*, 11 Gratt. 183, 185, 186, 188, and *foot-note*; *Yancey*

the judgment, and remanded the cause 338 to the county *court, for a new trial to be had therein. And then the defendant appealed to this court.

The bill of exceptions to the opinion of the county court overruling the motion for a new trial, purported to set forth all the evidence adduced at the trial by both parties, in the words of the witnesses. Of the payment to the plaintiff, alleged in the first plea, there was no evidence at all. And as to the gift alleged in the three other pleas, the evidence on the part of the defendant, taking it alone and discarding the conflicting evidence adduced by the plaintiff, amounted to this: That the defendant was the nephew of the obligee, James Ewing the elder, and has been taken, in his boyhood, to live with his uncle "at his home house," and continued to live with him there many years, labouring on the farm; and afterwards lived on another farm of his uncle, receiving wages. That, after the defendant's attainment to full age, and before the execution of the bond in question, one Morgan having lent him some £50. or £60. to help him to pay for a piece of land he had bought, the defendant told him, his uncle had promised to let him have £100. to help him to pay for his land, and drew an order on his uncle, in favour of Morgan, for the money borrowed of him: this money the uncle paid to Morgan, but first asked him, how his nephew came to owe it to him: Morgan told him, he had lent the money to the defendant to help him to pay for his land, and then asked, whether he did not mean to give his nephew the money: the uncle said, no: Morgan said, he thought he ought to do so; upon which the uncle said, he never intended to make him pay it, but he did not wish him to know his intention, lest it might make him lazy. That, after the execution of the bond, the uncle, in several conversations, at different times, said, he had let his nephew have £100. to help him to pay for the land he had bought, and had pretended to lend it to him, and had taken his bond with surety for it; but he never intended to ask him for it; he never intended, from the first, to make him pay it; he intended

to give it to him, though he did not 339 wish him to know *this, for fear it would make him lazy; it was not well to give a young man too much, for it would make him proud and lazy. That the bond was executed in 1810, and the obligee lived till 1817, without taking any measures to enforce payment of the money: and, to account for the fact, that the bond had never been given up to the defendant by his uncle, or destroyed by him, proof was adduced, that in two conversations between him and his wife (the plaintiff in this action) she had informed him that the bond was lost or mislaid; that she had searched for it among his papers in vain; that she had inquired of an agent, (who had some of his bonds to collect) whether he had this bond, and found he had it not; but she expected on a more diligent search it would be found. It did not appear when the bond was found, whether before or after the obligee's death: it was assigned by his executors to his widow, in part of the share of the estate left to her.

Leigh for the appellant, insisted, that it was not competent to an appellate court, to review the opinion of the court before which the cause was tried, overruling a motion for a new trial, upon such a bill of exceptions as this, which, instead of stating the facts proved at the trial to the satisfaction of the court, detailed all the evidence in the words of the witnesses, and thus presented a sort of demurrer to evidence after trial and verdict rendered. He cited *Bennett v. Hardaway*, 6 Munf. 125; *Carrington v. Bennett*, 1 Leigh, 340.

Daniel for the appellee, said, that the reason of the opinion expressed by the court in *Bennett v. Hardaway*, was, that the appellate court could not be as competent as the court which tried the cause and heard the testimony and saw the witnesses, to weigh conflicting testimony, and determine on which side the truth lay; and the principle was, that an appeal cannot be taken upon a mere question of fact, in the form of exceptions to an opinion overruling a 340 *motion for a new trial. But, in the case now before the court, if all the evidence adduced by the plaintiff in the county court, were disregarded; if all the facts testified by the witnesses for the defendant, were taken as true; allowing withal, the utmost conceivable latitude of inference from those facts; it was plain, that the defendant had not made out a case in proof, which supported any one of his four pleas; and that, therefore, the verdict was palpably contrary to evidence.

CARR, J. In the argument here, the appellant's counsel relied solely on the doctrine held by this court in *Bennett v. Hardaway*, that a bill of exceptions to the opinion of a court, overruling a motion for a new trial made on the ground that the verdict is contrary to evidence, must contain the facts only which the court considered proved, and not a statement of the evidence given to the jury. In *Carrington v. Bennett*, I have given my view of that case, in which I was overruled by my brethren: I inclined to think, that under its authority, a bill of exceptions, which in a motion for a new trial, detailed all the

v. Field, 85 Va. 761, 8 S. E. Rep. 721; *Seabright v. Seabright*, 28 W. Va. 471; *Miller v. Neff*, 38 W. Va. 206, 10 S. E. Rep. 381; *foot-note* to *Barker v. Barker*, 2 Gratt. 344. And though a host of witnesses prove that the donor declared he had given the thing in question, it will be of no avail, without some proof of delivery. See, citing principal case, *Yancey v. Field*, 85 Va. 766, 8 S. E. Rep. 721; *Chambers v. McCreery*, 106 Fed. 384.

There is no distinction between gifts *causa mortis* and gifts *inter vivos* except that in the former case, the gift does not take effect until the death of the donor, in the latter it takes effect immediately. To this point the principal case was cited in *Elam v. Keen*, 4 Leigh 338.

In a *foot-note* to *Miller v. Jeffress*, 4 Gratt. 472, it is shown that while the rule as to the requisites of a gift *causa mortis* is the same as it is in respect to gifts *inter vivos*, the evidence of the delivery is necessarily different: for, while, in the former case, the gift occurring *in extremis* and taking effect only upon the death of the donor, the acts, acquiescence, and subsequent conduct of the donor can never be relied on as evidence of the delivery, in respect to gift *inter vivos* the subsequent conduct of the donor is often most potent evidence of the complete execution of the gift.

For further information on this subject, see monographic note on "Gifts" appended to *Barker v. Barker*, 2 Gratt. 344.

evidence, would be rejected by the appellate court, without considering, particularly, the nature or amount of that evidence: they thought the only effect of that case was, that it is not competent to a party, by way of exception to the refusal of a new trial, to refer to the judgment of the appellate court, the credit of the witnesses; and that, therefore, the exception should contain the facts which the trying court considered as proved, not the evidence by which they were proved; that this rule applied to cases, where there is conflicting evidence; but that where the facts are not directly proved, but must be inferred, the appellate court must have the facts proved, in order that it may make the inferences. I cannot but think, that this construction rather curtails of its fair proportions, a case which was very solemnly considered by this court: but waiving my own impressions, till the point can

341 be settled by a full court, I have taken up the bill of exceptions in the *present case, and given the defendant, who succeeded with the court and jury, the full benefit of all his evidence, by throwing out of the case all the evidence given for the plaintiff, and considering every thing stated by the defendant's witnesses, as proved. And taking the facts testified by the defendant's own witnesses, as facts proved, it seems to me impossible to say, that they support either of his pleas; and yet the jury has found all the issues for the defendant. That they do not prove payment, or any thing from which payment may be inferred, is most manifest. Neither, to my mind, do they prove a gift, but the direct contrary, that the testator had not given, but merely intended to give. There is no promise even, no conversation between the parties. The uncle, expressly, to the question, have you given the money, answered, no. And, in the other conversations, he merely expressed his intended kindness and bounty to his nephew; never what he had done, or was then doing; always what he intended to do at a future day: and he gave reasons (which no doubt were weighty with him) why he delayed his intended bounty; that it was not well to give a young man too much, for it would make him proud and lazy. There is no gift, then, or any thing from which it can be inferred. But if a host of witnesses had proved, that the testator declared he had given the bond or the money to his nephew, it would have been of no avail, without some proof of delivery. A verbal gift of a chattel, without actual delivery, does not pass the property to the donee. This is the settled doctrine of the modern decisions. In *Irons v. Smallpiece*, 2 Barn. & Ald. 552, chief justice Abbott said, "that by the law of England, in order to transfer property by gift, there must either be a deed, or instrument of gift, or there must be an actual delivery of the thing to the donee." The rest of the court agreed in taking this as the settled doctrine. The same point is decided in *Bunn v. Markham*, 7 Taunt. 224; 2 Eng. Com. law. Rep. 81. That, to be sure, was a case of a *donatio mortis causa*; but with respect to the

342 necessity of a delivery, *they stand precisely on the same ground as a

gift *inter vivos*. *Bryson v. Brownrigg*, 9 Ves. 1; *Antrobus v. Smith*, 12 Id. 39, (with other cases) contain the same doctrine. Here it is expressly proved, that the bond never was delivered, nor any written transfer made; but that the testator retained the bond, which came regularly to the hands of his executors, and was distributed as a part of the estate. Proceeding, then, upon the ground that we may look into this bill of exceptions at all, I think it furnishes as strong a case as can well be imagined, of a verdict found contrary to evidence; and I shall not dissent from my brethren in affirming the judgment.

GREEN, J. It was insisted, that the exceptions in this case were not well taken, that they cannot be looked into by the court, and that the case stands, as if it came up upon a general verdict, and motion for a new trial, without any thing upon which to found the motion; and this upon the authority of *Bennett v. Hardaway*. I have already, in the case of *Carrington v. Bennett*, stated what I consider as the true principle and effect of that case, which I intirely approve of. It is that a party shall not be permitted so to frame a bill of exceptions, as to refer the credit of the witnesses to the appellate court. In that case, the testimony of the witnesses conflicted, and the just decision of the case depended upon the degree of credit due to the witnesses, respectively, of which the appellate court had no criterion, such as the trying court had, upon which to form any judgment. But, in the present case, there is no such difficulty: for, crediting or discrediting all or any of the witnesses *ad libitum*, there is no evidence whatever which justifies the verdict. The jury found, that the defendant had paid the debt in question to the plaintiff, without a scintilla of proof or presumption to sustain the finding. If they had found truly upon that issue, then it would have been open to the plaintiff to move the court, if the other issues had been found against her, for a judgment non obstante verdicto, upon the ground that the last three pleas, if true, presented no legal bar to her action. This right, whether it would have availed her or not, she has lost by the false finding upon the first plea; and she ought not to have lost it in that way. Again, crediting or discrediting all or any of the witnesses at pleasure, there is no evidence whatever of any good, legal or valuable consideration for the alleged gift; and without such proof, it was impossible to find truly, that either of the last three pleas was true; for they alleged such considerations, and the defendant was bound to prove them, to entitle him to a verdict on the issues involving the truth of that allegation. Nor was this mere surplusage. If these strange pleas were good with these averments of consideration (of which I doubt very much, since an obligation could be dissolved at common law, only by cancelling, obliterating or surrendering it, or by some equivalent act, or by a strict performance of the condition, or by a release, and the statutes have given no additional plea, but that of payment to be proved by parol evidence) yet, without such averments, the pleas were

unquestionably bad, and might have been demurred to; or, after a verdict finding them true, a judgment might have been given against them, non obstante veredicto. Finally, (treating the evidence in the same way) there is none whatever to support these pleas, even without the averment of consideration; none whatever to establish a valid gift, having any effect, at law or in equity, either to release the obligation, or to vest in the appellee the property of the bond, or of the money due upon it, or any right of action, at law or in equity, in respect to it, against the donor or his representatives. No parol gift, without an actual delivery of the thing given, can vest in the donee any right or title in or to the thing given, or divest the right or title of the donor. This is unquestionably settled as the common law. There was, indeed, formerly, some difference of opinion, upon this point: but all doubts are settled by the recent decisions in the English courts,

344 both of law and equity; in the "Common Pleas, in the case of Bunn v. Markham; and in the court of King's Bench, in that of Irons v. Smallpiece; in which all the former authorities were considered, and both courts were unanimous. In the one case, the donor (if he may be so called) had written upon the parcels containing the property, the names of the person for whom they were intended, and requested his son to see the property delivered to the donees. In the other, a father, twelve months before his death, had given his son two colts: six months after, the son having been to a neighbouring market, to purchase hay for the colts, and finding it to be very dear, mentioned it to his father, who agreed to furnish what they might want at a stipulated price, but furnished none until three or four days before his death; the colts remaining all the time in the father's possession. And both these gifts were held to be invalid for the want of actual delivery. For the cases in equity, see Bryson v. Brownrigg, 9 Ves. 1; Antrobus v. Smith, 12 Ves. 39; Hooper v. Goodwin, 1 Swanst. 485, and note on Walter v. Hodge, 2 Id. 106, and the cases of donatio causa mortis, in which delivery is held to be necessary to the perfection of the gift, and passing the right and title. Ward v. Turner, 2 Ves. sen. 439. The only difference between the donation causa mortis and inter vivos, is, that the latter is absolute and unconditional, the other is in contemplation of death, and therefore subject to the implied condition, that the thing is to be restored if the donor recovers; but to give a right to the donee, the gift must be perfected alike in both cases, by delivery. If the subject of the gift be incapable of delivery, it cannot be given by parol, but must be transferred by some writing, and a delivery of that writing. In the case before us, neither the bond in question, nor the money due upon it, could be effectually given, or forgiven, or released to the obligor, but by the obligee's cancelling or destroying it with that avowed intention, or surrendering it to the obligor, or to some other for him, or by some instrument in writing to that effect;

345 nor could any suit in law or "equity

be maintained upon such an imperfect gift, it being nudum pactum. The strongest case for the defendant, which he could have asked the court to certify, upon the evidence, was that the defendant had proved that the obligee verbally gave him the bond and the money due upon it, without delivering it to him; and that this was the only fact proved in the case: and then we should have held, that a new trial ought to have been granted. I am of opinion, that the judgment of the circuit court should be affirmed.

CABELL, J. The principle decided in Bennett v. Hardaway, is, that this court, not possessing the means of deciding correctly, will not undertake to decide at all, on the credit of witnesses; and, consequently, that if a bill of exceptions to the judgment of an inferior court, granting or refusing a new trial, be so framed as that this court cannot get at the right of the case, without deciding on the credit of the witnesses, the exception shall be considered as incorrectly taken, and the judgment shall be affirmed. Hence it has become a general rule, that a bill of exceptions ought to state the facts which the inferior court considered as proved, and not merely the evidence, or what the witnesses testified. The case to which this rule was applied in Bennett v. Hardaway, was a case of contradictory testimony; for judge Roane, who delivered the opinion of the majority of the court, expressly said, that "the evidence, as it appeared on the record, was conflicting and contradictory." But the principle is equally applicable to a case, where there is no conflict in the testimony; as in the case of Carrington v. Bennett. And I will here take occasion to observe, that although I did not sit in that case, I have attentively considered it, and approve of the decision. But, though a bill of exceptions may have violated the general rule, and may have stated the evidence given, instead of the facts proved, it does not necessarily follow, that the judgment

346 if the evidence *stated be such, that, excluding all adduced by the party against whom the court decided, and admitting the truth of all adduced by the other, the judgment of the inferior court would still be wrong, then the principle decided in Bennett v. Hardaway, would not prevent this court from reversing such judgment; because, in such a case, this court would not have to decide on the credit of the witnesses; it would proceed on the admission of their credit. To permit such a judgment to stand, merely because the bill of exceptions had not complied with the general rule, which requires the statement of facts, and not of evidence, would be to stretch the rule beyond its principle, and to sacrifice justice to the forms intended for its protection. And such would be the case, if the judgment of the county court, now under consideration, were to be affirmed: for, if all the evidence adduced by the plaintiff at the trial were expunged from the record, and if the truth of every word said by the defendant's witnesses be admitted, nothing is clearer, than that the verdict ought to have been for the plain-

tiff; and, consequently, that the county court ought to have granted a new trial.

The judgment of the circuit court, reversing that of the county court, and remanding the cause for a new trial, is affirmed.

347 *Clark v. Hardiman.

October, 1830.

(Absent BROOKE, P., and COALTER, J.)

Sale of Slaves—Retention of Possession by Vendor—Case at Bar.—H. makes a bill of sale of slaves to C. without any consideration, and notwithstanding the deed, remains in uninterrupted possession for 25 years, and dies in possession; after his death, his widow claims these slaves as her own property, and holds adversary possession of them for more than five years; then administration of H.'s estate is committed to the sheriff, who gets possession of the slaves, and a creditor of H. who had recovered judgment against the sheriff administrator, levies an execution on one of them, which is sold so satisfy the same: in detinue by the widow against the purchaser.

Same—Same—Same—Statute of Limitations*—When It Begins to Run against Administrator.—HELD, 1. that the statute of limitations did not enure to give the widow a title to the slave, since it did not begin to run till an administrator of her husband's estate was appointed.

Same—Same—Same—Liability of Slaves to Execution at Suit of Vendor's Creditor.—And, 2. that though H.'s bill of sale to C. was good as between the parties, yet being fraudulent as to H.'s creditors, and the subject having come to the hands of H.'s administrator, it was liable to execution at the suit of a creditor of H. and the levy of such execution and the sale under it may be pleaded in bar of any claim set up by C. the fraudulent grantee under the fraudulent bill of sale.

Upon the trial of an action of detinue, brought by Sarah Hardiman against John Clark, for a slave named Charles, in the circuit court of Charles City, the jury found a special verdict, stating, in substance, the following case:

Francis Hardiman deceased, who was the husband of the plaintiff, in the year 1790, received in right of his wife, in the distribution of her father's estate, a parcel of slaves, of which the slave Charles was one. And in June 1794, he executed a bill of sale to William Christian, purporting, in consideration of £300. to sell and convey those slaves to him, then thirteen in number, of which Charles was one, and sundry articles of furniture, plantation utensils, and stock: this bill of sale was proved in the county court of Charles City, by one witness in December 1794, and by another in February 1796, and thereupon ordered to be recorded. No part of the consideration expressed in the bill of sale was paid by Christian to Hardiman; and Hardiman,

notwithstanding the deed, retained and held uninterrupted *possession of the whole subject. In 1803, all of the slaves mentioned in the bill of sale, were taken in execution to satisfy a debt due by Hardiman to William Christian; when one of them was really sold to Henry Christian, and the proceeds applied to the debt; and the same Henry Christian purchased the slave Charles now in question, and John Christian purchased all the other slaves; but neither Henry paid any money for Charles, nor did John pay any

money for the other slaves bought by him; and the slave Charles, as well as the others, were returned to the possession of Hardiman, and remained in his possession till his death. In the year 1811, Hardiman gave Henry Christian a bond for the hire of Charles for that year. In 1812, he took the oath of insolvency, rendering a schedule of his effects, in which none of these slaves were mentioned. He died in 1816, leaving all the slaves, Charles among the rest, upon a plantation in Charles City, which he died in possession of. His family at his death, consisted of his widow, the plaintiff, and four children, who lived on the plantation, and (excepting two of the children who had since left the family) continued still to reside upon it, cultivating the land in common, and employing the slaves in the cultivation of it. But from the time of Hardiman's death in 1816, his widow, the plaintiff, always claimed the slaves as her own property, and it was the understanding of the neighbourhood, that she did so claim them. About the year 1817, Henry Christian claimed the slaves under the bill of sale thereof to William Christian, of June 1794 (whether he claimed under that deed, as the administrator of William, or how, was not found in the verdict), and he demanded a bond of Mrs. Hardiman for the hires of them, which she refused to give, saying that her husband had squandered all the rest of her property, and she meant to hold the slaves. It was expressly found, that Henry Christian never claimed the slaves or any of them for himself, but took the part he did in these transactions, out of friendship for Hardiman and his family. A suit

349 had been *brought by Benjamin Ladd against Hardiman in his lifetime, for debt; but, in consequence of Hardiman's death, the process therein was not executed upon him, and the suit was not farther proceeded in till 1823, when it was revived against Benjamin Harrison, sheriff of Charles City, to whom administration of Hardiman's estate was committed in May 1823; the estate having till then remained unrepresented. Soon after the administration was committed to the sheriff, one of his deputies took possession of the slaves left by Hardiman on his plantation at his death. Ladd prosecuted his suit to judgment against the sheriff administrator, and sued out execution, which was levied on Charles, the slave in question, who was sold to satisfy the execution: the defendant Clark was the purchaser. Mrs. Hardiman, claiming the property as her own, had forbidden the sale; and she brought this action to recover this slave from Clark. And the question referred to the court, was, Whether or no, upon the whole case, the plaintiff was entitled to recover?

The circuit court held, that the law upon the special verdict was for the plaintiff, and gave judgment for her accordingly; from which Clark appealed to this court.

The attorney general, for the appellant, said he was at a loss to discover the ground upon which the circuit court held that the appellee was entitled to recover: it seemed to him, that the law upon the case found in the special verdict, was clearly for the

*Statute of Limitations.—See generally, monographic note on "Limitation of Actions" appended to *Herrington v. Harkins*, 1 Rob. 501.

The principal case was cited in *Bickle v. Chrisman*, 76 Va. 688.

appellant. The bill of sale of Hardiman to William Christian of June 1794, and the sales under the execution sued out against Hardiman in 1803, in respect to the slave Charles sold to Henry Christian, and the other slaves sold to John Christian, were all, upon the face of the transactions, grossly fraudulent, and under the circumstances of the case, merely void: and Hardiman having held undisputed and uninterrupted possession, without any real claim being set up under those pretended sales, for so many years, and having died in actual possession of them, they devolved to his personal representatives: the right of *property vested in the sheriff, so soon as administration of Hardiman's estate was committed to him, and upon his taking possession of the subject, it became assets in his hands, subject to the debts of the intestate. Neither could the statute of limitations avail to convert Mrs. Hardiman's possession into a title, as against the administrator; because the statute did not begin to run till the estate of her husband, to which the property belonged, was represented; and the sheriff claimed and took the possession, shortly after administration of the estate was committed to him.

Leigh, for the appellee, said, that supposing the bill of sale of June 1794, and the sales of the slave Charles to Henry Christian, and of the other slaves to John Christian, under the execution in 1803, were fraudulent transactions, (which not being expressly found, it is not the province of the court to infer from the facts found,) yet those sales were not, on that account, merely void: the bill of sale, and the sales under the execution in 1803, were only void as against Hardiman's creditors, and purchasers from him; they were good as between the parties; they vested the title in the vendees, not only as against Hardiman himself, but against his executors or administrators. Neither Hardiman himself in his lifetime, nor his administrator after his death, could have claimed the property, nor defended his possession of it, against the vendees claiming under those sales, on the ground, that they were fraudulent, and the vendees as well as Hardiman parties to the fraud. See the statute of frauds and perjuries, 1 Rev. Code, ch. 101, § 2, p. 372, and *Starke's ex'rs v. Littlepage*, 4 Rand. 368. The title then, as against Hardiman at his death, and as against his personal representatives afterwards, was in the Christians: and, as against them, Mrs. Hardiman's adversary possession of more than five years, from her husband's death in 1816, till the administrator took possession in 1823, gave her a good title to sustain her action of detinue. *Newby's adm'r v. Blakey*, 3 Hen. & Munf. 57; *Elam v. Bass's ex'rs*, 4 Munf. 301; *Hudsons v. Hudson's adm'r*, 6 Munf. 352. The appellant claimed the slave in question, under an execution levied upon him in the hands of Hardiman's administrator; he claimed under the administrator; and, as the administrator had no title, which he could have made good against Mrs. Hardiman, so neither had the appellant.

CARR, J., delivered the opinion of the court. The circuit court, in giving judgment for the appellee, upon the case found in the special verdict, must, I presume, have gone upon one of two grounds; either, 1. that the possession of the widow more than five years, claiming right, gave her a title against all the world; or 2. that as the deed to William Christian, and the sale under his execution in 1803, though unquestionably fraudulent as to the creditors of Hardiman, were good between the parties and those claiming under them, the sheriff could not take the slaves, and administer them as the assets of Hardiman. As to the first of these points: the reason on which it has been decided, that five years peaceable possession of slaves gives title, is that such possession affords a complete bar under the statute of limitations. This is the language of the court in *Newby's adm'r v. Blakey*, where this point was first determined; but it is added, that this bar can only be raised in those cases where the statute runs. In this case, it is expressly found, that from the death of Hardiman to the year 1823, his estate was unrepresented. During this time, then, there was nobody in whom Hardiman's title to the slaves vested; nobody who could demand them, or prosecute such demand; nobody who was in default; and, consequently, nobody against whom the statute could run. No possession, therefore, during this interval, with whatever claim it might be accompanied, could give any title against the representative of Hardiman, whenever such might be appointed. Then, as to the second point, it is clear, that at Hardiman's death, his title was good against all the world, except those *claiming under the deed to Christian, and the sales on his execution in 1803; and these (as I have said) were palpably fraudulent as against his creditors. The sheriff, therefore, when the estate was committed to him, rightfully as to all but those claimants, took possession of these slaves. Nor could Mrs. Hardiman have maintained an action against him for them, as she, so far from claiming under the deed or sale, claimed in direct opposition to them. If, when the judgment was obtained against the sheriff as Hardiman's administrator, and the execution delivered to the officer, these slaves had been in the adverse possession of any claimant under the deed or sale, the execution could not have been levied upon them, for the technical reason, that they would not have been, in that case, the goods and chattels of Hardiman in the hands of the sheriff to be administered. But it is clear, from the finding, that the execution was levied on the slave Charles in the possession of the sheriff as Hardiman's representative. And this levy the sheriff could not have prevented by any defence founded on the fraudulent deed or sale; for the creditor finding his debtor's property in the hands of his representative, had a perfect right to take it by his execution. And this levy protects the representative of Hardiman from the claimants under the deed and sale, though, but for this, he would have held the slaves subject to their claims: for he might effectually plead this seizure and

sale against such claim. This is expressly decided in the case of *Hawes v. Loader*, Yelv. 196, as may be seen in the 4th resolution of that case. The judgment must be reversed and entered for the appellant.

353

*Little & Telford v. Brown.

October, 1880.

(Absent BROOKE, P., and COALTER, J.)

Sale of Land—Lien for Purchase Money—Right to Profits—Case at Bar.—J. & D. W. purchase lands of B. and to secure the purchase money, payable in instalments, convey same lands to a trustee, upon trust to permit J. & D. W. to take the profits thereof to their order, use and benefit, till the time appointed for payment of the last instalment, and then in default of payment, to sell the subject, and apply proceeds to satisfaction of the debt; afterwards, and before the last instalment of the debt to B. falls due, J. & D. W. mortgage same lands, and all yearly rents, issues and profits thereof, and all their right and interest therein, to L. & T. to secure a debt due them: **Held**, that L. & T. are entitled, in preference to B. to all profits accruing prior to the time when the last instalment of debt to B. falls due.

Vendor's Lien—Effect Thereon of a Mortgage for Purchase Money.—A vendor, taking a mortgage of the subject sold to secure the purchase money, can only claim under the mortgage, and according to its terms: the mortgage supercedes the implied equitable lien for the purchase money, which but for the mortgage would have attached to the subject.

Same—Right Thereunder to Profits.—The implied equitable lien of a vendor upon the subject sold, for the purchase money, does not give the vendor asserting the lien, any claim for the profits of the subject.

This was an appeal from a decree of the superior court of chancery of Staunton, in two suits, one brought by Little & Telford against John, David, and William Willson, and the other brought by William Brown against Little & Telford and the three Willsons; both causes having resulted in a contest between the appellants Little & Telford and the appellee Brown (both parties being creditors of John & David Willson) for priority of satisfaction out of rents and profits of certain real estate of their common debtors, which had accrued pending the first suit, and were at the disposal of the court. The case was thus:

By deed of bargain and sale, dated the 11th March 1819, Brown sold and conveyed to J. & D. Willson four lots in the town of Waynesborough; and the Willsons executed a deed of trust, dated the 30th day of the same month, whereby they conveyed the four lots to a trustee, in trust to secure the payment of the purchase money to

Brown in instalments. This deed of

354 trust, reciting that the Willsons owed Brown 3250 dollars, to be paid as per bonds, by the 25th February 1827, conveyed the lots to the trustee, upon trust, "that he should permit the said J. & D. Willson to remain in quiet and peaceable possession of the property, and take the profits arising from the same to their order, use and benefit, until default should be made in the payment of the said sum of 3250 dollars; and that, upon such default happening in

the year aforesaid" (namely, in 1827,) the trustee should sell the subject to satisfy the debt.

And by another deed of trust, dated the 9th October 1819, the same J. & D. Willson, in order to secure a debt of 1509 dollars due to Little & Telford, conveyed the same lots which they had bought of Brown, and the yearly rents, issues and profits thereof, and all their right, title and interest therein, to a trustee, upon trust, that he should sell the same to satisfy the debt, as soon after the 9th October 1821, as conveniently he could, or as Little & Telford should require.

The trust subject having been abandoned by the Willsons, and left to be disposed of among the creditors, was, upon the motion of Little & Telford, soon after the commencement of their suit, put into the hands of a receiver of the court, to let out and receive the rents. And the subject itself proving insufficient to pay the debt of 3250 dollars due to Brown, and secured by the first mentioned deed of trust; and all the rents accruing prior to the 1st January 1823, and part of the rents of that year, having been expended in repairs under orders of the court; the question arose, between the appellants Little & Telford, and the appellee Brown, which was entitled to the rents accruing afterwards down to the 25th February 1827?

The chancellor held that Brown was entitled to them, and decreed that they should be paid over to him; from which decree Little & Telford appealed to this court.

Daniel, for the appellants, said the decree was clearly erroneous. It gave to

355 Brown that which the deed of trust of the 11th March 1819, under which he claimed, expressly reserved to the Willsons; and it took from Little & Telford that which, as it belonged to the Willsons, exempt from Brown's lien, they had a right to mortgage and which they did mortgage, in express terms, to Little & Telford.

There was no counsel for the appellee.

GREEN, J., delivered the opinion of the court. The deed of trust to secure the debt to Brown, expressly stipulated, that the Willsons should enjoy the rents and profits until the 25th February 1827, and Brown could not have acquired the possession, nor consequently received the rents and profits until after that day, either by an action at law or a bill in equity; and the deed of trust to secure the debt to Little & Telford, expressly conveyed the rents, issues and profits accruing from the 9th October 1821. That is, the Willsons conveyed by the last deed, the very right which they had reserved by the first. The circumstance, that the debt secured by the first deed of trust, was for the purchase of the property, has no effect upon the question as to the rents. For, 1. the implied lien for the purchase money, which would have existed if the deed of trust had not been given, was utterly destroyed by the execution of that deed, and whatever effect that implied lien might have had upon that question, it is superseded by the express stipulation in the deed: *expressum facit cessare tacitum*. And, 2. such an equitable lien gives no right at law or in equity, to claim rents and profits. Certainly the

*Vendor's Lien—Effect Thereon of a Mortgage for Purchase Money.—When a vendor takes a mortgage of the subject sold to secure the purchase money, his implied equitable lien for the purchase money is superseded, and he can claim only under the mortgage. To this point, the principal case was cited in *Wilson v. Davidson*, 2 Rob. 400; *Buchanan v. Clark*, 10 Gratt. 176; *Blair v. Thompson*, 11 Gratt. 444; *The Ann C. Pratt*, 1 Fed. Cas. 951.

creditor could not maintain a suit at law for them; and such a claim has never been allowed or even made in equity. The decree so far as it affirms the right of the appellee and disaffirms that of the appellants to the rents in question, must be reversed.

356 *Bass and Wife and Others v. Scott and Others.

October, 1880.

(Absent BROOKE, P., and COALTER, J.)

Wills—Construction—Use Created by Devise—Effect.—Testator devises and bequeaths real and personal estate to trustees, in trust for the equal use and benefit of testator's four sisters, (naming them) and their heirs forever, to be managed as the trustees should think most conducive to the interest of each of the parties; two of the sisters being *femes covert*:

Same—Same—Same—Same.—HELD, 1. that each of the sisters took a fee simple as to the real, and the absolute property as to the personal subject, in her share of the trust estate.

Same—Same—Same—Same.—And, 2. that the legal title remains in the trustees. In order that they may manage the part of the subject intended for the use and benefit of each sister. In such manner as the trustees shall think most conducive to the interest of each respectively.

Virginia Statute of Uses—Application—Uses Created by Devise.—It seems that the statute of uses of Virginia, does not apply to uses created by devise, and transfer such uses into possession of the cestui que use.

Charles Farmer, by his last will and testament, after making provision for his debts, and bequeathing one specific legacy, devised and bequeathed the whole of the residue of his estate to his brother Nelson Farmer, upon condition, that he (Nelson) should convey the whole of his own estate, real and personal (except that which he acquired by his wife) to trustees, to be disposed of as the testator should by that his will afterwards direct. And then he devised and bequeathed one fifth of the estate, so to be conveyed by his brother to trustees (named in the will) to be disposed of according to his will, to Marshall Farmer, Judith Waddell and Sally Farmer (to be equally divided among them) and their heirs: and he devised and bequeathed the residue thereof, to trustees, "in trust for the equal use and benefit of his (the testa-

tor's) sisters, Betsey Farmer, Kitty Farmer, Polly Bass and Patience Radcliffe, and their heirs forever, to be managed as the trustees should think most conducive to the interest of each of the parties."

Nelson Farmer accepted the devise and bequest of the testator's estate to him, upon the condition on which it was *given; and, in performance of the condition, conveyed the whole of his own estate, except what he had acquired by his wife, to the trustees named by the will, to be held to the uses thereby declared. As to the one fifth of this subject, which was given by the will, to Marshall Farmer, Judith Waddell and Sally Farmer, the trustees had no difficulty; but they doubted how they were to act in regard to the other four fifths, which the will directed them to hold in trust and manage for the equal use and benefit of the testator's four sisters above named, and, therefore, hesitated to execute their trust.

Whereupon, Christopher Bass and Polly his wife, John Radcliffe and Patience his wife, Betsey Farmer and Kitty Farmer exhibited their bill, in the superiour court of chancery of Richmond, against the trustees, and Marshall Farmer, Judith Waddell and Sally Farmer, insisting that the four fifths of the subject given to them, real and personal, ought, simply, to be divided among them in equal shares, and conveyed to them, respectively, in fee simple and absolute property; and praying the court to direct the trustees so to divide and convey the subject to them. The defendants, in their answers, submitted it to the court to determine and direct, whether they should divide and convey the subject according to the prayer of the bill? or, whether the trustees should retain the title, and hold and manage the property, as they should think best, for the use and benefit of the testator's four sisters to whom it was given? or, how they ought to dispose of the subject, so as to fulfil the intentions and purposes of the testator?

The chancellor was of opinion, that it was the intent and effect of the will, that the trustees should retain in themselves the legal title of the four fifths of the subject given to the testator's four sisters, and hold and manage their respective shares thereof, as they should think most conducive to their interests, and this too in exclusion of the husbands of such of them as were married; and, to the end that the

358 *property might more certainly be preserved for their heirs, that the sisters ought to have only life estates in the use of their respective shares, which at their deaths should be conveyed to their respective heirs. And he decreed, that the whole subject should be divided into five equal parts; that one fifth part should be allotted to Marshall Farmer, Judith Waddell and Sally Farmer, and divided among them in equal parts; and that the remaining four fifths should be divided into four equal parts and those fourth parts allotted in severalty to the trustees; and that one fourth part should be held in severalty, and managed, by the trustees, for the use and benefit of each of the testator's four sisters, during

*Virginia Statute of Uses—Application—Uses Created by Devise.—There seems to be a material difference between the English statute of uses and the Virginia statute. *Bass v. Scott*, 2 Leigh 356. The Virginia statute has not yet been judicially construed, except that in the case just cited, it was considered as not extending to a devise. *Jones v. Tatum*, 19 Gratt. 733; *Ocheltree v. McClung*, 7 W. Va. 244; *Bell v. Humphrey*, 8 W. Va. 25. To the point that the Virginia statute of uses does not execute uses created by will, there being no general statute of uses, the principal case was also cited in *Carney v. Kain*, 40 W. Va. 807, 23 S. E. Rep. 665.

See the principal case also cited in *Dunlop v. Harrison*, 14 Gratt. 258.

Chancery Practice—Trust Estate—Directing Trustee to Convey Legal Title to Beneficiary.—In *Carney v. Kain*, 40 W. Va. 810, 23 S. E. Rep. 667, it is said: "A court of equity may direct the trustee to convey the legal title to the cestui que trust whenever by the language of the instrument, or in contemplation of the settler, such management and control ought to come to an end. But this power of the chancellor is to be exercised according to a sound discretion; and the court ought to refuse to exercise it when, as in the present case, it was manifestly the intention of the testator that the control and management of the property should remain with the trustees. *Bass v. Scott* (1880) 2 Leigh 356." See also, the principal case cited on this point in note to *Thom v. Thom*, 3 Va. Law Reg. 733, 733; *Carney v. Kain*, 40 W. Va. 821, 23 S. E. Rep. 661; *Armistead v. Bart*, 97 Va. 321, 33 S. E. Rep. 616.

her life, and at her death conveyed to her heirs.

From this decree, the plaintiffs appealed to this court.

The attorney general, for the appellants, and S. Taylor, for the appellees, submitted the case without argument.

CABELL, J., delivered the opinion of the court. There is nothing in the will of Charles Farmer, to restrain the legal effect of the word "heirs," so as to make his sisters take an estate for life only, and their children or next of kin to take by purchase. The sisters took a fee simple in the real estate, and the absolute property in the personal estate, devised and bequeathed to their use. The decree is, therefore, erroneous, so far as it restricts the interests of the sisters to their lives only, and gives it to their children afterwards.

But, although it was the intention of the testator to give his sisters an interest equivalent to a fee simple, he did not intend to vest in them the legal estate, nor to give them the actual management of the property: he chose to vest the legal title in the hands of trustees, and to give them the management of the property, according to their discretion, for the use and benefit of his sisters. This is a disposition which the testator had a right to make: and it ought not to be wantonly broken in upon.

Our statute does not execute
359 *uses created by will;* we having no general statute of uses. It is true that a court of equity may, on its own original principles, direct a trustee to convey the legal title to the cestui que trust, when-

*This general proposition advanced by the learned judge arguendo, though founded on the words of our statute of uses, yet seems somewhat questionable: and as it may, in its application to other cases very different in their circumstances from this, be found inconvenient, it may not be improper, with all defence, to state the doubt. The words of the statute are: "By deed of bargain and sale, or by deed of lease and release, or by covenant to stand seized to use, or deed operating by way of covenant to stand seized to use, the possession of the bargainor, releasor, or covenantor, shall be deemed heretofore to have been, and hereafter to be, transferred to the bargainee, releasee, or person entitled to the use, for the estate and interest which such person hath or shall have in the use, as perfectly as if the bargainee, releasee, or person entitled to the use, had been enfeoffed with livery of seisin of the land intended to be conveyed by such deed or covenant." 1 Rev. Code, ch. 99, § 29, p. 370. A devise of lands is a conveyance, but not one of the conveyances specified by the statute: nor do its words embrace a conveyance by feoffment, any more than a conveyance by devise, to use. Then, suppose the case of a feoffment, or a devise, to one to the use of another, simply and generally, without any discretion or control entrusted to the feoffee or devisee to use, the question would be, whether the statute would not execute the use, and give the legal estate to the cestui que use directly, without any formal conveyance to him by the feoffee or devisee to use? or would the estate of the cestui que use be only an equitable estate, so that he could not assert his right in an action at law, in his own name, upon the strength of the feoffment or devise alone? If such a case be not within the letter, is it not within the equity, of this remedial statute? If it be not, it will be for the legislature to consider, whether it will be wise to make the statute more comprehensive. As to personal estate, the statute certainly has no application to that; but, in the case of a gift or bequest of a chattel to one for the use of another: if nothing is required to be done with the subject by the trustee; if his intervention be nowise necessary to accomplish the declared purposes of the gift; the cestui que trust, I apprehend, is entitled to the possession, and the gift of the entire absolute use of a chattel, in whatever form, is equivalent to a gift of the thing itself.—Note in Original Edition.

ever it may be proper that that shall be done; as in the case of a naked use. But this power is to be exercised according to a sound discretion; and the court ought to refuse to exercise it, when, as in the present case, it was manifestly the intention of the testator, that the management of the property should be at the discretion of the trustees, and not of the cestui que
360 trust. The decree *should, therefore, have directed a division of the property, and an assignment of one fourth part of the four fifths of the subject, intended by the testator for his four sisters, in severalty, to the trustees, to be held by them for the use and benefit of each of the four sisters, respectively, and their heirs forever, and managed by them as they shall think most conducive to the interest of the cestui que trust; reserving a right to the parties to apply to the court, from time to time, for farther directions, which future events may render necessary or proper; for it would be premature to give any opinion, at present, as to the powers, which the testator's sisters, or their husbands, may have over their equitable interests.

So much of the decree as conflicts with this opinion is to be reversed, and the cause remanded to the court of chancery to be farther proceeded in according to the principles here declared.

361 *Windrum v. Parker and Goodwyn.

October, 1880.

(Absent BROOKE, P., and COALTER, J.)

Executions on Decrees—Control of Equity Courts Over.*

—The statute giving common law executions on decrees in chancery, gives the courts of chancery the superintendence and control of all such process, and power to correct irregularities and abuses in it.

Same.—Same.—The courts of chancery may quash executions irregularly sued out on their decrees, and forthcoming bonds taken under them, on motion made on notice, in a summary way.

Executions—Construction of Statute—Right to Second Execution When First Not Returned.—Construction of the 3d section of the statute of executions, 1 Rev. Code, ch. 184: it authorises a party who has sued out one execution, to sue out other executions: if the first be not returned and be not executed: if the first be executed though not returned, the party is not entitled to sue out any other execution.

Ca. 3a.—Discharge of Debtor by Order of Creditor—Effect.—If a debtor be arrested on a ca. sa. and discharged by order of the creditor or his agent, no other execution can be had on the same judgment or decree.

*Executions on Decrees—Control of Equity Courts Over.—When the statute law authorized the issuing executions on decrees, it clothed the courts of chancery with the power of watching over such process and correcting any abuses arising under it, to the same extent and by the same means that courts of law use. And in deciding upon all questions in respect to executions on decrees, the courts of chancery are bound to abide by the common law and statutes respecting executions at law. *Snively v. Harkrader*, 30 Gratt. 492, citing the principal case.

Ca. 3a.—Discharge of Debtor by Order of Creditor.—Effect.—It has undoubtedly been established, by a series of decisions, that where a defendant in execution under a ca. sa. has been discharged from his imprisonment by the direction or with the consent of the plaintiff, no action will ever again lie on the judgment on which the execution is founded, the judgment being considered as satisfied. Nor can any new execution ever issue on that judgment, even though the defendant was discharged on an express understanding on his part, that he should be liable again to be taken in execution, on his failure to comply with the terms on which the discharge took place. *Noyes v. Cooper*, 5 Leigh 187, citing the principal case.

Same—Escape of Debtor—Rights of Creditor.—If debtor in custody under a ca. sa. be permitted to escape, the creditor is entitled to another execution against the debtor as well as to an action against the sheriff for the escape; per GREEN, J.

A fieri facias was sued out of the superior court of chancery of Richmond, by Windrum against Parker, upon a decree of that court, for 254 dollars; and the execution having been delivered to the sheriff of Southampton, and levied by him on property in Parker's possession, Parker gave a forthcoming bond with Goodwyn his surety, for the delivery of the property at the day and place of sale. And upon a motion made by Windrum in the court of chancery, upon due notice, for an award of execution upon the forthcoming bond, against Parker and Goodwyn, and a cross motion by Parker and Goodwyn, also upon due notice, to quash the fieri facias and the forthcoming bond taken upon it, the case appearing in evidence, was as follows:

Windrum had sued out a capias ad satisfaciendum against Parker, for the same debt, on the same decree, some twelve months before the suing out of the fieri facias in question. And the sheriff of Southampton deposed, that John Wyche, who was introduced to him as the agent or attorney of Windrum, by Mr. Claiborne (a member of the bar, whom he *knew to have been the attorney for Windrum, in another and recent case), delivered the capias to him, and desired him to execute it: that Parker was presently arrested, and carried to the sheriff's office: that Wyche asked the sheriff, to let Parker walk out with him for a few minutes, which being assented to, they retired together, and returning in a short time, Wyche told the sheriff he might release Parker: that the sheriff being about to make his return upon the capias, asked Wyche if he was the legally authorised agent or attorney of Windrum, to which he answered that he was, and putting his hand in his pocket was in the act of producing his authority, when the sheriff told him he was satisfied, and thereupon endorsed his return upon the process: "Arrested the within named Henry Parker, on the — day &c. and by the direction of John Wyche, attorney for the plaintiff, he was released:" that the capias with this return upon it, was handed by the sheriff to Wyche, with a request that he would return it to the clerk's office, which he promised to do: that some two months afterwards, the capias was again presented to the sheriff by Mr. Claiborne, who requested him to alter his return, saying, that it might be doubted, upon the terms of the return, whether Parker had not paid a consideration for his discharge, and after such a return upon such an execution, it would be impossible to get another execution, and indeed the clerk refused to issue another; but the sheriff refused to make any substantial alteration of his return, and only consented to add the words "therefrom" after the word "released," at the end of it; and then the process was handed back to Mr. Claiborne, who, as the sheriff thought, was acting in this business as the attorney of Windrum. It appeared, that Windrum had sued out

another fieri facias against Parker, upon another decree of the superior court of chancery, for another debt, about the same time the fieri facias in question was sued out: that that other fieri facias was levied, by directions of the same John Wyche (professing, with Windrum's knowledge, to act as *his agent therein) on some property in Parker's possession, thought the sheriff doubted whether he was the owner of it, and demanded indemnity; that this property was actually sold, Windrum and Wyche both attending the sale, and Wyche, in Windrum's presence, assuming the entire direction and control of that proceeding, as Windrum's agent.

Upon this evidence as to the service of Windrum's capias ad satisfaciendum on Parker, for the same debt, and upon the same decree, upon which the fieri facias in question was sued out, and of the release of Parker from custody under the capias, by which directions of Wyche as Windrum's agent; the chancellor overruled Windrum's motion for award of execution on the forthcoming bond; and, on the cross motion of Parker and Goodwyn, quashed the fieri facias, and of course the forthcoming bond also. Windrum appealed to this court.

The attorney general for the appellant, objected, 1st. That even supposing the fieri facias was irregularly sued out, the motion to quash it was not the proper course, nor had the court of chancery any jurisdiction to correct any irregularity of the kind complained of in this case: the cause of relief being matter of fact, and disputed matter of fact, the true remedy was that which the common law provided and administered, namely, an audita querela. 1 Com. Dig. Audita querela. A. D. pp. 785-8. Or, if the chancellor could properly interfere at all, he could only do so by injunction. 2dly, He insisted, that the fi. fa. was regularly sued out. The previous ca. sa. had not been returned to the office: and the statute of executions (1 Rev. Code, ch. 134, § 3, p. 527,) provides, that "when any writ of execution shall issue, and the party at whose suit the same is issued, shall afterwards desire to take out another writ of execution at his own proper costs and charges, the clerk may issue the same if the first writ be not returned and executed;" that is, if it be not returned as

well as executed: for the fact of the process having been executed *or not, can only be known by the return. 3dly, He said, the only ground on which Windrum's right to take out the fi. fa. could be denied, was merely technical: it was not pretended, that Parker had paid the debt, or that Windrum had intentionally released it, but only that the discharge of Parker from custody under the ca. sa. which had been previously served on him, by the directions of Wyche, was a bar to any other execution on the same decree. The authority of one person to discharge the debtor of another from custody under execution, without satisfaction of the debt, must be well ascertained by clear and decisive evidence, and strictly pursued. *Crary & Morgan v. Turner*, 6 Johns. Rep. 51. And he insisted there was

*Same—Escape of Debtor—Rights of Creditor.—See foot-note to *Carthrae v. Clarke*, 5 Leigh 288.

no proof, that Wyche was Windrum's attorney at law, or his attorney in fact, or otherwise his agent authorised to give the directions under which the sheriff discharged the prisoner. The sheriff's return (according to his own account of it) seemed to import, that he regarded Wyche as Windrum's attorney at law; and if that was the nature of his authority, he certainly had no right to discharge his client's debtor from execution without satisfaction. *Jackson v. Bartlett*, 8 Johns. Rep. 281; *Kellogg v. Gilbert*, 10 Johns. Rep. 220. The sheriff, then, discharged Parker without any due authority; he permitted his prisoner to escape; and Windrum was entitled to his action against the sheriff for the escape, and to another execution against the debtor. 2 Bac. Abr. Execution, D. p. 719. And the case of *Kellogg v. Gilbert* shewed, that Windrum, in the present case, might have prosecuted his action against the sheriff for the escape at the same time that he pursued the debtor by a new execution.

Leigh, for the appellees, said, it had never been doubted, that the statute which gave the common law process of execution to enforce decrees in chancery, conferred on the court of chancery, of necessity, the power and duty to superintend the process; to do whatever may be necessary to give effect to its process, if regularly sued

365 out, and to correct any *abuse of it: and, as a motion for award of execution on forthcoming bonds, taken under executions sued out upon decrees in chancery, must be addressed to the chancellor, so also to him must be addressed all complaints of process irregularly sued out on his decrees, and all applications for redress against abuses of the process of his own court. And the motion was the proper course for the party aggrieved to obtain redress. An *audita querela* could not be prosecuted in the court of chancery; and a bill of injunction would be dilatory and expensive. Indeed, the *audita querela* was obsolete in our practice: the proceeding by motion to quash had been long since substituted for it, in the courts of common law. As to the construction of the 3d section of the statute of executions; he said the meaning and effect of that provision were, that a party having sued out one execution, may demand another of the clerk, if the first be not returned and be not executed; or, in the words of chief justice Marshall, delivering the opinion of the court in *Peyton v. Brooke*, 3 Cranch, 96, "the statute contemplates the case where the first execution is not returned nor executed; that is, where it is out and may be served." Where one execution has been sued out, but no return thereof has been made, the party may demand other executions of the clerk, at his own cost; but he must take them at his peril also; and if his first execution has been saved, his other execution will be quashed. In the present case, however, the first execution (the ca. sa.) had been executed, and returned executed, and then withdrawn from the office, and suppressed; as is manifest from Mr. Claiborne's application to the sheriff to alter his return, and the reason he assigned for the request. This was a gross

abuse. Whether Wyche was the agent of Windrum, and acted by authority from him, in directing the sheriff to discharge Parker from custody under the ca. sa. was a question of fact, which the court would consider, and decide, upon the evidence. If he was, there could be no doubt of the legal effect of such a discharge of the debtor.

Vigers v. Aldrich, 4 Burr. 2482; 366 *Jacques v. Withy*, 1 T. R. 557; **Clarke v. Clement*, 6 T. R. 525; *Tanner v. Hayne*, 7 T. R. 420; *De Costa v. Davis*, 1 Bos. & Pul. 242; *Blackburn v. Stupart*, 2 East. 243; *Furman v. Gaskin*, 2 Caine 369; *Yates v. Van Ransellaer*, 5 Johns. Rep. 364.

CARR, J. It was contended by the appellant's counsel, 1. that under the 3d section of our statute of executions, the *ieri facias* in question was properly issued, Windrum having a right to demand the same, because the first execution was not returned and executed: 2. that the court could not on motion quash the execution, the proper remedy being *audita querela*, or injunction: and 3. that if a motion was proper, the decree was wrong upon the facts. The words of the statute on which the first point rests, are taken verbatim from a statute passed in 1726 (4 Hen. stat. at large, p. 156), and there we find them immediately preceded by this preamble: "And for removing all scruples, which may be entertained among clerks, concerning the issuing of executions, Be it enacted and declared," &c. It is purely directory to clerks. We see from various cases, that, in practice, a plaintiff was permitted to take out several executions upon his judgment at the same time. *Stamper v. Hodson*, 8 Mod. 302; *Miller v. Parnell*, 6 Taunt. 370; 1 Com. Law Rep. 414, S. C. This was convenient, and productive of no mischief: for the process was always under the control of the court; and if the plaintiff proceeded upon one, he thereby determined his election, and could make no use of the other. It seems clear to me, that the clause in question was meant merely to regulate this practice; and applies solely to cases, where a party having taken one execution, wishes before that is returned, or acted upon, to take out another. In such case, he is permitted to do so, "at his own proper costs and charges." This is also the opinion of the federal court, as delivered by chief justice Marshall, in *Peyton v. Brooke*. It cannot be presumed, indeed it was not contended, that the law meant that a *fi. fa.* should issue, where in truth a ca. sa. had been levied and not discharged: but 367 it was said, the clerk *was not to judge of the fact, and could only know of the levy by the regular return; that, therefore, the clerk, in this case, as there was no return, was bound to issue the second execution. I do not think it material to discuss this question; for, admitting that the clerk committed no error in issuing the execution, the question still remains, could the plaintiff properly have it levied after what had taken place on the ca. sa. and if not, had not the court power to quash it on motion? That the levy of a ca. sa. and the release of the debtor from execution, by the plaintiff or his agent, is an

extinguishment of the debt, I have considered to be as well settled as any point can be, by an unbroken series of decisions. I must, indeed, do the counsel the justice to say, that I did not understand him to controvert this position. But he contended, that the second execution could not be quashed (especially by a court of chancery) on motion, but there should have been an *audita querela*, or injunction. I consider that when our law authorised the issuing executions on decrees, it clothed the chancellor with the power of watching over such process, and correcting any abuses arising under it, to the same extent, and by the same means, that courts of law exercise. The adjudged cases on the subject shew, that where the debtor had been discharged on a *ca. sa.* and other execution afterwards taken out against him, it was quashed indifferently on motion, or on rule to shew cause, which in truth is a mere notice of a motion, such as the party has here. With us, the *audita querela* is intirely superseded in practice, the proceedings by motion being considered as the cheaper and more convenient mode. The cases of *Taylor v. Dundass*, 1 Wash. 94; *Hendricks v. Dundass*, 2 Wash. 50; *Downman v. Chinn*, Id. 303, suffice to shew, that it has been the constant and approved practice of our courts, to exercise the power of quashing process which has irregularly issued, or been abused in the execution of it, on motion. I will not inquire here into the power of an attorney at law to bind his client, by discharging his debtor from execution; because, from the evidence, I think Wyche acted in the combined

368 *character of attorney at law and attorney in fact; and I feel no doubt, that his direction justified the sheriff in the discharge.

GREEN, J. It is clear, that Wyche had authority from Windrum to control his executions on a decree in chancery against Parker. He was in possession of the *ca. sa.* delivered it to the sheriff, and directed his proceedings upon it. He afterwards attended the sale appointed under the subsequent execution in company with Windrum, and acted on that occasion, as having the management of the execution. The sheriff, after indorsing his return upon the *ca. sa.* to the effect that he had executed it, and discharged the defendant by order of Wyche, the attorney for Windrum, delivered it to Wyche; and there is good reason to believe, from the declaration of Mr. Claiborne, who seems to have acted as the counsel for Windrum, that it was actually carried to the clerk's office, but the clerk refusing to issue a new execution on account of that return, it was withdrawn. However this may be, the execution and return delivered to Windrum's agent, from whom the sheriff received the execution, have been suppressed by Windrum or his agent or attorney, after an unsuccessful attempt to prevail upon the sheriff to alter his return and make it false.

The chancellor has, I think, put the just construction upon the execution law. The clerk was justified in issuing the last execution, in consequence of the *ca. sa.* not being returned; for to make a technical

return, it is necessary that the execution should be actually returned to the office, with an indorsement signed by the sheriff, shewing how he has proceeded on it. But the plaintiff took out his second execution at his peril. Knowing the fact of the *ca. sa.* having been executed, he imposed upon the clerk by suppressing the *ca. sa.* and got another execution, which could not have issued but for his fraudulent suppression of the *ca. sa.* and return. Every court has an undoubted power to superintend the execu-

tion of its own process, and especially 369 of executions, *and to correct abuses therein, on motion, in a summary way; and may inquire into the facts necessary to the exercise of that power, either by the aid of a jury, or otherwise; confining itself, in all cases, within the limits of a sound judicial discretion, according to the nature of the case. Nor is there any doubt, that the discharge of a debtor in execution, by order of the plaintiff, is a perpetual bar to a new execution on the same judgment or decree. This is the settled rule in the courts of law; and since all executions, which can be issued upon a judgment at law, have been allowed by our statute to issue upon decrees in chancery, the courts of chancery are bound, in deciding upon all questions in respect to them, to abide by the common law and statutes respecting executions at law.

The question raised at the bar in respect to the right of a plaintiff to take out a new execution in case of a voluntary escape, does not occur in this case; for here was no voluntary escape. The sheriff acted under the directions of one duly authorised to control it. If this be not fully proved, it ought to be presumed in *odium spoliatoris*: but I think it is sufficiently proved by the evidence: the very suppression of the return is proof that it was a true one, and known to be so; for if it had been false, there would have been no motive to suppress it, since it would have made the sheriff liable for the debt. If that question did arise, I should think, that in a case of voluntary escape, a new execution might be taken out; though the contrary was held, as far back as the reign of Elizabeth, *Linacre's case*, Le. 230, yet in the reign of Charles II. it was settled upon the principles of the common law, uninfluenced by any statute, that in such a case, a new execution may issue. *Bassett v. Salter*, 2 Mod. 136.

CABELL, J., concurred, and the order was affirmed.

370

**Mayo v. Winfree.*

November, 1880.

(Absent COALTER, J.)

Equitable Relief—Excessive Distress for Rent.—A tenant complaining of distress made for more rent than was in arrear and due, not having resorted to an action of replevin for redress, nor shewing any reason for failing to resort to his remedy at law, is not entitled to relief in equity.*

Winfree exhibited a bill against Mayo, in the county court of Chesterfield in chancery, setting forth, that Winfree having

*See generally, monographic note on "Detinue and Replevin" appended to Hunt v. Martin, 8 Gratt. 578; monographic note on "Landlord and Tenant" appended to Mason v. Moyers, 2 Rob. 606.

rented a tenement of Mayo, for one year, at a stipulated rent of 130 dollars per annum, Mayo, during the year, sent him a notice that the rent in future must be 400 dollars per annum, payable quarter yearly; whereupon Winfree was preparing to quit the tenement, but meeting with Mayo shortly after he received the notice, he complained to him, that the rent he demanded for the future was too high, and Mayo agreed that Winfree might occupy the tenement for another year at the rent of 130 dollars per annum which had been stipulated for the first year; and upon these terms Winfree continued to hold the premises for a second year. But at the end of the third quarter of the second year, Mayo distrained for three quarters rent in arrear at the rate of 400 dollars per annum; Winfree gave a three months replevy bond for the rent so distrained for; and the rent not being paid according to the tenor of the bond, the county court of Chesterfield awarded execution thereon, under the statute concerning rents, 1 Rev. Code, ch. 113, § 1, 2, pp. 446, 7. And the bill prayed an injunction to restrain Mayo from proceeding on his execution for the excess of the rent claimed by him above the rate of 130 dollars per annum. The injunction was awarded.

Mayo in his answer, stated, that he had given Winfree written notice that if he continued on the tenement a second year, he must pay 400 dollars rent per annum, quarter yearly, and that Winfree continued 371 on the premises accordingly; *and he positively denied, that he had afterwards agreed with Winfree, that he might continue at the reduced rent of 130 dollars.

The case was removed by certiorari to the superiour court of chancery of Richmond.

There was proof, that the stipulated rent of the first year was 130 dollars, and that Mayo, during the first year, gave Winfree written notice that he should demand and expect a rent of 400 dollars per annum, payable quarterly, if Winfree should continue his tenancy. The question of fact, upon the merits, was, whether, after that notice was given, there was any agreement between the parties, that Winfree should continue to hold at the old rent of 130 dollars per annum? The chancellor upon the hearing, thought there was sufficient proof of this agreement; and he perpetuated the injunction as to the excess of rent demanded by Mayo, above the rate of 130 dollars per annum. Mayo appealed to this court.

The cause was argued here by the attorney general for the appellant, and S. Taylor for the appellees, as well upon the merits, as upon the question of jurisdiction, whether Winfree's case, upon his own shewing in the bill, was a proper one for relief in equity?

BROOKE, P. This is an action of replevin in the disguise of a bill in chancery. The allegations of the bill, if all true, shew a case to which the remedy by writ of replevin is peculiarly adapted: neither is any reason shewn or pretended, why Winfree failed to resort to his legal remedy. To entertain such a bill as this, were to

allow a tenant complaining of a wrongful distress, to evade all the provisions of the statute regulating the writ of replevin; the duty of giving bond and surety to perform, and satisfy the judgment of the court, if he be cast, and the penalty which the law in that case imposes upon him; 1 Rev. Code, ch. 113, § 23. The court of chancery had no jurisdiction of the case: and 372 *if it had, the court would reverse the decree upon the merits: the case set forth in the bill is not proved. The decree is to be reversed, the injunction dissolved, and the bill dismissed.

Southall v. Garner.

November, 1830.

(Absent BROOKE, P. and COALTER, J.)

Replevin—Pleadings—Common Law Rules in Force in Virginia—Avovery.*—The common law rules respecting the pleadings in replevin, and particularly in regard to the nicety and precision required in avowry, are in force in Virginia, unaffected by any statutory provision: therefore, an avowry, faulty according to the common law rules applicable to that pleading, was held bad on general demurrer.

In an action of replevin, brought in the county court of Albemarle, by V. W. Southall, claiming as trustee for James Leitch, against Mary Garner, for goods which she had distrained for rent due her from Peter Laporte, Southall, in his declaration, complained that the defendant, on &c. at the parish of — in the county aforesaid, in a certain dwelling house there, took the goods and chattels, to wit, two milch crows, three feather beds, &c. (enumerating sundry articles of furniture) of him the said plaintiff trustee as aforesaid, of great value &c. and unjustly detained the same &c.

The defendant filed an avowry of which the following is an exact copy: "And the said defendant by her attorney, comes and defends the wrong and injury, when &c. and well avows the taking of the said goods and chattels in the said declaration mentioned, in the said dwelling house in which they are alleged to have been taken, because she says, that a certain Peter Laporte, for several months, to wit, for nine months next before the taking of the said goods and chattels, held and enjoyed the said dwelling house, in which the said goods and chattels were taken, with 373 the appurtenances, *as tenant thereof to the said defendant, by virtue of a certain demise thereof to him the said Peter Laporte theretofore made, to wit, on the 1st day of January 1820, at and under the yearly rent of 400 dollars, payable quarterly, to wit, on &c. by even and equal proportions; and because the sum of 100 dollars, parcel of the said rent, which had accrued during the quarter ending the 25th day of December 1820, was at the time when the said goods and chattels were taken as aforesaid, due and in arrear from the said Laporte to the defendant, the defendant well avows the taking of the said goods and chattels in the said dwelling house, for and in the name of distress for the said rent,

*See generally, monographic note on "Detinue and Replevin" appended to Hunt v. Martin, 8 Gratt. 578. The principal case was cited in Bargamin v. Pottiaux, 4 Leigh 421: Carter v. Grant, 32 Gratt. 778.

so as aforesaid due and in arrear to the defendant; and in this she is ready to verify &c."

To this avowry, the plaintiff pleaded in bar, that Laporte, the tenant, during the year for which the premises were let to him by the defendant, as stated in her avowry, executed a deed of trust, which was afterwards duly recorded, whereby he conveyed the goods now distrained to the plaintiff, in trust, to secure a debt then and still justly due to Leitch; whereby the goods passed to the plaintiff as trustee for Leitch, and were not liable to be distrained for the rent due from Laporte to the defendant.

And to this plea the defendant put in a general demurrer.

The county court gave judgment for the defendant; the plaintiff appealed to the circuit court, which affirmed the judgment; and then he appealed to this court.

The case was argued here by Johnson for the appellant, and Leigh for the appellee. The parties, in the court below, apparently intended to present the question, upon the construction of the act of 1815, ch. 15, § 7, 1 Rev. Code, ch. 113, § 15, p. 450, whether goods mortgaged by a tenant, during his occupation of leased premises, and retained in his possession upon the premises, are liable to be distrained for the rent in arrear? In other words, whether, in

such a case, the title of the mortgagee 374 is paramount to *the rights of the landlord? And that point was argued by Leigh with much earnestness; but Johnson said the court could not get to that question in this case, and declined the discussion of it: for,

He said, that upon Garner's general demurrer to Southall's plea in bar, the court must look back to the first fault in the pleadings; and it would find the avowry fatally defective: that this avowry was apparently framed upon the precedent, in 2 Chitt. Plead. 512, of an avowry under the statute of 11 Geo. II, ch. 19, § 22, but it did not pursue Chitty's precedent, and it would have been naught, even if we had any such statutory provision here, which we have not; much more was it faulty at common law, which is the law of Virginia on the subject. It was faulty, 1. Because it did not aver that the lease was continuing, or that the tenant was in possession and the landlord's title continuing, at the time of the distress. At common law, distress could not be made after the lease expired: our statute authorised distress afterwards, if the tenant continue in possession and the landlord's title continue; 1 Rev. Code, ch. 113, § 20, 21. 2. Because the demise and the landlord's title were imperfectly set out: neither the commencement nor expiration of the term, but only the date of the lease, is set out; nor who were the parties to the demise; nor the days of payment of the rent; nor what was the title of the avowant; nor that she or any body else was seized; nor that the property distrained was upon the demised premises; nor that it was the property of the tenant; which the 15th section of our statute concerning rents, certainly renders necessary. The common law required much strictness and nicety in avowries; and, in particular, it required the

avowant to shew his title, and that the reversion is in him, and to set forth the demise with precision. Poole v. Longueville, 2 Wms. Saund. 282, 284, b., note 3; Hale's 2d exception to the avowry in Bennet v. Holbech, Id. 319, a.; Scilly v. Dally, 2 Salk. 562, 1 Bro. P. C. 525; S. C. 375 Reynolds v. Thorpe, *2 Stra. 766; Hawkins v. Eckles, 2 Bos & Pull. 359; Harrison v. M'Intosh, 1 Johns. Rep. 379, 383.

Leigh, contra, endeavoured to shew, 1. That the declaration was faulty in omitting to give any manner of description of the goods replevied, or of the place where they were taken. He did not contend, that an exact description of the goods, distinguishing them, with absolute certainty, from all other goods of the like kind, was necessary, for such description would be hardly practicable; but they might and ought to have been described and identified with all practicable certainty; they might and should have been described, as goods then in possession of Laporte, and at the house by him occupied. If it was right on general demurrer to the plea, to go back to the faults of the avowry, it was right to go a step farther back, and look to the faults of the declaration. 2. That the defects in this avowry, if they would have been fatal in a controversy between a landlord and his tenant, who has an interest to contest the avowant's title and right to distrain, were immaterial in this controversy between the landlord and a stranger to the lease, who had no interest to contest the landlord's right which the tenant did not dispute. All the cases cited by Johnson, were cases between landlord and tenant. 3. That though the avowry might be bad on special demurrer, it was not so on general demurrer. In the cases cited, the avowries were specially demurred to. The plaintiff cured the defects of the avowry here, by pleading to it; they were not such as would have been good cause in arrest of judgment; Freeman v. Jugg, 3 Salk. 307.

Johnson replied, that the declaration was as certain as in such a case was practicable, and at all events the faults alleged against it, were cured by the defendant's avowing. Bullythorpe v. Turner, Willes 476, note (a.) The avowry was bad on general demurrer; its defects were not cured by the pleading to it, and would have been sufficient cause in arrest of judgment. English v. Burnell, 2 Wils. 258; Bain v. Clark, 10 Johns. Rep. 435, 9. If in replevin be- 376 tween *tenant and landlord, the landlord must shew his title and his right to distrain the goods of his tenant, he ought to be held to equal strictness, at least, when he avows the taking of the goods of a stranger in distress for rent.

GREEN, J., delivered the opinion of the court. The question which the parties intended to submit by their pleadings, is not brought up in such a way as that it can be judicially settled by the judgment of the court in this case. The demurrer leads us up to the first fatal error in the pleadings. Upon the authorities cited at the bar, the declaration, if not good against a special demurrer, is good upon general demurrer, and cured by the pleading over. But the

avowry is fatally defective in many of the particulars stated at the bar. This avowry was imperfectly copied from the form in Chitty's Pleadings, framed upon the provisions of the english statute of 11 Geo. II, ch. 19, § 22, which, in cases of distress for rent, greatly relaxed the strictness necessary in avowries by the common law; but we have no such statute, and none which at all affects the rules of the common law applicable to the pleadings in replevin.

The judgment is to be reversed, the demurrer overruled, and the cause sent back, with a direction to award a writ of inquiry as to the damages sustained by the plaintiff.

377 *Madden v. Madden's Ex'ors.

November, 1830.

(Absent BROOKE, P., and COALTER, J.)

Interlocutory Decrees—Appeal.—Upon appeals from interlocutory decrees in chancery, only so much of the cause is before the appellate court, as the court of chancery has acted upon.

Wills—Construction—Life Estate in Personality.—Testator bequeaths, that "all his moveable property after the death of his wife, shall be sold, and the proceeds divided among his five daughters: after all his debts paid, all his moveable property should be at the intire disposal of his wife: on her decease, the same to be disposed of as above mentioned." HELD, that the wife took only a life estate in such of the moveables as were capable of being used and returned in kind; and, therefore, the wife's gift of a slave to one of her daughters, passed only the wife's life estate therein to the donee.

Same—Same—Same—Liability of Life Tenant for Personality Consumable in Use—Quære.—Whether the wife, or her estate after her death, was accountable to the legatees in remainder, for such of the moveables as were consumable in the use, such as grain, or for the proceeds of crops left on hand by the testator, or for money or debts collected?

Mabra Madden the elder, of Frederick, by his last will and testament, inter alia, bequeathed as follows: "I desire the moveable property of every description, after the death of my wife, shall be sold, and the proceeds thereof equally divided among my

***Interlocutory Decrees—Appeal.**—To the point that, upon an appeal from an interlocutory decree, so much of the cause is before the appellate court as the court below has acted upon, and no more, the principal case is cited in *Miller v. Cook*, 77 Va. 816; *Ballard v. Chewning*, 49 W. Va. 508, 39 S. E. Rep. 172.

†**Wills—Construction—Life Estate in Personality—Liability of Life Tenant.**—Where chattels are given to a person for his life, without any limitation over in remainder, the legatee for life has not absolute property in such chattels, but his estate is accountable to the estate of the testator for such chattels as the legatee, in his lifetime, sold and converted to his use, or his administrator, after his death, sold and converted to the use of such legatee's estate; but such is not the case with such chattels as are consumed in their use (*quæ in usu consumuntur*) in which the legatee for life has an absolute property. *Bartlett v. Patton*, 33 W. Va. 71, 10 S. E. Rep. 21, 22. In delivering the opinion of the court, JUDGE BRANNON said: "There is no question but a life-estate to one with remainder to another in personality may be given, as recognized in an infinite number of cases. *Houser v. Ruffner*, 18 W. Va. 258, and cases cited; *Frazer v. Bevill*, 11 Gratt. 9; *Chisholm v. Starke*, 3 Call 25, and cases below. In *Madden v. Madden*, 2 Leigh 377, it was held that under the will the wife took an estate for life in such of the moveables as were capable of being used and returned in kind, and a *quære* was left whether the wife or her estate was accountable to the legatees in remainder for such of the moveables as were consumable in their use, such as grain or money or debts." See also, citing the principal case, *Bartlett v. Patton*, 33 W. Va. 80, 10 S. E. Rep. 24; *foot-note* to *Cross v. Cross*, 4 Gratt. 266 (containing extract from *Bartlett v. Patton*, 33 W. Va. 80, 10 S. E. Rep. 24).

five daughters, Nancy, Susan, Mary, Jane and Elizabeth: after all my just debts are paid, my desire is, that all my moveable property shall be at the intire disposal of my wife, Jane Madden: on her decease, the same to be disposed of as above mentioned." The testator's widow, Jane Madden, and his son Mabra Madden the younger, were his executors. The moveable property, bequeathed by the above recited clause of his will, appeared, from the inventory and appraisement of his estate, to have consisted of household furniture, farming utensils, stock of horses, cows &c. and one male and one female slave; and it was alleged, that he also left a crop on hand and some debts due him, which were included in the same bequest. The female slave died in childbed, soon after the testator's death, leaving an infant child, a girl, afterwards called Lucinda, then only

378 two or three weeks old *feeble, sickly and unlikely to live; and the testator's widow Mrs. Madden, promised her daughter Nancy, that if she would give her care to this child, and should succeed in rearing it, she would give it to her. Nancy Madden, accordingly, took charge of the child, and by the most humane and constant care, succeeded in rearing it. And, some years afterwards, her mother Mrs. Madden and James Bulger, the husband of her sister Elizabeth, and John Thomas, the husband of her sister Jane, joined in a deed, conveying to Nancy Mad-

In *Bartlett v. Patton*, 33 W. Va. 75, 10 S. E. Rep. 22. It is said that, in the principal case, JUDGE GREEN leaned strongly against the legatee for life having an absolute property even in specific bequests of articles consumable in their use.

Same—Same—Devise for Life with the Power of Disposal—Effect.—Numerous cases show that where a power of disposal accompanies a bequest or devise of a life estate, whether such estate be given expressly or by implication, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power was intended. *Miller v. Potterfield*, 86 Va. 883, 884, 11 S. E. Rep. 496, citing, among others, the Virginia cases of *Madden v. Madden*, 2 Leigh 377; *Johns v. Johns*, 86 Va. 333, 10 S. E. Rep. 2.

Same—Same—Devise for Life with Absolute Power of Disposal—Effect.—It is settled, that if a testator gives property to a devisee or legatee, to use or dispose of at his pleasure, that is to consume or spend, sell or give away, at his pleasure, such devisee or legatee has the fee simple or absolute property, even though his interest in it be called by the will a life estate; and there be a provision in the will, whereby what remains of the property at the death of a devisee or legatee, is given to another person. *Milhollen v. Rice*, 13 W. Va. 519, citing, among others, the Virginia cases, *Riddick v. Cagwood*, 4 Rand. 547; *Madden v. Madden*, 2 Leigh 377, 385; *Burwell v. Anderson*, 3 Leigh 348, 355; *McLison v. Cooper*, 4 Leigh 408; *May v. Joynes*, 20 Gratt. 662; *Spink v. Hayworth*, 26 Gratt. 384. See also, *foot-note* to *May v. Joynes*, 20 Gratt. 662, collecting many cases in point and discussing this subject at some length.

It was said by JUDGE GREEN in *Madden v. Madden*, 2 Leigh 377, in an able review of the cases on the subject, that it was settled law that, *whenever there is an interest given, coupled with an absolute power of disposition in respect to all property of every description, real and personal, the first taker would have an absolute property, and that there was no distinction between a case of a gift for life, with a power of disposition added, and a gift to one indefinitely, with a superadded power to dispose of by deed or by will.* HARRISON, J., delivering the opinion of the court in *Farish v. Wayman*, 91 Va. 435, 21 S. E. Rep. 810.

But in *Milhollen v. Rice*, 13 W. Va. 526, JUDGE GREEN, who delivered the opinion of the court, said: "JUDGE GREEN in a dissenting opinion in *Madden v. Madden's Ex'rs*, 2 Leigh 380, denied (with some qualifications) that there was an established distinction between a case of a gift for life, with a power of disposition added, and a gift to one indefinitely.

den, in consideration of her care, trouble and expense in rearing the girl Lucinda, all their right, title and interest in her. Under this title, Nancy Madden claimed and held the girl in possession, till her mother's death, thirteen years after the deed was made.

Upon a bill exhibited in the superiour court of chancery of Winchester, by Nancy Madden against Samuel Madden and John Rippler executors of Mabra Madden the younger, who was surviving executor of his father, the testator Mabra Madden the elder, the executor also of his mother Jane Madden, and James Bulger, and Elizabeth his wife, John Thomas and Jane his wife, Thomas Hunter and Mary his wife, and Thomas Jones and Susan his wife, the following questions of law arose: 1. Whether the will of Mabra Madden the elder, in giving his wife the intire disposal of his moveable property, did not, in effect, give her an absolute estate therein, so that her gift of the female slave in question to Nancy Madden, sufficed to pass a perfect title to the donee? Or, if not, 2. Whether, as Mrs. Madden was an executrix of that testator, her conveying of this slave was effectual to pass the legal title to the donee, leaving the executrix accountable for the value to the legatees in remainder? If neither, 3. Whether, considering the care, trouble and expense, incurred by Nancy Madden, in rearing this slave, she was not entitled to remuneration from the legatees in remainder?

Upon these points the chancellor was of opinion, that the testator's widow Jane

Madden, took under his will, only a
379. *life interest in the moveable property and could transfer no more to

with a superadded power to dispose by deed or will. He was apparently misled by the cases of *Goodtitle v. Otway*, 2 Wills, 6; *Beachcroft v. Broome*, 4 T. R. 441; *Barford v. Street*, 16 Ves. 135; *Irwin v. Farrer*, 19 Ves. 86, which are the only cases he cites to sustain his view.

All these cases we have examined and commented on. JUDGE GREEN seems however to have entertained this view but a brief time. He concurred in the decision in *Burwell Ex'rs v. Anderson's Adm'r*, etc., 8 Leigh 356, decided shortly afterwards. JUDGE TUCKER, in delivering the opinion of the court in that case, says: "A devise to A. to dispose of at his will and pleasure, gives a fee simple; but a devise to a wife for life, and after her decease she to give the same to whom she will, passes but a life estate with a power. When such inconsistent life estate is given, the fee does not pass; for the whole matter rests upon intention."

"I conclude therefore, as stated by Sir William Grant in *Bradley v. Westcott*, 18 Ves. 453, and by CHANCELLOR KENT in *Jackson v. Robbins*, 16 Johns. 568, that the distinction, on which I have been insisting, is perfectly established; and that a devise or gift to A. and such persons, as he shall appoint, is a fee simple, or absolute property in A. without an appointment; but if it is to him for life, and an unlimited power of appointment is superadded, he has but a life estate. And if the superadded power was, to appoint a specified class of persons, it would a fortiori not enlarge his property life estate to a fee simple, or absolute property."

Same—Rule of Construction.—In the principal case, speaking of the will therein construed, CARR, J. said (at page 380): "There are no technical words or forms of expression used in the will. It is, evidently, the production of a plain man, who, though he understood very well what he meant to say, and was able to express himself quite intelligibly, knew nothing of legal forms or legal phrases. To ascertain his meaning, we must not look to treatises on wills, or to adjudged cases, but simply to the words he has used." These words of JUDGE CARR were approved by LEWIS, P., speaking for the court in *Miller v. Potterfield*, 86 Va. 878, 11 S. E. Rep. 486.

Nancy Madden, by any deed or gift made by her in her own right; that if the gift could be regarded as made by her in her executorial character, it would be void, since an executor cannot make a valid gift of his testator's property, though his sale to a purchaser for valuable consideration without notice of fraud, it is good; that, therefore, Nancy Madden had no title to or right in the slave Lucinda, except as a legatee in remainder, and as assignee of the right of two others of the legatees; that her care and expense in rearing this slave from her childhood, could give her no claim for remuneration against the legatees in remainder, that being properly a charge against her mother, who, as the owner for life, was bound to take care of and support her; and that the court ought not to impede the sale of this slave by the executors, since she was a subject otherwise indivisible among the legatees in remainder, and since the testator expressly required all the property remaining at the death of his wife to be sold, and the proceeds divided among his five daughters, and the sureties in the administration bond are responsible to the parties, if the executors fail to account for the proceeds. And the chancellor made an interlocutory decree in the cause, grounded on these principles.

He also intimated an opinion on another point (though he did not decide it, or found any part of his decree upon it, because all the parties interested in the point, were not then regularly convened before the court) namely, that the bequest of the moveable property, to the testator's wife for life, so far as it affected articles the use of which consisted in the consumption of them (such as grain) with a power of intire disposal, was, according to the better opinions, absolute, and a limitation of them over in remainder, ineffectual; and though such a bequest of money might not, generally, fall within the same principle, yet the strong language of this will, that after the testator's debts should be paid, all his moveable property should be at the intire disposal of his wife, excluded the
380 notion of her accountability *even for

money, or indeed, for any articles except such as were susceptible of being used and returned in kind.

Nancy Madden appealed from the chancellor's interlocutory decree to his court, where the cause was argued by Nicholas for the appellant and Leigh for the appellees, upon the points above stated, and upon other points also presented by the decree, which it is needless to report, because, though they were the grounds on which this court reversed the decree, they depended on the peculiar facts and circumstances of the case, and involved no general principle.

CARR, J. Upon these appeals from interlocutory decrees, so much of the cause only is before the court as the chancellor has acted upon: this, I think, has been the constant course of the court. The chancellor, then, has decided, in the first place, that Nancy Madden had no title to or right in the slave Lucinda, but as a legatee of her father and assignee of other legatees; that Mrs. Madden the testator's widow, took, under his will, not an absolute prop-

erty in the slaves included in the moveable property thereby bequeathed, but only a life estate. The inquiry is as to the meaning of the bequest: it is a pure question of intention. There are no technical words or forms of expression used in the will. It is, evidently, the production of a plain man, who, though he understood very well what he meant to say, and was able to express himself quite intelligibly, knew nothing of legal forms or legal phrases. To ascertain his meaning, we must not look to treatises on wills, or to adjudged cases, but simply to the words he has used. There were but two slaves included in this bequest of the moveable property, one a man of trivial value, the other a female (the mother of Lucinda) who died shortly after the testator. If Lucinda was the property of Mrs. Madden, it is because her mother was given to her by the will. "I desire the moveable property of every description, after the death of my wife, shall be sold, and the money divided among my five daughters." This sentence it is impossible to misunderstand, or to have

381 "a doubt about: it expresses the clear will of the testator on two points, 1. that all his personal estate was to be sold for the benefit of his daughters, and 2. that this sale was to take place after the death of his wife. This (as lawyers know) would have given his wife a life estate in the personal property, by implication; but the testator probably had no idea, that a direction to sell after his wife's death, would imply an estate for life to her; and if he did know it, he chose not to rest it on implication, but to give it to her expressly. He therefore adds, "after all my just debts are paid, my desire is, that all my moveable property, shall be at the intire disposal of my wife." Now, is there any thing in this provision, incompatible with the first? If the testator had stopped here, does not every one see his meaning at a glance? At my wife's death this property shall be sold; but till then, she shall have the intire disposal of it. Is there any thing in these words "intire disposal" which, of necessity, and in the teeth of the preceding sentence, vests the absolute property in the wife? They are not technical words, to which a fixed meaning is attached, and that so well known, that we must suppose the testator so used them. They are such words as may well be explained, and their operation either enlarged or restricted, by the context. Thus, the direction being given to sell the property at the wife's death, the intire disposition given her, means the free use and enjoyment, the uncontrolled possession and ownership, until her death, but such a possession, ownership and disposal, as may leave the property to be sold at her death. This, I say, would seem to me the plain construction, if the testator had stopped at the sentence giving his wife the intire disposal: but he immediately adds, "On her decease, the same to be disposed of as above mentioned;" thus repeating his favorite wish of a sale and division among his daughters, and making, as he no doubt thought, "assurance doubly sure." Small indeed, would seem to be the worth of language, or the security of wills,

if an idea thus clearly expressed, thus solicitously recurred to, and anxiously 382 inculcated, can be *explained away.

It is impossible to suppose, that the testator meant by the gift to the wife, to defeat and destroy the sale directed at her death; and yet he must so have meant, if he meant to give her the intire and absolute interest in the property. Indeed, it is not, I believe, contended that the testator meant to vest in his wife the absolute property, but that he intended to give her a life estate, with an absolute power of disposition, leaving only so much to be sold at her death, as should be undisposed of by her, and that, by consequence, this power of disposal vested in her the absolute interest in the whole, whether disposed of or not, and rendered the direction to sell at her death void, not by force of the testator's intention, but by operation of law. This argument concedes, 1. that the testator intended to give his wife only a life estate; and 2. that he intended a sale of the property left at her death. But, it is said, he meant to give her an absolute power of disposal of the property, and this converts the estate for life into an absolute estate, and destroys the intention to give it for life, and the direction to sell after her death. Thus, while we are looking for intention alone, we suffer one doubtful phrase, "intire disposal," a phrase having nothing technical, no settled meaning, but liable to be enlarged or restricted by the context, to overrule and destroy the settled wish and will of the testator, twice expressed in words as clear as light, viz. that his moveable property of every description should be sold at the death of his wife, and the money divided among his daughters. To such a construction I can never assent. I am clearly of opinion, that the testator meant to give his wife, and has given her, a life estate in the moveable property, with a power of disposal commensurate with that estate; and at her death the property to be sold, and the money divided among his daughters. I agree, therefore, with the chancellor, that the testator's widow Mrs. Madden, had only a life estate in the slaves in question, and could give no more by her deed to the appellant. His other positions, that an executor cannot make a valid gift of his testator's property, and that 383 the appellant can have no claim *to remuneration for her trouble and expense in rearing this slave, against her co-legates in remainder, seem to me indisputably correct; indeed, they have hardly been contested. And these are the only principles declared, the only points of law decided, by the decree.

GREEN, J. The provisions of the will of Mabra Madden the elder, directing that his moveable property of every description, after the death of his wife, should be sold, and the proceeds divided between his daughters, and that, after the payment of his debts, all his moveable property should be at the intire disposal of his wife, and on her decease the same should be disposed of as before mentioned, are so inconsistent, that they would, if taken literally, utterly destroy each other. Such a construction ought not to be admitted, if by any other,

consistent with the probable intention of the testator, the provisions can be considered as each modifying the other, without destroying their whole effect.

The judgment of the court below upon this will, was 1. that it gave only a life estate to the widow: 2. that such a gift with a power of disposition of articles, such as grain, the use of which consists in its consumption, is absolute, and a limitation over ineffectual: 3. that although money may not, generally, fall within this principle, yet the strong language of this will, that after the debts were paid, all the testator's moveable property should be at the intire disposal of his wife, excluded the notion of her accountability for money, or for any articles except such as are susceptible of being used and returned in kind. And, upon these principles, the court thought, that neither the widow nor the executors of Mabra Madden were accountable to his daughters, for money received on account of outstanding debts due to the testator, or for the sales of crops on hand or growing at the time of his death. I infer also, from an expression in the decree, "since the testator expressly requires all the property remaining at the death of his wife, to be sold and the proceeds divided amongst his five daughters," *that the court was of opinion, 384 that the power of disposition given to the wife had the effect of restraining the testator's disposition in favor of his daughters, to such of the property only as remained at his wife's death undisposed of by her. And this, I am perfectly convinced, was the real intention of the testator.

The first sentence of his will, on this subject, by directing, that his moveable property of every description, should after the death of his wife be sold, gave her a life estate by implication in the whole: the second modified it, by subjecting the whole to her intire disposition, not with the intention of revoking the former in toto, but only so far as the widow should exercise that power of disposition: and the last was a mere repetition of the first, and modified alike by the second. This construction attributes to the testator a reasonable intention, and one not at all uncommon, to give to a favorite legatee the use of a fund for life, with a power to dispose of as much of it as might be necessary to the occasions of such legatee, to be judged of by the legatee, and with a desire, that so much of it as was not disposed of by the first taker, should go to the persons next in his affections; particularly, when the last are in the same relation to the first taker as to the testator, and likely to be as much in the affections of the first taker as his own. This construction too would leave every clause of the will to have some effect. If, on the contrary it is supposed, that the testator intended a power of disposition given to his wife, only co-extensive with the interest for life previously given, it would render that provision utterly nugatory; for the legatee would have had such a power of disposition as a necessary incident to her interest for life. And if such a construction could be put upon a

power given in general terms, it is impossible to apply it to one given in such broad emphatic terms as "the intire disposal:" a power of disposition for life, is not a power of intire disposition. It would be still more extravagant to suppose, that the testator, when he gave the same power, in the same terms, as to all his 385 *personal property, intended, and had in his mind, that it should operate as to some articles, (such as would necessarily be consumed in use, money, debts and the proceeds of crops made for sale and sold) and give his wife an absolute right of property in them, and as to others (such as could be used and returned in specie) only a power of disposition of her interest for life. Whether such is or is not the legal effect of such a power, connected with a life estate, is another question, which will be attended to; but, surely, such an effect could not have been the intention of the testator.

If the court below, as I have supposed, entertained the same opinion which I have expressed as to the construction of the will, that the testator intended to give only a life estate in his personal property to his wife, with a power of absolute disposition over all or any part of it at her pleasure, and that only such part as was not so disposed of should be sold at her death, and disposed of according to his will, then it was wholly unnecessary to go any further, than to inquire whether such a disposition could be legally carried into effect? If it could, then the will of the testator controlled the disposition of the whole alike, without any discrimination. If it could not, because the limitation over in such a case would be void, as being contrary to settled rules of law, the limitation would be wholly frustrated, and the first taker, by virtue of such an absolute power of disposition, would have the absolute property in all, and not a part only of a peculiar description. And this is the settled law (wherever there is an interest given coupled with an absolute power of disposition) in respect to all property of every description, real and personal, as was decided in *Riddick v. Cohoon*, 4 Rand. 547, upon many authorities there collected. That case and those there cited, are all cases of gifts, indefinite, or expressly in fee; and it may be supposed, that the rule applies only to such cases, and not to those which are limited to an estate for life, either expressly or by implication, especially, as it was said

386 by the master of the *rolls in *Bradley v. Westcott*, 13 Ves. 452, that there was an established distinction between a case of a gift for life with a power of disposition added, and a gift to one indefinitely with a superadded power to dispose by deed or will. I am satisfied there is no such distinction, except so far as the character of the estate first given, may, in doubtful cases, influence the construction of the will, as to the extent of the power given; but when the will expressly gives a power of absolute disposition, the effect is the same in both cases. Thus, in *Goodtitle v. Otway*, 2 Wills. 6, a devise to one for life, and after death to her issue, but if none that she should have power to dis-

pose of the lands at her will and pleasure, it was held, that she had an estate tail with a fee simple upon contingency, and not a mere power to dispose or appoint. And *Beachcroft v. Broome*, 4 T. R. 441, is to the same effect. It may be said, that there was in those cases, no limitation over upon the failure of the tenant for life to dispose of the subject, and that circumstance makes a difference: but it does not. In *Barford v. Street*, 16 Ves. 135, the devise was of real and personal estate, in trust to pay the rents, dividends &c. to a married woman for life, and after her death, to convey &c. according to her appointment, with a limitation over in case of her death without making an appointment: the master of the rolls held, that she had an absolute property immediately, and decreed the trustees to convey it absolutely to her in her life time. So, in *Irwin v. Farrar*, in the Exchequer, 19 Ves. 86, a sum of money was given to trustees to be invested in government securities, the dividends thereof to be paid to a niece of the testatrix for life, and after her decease, to such person or persons, or for such use or uses as she should appoint by will or otherwise, and empowering her to apply the fund, if she chose, to the purchase of an annuity, so that it was purchased and secured, with the approbation of the trustees, and that she should not have power to sell such annuity: it was held, that the legatee had an absolute power of disposition over the whole fund, and decreed, that the

387 trustees should pay over the legacy *to her for her own use, and to be at her own disposal. In the case above stated of *Barford v. Street*, the estate was limited in express terms, to the life of the first taker; it was vested in trustees; and there was a limitation over, in case she should fail to dispose of it by appointment: and in *Irwin v. Farrar*, the first taker had no power to dispose of it, according to the literal terms of the will, but by some act to take effect after her death. In our case, there is no limited estate in terms; no trustees are interposed; and the power is immediate and unlimited as to manner, object and subject. The observation of the master of the rolls, in *Bradley v. Westcott*, in respect to a settled distinction in such cases, between an indefinite interest, and an express life estate, given in the first instance, was made in reference to the effect of that circumstance, in determining the extent of the power. There, the testator gave all his personal property to his wife for life, "to be at her full, free and absolute disposal and disposition, during her natural life, without being in any wise liable to be called to any account of or concerning the amount, value of particulars thereof, by any person or persons whatever," and from and after her decease, he gave a certain specified part thereof, to such persons as his wife by her will duly executed should direct and appoint, and if she should make no such appointment, that part was to fall into the residue, which should remain undisposed of by his wife at the time of her decease; and all the rest, residue and remainder of his said personal estate, which should remain undisposed of

by his wife at the time of her decease, he gave to a residuary legatee. The master of the rolls held, that the express estate for life, and power of disposition, for her natural life only, given in the first instance to the wife, were not enlarged by the subsequent declaration exempting her from account &c. nor by the subsequent disposition of the property remaining undisposed of by the wife at her decease; because that would allow an implication from equivocal terms to control an express limitation of the estate and of the power of disposition, to her life only; and,

388 especially, because a power of *appointment in absolute property by her will, was given to the wife, as to a specified part of the property, which contradicted the idea of a general power over the whole: and that the exemption from accountability &c. was also only intended to protect her from any trouble, in that way, during her life only. He admitted, that it was necessary to construe this to be either a mere interest for life (with the greatest power of disposition, which one having such an interest could enjoy) or to be property in the widow: that there was no medium: for he could not say, that she had a life interest, with a power to dispose of the whole, if she thought fit, but that the will shall operate upon what she should leave undisposed of. Upon that construction it would be property, as it would be absolutely uncertain what would be the subject of the residuary bequest. And, consequently, he held that she had only a life estate, even in that over which she had a power of appointment by will; and that her will giving in general terms all her property did not pass it to her legatee. In our case, we have no express estate for life, no express limitation of the power of disposition to the continuance of the life estate, and no particular power to dispose of a specified part of the property, to control, not an implied power to dispose of all, (as in that case) but an express power to that effect, in our case.

If it was the opinion of the chancellor, that the testator intended only to give a power of disposition co-extensive with the interest of the donee for life, and that, in such a case, the law controlled the intention of the testator, in respect to such articles as could be only used by consuming them, because incapable of limitation, and gave the absolute property of such to the donee; and that the existence of the power, though nugatory to all other purposes, would have the effect of enlarging the scope of that rule of law, so as to embrace other articles not necessarily consumed in use, such as money, debts collected, and the proceeds of crops sold: I cannot assent to either of these propositions. As to the last, the intent of the testator was, avowedly,

389 the *same as to his whole moveable property of every description; and if his intention was invalid as to a part, because contrary to a rule of law, and valid as to the rest, it would be because the law itself marks the line of discrimination contrary to the testator's will; and it would be extravagant to say, that the intention of the testator could operate either way,

beyond the legal line of discrimination. If it could affect any thing beyond that line, it must of necessity affect all alike. As to the first proposition, I do not think that the doctrine is true, that an interest given for life in things *quæ ipso usu consumuntur*, confers, by operation of law, an absolute property, with or without a power of disposition, which, if connected with such an interest, must operate by its own force, and alike upon all descriptions of property given for life, either extending the life estate to an absolute property in all or none. The master of the rolls, in *Randall v. Russell*, 3 Meriv. 194, did indeed assert, that a specific bequest of such articles for life (without any express power of disposition) did vest an absolute property in the first taker, but admitted, that in case of a residuary bequest it did not, and that in such a case the limitation over would be valid. In the present case, the bequest was residuary, or of the same nature, being of things of all descriptions in mass, which is the only ground of discrimination between a specific and residuary bequest. It is therefore unnecessary, in this case, to examine the general question at large: but I must be permitted to say, that my opinion, made up on great consideration and given judicially in an important case, with this opinion of the master of the rolls before me, was, and is, that even in the case of a specific bequest of such articles for life with a limitation over, the limitation is good; that the intention of the testator, being in such case most obvious, that the legatee in remainder shall have the benefit of the subject after the death of the first taker, it ought to be carried into effect, if possible. And it may be effectuated by requiring the representative of the first taker, to deliver articles of the same

kind and quality, or to pay their
390 *value to the remainderman. This is clearly the civil law, from which the principle of the common law now prevailing was taken, and is intirely just, and no way inconvenient in its execution.

If I am right in supposing, that the intention of the testator was to give a life estate in the whole of his personal property of every description to his wife, with an absolute power of disposition as to all, and that so much thereof as might be left undisposed of by her at her death, should be sold &c. then an absolute property in the whole was vested in her, whether disposed of by her or not, and the limitation over was void, not by force of the testator's intention, but by operation of law; and her conveyance of the slave in question passed an absolute property; for, though it may be that she believed that she only had a life estate, which she intended to pass by the deed, yet as that conveyed, in terms, all her right and title, it passed the absolute property to the grantee. *Wiseley v. Findlay*, 3 Rand. 361.

Suppose, however, that in such case an absolute property in the whole does not vest in the first taker, by force of a rule of law rendering the limitation over as to the part undisposed of by the first taker void, and that the intention of the testator in respect to the disposition of such part can

be legally carried into effect; still the actual disposition of any part by the first taker, would vest an absolute property in the devisee or vendee, as the case might be, and effectually withdraw it from the operation of the will, directing only that such of the property as remains undisposed of by the first taker, shall at her death be sold &c. The gift or sale of the slave in question, when a sickly and motherless infant of three weeks old, by Mrs. Madden to the appellant, in consideration of her taking care of it and preserving its life, was an intire and absolute disposition of it, as was her subsequent conveyance of it by her deed, not as an executrix, but as a legatee for life with an absolute power of disposition. The suggestion, therefore, in the decree under consideration, that an executor cannot
391 give away his testator's *property, has no application to the case; but even an executor would have that power, if the intire disposition was given to him by the will.

CABELL, J. The controversy in this case depends upon the construction of the will of Mabra Madden, the elder; and the question is as to the testator's intention.

It is agreed, on all hands, that he intended his wife to have a life estate in his moveable property: but the controversy is, whether he did or did not intend to give her any other power over the property than that which would necessarily belong to her as mere tenant for life? It is contended, on the one hand, that she had no other interest or power, than as mere tenant for life; on the other, that she had not only a life estate in the property, but the power to dispose absolutely of any part or of the whole thereof, so as to leave nothing for the daughters, except such as she might fail to dispose of.

There is not, in my opinion, any thing in this will, to justify the belief, that the testator intended thus to subject the interests of his daughters to the power of his wife. It is not usual for the father of a large family to pursue such a course; and I think it an unnatural course, unless there be particular circumstances which require it. In a doubtful case, therefore, I should feel no disposition to attribute such an intention to a testator. But, in this case, the testator has expressed himself so strongly as (in my judgment) to leave no doubt of his intention. The solicitude which he has manifested for the interests of his daughters, is at least equal to that which he has shewn for the interest of his wife, though he has provided for them in different ways. To his wife he gives the enjoyment of the property during her life; but, if there be any force in language, he also intended that his daughters should enjoy it after her death. It is somewhat remarkable, that the clauses of the will on which the question arises, commence and end with the declaration, that his daughters are to

have, after the death of his wife,
392 *the benefit of all of his moveable property. This is certainly so, as to the first clause; for the expressions there are, that the moveable property of every description, after the death of his beloved

wife, should be sold, and the proceeds thereof equally divided among the five daughters. The same idea is as strongly expressed in the last clause, where, after having in the intermediate clause declared that all his moveable property should be at the intire disposal of his wife, he immediately adds, "on her death the same shall be disposed of as above mentioned;" that is, sold for the benefit of his daughters. The word "same," in the last clause, refers to the property which in the preceding clause he had put at the intire disposal of his wife; viz: all his moveable property. The testator could not have intended, that his wife should have the power to dispose, absolutely, of all his moveable property, so as to leave none of it for his daughters, and yet intend that his daughters should have it all, after her death. The two intentions are inconsistent with each other. When contradictory expressions occur in wills, it is our duty to reconcile them if we can. As, then, the testator has declared, in the most express and positive terms, that his daughters are to have all his moveable property after his wife's death, and that in the mean time she is to have the intire disposal of it, it seems to me impossible to resist the inference, that, by the terms intire disposal of his wife, he meant no more than that she should have that sort of intire disposal, which is necessary to the full and uncontrolled enjoyment of it during her life. I am therefore of opinion, that the wife took only a life estate under the will, and had no right to give away the slave in question. As to the points of law, which have been discussed at the bar, though not decided by the chancellor, I give no opinion on them; because, according to the view which I have taken of the case, some of them can never arise, and because it would be premature to decide the others, before all the parties interested in

them shall be brought before the court.
393 *CARR, J., thought the decree right in omnibus; but, the other two judges, holding that it was erroneous upon the points before alluded to, as depending upon the peculiar facts and circumstances of the case, involving no general principle, and therefore not necessary to be noticed in the report, the decree was reversed, and the cause remanded to the court of chancery.

Jacobs v. Hill and Others.

November, 1830.

(Absent COALTER, J.)

Sheriff—Bond of Deputy—Construction—How Long Binding on Deputy's Sureties.—A bond is executed to a sheriff, during the first year of his shrievalty, by a deputy sheriff and his sureties, the condition whereof recites, that the sheriff has been commissioned sheriff of N. and that the deputy has

***Sheriffs.**—See generally, monographic note on "Sheriffs and Constables" appended to Goode v. Galt, Gilb. 152.

***Same—Bond of Deputy—Nature of.**—A contract between a sheriff and his deputy is a private affair, and therefore the bond of the deputy is not an official or statutory bond, with condition prescribed by statute, but may contain just such provisions to protect the sheriff and impose duties, obligations, and liabilities on his agent, the deputy, as may be inserted in it. It is a common-law bond, not a statutory one. Poling v. Maddox, 41 W. Va. 781, 24 S. E. Rep. 1000, citing the principal case to sustain the proposition.

undertaken the duties of the said office for and during the time the sheriff may continue in office, &c.; HELD, that the contract here recited is a deputization of the office not only for the first but for the second year also of the shrievalty, and the sureties are bound for the conduct of the deputy during both years.

Same—Motion against Deputy and Sureties—Interest.—The statute 1 Rev. Code, ch. 78, § 33, giving a summary remedy by motion for a sheriff against his deputy and his sureties, does not authorise the court to allow interest.

Same—Same—Evidence against Sureties—Judgment against Sheriff.—A motion is made against a sheriff for default of his deputy, upon which the sheriff, with assent of the deputy, but without the knowledge of his sureties, confesses judgment: HELD, the record of this judgment, is admissible

†**Same—Motion against Deputy and Sureties—Interest.**—The principal case was cited with approval in Willard v. Overseers of Poor, 9 Gratt. 141.

§**Same—Evidence against Sureties—Judgment against Sheriff—Effect.**—Crawford v. Turk, 24 Gratt. 176, was an action of debt, brought by a sheriff against his deputy and the sureties of the deputy, on the official bond of the deputy, to recover the amount of a judgment rendered against the sheriff for the default of the deputy. The question was presented to the court of appeals whether the judgment rendered against the sheriff, the deputy having attended the trial and made full defense to the action, was binding and conclusive upon the sureties of the deputy in the action of the sheriff against the deputy and his sureties. It was held that the judgment was conclusive evidence against the sureties of the deputy as well as against the deputy himself. JUDGE MONCURE, who delivered the opinion of the court, discusses at some length the principal case, Munford v. Overseers, 2 Rand. 318, and Cox v. Thomas, 9 Gratt. 323, and shows that they are not opposed to the view which is taken in the case at bar. Though he seems to approve the proposition laid down in Munford v. Overseers, 2 Rand. 318, that a judgment against a principal in a bond is not conclusive against his sureties, he thinks that the case of a deputy and his sureties, so far as it relates to the effect upon the sureties of a judgment against the deputy, does not come within the purview of the rule governing the case of a principal and his sureties: but that the bond given by a deputy and his sureties is a bond of indemnity, and the case of a deputy and his sureties falls under that class of cases in which those who are not parties to the suit, and do not claim under either of the parties, may be bound by the judgment.

In discussing the decision in the principal case, he says: "It was not necessary to decide, and was not decided in that case that the judgment against the sheriff was not conclusive evidence against the sureties of the deputy, but it was sufficient to decide, as it was decided, that the said judgment was *prima facie* evidence against them. The remark of JUDGE CARR in delivering the opinion of the court, that 'This, we think was ample evidence of the fact, and charged his sureties, unless disproved by them,' was extrajudicial as to the concluding words, 'unless disproved by them,' and seeming in that respect to have been made without advertent to the distinction noticed by JUDGE GREEN, as before mentioned. 2 Rand. 318. JUDGE CARR treated the case before him as a case falling under the general rule which governs the case of principal and surety, instead of a case falling under the exceptions, which includes cases of contracts of indemnity and the like. Whether it properly fell under the one or the other, the result of the case would be precisely the same."

"In that case the judgment against the sheriff was by confession, though with the assent of the deputy, and it was therefore contended by the sureties of the deputy, that it did not bind them: there being, as they said, no other evidence of the deputy's default. But the court said the record showed that the motion against the sheriff was for judgment for the amount of the clerk's tickets for fees put into the hands of his deputy, and that upon this motion the deputy assented in open court to the confession of judgment by the sheriff: in other words, confessed that he had received the clerk's tickets and had not accounted for them: this the court thought, 'was ample evidence of the fact, and charged his sureties, unless disproved by them.' Had the judgment been rendered against the sheriff, not by confession, but *in invitum*, and against the utmost resistance of the deputy, the court might have thought the judgment conclusive, not only against the deputy but also against his sureties. In the case now under consideration the judgment against the sheriff was *in invitum*, and

evidence against the deputy's sureties, upon a motion by the sheriff against the deputy and his sureties.

Same—Bond of Deputy—Effect of Death of One Surety.

A deputy sheriff gives bond with eight sureties to the sheriff; one of the sureties dies: HELD, a motion lies on the bond against the deputy and the surviving sureties.

Jacobs was commissioned sheriff of the county of Nelson, for the year 1820-21, and, by a second commission, was continued in the office for the year 1821-22. During the first year of his service, he appointed Hill his deputy; and Hill, with eight sureties, executed a bond to Jacobs, with condition which (so far as it is material) to recite it *here) was in the following words: "The condition of the above obligation is such, that whereas W. B. Jacobs hath been commissioned sheriff of the county of Nelson, and the above bound J. T. Hill hath undertaken the duties of the said office, for and during the time the said Jacobs may continue in office; now, if the above bound J. T. Hill shall well and truly execute and perform the duties of the said office, as deputy sheriff, and well and truly collect and account for all moneys which he may receive by any process, &c. and shall moreover indemnify, keep and save harmless the said W. B. Jacobs from all costs, fines, forfeitures and amercements, which he may be subject to in consequence of his the said J. T. Hill's default, in all suits, actions and motions, and shall in all respects execute and perform the duties of deputy sheriff as he may be required by law, then this obligation to be void." During the second year of Jacobs's shrievalty, the clerk of Nelson put his tickets for fees into the hands of Hill, the deputy, for collection; and Hill failing to collect and account for them, the clerk made a motion in the county court of Nelson, against Jacobs, the high sheriff, for

against the utmost resistance of the deputy, who was present on the trial, was examined as a witness for the defendant, and seemed to be the person manifesting the most interest in the progress and result of the action.

And in *State v. Nutter*, 44 W. Va. 389, 30 S. E. Rep. 67, 68, it is said: "I think that in this state a judgment against a principal does not bind the surety, as a general rule. *Bigelow v. Estop*, 145; *Craddock v. Turner*, 6 Leigh 118; *Munford v. Overseers of Poor*, 2 Rand. (Va.) 318; *Jacobs v. Hill*, 2 Leigh 393; *Black, Judgm.* § 586. These cases overrule *Baker v. Preston*, *Gilmer* 235. There is high authority, however, in favor of the conclusiveness of a judgment against the principal upon the sureties. *Stovall v. Banks*, 10 Wall 583; *Bigelow v. Estop*, 146, note 2. I said above that the judgment is not generally conclusive upon sureties. It depends upon the character of the bond. If it undertakes to pay such judgment as may be recovered, that judgment is conclusive, because that judgment is the event on the happening of which the surety agrees to pay. *Crawford v. Turk*, 24 Gratt. 176. If the effect of the obligation is such that the surety is to be bound by the result of litigation between others, he is, in the absence of fraud or collusion, concluded by such result." 1 *Brandt Sur.* § 110; *Herm. Estop.* §§ 139, 153; *Black, Judgm.* § 586. Where the bond is not merely to pay damages, but for indemnity against liability by judgment, it is conclusive."

In *Henrico Justices v. Turner*, 6 Leigh 128, *TUCKER, P.* in his dissenting opinion, said: "In the case of *Jacobs v. Hill*, 2 Leigh 393, a judgment confessed by the sheriff, with the assent of the deputy, but without the knowledge of his sureties, was indeed held to be admissible evidence, but not conclusive, for *JUDGE CARR*, in delivering the opinion of the court, said that it charged the sureties, unless disproved by them."

See the principal case also cited in *Board of Supervisors v. Dunn*, 27 Gratt. 622; *Carr v. Mead*, 77 Va. 160.

the amount, and damages at the rate of 15 per centum per annum, according to the statute; upon which Jacobs confessed judgment for 807 dollars, the amount due, and the damages to be computed from the 1st November 1822 till paid, and costs. And then Jacobs gave a notice to Hill and seven of his sureties (stating that the eighth surety was dead) that he should make a motion against them in the same court, for the 807 dollars and the damages and costs, which the clerk had recovered against him for Hill's default. At the trial of this motion, in the county court, the facts above stated appeared in evidence; and it was proved, that Jacobs confessed the judgment to the clerk, with the assent of Hill; which was the only proof adduced of Hill's default; and there was no proof that Hill's sureties were privy to, or had any knowledge of Jacobs's confession of judgment.

*Upon this state of facts, the county court gave judgment for Jacobs, for the 807 dollars and the damages and costs recovered of him by the clerk with interest on the aggregate of principal, damages and costs, from the date of the clerk's judgment for them, and the costs of this motion. To this judgment the defendants prayed and obtained a supersedeas from the circuit court of Nelson, which reversed the judgment, and then Jacobs appealed to this court.

Leigh, for the appellant, referred to the cases of *The Commonwealth v. Fairfax*, 4 Hen & Munf. 208, *Royster v. Leake*, 2 Munf. 280, and *Munford v. Rice*, 6 Id. 81, and he said, the question was, Whether the condition of Hill's bond to Jacobs, bound him and his sureties for his faithful performance of the office of deputy, during both the years of Jacobs's shrievalty, or only during the first year? a deputy sheriff and his sureties may, during the first year of his principal's shrievalty, contract that the deputy shall duly perform the duties of the office, for that and the second year of the shrievalty also; and if that was the contract in this case, it fell within the principle of *Royster v. Leake*, and the judgment of the county court was right; but if the condition of the bond imported a deputization of the shrievalty for Jacobs's first year of service only, the principle of *The Commonwealth v. Fairfax* and *Munford v. Rice*, applied to the case, and the judgment of the circuit court was right.

The parties contracted with knowledge of and reference to the statute; which provides, that every person commissioned as sheriff, "shall be continued in office for one year after his qualification, and may, with his own consent and the approbation of the executive, be continued for two years," &c. 1 *Rev. Code*, ch. 78, § 6, p. 277. The contract recited in the condition of the bond in this case, pursued, substantially, the language of the statute: whereas W. B. Jacobs hath been commissioned as sheriff of and for the county of Nelson, and the above bound J. T. Hill hath undertaken the duties of the said office, for and during the time the said Jacobs may continue in office;" not during the term of the office for which Jacobs then held a commission, but, in

the language of the statute, during the time he might continue in office; that is, the whole time for which he might lawfully be continued in office; namely, two years, and until a successor should be appointed.

Johnson, for the appellees, said, that the principle was settled by the case of *The Commonwealth v. Fairfax*, that the office of sheriff was an annual office: and considering that the condition of the bond in this case recited that Jacobs had been commissioned sheriff of Nelson (that is, for a single year only) and that Hill had undertaken the duties of the said office (referring to the office of shrievalty for that year) for and during the time the said Jacobs may continue in office; these last words must be understood as importing Jacobs's continuance in the office he then held, namely the shrievalty for that year. He might have died, or resigned, or been ousted of the office, during the year; and a determination of the annual office of the sheriff within the year, would have determined the deputation of it to Hill; so that the deputation of the office to Hill, for and during the time Jacobs might continue in it, might just as properly be applied to his continuance in the annual office he then held, as to the shrievalty for the succeeding year for which he might subsequently receive a commission. In the language of the court in *Munford v. Rice*, "it is not natural to give to the general expressions" in the bond of this deputy sheriff, "an extension beyond the term for which his principal himself held his office."

But the judgment of the county court was plainly erroneous, in other respects. 1st, The only evidence adduced of Hill's default, was the judgment which Jacobs confessed to the clerk with the assent of Hill, which is not evidence of Hill's default, as against his sureties. *Munford v. Overseers of the poor* &c., 2 Rand. 313. 2dly, The judgment *was rendered, not only for the principal, damages and costs, recovered by the clerk of Jacobs, but for interest on the aggregate amount; but the statute which gave this summary remedy by motion, authorised judgment against the deputy and his sureties for the amount recovered of the sheriff for the deputy's default, but not for interest upon it. 1 Rev. Code, ch. 78, § 33, p. 283. 3dly, The statute gave the motion against the deputy and his sureties, their heirs, executors or administrators, jointly or severally: but the motion here was neither joint nor several: it was a motion against the deputy and seven of his sureties, omitting the representatives of the eighth who was dead.

Leigh acknowledged that the statute did not in express words, authorise the judgment for interest; the interest, however, might, perhaps, be justly considered an incident to the principal. As to the other objections taken by Johnson, he said, the case of *Munford v. Overseers of the poor* &c. only settled that a judgment against the principal by default, was not conclusive evidence against the sureties, not that it was inadmissible. The judgment in the present case, against the sheriff, upon his confession made with the assent of the deputy, was admissible evidence of the

deputy's default against his sureties: they might have controverted the fact of the default; but they did not. The representatives of the deceased surety neither ought nor could regularly be included in the same motion with the living obligors.

CARR, J., delivered the opinion of the court. He reviewed the cases of *The Commonwealth v. Fairfax*, *Royster v. Leake* and *Munford v. Rice*, and then said: From these cases we may deduce two conclusions. 1. That the office of the sheriff being an annual one, he must give an annual bond. 2. That the contract of the sheriff and his deputy being a private affair, not regulated as to its continuance by law, may be either for one or two years. The case before us arises on a bond executed by a deputy and his sureties; and the question is, Whether the parties intended

398 *to be bound only for one year, or for two? The statute concerning sheriffs enacts, "that every person hereafter commissioned and qualified as aforesaid, shall be continued in office for one year after his qualification, and may, with his own consent and the approbation of the executive, be continued for two years" &c. The bond here recites, that "whereas Jacobs has been commissioned as sheriff &c. and the said Hill hath undertaken the duties, of the said office, for and during the time the said Jacobs may continue in office" &c. From the similarity (almost identity) of expression in the law and the bond, it seems to me highly probable, that the parties meant to be bound for the whole period during which the sheriff might under the law hold the office. The law says, the sheriff shall be continued in office for one year, and may be continued for two years: the bond says, the deputy has undertaken the office, for and during the time the sheriff may continue in office. If the words of the bond had been may be continued in office, they would have been the same used in the statute; and we must have concluded, that by adopting the very words of the statute, which was probably before the parties, they meant to be bound for the same period, during which, under those words, the sheriff might hold the office; namely, two years. But what is the difference in meaning, between the words may be continued in office, and may continue in office? The parties knew the law; knew, that the sheriff must continue in office for the first year, but that for the second year, his own consent and the approbation of the executive were necessary. When they say, then, we agree to be bound, as long as the sheriff may continue in office, do not they mean exactly the same, as if they had said, we will be bound as long as the sheriff may be continued in office? He could not continue in office, unless he was continued in office. So far as his own consent operated, he might be said (using the verb actively) to continue in office: so far as the approbation of the executive operated, he might be said, by that approbation, to be continued in office: but he could not continue in 399 office *without a concurrence of both these. The two phrases then, as applied to the continuance of the sheriff in office, mean precisely the same thing; and

I conclude, that by using this language, the obligors meant to be bound for the whole time that the law would permit the sheriff to continue, or to be continued, in the office. This conclusion may be fortified by another view of the subject. The bond here, recites that the deputy had undertaken the duties of the office of sheriff, which seems as if he had taken the whole office. The history of the country informs us, that nothing is more common than for a sheriff, so soon as he is appointed, to form out his office for the two years to a deputy; and this court has sanctioned the custom. It seems very probable, from the recital in the bond, that this is a transaction of that kind; and so, the bond of the deputy would of course be given for the two years.

It was also objected by the counsel for the appellee, that the judgment of the county court against the sureties of the deputy was wrong, because the judgment recovered by the clerk against the sheriff, being by confession, did not bind the deputy's sureties, and there was no other evidence of the deputy's default. But the record tells us, that it was a motion against the sheriff, for judgment for the amount of the clerk's tickets for fees, put into the hands of his deputy Hill, during the second year of the shrievalty, and that upon this motion, Hill, the deputy, assented in open court, to the confession of judgment by the sheriff; in other words, confessed that he had received the clerk's tickets, and had not accounted for them: this, we think, was ample evidence of the fact, and charged his sureties, unless disproved by them.

It was farther objected, that one of the sureties being dead, this motion could not be made against the survivors; for it must be a joint motion against all, or a several motion against one; and this was neither. This objection is considered unsound. At common law, the principle is perfectly settled, that by the death of one or more
400 of the obligors, *the obligation is not discharged, but survives against those who remain, and an action lies against them as surviving obligors. So, on the joint and several bond given here by the deputy and his sureties; the statute gives a motion against them, their heirs, executors and administrators, jointly and severally; and one of the obligors dying, the motion lies against the survivors jointly, or any one of them severally. It would be strange indeed, if it were otherwise; for then, in proportion to the number of sureties, added for the safety and protection of the sheriff, would be the chance of his losing by the death of some one of them, the remedy given him by the statute; and this loss produced by the act of God, which the maxim tells us shall injure no one. But we have authority also against this. In *Shelton v. Ward*, 1 Call, 538, the motion was against the sureties of a deceased deputy sheriff. And in *Royster v. Leake*, the motion was against Royster and others, sureties of Vaughan, deputy for Payne; and Mr. Wickham took the very objection, that the law gave either a joint or a several motion, but that was neither: yet the court affirmed the judgment.

It was also objected that the judgment was erroneous in giving interest on the aggregate of principal, damages and costs, which had been recovered against the sheriff for the default of the deputy. It seems to me just, that such interest should be awarded, and I had thought there was a positive law giving it; but I have not been able to find it; and, as the section of the statute under which this motion was made, says nothing about interest, and acts giving summary remedies are construed strictly, the judgment of the county court, so far as it gives interest, must be pronounced erroneous.

The judgments both of the circuit and county courts, must be reversed, and judgment entered here, for the aggregate amount of the principal, damages and costs, recovered of the sheriff for his deputy's default.

401 *Dickenson v. Davis and Others.

November, 1830.

(Absent COALTER, J.)

Chancery Practice—Improper Parties Plaintiffs—Effect of Objection in Appellate Court.—If one person to whom alone the right asserted in a bill in chancery appertains, and other persons who have no right, join in the bill, and the cause be proceeded in to a decree in the court of chancery, without any objection there to the joining of improper parties plaintiffs in the bill: upon appeals from the decree to this court, the objection will have only this effect here, that the court will consider the right as vested in the plaintiff entitled thereto, and affected by his acts or omission.

Depositions—Irregularities—Objection in Appellate Court.—If irregularities occur in awarding a commission to take a deposition in chancery, and in taking the deposition and the deposition be read at the hearing in the court of chancery without any exception taken there; upon appeal to this court, objections taken here to the deposition, for such irregularities, cannot avail to exclude the evidence.

Chancery Practice—Estoppel;—Case at Bar.—A. applies to B. for a loan of money, upon the security of a mortgage of slaves then held by A., and B. being doubtful as to A.'s title to the slaves, and apprehensive that C. has some claim to them, applies to C. to know, whether he has such claim, explaining his reason for the inquiry: upon which C. informs him he has no right to the slaves, being at the time apprised of all the facts, on which his right, if any he has, depends: B. lends the money, and takes the mortgage of the slaves: HELD, that C. cannot be allowed, in equity, to assert the right he had disclaimed against the mortgagee B.

Appellate Practice—Appeal by Portion of Co-defendants—Effect.—A. and B. are co-defendants in a suit in chancery for recovery of a parcel of slaves and an account of their profits; B. claims the

***Chancery Practice—Improper Parties Plaintiffs—Objection for the First Time in Appellate Court—Effect.**—To the point that objection cannot be made to the joining of improper parties plaintiffs for the first time in the appellate court, the principal case was cited with approval in *Malone v. Hobbs*, 2 Rob. 390.

As to the effect of failure to make objection to the joining of improper parties plaintiffs in due time, see, citing the principal case, *Tarr v. Ravenscroft*, 12 Gratt. 651; *Valden v. Stubblefield*, 28 Gratt. 158.

***Depositions—Irregularities—Objection in Appellate Court.**—To the point that an objection to a deposition for want of notice of the taking of it cannot be made for the first time in the appellate court, the principal case was cited in *Hill v. Bowyer*, 18 Gratt. 380. See further, monographic note on "Depositions" appended to *Fleld v. Brown*, 24 Gratt. 74.

***Estoppel.**—See generally, monographic note on "Estoppel" appended to *Bower v. McCormick*, 28 Gratt. 310.

***Appellate Practice—Appeal by Portion of Co-defendants—Effect.**—See on this subject, foot-note to *Tate v. Liggit*, 2 Leigh 84 and other foot-notes in this series of reports there cited.

The principal case was cited with approval on this point in *Crawford v. Patterson*, 11 Gratt. 375; *Morgan v. Ohio River R. Co.*, 39 W. Va. 25, 19 S. E. Rep. 591.

slaves under a mortgage thereof to him by his co-defendant A., there is a decree for the slaves and profits, against both defendants: B. alone appeals from the decree: the court, holding that the plaintiffs had no right, considered the whole cause before it, upon B.'s appeal, and dismissed the bill as to A. as well as B.

This was a suit originally brought in the county court of Bedford, in chancery, by the appellees, Smithson Davis, Susan Davis, and Josiah Harrison, administrator of his deceased wife Rachel Davis, against Thomas Stewart and Tirzah his wife administratrix of her first husband Richard Davis deceased, and the appellant William Dickerson. Richard Davis died, intestate, in the year 1784, when slaves were real property; and the plaintiff, Smithson, claimed as his heir at law, and the other plaintiffs as his distributees, a slave named

Lucy, and her increase now numerous, three *of which were then in the possession of the defendant Dickenson, who claimed the same under a mortgage and purchase from his co-defendant Thomas Stewart, and the rest were in the possession of Stewart, though they also were under mortgage to Dickenson. The object of the bill was, to recover of the defendant Dickenson, such of the slaves as he held in possession, and the profits thereof since they had come to his possession, and of the defendants Stewart and wife, such of the slaves as Stewart yet held, and the profits which he had taken and enjoyed.

It was agreed by all parties, that the slave Lucy in question, was originally a part of the estate of William Morrison, who died as early as the year 1761; and that he, by his will (according to the construction put upon it, acquiesced in and conformed with all parties concerned, though that construction seemed somewhat questionable) devised and bequeathed all his slaves and moveables to his wife for life, with a power to her, with the concurrence of his executors, to appoint the same to and among his children. And the plaintiffs alleged, that Mrs. Morrison, with the concurrence of the executors, made an appointment of the slave Lucy, to the testator's daughter Tirzah, then the wife of their father Richard Davis, and delivered her to him, and that he held the possession of her till his death, and that, therefore, she and her increase appertained to his estate. On the other hand, the defendants alleged, that though Mrs. Morrison, the tenant for life, had made a verbal loan of the slave Lucy to Davis during his life, and he had held possession of her under that loan, yet in fact, no appointment was made by Mrs. Morrison during Davis's lifetime; that after his death, he reclaimed this slave which she had lent him; that, in 1796, after her daughter Mrs. Davis had married her second husband Stewart, Mrs. Morrison and James Higginbotham, the surviving executor of her husband, united in a general deed of appointment of that testator's slaves among his children, and thereby, for the first time, appointed the slave Lucy and her increase to Mrs. Stewart, and delivered *the property to her husband: that thus, these slaves were the property of Stewart. But

the defendant Dickenson also alleged, that Stewart having applied to him for a loan of money, and having offered him a mortgage of the slaves in question as a security, he determined to be assured of Stewart's title before he would advance his money upon that security, and applied to the plaintiff Smithson Davis, to know whether he had any claim to the slaves (explaining to him his reason for the inquiry) and was told by Davis that he had none; upon which he lent his money to Stewart, and took the mortgage: and he insisted, that this assurance of Smithson Davis, that he had no claim to the slaves in question, upon the faith of which he had advanced his money upon a mortgage of the slaves, precluded the plaintiffs, in equity, from now asserting a claim to the property against him.

Upon the question of fact, when and how Mrs. Morrison and the executor of her husband had in truth made the appointment of the slave Lucy to her daughter Tirzah, whether by verbal appointment and delivery of the property, during the lifetime of her first husband Davis, or not till after his death and after her marriage with her second husband Stewart, and then by the general deed of appointment of 1796 under which Stewart claimed, and which was exhibited in the cause, there was much parol evidence. But the principal evidence on which the plaintiffs relied, to prove that the appointment was made during Davis's lifetime, and the slave delivered to him accordingly, was the deposition of James Higginbotham, the executor of William Morrison, who was required by the will of that testator, to concur with his widow in the appointment of the subject to and among his children. This deposition was taken before the defendants had put in their answers to the bill, under an order of the county court, made on the motion of the plaintiffs, giving them leave to take it, not de bene esse, but in chief: no affidavit appeared in the record to found the order on: it was subscribed by the deponent, but there was not, in the record, any certificate of the magistrates, that he was sworn to it: *and the deponent, though a man of unquestionable integrity and veracity, was eighty years old, and this deposition was written for him by the plaintiffs' attorney, and the part of it most material for them, had been so written before the magistrates attended, and in the absence of the defendants' agent, though he attended before it was completed, and cross examined the deponent. But the deposition was read at the hearing, in the court of chancery, without any exception.

As to the alleged disclaimer of Smithson Davis of any right to the slaves in question, made to Dickenson before he lent his money to Stewart upon a mortgage of this property, the proof was as follows: a witness deposed, that Smithson Davis, in conversation with him, sometime after the commencement of this suit, said, that he had made some efforts to compromise the suit, as it was a hard case on both sides: that Dickenson had applied to him to know whether he had any claim to the slaves in dispute, before Dickenson's advances to

Stewart were considerable, and he informed Dickenson he understood he had no title to the slaves; and he then supposed he had none. And it appeared, that at the time of this disclaimer of right by Smithson Davis, he was about twenty-five years of age; and there were circumstances in proof, from which it might fairly be inferred, that he was also, most probably, well apprised of all the facts upon which he afterwards set up his present claim.

The cause, after having been many years pending in the county court, was removed by consent to the superiour court of chancery of Lynchburg. The chancellor was of opinion, upon the proofs in the cause, that the slave Lucy had been duly appointed to the defendant Tirzah in the lifetime of her first husband Richard Davis, and delivered to him accordingly, and that, consequently, that slave and her increase appertained to Davis's estate. And he made an interlocutory decree whereby he appointed commissioners to assign one third of the whole number of the slaves to Stewart and wife for her dower, to be held by Stewart for

his wife's life, with reversion to the
405 *plaintiffs: and as to the other two thirds, when ascertained by the assignment of Mrs. Stewart's dower, he decreed that Dickenson should deliver such of them as he held in possession to the plaintiffs, and render an account of the profits thereof since they came to his possession; and that Stewart should deliver to the plaintiffs such of them as he held, and render an account of the profits of the subject accrued and received by him since his marriage with the widow and administratrix of Davis.

In pursuance of this decree, the dower slaves of Mrs. Stewart were assigned to Stewart and wife, and a report thereof was made to the court; and an account was taken, and reported, of the profits of the slaves held by Dickenson, with which, upon the principles of the decree, he was chargeable; the amount of which was 681 dollars; but there was no account taken of the profits with which Stewart was chargeable. Upon the reports coming in, the chancellor made a peremptory decree, that Stewart and Dickenson should forthwith deliver to the plaintiffs all the slaves in controversy (except the dower slaves) by them respectively held, and that Dickenson should pay the plaintiffs the 681 dollars, reported to be due from him for profits.

Dickenson alone appealed from the decree.

1. Wickham, for the appellant, objected, that if the appellees had right at all, their bill was framed upon a misconception of the right. If the slaves appertained to the estate of Richard Davis, they were, as the law stood at the time of his death, real estate, which descended to Smithson Davis, his eldest son and heir at law; and, though he was bound to give his sisters a distributive share of the value, he alone was entitled to the subject itself, and he alone could maintain a suit for it.

Johnson, for the appellees, answered, that the sisters being entitled as distributees of their father, to distributive shares of the value of his slaves, were in-
406 terested in the recovery *of the

slaves themselves, and, therefore, were proper parties to the suit. But, whether they were proper parties or not, the objection could not avail here: this court could correct the details of the decree, and adjudge the whole subject to the heir at law.

2. Wickham said, that the deposition of James Higginbotham, on which the appellees mainly relied to prove their case, could not be considered by this court as evidence at all: that, as the law stood at the time the county court gave leave to take it, the court, in the then state of the case, before answer filed, could only have given a commission to take the deposition *de bene esse*, and that upon proper affidavit, shewing grounds for awarding such a commission: that the deposition of this aged witness, whose memory must have been impaired, having been written for him beforehand, by the attorney of the plaintiffs, was rather the deposition of the attorney than of the witness: and that there being no certificate that the witness was sworn to it, it was not, in truth, a deposition.

Johnson answered, that the evidence had been read at the hearing, without exception. If it had been timely excepted to, the deposition might have been taken over again, or the objections removed by proof. Objections of this kind to evidence read in the court below; all objections, indeed, founded on irregularity in taking depositions in chancery, not taken there by exception, come too late in the appellate court, and if allowed here would have the worst effects of a surprise on the parties who adduced them.

3. Wickham insisted, that supposing Higginbotham's deposition could be properly considered as evidence, yet viewing that deposition in connexion with the other proofs in the cause, not only had the appellees failed to prove their case, but it was disproved, and the contrary case established, by the evidence. This was an un-mixed question of fact, which was discussed with much earnestness on both sides.

4. Wickham contended, that the disclaimer of title to the subject, by Smithson Davis, who as the heir at law of
407 *his father had the whole right to it, if it pertained to his father's estate, made to Dickenson, before he made advances to Stewart, and trusted to a mortgage of this subject for his security; and made too, with full knowledge of Dickenson's motive for inquiring into Stewart's title and Davis's claim; precluded Davis in equity, from asserting against Dickenson, the claim or pretension now set up.

Johnson said, that the only ground on which Davis's disclaimer of right could preclude him from afterwards asserting his just claim, was that the disclaimer was fraudulent; that with full knowledge of his right, he disclaimed it, and thus betrayed Dickenson into an advance of money to his father-in-law upon a bad security. Now, he said, the proof that Davis did disclaim his right, was Davis's own admission that he had done so, accompanied with a declaration, in the same breath, that at the time of the disclaimer, he was ignorant of his right to the subject.

CARR, J. It is objected by the appel-

lant's counsel, that the plaintiffs were improperly joined in the bill; for, supposing the slaves to have been the property of Richard Davis, Smithson, his son and heir, would, according to the law of that day have succeeded to them alone; the other children having nothing more than a claim on him for their distributive portions of the appraised value. That this is a correct statement of the law, is certain; and I will not say what might have been the effect of this objection, if properly pleaded: but in the present situation and stage of the cause, I think it can have no other effect than this, that the court will consider the right, if there be any, as vested in Smithson, and bound by his acts or omissions. It was also objected that the deposition of James Higginbotham could not be read, there being no proper order of court for taking it, and no certificate of magistrates that it was sworn to, and it being altogether written by the attorney for the plaintiffs, before the arrival of the justices, or any person representing the defendants. If these objections had been taken in the

408 *court below, by exception, they would unquestionably have been fatal, unless the plaintiffs could have removed them by evidence. But as it is, I do not think the first two can be looked into here. The facts, that the deposition was written by the plaintiffs' attorney, and the parts of it most material for his clients, before the arrival of the magistrates, or of the opposite parties or their agent, do appear on the record; and though it would be too harsh, at this late stage of the controversy, when the witness is probably dead, to exclude the deposition, yet, I think, these circumstances cannot but materially affect its credit. And taking this deposition with its credit thus impaired, and comparing it with the other proofs in the cause, the clear deduction from the whole is, that if Richard Davis was (and it appears he was) in possession of this slave during his lifetime, he held that possession under a loan from his mother-in-law, Mrs. Morrison; and that the slave Lucy was for the first time appointed to her daughter Tirzah, by the general deed appointing the slaves of the testator William Morrison to his children, executed in pursuance of his will, by Mrs. Morrison and his surviving executor, in 1796, when the appointee Tirzah was the wife of Stewart, to whom accordingly the property was delivered; and, therefore, the slave Lucy and her increase do not pertain to Davis's estate, but belonged to Stewart. [Here the judge entered into a critical examination of the evidence.] And if this question of fact were more doubtful than I think it is, there is yet a consideration, which would repel the claim of the appellee Smithson Davis (to whom alone, if the property belonged to his father's estate, the right descended) so far as he seeks to disturb the mortgage to Dickenson. It is in proof, that when Dickenson was solicited to make advances to Stewart, and take a mortgage of these slaves for his security, he took the precaution, before he would venture, to apply to Smithson Davis, and to ask him whether he had any claim to the property, telling

him his reason for making the inquiry; and Davis answered, that he understood 409 he had none. He stood *by, then, and saw Dickenson's advances made to Stewart, and the mortgage taken; and then brought suit. He said, indeed, in relating the fact of this disclaimer, that at the time he so informed Dickenson, he supposed he had no title. But he did not pretend that he was then ignorant of the facts upon which the claim he now sets up rested; and there are circumstances in proof [the judge stated and examined them] which evince, that he was, most probably, fully apprised of them. He could not be allowed to disturb a security which he himself induced Dickenson to accept and trust to: his rights, if he had any, would be postponed to those of Dickenson: this is a settled point; *Stewart v. Luddington*, 1 Rand. 407, and the cases there cited, and *Lang v. Lee*, 3 Id. 410. This, however, is a secondary consideration: the ground on which this court decides the cause, is, that the slaves in question were never the property of Davis, the father, and consequently, the appellees have no title.

The other judges concurred in this opinion, and directed a decree to be entered, reversing the chancellor's decree, and dismissing the bill.

Johnson asked, whether the court intended to reverse, or could regularly reverse so much of the decree as affected Stewart and wife, who had not appealed from it? He referred to *Tate v. Liggit &c.*, ante, 84, 108.

Wickham said, the decree against Stewart and wife affected the rights of the appellant Dickenson: for he was the mortgagee of the slaves held by Stewart, as well as mortgagee and vendee of those held by himself.

BROOKE, P. The court considers the whole cause before it, upon Dickenson's appeal.

410

*Gordon v. Jeffery.

November, 1830.

(Absent COALTER, J.)

Forthcoming Bond—Execution by Surety Induced by Deception—Equitable Relief—Case at Bar.—A *fi. fa.* being sued out by J. against M. and being in the hands of the sheriff, M. the debtor, applies to G. to join him in a forthcoming bond thereon, and represents to him, in the sheriff's presence, that the amount of the debt is about one seventh of the real amount, which representation the sheriff does not contradict: whereupon, G. consents to become the surety, and M. and G. sign and seal a forthcoming bond, blank as to the amount of the execution and as to other material particulars, and deliver it to the sheriff, who afterwards fills up the blanks: and execution is awarded upon this forthcoming bond: HELD, G. is not entitled to relief in equity against the obligation of the bond, upon the ground of the deception which induced him to execute it, as the creditor to whom it was taken was no party to the fraud, and the sheriff, who was party to it, was not the creditor's agent in taking the bond. **Same**—Failure to Give Surety Notice of Motion on—Equitable Relief—Terms of Relief.—But the award of execution on the forthcoming bond, was founded on proof by the sheriff of notice given by him to G. when in fact no such notice had been given, and the sheriff had induced G.'s attorney to believe that no notice would be given: whereby G. was de-

*Forthcoming Bonds.—See generally, monographic note on "Statutory Bonds" appended to *Goolsby v. Strother*, 21 Gratt. 107.

The principal case was cited in *Smith v. McLain*, 11 W. Va. 672.

prived of the opportunity of defending himself at law, upon the plea of non est factum: HELD, that, in giving notice on a forthcoming bond, the sheriff acts as agent of the creditor, who is not entitled to benefit by any fraud he commits in relation thereto; and that, in the present case, the surety was entitled to relief in equity, upon the ground of surprise, but only on terms, that he himself shall do equity; that is, that he shall pay the amount for which he really intended to bind himself as surety.

In a suit of Gordon against Jeffery, in the superior court of chancery of Fredericksburg, the case alleged in the bill, and, in the opinion of this court, proved by the evidence, was thus:

Five writs of fieri facias were sued out of the court of Orange, against Robert Mallory, upon judgments of that court; one by Buck, amounting, principal, interest, costs and sheriff's commissions to 250 dollars; one by Lightfoot, amounting to 238 dollars; one by Bradley, amounting to 98 dollars; one by Burgess, amounting to 828 dollars; and the other by the appellee Jeffery, amounting to 651 dollars: in the aggregate 2065 dollars. These executions were all delivered to Holloway a deputy sheriff of 411 Orange, and were *in his hands at the same time. The executions were not actually levied: but Mallory applied to Gordon, to join him as his surety in forthcoming bonds for the delivery, at the time and place of sale, of property specified by Mallory, or to be specified in the forthcoming bonds, as having been taken in execution under the five writs of fieri facias; and to induce Gordon to incur this responsibility, Mallory represented to him, in the presence of Holloway, the deputy sheriff, that the whole amount of the five executions was only two or three hundred dollars; and Holloway, though he must have known the truth, did not gainsay this erroneous representation. Misled by this information of the small amount of the debts, Gordon consented to become the surety; and Mallory and Gordon signed and sealed five blank forthcoming bonds; blank, probably, in all particulars; blank, certainly, as to the names of the creditors, the name of the deputy sheriff who had charge of the executions, and the amounts thereof respectively: and they delivered these forthcoming bonds, or rather forms of bonds, so signed and sealed by them, to Holloway. The blanks in the bonds were afterwards filled up, partly by Holloway, and partly by his clerk by his directions: Holloway himself inserted the description of the property in the conditions of the bonds, there stated to be the property of Mallory which he had taken in execution, though it appeared, that, in fact, Mallory had not at the time any such property: the other blanks were filled up by the clerk. Motions were made in the county court for award of executions on these forthcoming bonds, and due notice of the motions being proved by Holloway, executions were awarded. The motions were made at the short morning session of the monthly court in April, the day of the election, in the absence of Gordon's counsel: and it appeared most probable, that no notice of the motions had been given to Gordon; but, on the contrary, Holloway had, at the preceding March term, informed Gordon's

counsel, that he had not given, or that he would not give, notice upon the forthcoming bonds, to the next court; that 412 he supposed *the attorney for the creditors would not move against him, the sheriff, and he should give Mallory time to get in his crop of wheat. The county court, at the May term after the award of executions on the forthcoming bonds, upon the motion of Gordon, and upon proof of the material facts of the transaction above stated, being satisfied, that the forthcoming bond taken to Jeffery was fraudulently obtained from him, and having been in blank when signed and sealed by him, and that the award of execution thereupon had been obtained by surprise, and that the proceedings and return upon the fieri facias on which the bond was taken, were wholly irregular, quashed the forthcoming bond taken to Jeffery, and the writ of fieri facias upon which it had been taken. But to this order, the circuit court, at the instance of Jeffery, allowed a supersedeas, and eventually reversed the order.

Gordon, then, exhibited this bill against Jeffery, setting forth all the facts of the case; alleging that this forthcoming bond to Jeffery, as well as the other four forthcoming bonds, had been obtained from him by the misrepresentation, as to the amount of the debts, made by Mallory in the presence of the deputy sheriff, and not contradicted by him; that this bond (as well as the other four) having been blank in the most material particulars, when signed and sealed by him, and the blanks afterwards filled up by the deputy sheriff, was not his deed; and that no notice having been given him of the motion for award of execution on the bond, but on the contrary his counsel having been informed by Holloway, that notice had not been or would not be given on the bond, he was prevented from making his defence at law, and the award of execution was obtained by surprise: and, therefore, praying an injunction to further proceedings on Jeffery's execution on the forthcoming bond.

The chancellor awarded the injunction, according to the prayer of the bill: but, upon the hearing, he dissolved the injunction and dismissed the bill with costs.

Gordon appealed to this court.

413 *Stanard, for the appellant, insisted that the five forthcoming bonds, and this taken to Jeffery, among the rest, were obtained from Gordon by a misrepresentation as to the amount of the debts, which having been made in the sheriff's presence and not corrected by him, he was a party to it, and so the bonds were fraudulently obtained from Gordon; and that independently of the fraud, the facts alleged and proved would have fully sustained the plea of non est factum at law; and that Gordon having been prevented from making that defence upon the motion for award of execution upon the bonds; having been indeed lulled into security by the declaration of the sheriff that he had not given, or would not give, a notice upon the bonds, to the court, at which motions were afterwards made and execution awarded, the award of execution was obtained by gross fraud and

by surprise: that, therefore, the injunction ought to be perpetuated as to the whole debt. He cited King and Porterfield v. Smith et al., ante, p. 157.

BROOKE, P., delivered the opinion of the court. This case differs materially from those of King and Porterfield v. Smith. There, King executed the forthcoming bond, and delivered it to the sheriff, as an escrow, on the express condition, that another surety, the father of the debtor, should also execute it, in the confidence, probably, that if the father executed it, he would see that the son discharged it. The chancellor thought, that it was doubtful, whether the bond was executed and delivered as an escrow, and directed an issue to try that question; but, at the same time, dissolved the injunction, as to so much as the plaintiff would have been bound to pay, if the bond had been executed by the father as surety, according to the condition on which it was delivered, and the sureties made liable to pay the debt, the principal being insolvent. This court concurred with the chancellor, as to the propriety of the issue, but held, that the plaintiff was bound for the whole of the debt, or for no part of it; if the bond was his, for the whole; if not, for none; because in no case, had he agreed to make himself liable for any part, unless

414 the bond was executed *according to the condition on which it was delivered. The case before us is wholly different. Gordon intended to be bound for the debts due from Mallory, especially for that due Jeffery (as he admits); and to that end, signed the blank bonds, and delivered them to the sheriff, to be filled up according to the executions: his only ground of complaint in equity, is, that he was grossly deceived as to the amount of the executions, by the false representations of the debtor Mallory, made in the presence of the sheriff, who did not undeceive him. If that representation had been true, the circumstance, that he might have defended himself at law, on the plea of non est factum, but for the surprise practised on him by the sheriff, would not have entitled him to relief in equity; which, though it will not charge a surety farther than he is chargeable at law, will not relieve him, or any other party, against a judgment, however obtained, when such relief would be against conscience. For, if the surety intended to be bound when he signed the blank bond, to the full amount of the debt, the judgment would only have the effect of enforcing his deliberate contract; and to discharge him from it, would be against conscience. If Gordon had intended, when he signed the blank bond, to avail himself of that defence at law, he would have been practising a fraud both on the creditor and the sheriff. The circumstance, therefore, that he had an essential defence at law, of which he was deprived by the fraud of the sheriff, is of no importance, except that it gives jurisdiction to the court of equity to relieve him against the judgment, if, upon the other circumstances of the case, he is entitled to relief. Both parties are seeking to avoid a loss. Gordon, to relieve himself from the payment of the debt of

another, for which he has received no consideration; Jeffery to recover a just debt by due course of law. If both parties are blameless, a court of equity will not interfere. On Gordon's part, he in the first instance, was grossly negligent, in trusting the sheriff as he did, and enabling him to do the mischief, which must now fall on one of the parties. In conducting the executions, and taking the forthcoming bonds, the sheriff *was, in no sense, the agent of Jeffery, but an officer of the law, to whom he was under a legal necessity of confiding that duty: therefore, he is not at all affected by his fraud in that respect. And, if there was nothing more in the case, no relief could be given to Gordon; it being a principle frequently acted on, in courts of law, that where one of two innocent persons must suffer by the act of a third person, he who has trusted most must bear the loss. The sheriff was, however, the agent of Jeffery, in respect to the notice of the forthcoming bond. It was not his official duty to give the notice. The law gives the right to the creditor to whom the bond is made payable, to have an award of execution on his motion only. He is, therefore, responsible for the fraud of the sheriff, his agent in this respect; or, at least, cannot be entitled to benefit by it, though he was not privy to it, nor had the least participation in it. He stands, then, on different ground from that he would have occupied, if due notice had been given, and the award of execution had been made without opposition, through some accident not affecting him; such as the absence of counsel, or the like. Yet it does not seem equitable that this fraud of his agent, which does not touch his conscience, should have the effect to discharge Gordon from all responsibility; since he too has been in fault, and since he certainly intended to be bound by all the bonds that he signed, to the extent of 300 dollars. For, a court of equity will not relieve even against a judgment obtained by the fraud of the creditor, but on the terms, that the defendant at law shall pay what is justly due; upon the settled principle, that he who asks equity must do equity. I think, therefore, that the injunction ought to have been dissolved, only for a sum equal to the proportion of 300 dollars, which would fall to Jeffery, in a rateable distribution thereof among all the creditor of Mallory, to whom Gordon intended, when he signed the blank bonds, to become bound to that extent. The decree, therefore, is reversed, the injunction reinstated, and the cause remanded, to be further proceeded in, according to the principles here declared.

416 *Bell v. Hammond and Others.

November, 1830.

(Absent COALTER, J.)

General Deed of Assignment—Rights of Lien Creditor Therein.—A. mortgages lands to B. to secure a

*Deeds of Assignment—Rights of Lien Creditor Therein.—See monographic note on "Assignments for the Benefit of Creditors" appended to French v. Townes, 10 Gratt. 513.

Deeds—Recordation—Effect as Notice.—Our law, unquestionably in its present state, avoids deeds and

debt due to him; and then, by a general deed of trust, conveys the equity of redemption of the same lands, together with sundry personal property, to a trustee, to raise a fund to pay all his debts, including debts due B. other than that specifically secured by the mortgage: HELD. B. is entitled to receive the whole of the debt specifically secured to him by the mortgage, out of the proceeds of the mortgaged lands, and then to come in for distribution of the fund in the hands of the trustee under the general deed of trust, for satisfaction of the other debts due him, pro rata with the other creditors.

Upon a bill exhibited by Hammond and others, creditors of Beckwith, against Beckwith, and Bell, the appellant, and others, in the superior court of chancery of Winchester, the case was thus:

Beckwith, by deed, dated the 9th October 1815, and duly recorded the same day, conveyed two tracts of land to Powell, in trust, to secure a debt to Bell of 3500 dollars, with interest from the date.

By an agreement under seal, indorsed on the deed, dated the 3d June 1816, and duly recorded the same day, Beckwith agreed, that a further debt of 250 dollars, due by him to Bell, should be charged on the trust subject, and that the trustee might sell the same for the satisfaction of this debt also.

Then, by deed dated the 6th March 1817, and duly recorded on the 8th of the same month, Beckwith conveyed the same lands with sundry slaves and other personal estate, to Hite, upon trust, to sell the same, and to apply the proceeds to the payment of all the debts at that time due from Beckwith; and, secondly, that Hite should be and was thereby authorised to indemnify Bell, for any moneys which he might advance to Hite for the use of Beckwith, or which Bell might pay in satisfaction of outstanding legal obligations of Beckwith, in the hands of others, and that Bell as to all moneys then due him, should be entitled to equal justice with any other creditor, for payment out of the trust subject thereby conveyed.

417 *Afterwards, by a second agreement under seal, also indorsed on the first mentioned deed of trust of Beckwith to Powell, dated the 13th April 1817, and duly recorded the next day, Beckwith agreed, that the further sum of 1850 dollars advanced by Bell for him, and also the sum of 900 dollars for which Bell yet stood bound as surety for Beckwith, should be charged on the trust subject by that deed mortgaged, and that the trustee Powell might sell the same for the satisfaction and indemnity of Bell as to these sums also.

And, finally, by another instrument under seal, also indorsed on the first mentioned deed of trust to Powell, dated the 21st April 1817, Hite, the trustee in the second deed of trust above mentioned, reciting, that Bell had been compelled to pay 2750 dollars as surety to Beckwith, and that Beckwith had agreed to extend the lien of the first deed

of trust to Powell, so as to secure this additional sum due to Bell, declared his willingness, that the lien of the first deed of trust should be extended so as to secure that additional sum to Bell, notwithstanding the second deed of trust conveying the same subject to him, Hite, in trust &c.

It appeared, that this sum of 2750 dollars was advanced by Bell as surety for Beckwith, upon engagements incurred before the execution of the general deed of trust to Hite, of the 6th March 1817.

The lands mortgaged by both the deeds of trust, having been sold, and the proceeds being more than enough to satisfy the debt of 3500 dollars secured to Bell by the first deed of trust of October 1815, and the 250 dollars, secured to him by the first agreement indorsed on that deed, of June 1816, with interest on both sums, and there being a surplus arising from the lands, and other funds arising out of the other trust subject conveyed to Hite, by the general deed of trust of the 6th March 1817, but the fund being insufficient to satisfy all the creditors, the question arose, Whether Bell, claiming to come into partition of this fund

with the other creditors of Beckwith, 418 for satisfaction of his claims *against him for advances made after the execution of the general deed of trust to Hite, was entitled to receive out of the proceeds of the mortgaged lands, the full amount of the debts specifically secured to him, by the deed of trust of the 9th October 1815, and the agreement indorsed thereon of the 3d June 1816, and then to come, *pari passu* with the other creditors, in respect to the residue of his claims, into distribution of the residue of the fund?

The chancellor was of opinion, that he was not, and decreed accordingly; and Bell appealed to this court.

The cause was argued by Stanard for the appellant, and Nicholas for the appellees, upon the single point above stated.

GREEN, J., delivered the opinion of the court. The counsel for the appellant very properly waved any claim to priority over the other creditors, in respect to the additional sums advanced by him to and for Beckwith, after the execution of the general deed of trust to Hite. And the counsel for the appellees, with equal propriety, waved any objection to the appellant's priority, as to the 250 dollars advanced by him, and agreed to be charged on the mortgaged lands, by the indorsement on the deed of trust to Powell for his peculiar security, before the general deed of trust to Hite was executed.

The appellant was entitled to receive out of the proceeds of the mortgaged lands, the full amount of the debt originally secured to him by the deed of trust to Powell of the 9th October 1815, and the additional sum of 250 dollars charged upon the lands, by the indorsement on that deed, of the 3d June 1816, for which those instruments gave him a specific lien; and then to come, *pari passu* with the other creditors, in respect to the residue of his claims, into distribution of the residue of the fund. In the case of *Heams v. Bance*, 3 Atk. 630, lord Hardwicke held, that a mortgagee who had lent a further sum to the mortgagor on

conveyances, if unregistered, to the prejudice of subsequent purchasers and incumbrancers in good faith: and when duly registered, makes them effectual as notice to all the world. But the notice is of the contents of the instrument, and of nothing more; not of any secret condition, or trust, or equity, between the parties. *McClanachan v. Siter*, 2 Gratt. 300, citing, among others, the principal case: *Davison v. Waite*, 2 Munf. 527; *Colquhoun v. Atkinsons*, 6 Munf. 550. To the same effect the principal case was cited in *Houston v. McCluney*, 8 W. Va. 150.

bond, the mortgagor having created
419 a trust by will for the payment *of debts, could not tack the bond, but as to that must come in pro rata with the other creditors, upon the equitable fund; and in an anonymous case, 2 Ves. sen. 662, that, in a similar case, when the debtor had conveyed the mortgaged property in trust for other creditors, the mortgagee as to the amount of his mortgage and two judgments which he was entitled to tack, had a priority over the creditors under the deed of trust; but that the bond was only a charge upon the general assets of the debtor who was dead.

The decree is, therefore, to be reversed, and a decree entered according to the principle here declared.

Taylor and Wife v. Browne and Others.

November, 1830.

Will.—Disposition of Property Settled upon Wife.—B. makes a deed of settlement of property upon his wife, and then by will makes a disposition of the property, different from that made by the deed of settlement, and far less beneficial to the wife, and dies; the wife takes administration with the will annexed:

Same—Same—Right of Widow.—HELI, 1. the widow may claim under the deed of settlement, without having renounced the provision made for her by the will according to the statute, 1 Rev. Code, ch. 104, § 24.

Same—Same—Election.*—And, 2. the widow taking administration with the will annexed, is not an election by her to take under the will and not to claim under the deed of settlement.

William Browne deceased, by deed executed in his lifetime, dated the 9th January 1812, and duly recorded in the hustings court of Richmond the 13th July following, in consideration of natural love and affection for his wife, Mary Browne, conveyed to William Nettles, trustee, ten slaves, sundry articles of furniture, and some stock of horses, cows &c. in trust for the sole and separate use of Mary his wife for life, free and exempt from the control of her then husband the donor, or any future husband, with power to the wife to dispose of the subject by will or deed to such persons as she should think proper.

420 *William Browne, died sometime in November 1816, having made a will in the month of October preceding; whereby he devised his lands to his wife during her life or widowhood, remainder, after her death or marriage, to his brother Thomas Browne and his heirs: and he disposed of the property settled on his wife by the deed of January 1812; bequeathing four of the slaves therein mentioned, to her in absolute property; and the residue of the slaves, together with all his personal property, to her during her life or widowhood, and in case she should marry, then that this part of the subject should be sold, and that three female slaves, from six to twelve years old, should be purchased out of the proceeds, one for Eliz. Marston, one for Eliz. Durfey, and one for Eliz. Nettles, and that the residue of the proceeds should be equally divided between Thomas Browne, Caroline Radcliffe, and Susan Smith; but in case his wife should die his widow, she should have the free disposal of all the personal

estate bequeathed to her during life or widowhood, at her own discretion; and he expressed his hope and belief, that if she should die his widow, she would comply with his wishes in the disposal of the said property as above mentioned.

The will was proved in the hustings court of Richmond; and the executors named in the will (of whom the widow was one) having renounced the executorship, administration with the will annexed was granted to the widow.

Mrs. Browne, the widow, married Henley Taylor, in August 1817; and, on the 25th of that month, she executed a deed, whereby she disclaimed the provision made for her by her first husband's will, and relinquished all benefit or claim under it. And on the 20th October following, her husband Henley Taylor and she joined in a deed of renunciation to the same effect. Both these instruments were duly recorded in the hustings court of Richmond, within the year after the death of the testator William Browne.

Thomas Browne and the other legatees in remainder of the testator William Browne, exhibited a bill in the superior
421 *court of chancery of Richmond, against Taylor and wife, charging, that the deed of January 1812 was made without any lawful consideration, and was therefore void; and if it was not so, yet the widow of the testator in taking administration with the will annexed, had elected to take under the will, and could not now claim under the deed. They, therefore claimed all the property which was bequeathed by the will to the wife during widowhood, with remainder in the event of her marriage to them, and prayed an account of the administration &c.

Taylor and wife in their answer, stated that the wife had duly renounced the provision made for her by her first husband's will; and that, even without any such renunciation, they had a right to claim under the deed of January 1812; which, though voluntary, was good and effectual as against the donor and volunteers claiming under him: that the wife's taking the administration with the will annexed, was not an election to abide by the will, and not to claim under the deed, nor had she otherwise made such election: and that they were ready to account for all the estate of the testator, except that which was settled on his wife by the deed of 1812; but they claimed, under that deed, all the property thereby conveyed.

The first of the instruments of renunciation above mentioned, that of the 25th August 1817, which was executed by Mrs. Taylor alone, was filed as an exhibit in the cause, at the time of the hearing and of the interlocutory decree made therein. But the other deed of renunciation of the 20th October 1817, in which Taylor the husband joined with his wife, was not then exhibited: it was filed after the decree was entered, and subjoined to the transcript of the record sent to this court, by the clerk.

In order to prove, that Mrs. Taylor had elected to take under her first husband's will, and not under the deed of January 1812, the plaintiffs adduced the deposition of one of the appraisers of the testa-

*Election by Widow.—See the principal case cited in *Dixon v. McCue*, 14 Gratt. 562.

422 tor's estate, that the property *mentioned in the deed was appraised as part of the estate. The appraisement itself was not exhibited.

The chancellor held, that Mrs. Taylor was bound to abide by the provision made for her by her first husband's will, and could not claim against the will, and under the deed of January 1812, unless she had duly renounced the provision made for her by the will, according to the statute, 1 Rev. Code, ch. 104, § 26, p. 381.* And taking up the case upon the deed of renunciation of the 25th August 1817, he held, that that deed was ineffectual, because Mrs. Taylor was at that time a married woman, and the deed was executed by her alone without her husband joining in it. Therefore, he held, that the plaintiffs were entitled to the property bequeathed by the will of the testator William Browne, to his wife during her widowhood, with remainder in case of her marrying again to them; and ordered the defendants to render an account of the estate, and of the administration thereof, in the same manner as if the deed of January 1812 had never been made.

From this decree Taylor and wife appealed to this court.

The cause was argued here, by Leigh for the appellants, and the attorney general for the appellees, upon two points: 1. Whether Mrs. Taylor could claim under the deed of January 1812, without having re-
423 nounced the provision made *for her by the will of her first husband, William Browne, in due time and form, according to the provisions of the statute? In other words, whether the statute applied to the case? 2. Whether Mrs. Taylor, in taking administration of Browne's estate with the will annexed, or by causing or permitting the property in question to be appraised as part of his estate (if the fact was so), had elected to take under his will, and precluded herself from claiming under the deed of January 1812?

CARR, J., delivered the opinion of the court. The chancellor, in rejecting the claim of the appellants under the deed of January 1812, seems to have been governed wholly by the supposed failure of the wife to renounce in due and binding form, according to the terms of the statute, the provision made for the wife by the will of her first husband William Browne. As to the validity of the act of renunciation, we give no opinion. The provisions of the statute have, in our judgment, no application to the case. They were only in-

*The words of the statute are: "When any widow shall not be satisfied with the provision made for her by the will of her husband, she may, within one year from the time of his death, before the general court, or court having jurisdiction of the probat of the will as aforesaid, or by deed executed in the presence of two or more credible witnesses, declare, that she will not take or accept the provision made for her by such will, or any part thereof, and renounce all benefit which she might claim by the same will, and thereupon such widow shall be entitled to one third part of the slaves whereof her husband died possessed, which she shall hold during her life &c. and she shall, moreover, be entitled to such share of his other personal estate, as if he had died intestate, to hold as her absolute property; but every widow not making a declaration within the time aforesaid, shall have no more of her husband's slaves and personal estate, than is given her by his will."—Note in Original Edition.

tended to direct, how a widow shall proceed, who means to reject the provision made by her husband's will, and take that made by the law: but this can relate only to the slaves and personal estate of the husband; and so are the express words of the statute. It does not mean, that unless the widow renounces the will, she shall be prevented from making claim to property to which she is entitled, not under the will, but from a different source. With respect to such property, if it really belongs to the wife, and the husband has undertaken to dispose of it by will, this statute cannot govern the case: it must stand on the general doctrine of election, which disables a person from claiming under a will and against it. In *Wallace v. Taliaferro*, 2 Call, 447, this court required no renunciation of the will, but decided, that a husband could not devise slaves which he claimed in right of his wife, unless they were reduced into possession during the coverture. In *Upshaw v. Upshaw*, 2 Hen. & Munf. 381, the

wife was entitled to slaves, in which
424 her mother *had a dower right; the husband during the mother's life devised these slaves away from the wife, but left her all his other property during her life; she took the provision made for her by the will; and on the death of her mother, took also the slaves, which her husband had devised away, and held the whole for many years: she was sued by the devisees of the slaves: this court held, it was a case of election; that the wife could not hold under the will, and yet disappoint its provisions as to the slaves; but they said also, that to make an election binding, a party must have a clear knowledge of his rights and of the funds; and, therefore, though the wife had held the estate given her by the will for twenty years, they would have been inclined even then (as she seemed to have acted in ignorance of her rights, and the consequences of her holding) to have given her the power of election if she had not so appropriated a part of the property she held under the will, as to disable her from returning it. These cases shew (if, indeed, anything can shew it more plainly than the statute itself) that the provision in question concerning a widow's renunciation of her husband's will, has nothing to do with a case, where she has a claim to property independent of and paramount to the will. In this case, the widow claimed under the deed of 1812. That deed is charged by the bill as being fraudulent, and if creditors were before the court, it would no doubt be so considered as to them. But there is nothing shewn, which, as between the parties and volunteers claiming under them, can affect it in the slightest degree. It was contended that the qualification of the widow as administratrix with the will annexed, was such an election to take under the will, as precluded her from afterwards resorting to the deed. We do not think so. Her duty as administratrix was well and truly to execute the will, by paying first the debts, and then the legacies, as far as the goods, chattels and credits of the testator would extend, and the law charge her. But this related solely to the property of the testator: the law could

charge her no farther. And even if
425 this could *be considered an election,
at the time, to abide by the will, we
see that, before any change in the state of
things was made, within twelve months,
there was a decision not to take under the
will, but to abide by the deed: the renun-
ciation of the wife, made and recorded, fol-
lowed by an act of renunciation by her and
her second husband solemnly executed,
though not called for by the statute, is
sufficient evidence of this.

The decree is to be reversed with costs,
so far as it directs an account of the prop-
erty contained in the deed of 1812, and
affirmed as to the residue, and the cause
remanded, to be proceeded in according to
the principles here declared.

Beverly v. Brooke and Others.

Same v. Pickett and Others.*

November, 1830.

(Absent BROOKE, P.)

Mortgage—Usury—Witness—Mortgagor—Case at Bar.

—A. mortgages land to B. to secure debt due him, and then mortgages same land to C. to secure debts, first to C. then to other favored creditors, and then to all creditors; and, in a suit in chancery, between B. the first mortgagee, and A. the mortgagor, C. the second mortgagee and the creditors claiming under the second mortgage, B. claims priority under the first mortgage, and his claim is contested by C. and those claiming under the second mortgage, on the ground that the first mortgage is usurious: HELD, that A. the mortgagor, is interested in the event of the suit, and not a competent witness for his co-parties against B. to prove the usury.

Same—Same—Same—Disclaimer of Interest—

Effect.—And though A. the mortgagor, after executing the second mortgage, having been arrested under a ca. sa. had been discharged as an insolvent debtor, upon surrendering all his effects, which had been sold for a sum less than the debt for which he had been taken in execution; and though A. therefore, in his answer to the bill of B. the first mortgagee, disclaimed all interest in this controversy between his creditors; and though B. put in no replication to this answer: yet HELD, that this disclaimer of interest did not restore A.'s competency as a witness for his co-parties to prove the usury against B. since he could not by such disclaimer exempt himself from liability to any personal decree to which B. might be entitled against him either for debt or costs.

426 *Depositions—Competency of Witnesses—Right to Object—Case at Bar.—A.'s deposition was

taken by C. the second mortgagee and those claiming under him, under a special commission awarded by the chancellor to take the deposition subject to all just exceptions; and B. the first mortgagee, prayed and obtained a like special commission to take A.'s deposition, but did not act under his commission: HELD, that B. by obtaining this special commission himself, was not precluded from objecting to the competency of the deposition taken under C.'s commission.

Same—Same—No Exception in Lower Court—Appellate Practice.—When the deposition of a party in a suit in chancery is taken under a special commis-

*For sequel of principal case, see *Beverly v. Brooke*, 4 Gratt. 187. In this case the principal case is cited at pages 188, 216, 217, 218, 231, 233, 234.

*Depositions—Competency of Witnesses—Objection First Made in Appellate Court—Virginia Rule.—An exception to the deposition of a party to a suit on the ground of incompetency, though not brought to the notice of the court at the hearing, otherwise than by the exception, may be passed upon by that court; and, whether so passed upon or not, it may be passed upon by the appellate court, and the deposition be either read or excluded in the decision of the case by that court, as may be proper. *Statham v. Ferguson*, 25 Gratt. 38, citing principal case. See, in accord, *Fant v. Miller*, 17 Gratt. 227, 228, citing principal case.

But, in *Hord v. Colbert*, 28 Gratt. 54, 55, objection was made to the deposition of Joseph W. Colbert, a defendant in the cause, on the ground of his incompetency to testify. But the exception was not made

sion, subject to all just exceptions, whether the deposition be excepted against on the ground of incompetency or not. It behoves the court to examine and decide the question of competency; and though the deposition be read at the hearing in the court of chancery, without exception, yet if, on an appeal from the decree, the appellate court finds the deposition incompetent evidence by reason of the deponent's interest in the event, it will pay no regard to the deposition.

until after he had been cross-examined at great length upon all the issues involved, and the whole examination was concluded, although the party making the exception was aware of it as well before as after the cross-examination was commenced and concluded. The attention of the court below seems not to have been to the objection. The question was raised in the appellate court whether the objection had not been waived by this manner of proceeding. JUDGE STAPLES, who delivered the opinion of the court, said: "It is sufficient for the purposes of this case to say, that when the party cross-examines upon the issues involved, with a knowledge of the interest of the witness, he will not be permitted afterwards to make the objection. Having made the objection however in due season, he may then proceed to cross-examine without prejudice to his right to move to suppress the deposition at the hearing. *Jacobs v. Laybom*, 11 Mees. & Welsby R. 684; *Moorhouse v. De Passon*, 10 Ves. R. 432; *Harrison v. Courtauld*, 5 Eng. Ch. R. 428; *Donelson v. Taylor*, 8 Pick. R. 390; *Graves v. Graves*, 2 Paige R. 62, 3 Paige 240, 554; 1 Payne C. C. R. 400; 1 Phillips on Evidence 789.

"It may be said that the rule here stated has no application to parties examined as witnesses. Under the former practice, in the chancery courts of this state, when a special commission was issued to take the deposition of a party, saving all just exceptions, the duty devolved on the court to take notice *ex officio* of objections to the competency of the witness arising from his interest in the event of the cause. And in such a case an appellate court will consider and decide upon the question of competency, although the deposition may have been read in the court below without objection. *Leigh*, 425. The decision in *Beverly v. Brooke & als.*, 2 Leigh 425. The court was of opinion there that the question would have presented more difficulty had the deposition been taken under a general commission. (See principal case cited to the same effect in *Fant v. Miller*, 17 Gratt. 227, 228.)

"Whatever may have been the distinction formerly between parties and other witnesses, that distinction has been entirely abrogated by the statute, which declares that no witness shall be incompetent to testify because of interest; and in all actions, suits, and other proceedings of a civil nature, at law or in equity, the parties thereto shall, if otherwise competent to testify, and subject to the rules of evidence, and of practice applicable to other witnesses, be competent to give evidence. Code of 1873, p. 1109. Under this provision it is very clear the rule in respect to objections for incompetency on the ground of interest is equally applicable to parties examined as a witness as to those who are not parties. For these reasons I am of the opinion, if there was any valid objection to the testimony of Joseph W. Colbert, that objection has been waived, and he must now be treated as a competent witness."

And, in *Simmons v. Simmons*, 33 Gratt. 460, objection was made in the appellate court to the competency as witnesses of certain persons whose depositions had been received as evidence in the cause. In replying to the objection, JUDGE BURKS, speaking for the court, said: "It would seem to be a sufficient answer to this objection, that it does not appear that it was first made in the court below. Notwithstanding some expressions in decided cases, which seem to concede that objections to the testimony of a witness on the ground of his incompetency may be properly made in this court although not made, or considered, or passed upon in the court below, we are of opinion, that such objections, unless first made in the court below, cannot be relied on here, for the reason that if allowed, parties might be taken by surprise. If made in the court of original jurisdiction: First. The incompetency might in some cases be removed by release or otherwise: Second. If not removed and the witness be excluded, the loss of his testimony might perhaps be supplied by other evidence. See what was said by JUDGE MONCRE in *Fant v. Miller & Mayhew*, 17 Gratt. 187. Also *Beverly v. Brooke & als.*, 2 Leigh 425; *Hord's Admr v. Colbert & als.*, 28 Gratt. 49, 54, 55, 56; *Statham v. Ferguson's Admr & als.*, 25 Gratt. 38, 39. This seems now the settled law in Virginia. See *McVeigh v. Chamberlain*, 94 Va. 73, 26 S. E. Rep. 366.

Deeds of Trust—Notice to Trustees of Prior Unrecorded Trust Deed on Same Subject—Effect.—C. takes a mortgage from A. to secure just debts; and is informed immediately before the mortgage is executed, that A. has mortgaged the same subject to B. to secure a debt due him, but that the debt to B. is usurious; which mortgage to B. is not duly recorded: HELD, that C. and all claiming under the mortgage to him, are purchasers with notice of the prior unrecorded mortgage to B. and that the contemporary information that the prior mortgage was usurious, does not affect the question of notice of the prior mortgage.

Judgment—Alienation of Land Subject to—Liability of Alienees.—A judgment is obtained against a debtor; and then the debtor alien his lands

to divers alienees by divers conveyances; HELD, all the debtor's lands, in the hands of his several alienees, are alike liable to the judgment creditor, and the lands in the hands of the several alienees must contribute pro rata to satisfy the judgment.

James English obtained a judgment in the circuit court of Fauquier, at September term 1819, awarding execution on a forfeited forthcoming bond, against George Pickett and Steptoe Pickett, and F. W. Brooke their surety in the forthcoming bond. Steptoe Pickett was also a surety of George, having become bound for this debt, by the original judgment for the same as his appearance bail. Farther proceedings on the judgment were stayed by injunction awarded by the court of chancery of Fredericksburg, in December 1819; and, after a long controversy, the injunction was dissolved in part, and perpetuated as to the residue, by a decree of the chancellor in May 1826, from which decree an appeal was taken to this court, and the appeal was still pending.

427 *George Pickett, by deed dated the 10th June 1818, reciting, that he was indebted to Peter Beverley, by note of the same date, in the sum of 6200 dollars, payable in two years, conveyed 500 acres of land in Fauquier, to T. T. Mason, upon trust, in default of due payment, to sell the subject, and pay the debt to Beverley out of the proceeds. And the day after the date of the deed, Pickett, at the instance of Peter Beverley, addressed the following letter to Robert Beverley: "Alexandria, June 11th 1818. Mr. Robert Beverley, I am indebted to Mr. Peter Beverley the sum of 6200 dollars, payable in two years, for which I have given him my note payable in the bank of Alexandria, and a deed of trust upon my lands to secure the same; and as he is indebted to you and about to transfer the note to you, I now inform you, that I will punctually pay it when it becomes due. I am &c. (signed) G. Pickett." The debt was assigned by Peter Beverley to Robert Beverley.

The deed of trust was acknowledged by Pickett and Mason the trustee, before two justices of Fairfax, three several times; first, on the 11th June 1818; again, on the 17th December following; and last, on the 20th August 1819. The certificates of the first two acknowledgments were very informal: and the last was without a caption, in these words: "We, G. T. and R. R. magistrates of the county of Fairfax, certify, that G. Pickett and T. T. Mason, parties to the within conveyance, have duly acknowledged the same before us, on

in the inverse order of alienation. Indeed the principal case seems to be the only Virginia case that ever held otherwise. See, citing principal case, McClung v. Belrine, 10 Leigh 394, 402, 403, 405 (in this case, STANARD, J. in his dissenting opinion thought the decision of the principal case ought to be conformed to), and *foot-note*: Michaux v. Brown, 10 Gratt. 624; Alley v. Rogers, 19 Gratt. 367, 389, and *foot-note*: Jones v. Phelan, 20 Gratt. 241, 242, 243; W. Va. Code 1899, ch. 139, § 8; Va. Code 1849, ch. 186, § 10, p. 709; Va. Code 1887, § 3575.

See also, *foot-note* to Rodgers v. McCluer, 4 Gratt. 81; monographic note on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425; monographic note on "Marshalling Assets" appended to Carrington v. Didler, 8 Gratt. 280.

Same—Lien—Suing out Elegit.—See the principal case cited in Taylor v. Spindle, 2 Gratt. 60.

See principal case also cited in Cheatham v. Cheatham, 81 Va. 403.

See further, *foot-note* to Fant v. Miller, 17 Gratt. 187; *foot-note* to Statham v. Ferguson, 25 Gratt. 28; *foot-note* to Burkholder v. Ludlam, 30 Gratt. 255; note by JUDGE BURKS to Simmons v. Simmons, 33 Gratt. 460; monographic note on "Depositions" appended to Field v. Brown, 24 Gratt. 74; 1 Bart. Ch. Pr. (2d Ed.) 704 et seq.

Same—Same—Same—West Virginia Rule.—The West Virginia cases seem to adhere to the rule that objection may be made to a deposition, on the ground of the incompetency of the witness, for the first time in the appellate court.

In Middleton v. White, 5 W. Va. 574, it was held that an exception to a deposition on the ground of incompetency of the witness is not waived by not being insisted on in the court below. The principal case and Fant v. Miller, 17 Gratt. 187, are cited to sustain the position.

Again, in Rose v. Brown, 11 W. Va. 122, 133, it was held that an objection to a deposition on the ground of the incompetency of the witness, would be considered in the appellate court, although the objection be made there for the first time. See, in accord, Hill v. Proctor, 10 W. Va. 59; Vanscoy v. Stinchcomb, 29 W. Va. 263, 271, 11 S. E. Rep. 927, 930; *foot-note* to Fant v. Miller, 17 Gratt. 188, containing an extract on this point from Vanscoy v. Stinchcomb, 29 W. Va. 263, 271, 11 S. E. Rep. 927, 930.

Deeds of Trust—Notice to Trustee—Effect upon Beneficiary.—(Though the conveyances in the principal case are spoken of in the headnotes as mortgages, the facts of the case show that in reality they were deeds of trust. This is also true of the case of Conrad v. Harrison, 3 Leigh 532, cited below.)

It is a well settled principle of law, especially in Virginia and West Virginia, that notice to a trustee, is notice to a *cestui que trust*. Fidelity, etc., Co. v. Slendanoah &c., R. Co., 32 W. Va. 259, 9 S. E. Rep. 185; *foot-note* to French v. Loyal, 5 Leigh 627; Eubank v. Kirk, 1 Va. Dec. 254; Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. Rep. 354, all citing principal case.

Deed of Trust Creditor—Purchase.—It is well settled that a creditor taking a deed of trust on real estate to secure his debt is a purchaser within the purview of the act relating to registration of conveyances. Johnston v. Slater, 11 Gratt. 325, 326, citing principal case and Tate v. Liggett, 2 Leigh 84. For other cases in accord, see *foot-note* to Evans v. Greenhow, 15 Gratt. 153.

Judgment—Alienation of Land Subject to—Liability of Alienees.—In Conrad v. Harrison, 3 Leigh 532, a debtor mortgaged certain lands to three different creditors successively to secure debts due them. It was held that the third mortgagee could not call on the second mortgagee to contribute *pro rata* to the satisfaction of the debt due the first mortgagee. The proposition affirmed in the principal case, that where "a judgment is recovered against a debtor, and the debtor alien his lands to divers alienees and by divers conveyances, all the debtor's lands, in the hands of his several alienees, are alike liable to the judgment creditor, and the lands in the hands of several alienees must contribute *pro rata* to satisfy the judgment," was doubted, but held not applicable to the case at bar. JUDGES CABELL and TUCKER (pp. 541, 546) distinguished the principal case from the case at bar on the ground that the principal case was not a case of subsequent incumbrances after a prior mortgage, but after a prior judgment. JUDGE CARR, while he concurred in the opinion of the court in each case, said that he could not reconcile them, but that in each he decided as he thought right.

But later cases review the decision in the principal case on this point and expressly overrule it, or refer to it as overruled. And the rule established in both Virginia and West Virginia now is, that where land which is subject to a lien of a judgment, or other incumbrances, is aliened to different purchasers by successive alienations, it is chargeable in the hands of the purchasers

the 20th day of August in the year 1819, and desired us to certify the said acknowledgment to the clerk of the county of Fauquier, in order that the said conveyance may be recorded. Witness our hands and seals." [Signed and sealed by the justices.]

The deed, with this certificate of the acknowledgment of it, was lodged with the clerk of Fauquier, to be recorded, on the 5th May 1820 (after the date of English's judgment) and the clerk indorsed a memorandum on it, that it was received in the office on that day; but it was not admitted to record till the 25th December 1822. The delay was explained *by the clerk; who

deposed, that on the 5th May 1820, he received a letter from Mason, the trustee, inclosing the deed to him, and requesting him to record it, and to charge the deed for doing so to Peter Beverley; to which he answered, that he would not record the deed upon the credit of Peter Beverley for the fee, but if Mason, or any other person he could confide in, would undertake to pay the fee, he would immediately record it: that he, thereupon, made the memorandum of the date when he received the deed, and kept it, first among his own private papers, and afterwards among the unrecorded deeds in his office, until the 25th December 1822, when, being assured of the fee by an agent of Robert Beverley, the assignee, he committed it to record.

George Pickett, by deed dated the 3d May 1820, which was the next day duly recorded in the county court of Fauquier, conveyed the same 500 acres of land, together with sundry other real and personal estate, to John Scott, upon trust, to make sale of the whole subject, at such times and on such terms as best he could, and out of the proceeds, 1st, to discharge all sums of money for which Scott himself was then or might afterwards be bound for, on account of Pickett; 2dly, such of Pickett's debts as any other person was bound for, as his surety; 3dly, such other of Pickett's debts as Scott should prefer; and lastly, all his other debts. And, by another deed, dated the 22d January 1821, duly recorded the same day, he conveyed the same subject (more accurately specified and described) and some other property, to Scott, upon the same trusts.

After the execution and registry of both the deeds of trust to Scott, Letty Ball recovered a judgment against George Pickett, and sued out a ca. sa. thereupon; and Pickett being arrested upon it, in September 1821, surrendered his effects, took the oath of insolvency, and was discharged as an insolvent debtor. In the schedule which he rendered of his effects, he mentioned his equity of redemption of the property conveyed to Scott by the deed of the

22d January *1821, and he assigned that and all the other property mentioned in the schedule to the sheriff, by a formal deed of assignment: (though without such a deed, all his rights of property would have been vested in the sheriff, by force of the statute, 1 Rev. Code, ch. 134, § 34, p. 538). And the sheriff sold and conveyed the property contained in Pickett's schedule and deed of assignment thereof to him, to F. W. Brooke.

And, after George Pickett's insolvency, and surrender of his effects, under the ca. sa. sued out by Letty Ball against him, namely, in September 1822, John Laird recovered a judgment against him and Steptoe Pickett his surety. In April 1823, Laird had an entry made on the record book, that he elected to charge the goods and chattels and a moiety of the lands of the debtors, upon his judgment. And in November 1823, he assigned this judgment to F. W. Brooke.

There arose out of these transactions, three suits in the superiour court of chancery of Fredericksburg.

I. Jacob Weaver exhibited his bill against Scott, the trustee in the deeds of trust of May 1820, and January 1821, George Pickett, Peter Beverley, and T. T. Mason, the trustee in the deed of trust of June 1818, securing the debt due to Beverley; setting forth, that he was a creditor of George Pickett; claiming, that the debt due him should be charged on the trust subject conveyed to Scott by the deeds of May 1820 and January 1821; and praying, that Scott should be ordered to execute the trust, to sell the trust subject, and to apply the proceeds to the satisfaction of Pickett's creditors, according to the provisions of those deeds: charging, that the deed of trust of June 1818, executed to Mason to secure the debt to Beverley, had never been duly recorded; and that the debt thereby secured to Beverley was usurious, and Pickett had in fact paid the whole or the greater part of the money really advanced to him, with

legal interest: and insisting, therefore, that this *deed should not be allowed to stand in the way of the conveyances made of the same subject, by Pickett to Scott, for the benefit of his just creditors.

II. F. W. Brooke and Steptoe Pickett exhibited their bill against George Pickett, Peter Beverley and T. T. Mason his trustee, and Robert Beverley his assignee, John Laird and James English; setting forth, that they were the sureties for George Pickett for the debt due to English; and insisting, that English's judgment had unquestionable priority to the deed of trust executed by George Pickett to Mason to secure the debt due to Beverley, and they, the sureties for the debt due to English, had a right to be substituted in his place for the benefit of the lien of his judgment on Pickett's lands: setting forth also, the judgment recovered by Letty Ball against George Pickett, the ca. sa. sued out upon the same, the arrest of Pickett upon that process, his surrender of his effects, and discharge as an insolvent, and the sale and conveyance of the effects surrendered, by the sheriff to Brooke; and the judgment recovered by John Laird against George Pickett, and the assignment thereof by Laird to Brooke: charging, that the debt to Peter Beverley, to secure which George Pickett's deed of trust to Mason of June 1818 was executed, was usurious; that Peter Beverley was from the first only nominally the creditor, having lent the money secured by the deed of trust, as the agent of Robert Beverley, who supplied him with the funds to be lent out at usurious interest; and that

George Pickett's letter to Robert Beverley of the 11th June 1818, was, dictated by Peter, and designed to place Robert, though in fact the real creditor, in the ostensible situation of an assignee, induced to take an assignment of the debt by the promise of the debtor to make punctual payment to him; and that, whether this debt was usurious or not, Brooke, being the assignee of all the effects of George Pickett mentioned in his schedule and surrendered to the sheriff, upon his discharge as an in-

solvent under Letty *Ball's ca. sa. and being the assignee of Laird's judgment, acquired rights under both assignments, preferable to Beverley's claim and the deed of trust securing it, because both Ball's ca. sa. and Laird's judgment were prior in date to the registry of the deed of trust under which Beverley claimed.

Robert Beverley stated in his answer that Peter Beverley, having become justly and fairly indebted to him, to an amount larger than the debt due from George Pickett to Peter, offered to assign this debt to him in part satisfaction, and he was induced to take the assignment of it, by the assurances contained in Pickett's letter to him of the 11th June 1818, that the debt was justly due, was amply secured by deed of trust on Pickett's land, and would be punctually paid: that Peter Beverley was not his (Robert's) agent in the transactions with Pickett, out of which this debt arose; that he (Robert) was no wise concerned or acquainted with those transactions. and in particular, did not know or suspect, that the time he took the assignment, and did not now know, that the debt was usurious or otherwise illegal; and that, as he was neither party to the alleged usury, if usury there was, nor had any notice of it, and had been induced to take the assignment by the assurances contained in the letter above mentioned, he ought not, in case the fact of usury should be established, to be held liable to the consequences. And, as to the registry of the deed of trust under which he claimed, he said, he had been informed, that it had been lodged with the clerk to be recorded, and never knew that it had not been in fact recorded, immediately upon its being so lodged with the clerk, till long after the debt secured by it had fallen due.

As against Mason and Peter Beverley who were not inhabitants of Virginia, and failed to appear and answer, the bill was taken for confessed. The defendants English and Laird put in answers; but they had no interest in the controversy contrary to those of the plaintiffs.

*III. Robert Beverley exhibited his bill against George Pickett, Scott, the trustee in the deeds of trust of May 1820 and January 1821, Peter Beverley and T. T. Mason; and afterwards, an amended bill, making English, Laird, Steptoe Pickett and Brooke, parties defendants. He set forth all the facts touching the assignment by Peter Beverley to him, of George Pickett's debt to Peter, stated in his answer to the bill of Brooke and Steptoe Pickett, and, particularly, Pickett's letter to him of the 11th June 1818, by the assurances contained in which, he alleged, he was induced to take the assignment

of the debt; and all the facts touching the registry of the deed of trust of June 1818, under which he claimed; alleging, that it was duly acknowledged by the parties before the justices of Fairfax in August 1819, and lodged with the clerk to be recorded on the 5th May 1820, and that it was the clerk's fault or neglect that it was not then recorded; but whether it was duly and timely recorded or not, was, he insisted, wholly immaterial; for he charged, that Scott, before the execution of George Pickett's first deed of trust to him, that of the 3d May 1820, had notice of the execution of the prior deed of June 1818 securing the debt to Beverley; and the defendant Laird, or Brooke as his assignee, claimed under the deeds of trust to Scott, and had obtained a decree for satisfaction of Laird's judgment out of the trust subject in Scott's hands, according to the provisions of those deeds. And the bill prayed a discovery from Scott, whether he had such notice or not, and how and when; and that the trustee in the deed of June 1818, or some other person to be appointed by the court, should be directed to sell the trust subject thereby mortgaged, and to apply the proceeds to the satisfaction of the debt to Beverley; and general relief.

George Pickett answered, that since the execution of the several deeds of trust in the bill mentioned, he had taken the oath of insolvency, and surrendered all his interest in the subject, which interest had been sold by the sheriff for the benefit of the creditor at whose suit he was in execution, *for a sum not more than sufficient to discharge the debt due that creditor: and, therefore, he disclaimed all interest in the matter in controversy in this cause.

Scott, in his answer, admitted that, after the first deed of trust to him of the 3d May 1820 was prepared, and when Pickett had taken the pen in his hand to execute it, he observed to Scott, that he had borrowed money of Peter Beverley at twelve per centum per annum, and had given him a mortgage of part of his land to secure the payment of about 6000 dollars. Scott also stated, that he was jointly concerned with Brooke, in the assignment of Laird's judgment; and that Steptoe Pickett was surety for George to Laird.

Brooke, in his answer, also stated that Scott was jointly concerned with him in the assignment of Laird's judgment, and that Steptoe Pickett was surety for George to Laird; and he admitted, that the debt due to Laird was secured by the deeds of trust to Scott, and that the assignees thereof had claimed under those deeds, and obtained a decree for satisfaction out of the trust subject thereby conveyed, which as yet, however, had proved unproductive.

Steptoe Pickett, insisted in his answer, that being a surety for George Pickett to Laird, he had a right to demand that George Pickett's property conveyed by the deed of trust to Scott, should be applied in discharge of that debt, so as to relieve him from his liability as surety for the same, and that he, as surety to Laird, was entitled to be substituted to every advantage to which Laird was entitled.

Laird also answered. As against the defendants, Peter Beverley, Mason, and English, the bills were regularly taken for confessed.

The plaintiff put in a general replication to all the answers, except that of George Pickett, to which there was no replication.

The circumstances attending the delivery of the deed of trust of June 1818, under which Beverley claimed, to the clerk of Fauquier to be recorded, and his reasons for not recording it till the 25th

December 1822, were proved by the deposition of the clerk. They have been already fully stated.

The defendant Scott was examined as a witness, as to his notice of the deed of June 1818, before the execution of the deed of May 1820 to him; and he deposed substantially as he had answered, that, after the deed of May 1820 had been drawn, and when Pickett was about to sign it, Pickett told him, he had borrowed a sum of money of Peter Beverley at twelve per cent. interest, and had given a mortgage on part of the land included in the deed to Scott.

Upon the question, whether George Pickett's debt of 6200 dollars to Peter Beverley which was secured by the deed of trust of June 1818, and assigned by Peter to Robert Beverley, was usurious, there were many circumstances in proof; but the principal evidence, that, indeed, without which the charge of usury could not be established, was the deposition of the defendant George Pickett, which stated the fact and the particulars of the usury, very positively and explicitly. The question was as to the competency of his evidence; and the circumstances under which it was taken, and read at the hearing, were supposed to affect the question. They were these: the defendant Scott moved for and obtained a special commission to examine and take the deposition of Pickett, to be read at the hearing, saving all just exceptions. And, afterwards, Beverley himself moved for and obtained a like commission to examine Pickett. But Beverley never proceeded under his commission. The deposition was taken by the other parties, under the commission awarded on Scott's motion. When the deposition was returned, Beverley's counsel indorsed an exception to it, upon the envelope containing it, to the following effect: that he excepted to the reading of the deposition, taken, as it was, under a special commission subject to all just exceptions, on the ground, that the deponent was a party in the suits, and directly interested in the event. But the counsel did not sign this exception; and, for

435 aught that appeared, the *court was not apprised of it, or called upon to examine and decide upon it, so that the deposition was read at the hearing, without any exception presented to the court, or known to the parties who adduced and relied upon the evidence.

In the case of Weaver v. Scott and others, the chancellor, reserving for future consideration all questions as to the validity of the deed of trust of June 1818, under which Beverley claimed, the registry thereof, and the charge of usury in the debt which that deed was executed to secure, directed Scott

to sell all the trust subject comprised in the two deeds of trust to him of May 1820 and January 1821; and, an account having been taken of the debts chargeable on this fund according to the provisions of these two deeds, and Scott having made sales of the trust subject in pursuance of the decree, and made report thereof to the court, the chancellor decreed the payment of the proceeds to the creditors claiming under the deeds to Scott including Laird and his assignees, in the order provided by those deeds.

And afterwards, in the two cases of F. W. Brooke and Steptoe Pickett v. George Pickett, Beverley and others, and Robert Beverley v. George Pickett, Scott and others, the chancellor declared, that the deed of trust of George Pickett to Mason of June 1818, securing the debt to Beverley, was not a recorded deed within the meaning of the statute of conveyances (1 Rev. Code, ch. 99, § 4, p. 362,) until the 25th December 1822, when it appeared by the certificate of the clerk of Fauquier, to have been admitted to record; and that the plaintiff Robert Beverley, claiming under that deed to charge the land thereby mortgaged, must be postponed to the judgment creditors of George Pickett, whose liens attached before the deed was recorded; that Beverley, however, if he elected to do so, might come in under the deeds of trust of May 1820 and January 1821, for satisfaction out of the trust subject, according to the provisions of these deeds, and that, if

436 he failed to get satisfaction *out of that fund, he was entitled to a personal decree against George Pickett, for such portion of the debt secured by the deed of trust of June 1818, as might remain unsatisfied. And he decreed and ordered, that the marshal of the court should sell the 500 acres of land mortgaged by the deed of June 1818, and that, out of the proceeds of sale, he should pay Brooke, assignee of Laird, 4754 dollars with interest from the 1st July 1826 till paid, (being the balance due upon Laird's judgment against George Pickett and Steptoe Pickett his surety) and the costs of the suit of Brooke and Pickett v. Pickett, Beverley and others; and that the marshal should deposit the residue of the proceeds in bank, subject to the future order of the court.

Beverley appealed to this court.

The cause was argued here, by Johnson for the appellant, and Stanard for the appellees.

I. Johnson said, the first question was, whether George Pickett's debt to Peter Beverley, assigned to Robert Beverley, the appellant, to secure which the deed of trust of June 1818 was executed, was usurious or not? The chancellor, considering the charge of usury not proved, had decided against the preference claimed by Beverley under that deed, upon other grounds; but the effort to establish the usury, might and no doubt would be repeated here. He said, there was no other evidence of the usury but the deposition of George Pickett; so that the point depended upon the question of his competency. He contended, that Pickett was not a competent witness. For he was a party to the suits, liable, in

case the usury was not established, and Beverley should succeed in charging his debt on the land, either under his own mortgage or under the deeds to Scott, to a personal decree for so much of the debt as the trust fund should fall short of satisfying; and exempt from such liability, if Beverley's claim was condemned as usurious: liable, certainly, to a decree for costs, if Beverley should succeed; 437 and entitled to costs if Beverley should fail: and, therefore, interested to defeat him. But, if the evidence could be held competent, and the usury as between Peter Beverley and Pickett should be thereby established, Pickett, after his letter to Robert Beverley, of the 11th June 1818, whereby he induced him to take an assignment of the debt, as a fair debt, amply secured, which would be punctually paid, could not be allowed to set up the defence of usury against Robert Beverley; neither, therefore, could Scott, who claimed under Pickett the equity of redemption, and stood in Pickett's shoes, nor Laird or his assignee Brooke, who claimed under the deeds of trust to Scott, nor any other creditors of Pickett claiming under those deeds, avail themselves of the objection of usury, as against Robert Beverley, the innocent assignee of the usurer, misled and deluded by the debtor.

Stanard said, that Pickett's deposition related to the question of usury put in issue by the pleadings in Weaver's suit, and in that brought by Brooke and Steptoe Pickett, (the first and second suits above mentioned) and it was only in the third suit, upon the bill exhibited by Beverley, that Beverley could be entitled to a personal decree against Pickett, the deponent. Now, in this suit, George Pickett's answer to Beverley's bill, disclaimed all interest in the controversy; and to this answer, containing this explicit disclaimer, there was no replication: Pickett, then, was discharged from the cause. Accordingly, Beverley as well as Scott, asked a special commission to take Pickett's deposition: after that, neither party could be heard to object to his competency. And the deposition was, in fact, read at the hearing without objection; for the exception indorsed by Beverley's counsel, on the envelope which contained the deposition, not even signed by the counsel, never presented to the chancellor, or intimated to the other parties, indorsed on a paper which neither the court nor the parties would ever think of examining, could not be regarded as an exception at all. The deposition es-

438 tablished the usury as against *Peter Beverley. As to Pickett's letter to Robert Beverley, of the 11th June 1818, he went into a minute examination of the evidence, and endeavoured to shew, that in the transactions between Peter Beverley and Pickett, Peter was Robert's agent, lending Robert's money to Pickett; and that that letter, so far from being regarded as an inducement held out by Pickett to Robert Beverley, to take the assignment of the debt, and thus precluding Pickett, and those standing in his place, from relying on the usury, was a contrivance which manifested the consciousness of the usury

practised, and was a strong presumptive proof of the usury.

Johnson replied, that Pickett could not disclaim his interest in the controversy: he could not disclaim his personal liability to Beverley for the debt he owed him, or for the costs of suit. That the want of a replication to his answer, was immaterial; for there was nothing in the answer, which it was necessary to deny by replication. That, so far from Pickett having been discharged from the cause, it was set for hearing, and heard, as to him as well as the other parties. That, though Beverley had asked a commission to take Pickett's deposition, he had never proceeded under the commission. That, as to the deposition being read at the hearing without exception: if it was not enough, in all cases, to file such an exception among the papers in the cause (as he thought it was); yet this deposition was taken under a special commission, expressly saving all just exceptions; in other words, the court itself, in giving the authority to take the deposition, reserved the question of competency for its future consideration, and was bound to examine and decide it: and, besides, he doubted, whether it was necessary for a party, against whom a deposition of a witness, plainly incompetent upon the face of the record, is adduced, to file a formal exception to it, in order to avail himself of the objection to its competency: such exceptions were properly applicable to cases of irregularities in the taking of depositions, such as the want of notice and 439 the like, and *were required in order to save the party adducing them, from being surprised by the objection. The question whether Peter Beverley, in his transactions with Pickett, was the agent of Robert, was a question of fact; and he insisted, that there was no evidence which could justify the court in assuming the fact of the alleged agency.

II. Johnson insisted, that the deed of June 1818, under which Beverley claimed, ought to be considered as a recorded deed upon and from the 5th May 1820, when it was "lodged with the clerk to be recorded," according to the express provision of the statute, 1 Rev. Code, ch. 99, § 4. It was immaterial, whether it was actually recorded or not, or what was the clerk's motive or reason or failing to commit it to record immediately. But the point, he said, was of no consequence in this cause; or Scott had actual notice of the mortgage to Beverley, prior to the execution of the first deed of trust to him of the 3d May 1820; and, therefore, Beverley's mortgage, supposing it was never recorded, was good against Scott, and all persons claiming under the deeds of trust to him. Then, the state of the claims of the creditors, as to their priorities, stood thus: English's judgment was prior to Beverley's mortgage; but as he had claimed under the deeds of trust to Scott, over which Beverley's mortgage had priority, he could not avail himself of the previous lien of his judgment, to insist on the priority which that would otherwise have given him over Beverley's mortgage; or, if he was entitled to stand on the previous lien of the judgment, his claim ought to be charged

on that part of Pickett's lands which were not mortgaged to Beverley, but were, afterwards conveyed in trust to Scott. And either way, Beverley would be entitled to the benefit of the whole subject mortgaged to him. Scott, and the creditors claiming under the deeds of trust to him, were entitled to the equity of redemption to the land mortgaged to Beverley, and to the other trust subject comprised in those deeds.

As to Letty Ball's judgment and the 440 ca. sa. *which she sued out upon it, Pickett's surrender of his effects and discharge as an insolvent debtor, being subsequent to the execution of the deeds of trust to Scott, nothing but Pickett's equity of redemption of the subject comprised in those deeds, was surrendered to the sheriff for her benefit, and the sheriff could convey to Brooke no other interest in the lands in question. And Laird's judgment being subsequent to Pickett's discharge as an insolvent debtor, which vested all his rights of property in the sheriff for the benefit of the creditor at whose suit he was in execution, there was literally nothing on which the lien of that judgment could attach: Laird, and his assignee, could only claim under the deeds of trust to Scott.

Stanard denied, that the mortgage to Beverley could be regarded as a recorded deed at all: he said, the certificate of the acknowledgment of it by the parties, was fatally defective: for the justices of Fairfax, who certified that the deed was acknowledged before them, had no jurisdiction or authority for any such act, out of their county; and their certificate did not state, that the acknowledgment of the deed was taken by them in their county; nor was there even a caption to the certificate, referring the act to the county of Fairfax. And as to Scott's notice of the mortgage to Beverley, he remarked, that the notice given him of the existence of that deed, was accompanied by information, in the same breath, that it was usurious, and in effect void: and he endeavoured to maintain, that such a notice could not affect Scott, or the rights of those claiming under him.

GREEN, J. The first inquiry in these cases is, whether Beverley's demand is tainted and destroyed by usury? And this depends upon the question as to the competency of George Pickett as a witness. If he is competent, the proof of usury is full and complete, and the question as to the effect of his letter to Beverley of the 11th June 1818, would arise. If he is not a competent witness, the other evidence 441 *in the cause, though sufficient to excite strong suspicions, does not amount to satisfactory proof of usury.

Pickett, if Beverley's claim was valid to any purpose, was his debtor, and a party defendant in his suit, under such circumstances, that if the claim to satisfaction, in whole or in part, out of the land, either under the deed to Mason or under those to Scott, were established, Pickett would have been liable to a personal decree for any balance not satisfied out of the land, and for the costs. But if, on the other hand, Beverley's claim to satisfaction out of the land were repudiated, then, even though

Pickett might be still personally responsible in consequence of his letter, Beverley's bill must have been dismissed with costs as to Pickett, as well as to the other defendants, since the only ground of jurisdiction against Pickett, was the plaintiff's right to subject the land. In respect to the costs, therefore, at least, he had a direct interest in the event of the cause, depending upon the very point to which he testified. His evidence must, consequently, be rejected, unless the course taken by Beverley has sanctioned it.

His bill did not ask any specific relief against Pickett, particularly; but it prayed general relief; and that was sufficient to found any decree against any of the parties, which the state of the case at the hearing would justify. Pickett answered, that having surrendered all his interest in the land upon taking the benefit of the insolvent debtor's law, and the sheriff having sold that interest, for a sum not more than sufficient to satisfy the execution under which he surrendered, he had no longer any interest in the property, and he, therefore, disclaimed all interest in the subject of controversy; that is, between the other parties, as to the land. But he did not, and could not disclaim his interest in his own personal liability. Beverley put in no replication to this disclaimer; and that, it was argued, put Pickett out of court as a party. That may be a just rule, when the answer, followed by a disclaimer, is such as, if true, would shew that the party could have no interest in the decree

in any event, and the plaintiff admits 442 it to be true by failing to *reply to it. But, in this case, the answer being true, there could be no occasion to traverse it; and yet it shewed, upon its face, that the defendant had still an interest in the cause, and was liable to a personal decree, if the plaintiff was properly in court in respect to the land.

After the answer and disclaimer of Pickett were filed, Beverley procured an order for a special commission to take his deposition, subject to all just exceptions at the hearing. But he never took out and acted on the commission. The deposition was taken under a commission awarded by a special order to the same effect, made at the instance of the defendant Scott. The circumstance of Beverley having asked for a commission, cannot, in reason, preclude him from objecting to the competence of the witness; and no authority was cited in support of that proposition.

Finally, though there was an indorsement on the envelope of the deposition, in the hand writing of Beverley's counsel that he excepted to the reading of the deposition (particularly describing it) on account of the witness's interest in the event of the cause; yet it was not signed by the counsel, nor does it appear that the attention of the court was called to the exception, or that the court decided upon it. This frequently occurs in the records which come to this court, and as to depositions taken under general commissions, presents serious difficulty. But that difficulty does not exist in the case of a special commission, saving in terms, all just excep-

tions for the consideration of the court at the hearing; and, consequently, devolving on the court the duty to take notice, ex officio, of objections to the competency of the witness, arising from his interest in the event of that very cause; a question which cannot be affected by any collateral proofs.

Upon the whole, I think that Pickett's deposition should be rejected. And the chancellor seems to have disregarded it.

According to the views that have occurred to me, in respect to the priorities of the several parties claiming satisfaction of their debts out of the property in question, it is wholly immaterial whether the

443 deed of trust to Mason under *which Beverley claims, be considered as a deed admitted to record on the 5th May 1820, or the 25th December 1822, or as remaining an unrecorded deed to this day. No judgment creditors of Pickett appear, except one, who had his judgment before the 5th May 1820, and before Pickett's first deed to Scott, (namely, James English) and such as obtained their judgments after the execution of both the deeds to Scott, viz. Letty Ball and John Laird.

As to the first, English's judgment, it overreaches all those deeds, and operated as a lien on all the debtor's lands, which has not in any degree been impaired. He, and the sureties of Pickett to him, have been guilty of no laches or other act to impair its force. The judgment was rendered in September 1819, and enjoined in January 1820. The injunction was perpetuated in part, and dissolved in part, in May 1826, and an appeal taken from the decree, which, as far as appears, is still depending. Nor has English received any thing under the deeds to Scott; nor does he appear to have been privy or consenting to them. A sum has been retained in the case of *Weaver v. Pickett* and others, on account of his claim, subject to the future order of the court. If he had claimed under the deeds to Scott, that would not have barred him of his election to resort to his original security, the lien of the judgment, if at any time before the final disposition of the fund, he had found it to be his interest to do so. *Codwise v. Galston*, 10 Johns. Rep. 517. It was, however, insisted on the part of Beverley, that no part of this debt should be charged upon the lands conveyed to Mason; because, before Pickett conveyed the residue of his lands to Scott, if that residue had been extended, Pickett could not have claimed contribution from the lands conveyed to Mason, whom he was bound to indemnify; and, in equity, the residue of the lands should, in that case, be applied to the satisfaction of the judgment in exoneration of those conveyed to Mason. And this is certainly true, for neither a debtor nor his heir can claim contribution in such a case against the alienee of a part of the land bound by the

444 judgment. *From this it was argued, that Scott, the second alienee, and those claiming under the deeds to him, should stand in Pickett's shoes in that respect, and that residue first subjected to the satisfaction of the judgment, as far as it will go, in exoneration of the land conveyed

to Mason. Upon this subject, the law is perfectly settled. All the alienees of the lands of a debtor bound by a judgment or recognizance, no matter in what order the alienations were made, are bound to bear equally the burden of satisfying the judgment, by mutual contributions, pro rata, according to the value of the property held by them; all being considered as in equality, without regard to the priority of their purchases or conveyances. Authorities for this doctrine are referred to in 5 Vin. Abr. Contribution and Average, A. pl. 3, 4, 6, 7, 12, 19, p. 561, 2; Herbert's case, 3 Rep. 12. There is no pretence for calling upon Pickett's sureties, against whom the judgment was also rendered, for contribution. If there was such a right at law, equity would control it, by substituting the surety to the lien of the judgment upon the land of the principal debtor, no matter in whose hands it was. This, however, was not claimed. This judgment should be satisfied out of the proceeds of the lands conveyed by Pickett to Scott had already sold, and that in controversy, pro rata, in proportion to the neat amount of the sales thereof respectively. But if, in the case of *Weaver v. Pickett*, the proceeds of the land sold have been so disposed of as that that portion of English's judgment which ought to be paid out of that fund, cannot now be fully satisfied out of it (a question which cannot be examined here) still the land remaining unsold can only be charged with its due proportion, to be ascertained as aforesaid.

Letty Ball's judgment being subsequent to the execution and recording of both of the deeds to Scott, operated as a lien, not upon the land in question, the legal title to which, as to her, was vested in Scott, but upon Pickett's equity of redemption, or his interest in the surplus, if any, of the fund conveyed to Scott, after satisfying all 445 the purposes of the *deeds to him; that is, after paying all Pickett's debts, including that to Beverley, in the order specified in the deeds. The execution of the ca. sa. destroyed this lien, and the discharge of Pickett under the insolvent laws, vested his equity of redemption, or interest in that surplus, if any, in the sheriff for her benefit; and that again was vested in Brooke by the conveyance of the sheriff. The proceedings under the ca. sa. also vested in the sheriff, for the benefit of the creditor, all the property of the debtor conveyed by him by any conveyance made void by the statute of frauds and perjuries, as being in fraud of creditors, or by the statute of conveyances, as not being duly recorded; as was held in the case of *Shirley v. Long*, 6 Rand. 735. So that, if there had been no conveyance by Pickett of the land in question, other than that to Mason, and that were unrecorded at the time of the execution of the ca. sa. the legal title would have passed to the sheriff, and from him to Brooke, in opposition to that deed. But there was another unimpeached and duly recorded deed, providing for the payment of Beverley's debt, which, putting the deed to Mason out of the case, as if it had never been made, would give Beverley a preference over Brooke, claiming not under the

deed to Scott, but only as a purchaser of the title of the sheriff under Pickett's schedule and surrender of his effects.

Laird's judgment being subsequent to the ca. sa. and the proceedings under it, operated as a lien upon nothing; for Pickett then had no scintilla of interest, legal or equitable, in any thing, real or personal; the sheriff having sold all his interests, for a sum not more than sufficient to satisfy the execution under which he was taken, and thus annihilated even his interest in any surplus which might arise from the sale of his mortgaged property. If there had been a surplus, Laird's judgment would have operated as a lien upon that; but there was none. Laird, therefore, can claim nothing, but as a creditor under the deeds of trust to Scott, without any aid from his judgment, which gives no additional strength to that claim. And his claim stands precisely as it would, if he had not obtained judgment.

446 *Allowing the preference to English's judgment to the extent stated, the question arises between Beverley and those claiming only under the deeds to Scott, including Laird, as to the order in which the residue, after satisfying English's judgment, shall be applied; whether according to the terms prescribed by the deeds to Scott, putting Beverley in the last class of creditors to be satisfied, upon the ground, that the deed he claims under is void as to all Pickett's creditors claiming under the deeds to Scott, because not recorded; or to the satisfaction of Beverley's claim in preference to the creditors claiming under the deeds to Scott, upon the ground that it was in fact recorded before those deeds were executed, or that Scott, and consequently, those claiming under him, had notice of the deed to Mason, before the first deed to Scott was executed? I have already said, that it is unnecessary to any purpose in this cause, to decide whether the deed to Mason ought to be considered as a deed admitted to record on the 5th May 1820, or on the 25th December 1822, or remains a deed not duly recorded to this day; and I mean to give no opinion on that point. It is, in every view, unimportant; because the first deed to Scott, conveying the property in question, was executed and admitted to record, before the deed to Mason was delivered to the clerk; and the second deed to Scott does not impair the force of the first, for it is upon the same trusts precisely, and differs from it only in specifying the property conveyed more particularly, and conveying other property. So that those claiming under the first deed to Scott, would have an unquestionable priority to Beverley, unless Scott took that conveyance, as well as the last, with such a notice of the existence of the deed to Mason, as made it good against him, and all claiming any benefit under the deeds to him.

Such a notice I think he had: he was explicitly informed, that a deed for a part of the land was given to secure a debt to Peter Beverley, and, at the same time, that the debt was usurious. This notice made the deed as valid against him, at all claiming under the deeds to him, as if it had
447 been *duly recorded, liable to be im-

peached for usury, as it, would have been if recorded, and no otherwise. It had the same effect, as a notice of the existence of the deed, with a declaration by Pickett that he had paid the debt, would have had; and that surely could not have been considered as, per se, without any other proof of payment, destroying the effect of the notice of the existence of the deed.

Upon the whole, the land conveyed by the deed to Mason should be sold under the direction of the court of chancery; the just proportion charged upon it in favour of English's judgment, and applied towards the satisfaction thereof, in the first place; and then the proceeds applied to the debt secured to Beverley, and the costs of his suit; and the surplus, if any, distributed according to the order prescribed in the deeds to Scott.

The other judges concurred, and the decree was reversed with costs.

Jones v. Murdaugh.

December, 1830.

Trespass on Case—Wrongful Distress for Rent—Declaration—Allegations.—In an action upon the statute, 1 Rev. Code, ch. 113, § 5, for wrongful distress for rent when no rent in arrear, the declaration must set forth the relation of landlord and tenant existing between the plaintiff and defendant: and if it does not, the declaration is bad on general demurrer.

This was an action on the case brought by Murdaugh against Jones in the circuit court of James City, for making wrongful distress for rent, when no rent was in arrear and due.

The declaration was very informal: it contained two counts, as follows: "J. W. Murdaugh complains of W. Jones in custody &c. of a plea of trespass on the case; for that the defendant, on &c. at &c. wrongfully and illegally, in his own name and in those of his wife Mary and
448 P. L. *C. Burwell, caused a distress to be made and levied on the personal property of the plaintiff, to a large amount in value, to wit, to the value of 200 dollars, and, on &c. at &c. wrongfully and illegally, caused the said property to be sold; and the plaintiff avers, that before, on and since the day of distress and sale of the said property, no rent was due to the defendant and Mary his wife or P. L. C. Burwell. And further, the plaintiff charges and avers, that on &c. at &c. the defendant, pretending that rent was in arrear and due to him, wrongfully and illegally (through the agency of one M. and one B.), caused a distress to be levied and made on the personal property of the plaintiff, to a large amount in value, to wit, to the value of 200 dollars, and, on &c. at &c. caused the said property to be sold; and the plaintiff charges and avers, that no rent was in arrear and due to the said defendant, before, on or since the day and year aforesaid; whereby action accrued to the plaintiff to demand and have double the amount or value of the said rent distrained for, or double the value of the property distrained. Nevertheless, the defendant

*See generally, monographic note on "Landlord and Tenant" appended to Mason v. Moyers, 2 Rob. 606.

illegally caused said distress and sale to be made, against the form of the statute in such case made and provided, and to the damage of the plaintiff 1500 dollars, and therefore he brings suit &c." The defendant demurred generally to the declaration, and pleaded not guilty. The court held, that the law on the demurrer, was for the plaintiff. And upon the trial of the issue on the plea of not guilty, the jury found for the plaintiff, and assessed his damages to 400 dollars. The defendant made a motion for a new trial, on the ground that the verdict was contrary to the evidence; and the motion being overruled, he filed exceptions to the opinion of the court, thereupon, stating all the facts which had appeared in evidence at the trial; from which it appeared, that the plaintiff wholly denied any relation of tenant and landlord between him and the defendant, or the other parties, in whose names the declaration alleged the wrongful distress to have been made. The court gave judgment for 449 the damages *found by the jury; and the defendant, Jones, appealed to this court.

The case was argued here, by R. G. Scott for the appellant, and Stanard for the appellee; but the court decided it upon a point which was not noticed at the bar.

COALTER, J. The declaration, though it avers that the plaintiff complains of a plea of trespass on the case, is really, if any thing, a declaration in trespass under the statute for distraining the goods of the plaintiff for rent, when no rent was in arrear and due; and there is a verdict and judgment for double the value of the goods sold. The declaration was demurred to: and the question is, Whether it is a good one under the statute? Several objections were taken to it; one of which, the want of specification of the goods taken and sold, is perhaps fatal, according to the cases of Wyat v. Essington, 1 Stra. 637, and Bertie v. Pickering, 4 Burr. 2455. If this was a simple action of trespass, not founded on the statute, those cases would seem to me conclusive. How far this case may be taken out of that doctrine, being an action under the statute, not intended to contest the right of the property, or the propriety of the seizure of it, if rent had been due, I am not prepared to say, nor have I deemed it necessary to inquire; because, as it appears to me, there is a fatal defect in the declaration, which was not noticed at the bar. There are various actions that may be maintained by tenants against their landlords: as, 1st, trespass or case under the statute, 1 Rev. Code, ch. 113, § 5, for a distress made when no rent is in arrear and due, a remedy given in England, by the statute of 2 W. & M. stat. 1, ch. 5, § 5. 2d, An action for excessive distress, given by our statute, Ibid. § 31, which is similar to the english statute of Marl. 52, H. 3, ch. 3. A simple action of trespass did not lie at common law in such case; for at common law, the landlord might distrain for more than the rent in arrear, so as to make it the interest of the party to re- 450 deem the *goods by paying the rent; Lynne v. Moody, 2 Stra. 851. 3d, A special action on the case lies for distrain-

ing for more rent than is due, whereby the tenant has been obliged to pay a larger sum than was justly due, besides costs &c. And 4th, in England, an action lies under the statute of 51 H. 3, for distraining beasts of the plough and sheep, there being other sufficient distress on the premises. The forms of declarations in all these actions, are given in 2 Chitt. plead. 285, 6, 7, 8. And all of them go upon the relation of tenant and landlord, admitted and stated in the declaration. The precedent given by Chitty, of a declaration in such a case as that before us, sets out the fact, that the plaintiff was tenant of the defendant, and at what annual rent &c. It goes for double damages; and, of course, is not an ordinary action of trespassa de bonis asportatis, though a count of that kind may be joined with it, upon which the damages will be according to the nature and extent of the injury. Salter v. Brunaden, 4 Mod. 231, was an action of the same kind as this under consideration: there, there was a judgment by default, and a writ of inquiry of damages, and a motion in arrest of judgment for the defects of the declaration, in not sufficiently setting forth the demise, and shewing the relation of landlord and tenant, and that the goods were distrained for rent arrear; but, as these matters were set forth, though informally, the court held the declaration good. But the case shews, that the relation of landlord and tenant, must be substantially shewn in the declaration; and the inference which Chitty draws from it, is, that the demise need not be set out so fully and formally as in his form. In the case before the court, the declaration, so far from stating or admitting a lease, or any relation of landlord and tenant between the plaintiff and defendant, is wholly silent on that point: and when we look into the proofs (which are stated in the bill of exceptions) we find the plaintiff went on the ground that there was no lease, and no relation of landlord and tenant between him and the defendant; and yet 451 he recovers double damages. *It is unnecessary to inquire what would have been the consequence, if the plaintiff had declared merely for a simple trespass, or had joined a count of that kind; since we must decide on the demurrer, whether this is a good declaration or not? It seems to me that it is not, for the reasons I have stated; and that, therefore, the judgment ought to be reversed, and judgment entered for the appellant upon the demurrer.

The other judges concurred. Judgment reversed; and judgment entered for the appellant.

Threlkeld's Adm'r v. Fitzhugh's Ex'x.

December, 1830.

Sale of Land—Breach of Warranty—Measure of Damages.—Upon a sale of land by T. to B. the vendor covenants for himself, his heirs, executors and administrators, to warrant the land to B. his heirs

***Sale of Land—Breach of Warranty—Measure of Damages.**—Since the case of *Threlkeld v. Fitzhugh*, 2 Leigh 451, the definite fixed rule, never since departed from in Virginia, has been that the purchaser of land, upon eviction, is only entitled to the purchase price paid, with interest from the date of eviction, and costs. This rule is safe and certain; it is too well established, too plainly essential to the

and assigns: B. is evicted, and brings covenant for breach of this warranty: HELD, the proper measure of damages is the purchase money with interest from the date of the actual eviction, the costs incurred in defending the title, and such damages as the vendee may have paid, or may be shewn to be clearly liable to pay, to the person who evicted him.

Same-Same-Same-Querre.—But, though the purchase money with interest &c. was held to give the proper measure of damages in the particular case, the opinions of the judges leave it still questionable, whether the actual value of the land at the time of sale, if proved to be greater than the purchase money, with interest &c. may not be justly demanded.

Covenant, in the circuit court of Stafford, by Lucy Fitzhugh, executrix of Francis Fitzhugh deceased, who was assignee of William Bronaugh, against John Fox, administrator of Elijah Threlkeld deceased.

The plaintiff declared, That Threlkeld, in his lifetime, on the 6th July 1780, by deed of bargain and sale, in consideration of £88. Virginia currency, conveyed a parcel of land to Bronaugh, in fee; and covenanted, for himself, his heirs, executors and administrators, with Bronaugh, 452 his heirs and assigns, 1. that he had a good and indefeasible estate of inheritance in fee simple; 2. that he had at the time of the conveyance, good and lawful power and right to convey; 3. that the land was, and should forever remain, free and clear of and from all former and other gifts, sales, bargains, rights of dower, judgments, executions, titles, troubles, charges and incumbrances whatever, made, done, committed or suffered, by Threlkeld, or any other person or persons whatsoever; and 4. that Threlkeld and his heirs should and did thereby warrant the land to Bronaugh his heirs and assigns, against Threlkeld and Mary his wife and their heirs, and all and every other person and persons whatever: and that Bronaugh, having entered upon and being possessed of the land, by virtue of Threlkeld's conveyance thereof to him, by deed of lease and release, on the 3d April 1785, conveyed the premises, in fee, to the plaintiff's testator, Francis Fitzhugh, in his lifetime. And the plaintiff's alleged breaches of all the covenants: that Threlkeld, at the time of his conveyance to Bronaugh had not an estate in fee; and had not good and lawful power and right to convey; and that the premises were not and did not remain in the hands of Bronaugh and his assignee Fitzhugh, free from disturbance; and that Threlkeld and his heirs did not warrant

and defend the premises to Bronaugh, his heirs and assigns, against himself and his wife Mary and their heirs, and against all persons whatever; but, on the contrary, the plaintiff's testator, Fitzhugh, in his lifetime, on the 6th October 1808, was lawfully evicted of two undivided third parts of the land by the judgment of the district court of Fredericksburg, in ejectment, and was ousted of the other undivided third by John Fox, in right of his wife, who as one of the children and heirs of Mary, the wife of Threlkeld, the bargainor and covenantor, had lawful title thereto paramount to Threlkeld, or Bronaugh or Fitzhugh claiming under him.

The defendant pleaded covenants not broken, and covenants performed: and on these pleas issues were made up.

453 *At the trial, the defendant filed a bill of exceptions to an instruction given by the court to the jury: whence it appeared, that the plaintiff gave in evidence, 1. A deed of bargain and sale, duly executed by Threlkeld, and signed by his wife Mary, purporting to be the deed of them both, dated the 6th July 1780, conveying, in consideration of £88. a parcel of land of the inheritance of the wife, to Bronaugh in fee, and containing the four covenants for assurance of the title, set forth in the declaration, with this difference only, that, in the deed, the covenants purported to be the covenants of both the husband and wife, that they were seized of the fee simple, that they had lawful right and power to convey &c. but the deed was never acknowledged by the wife, on privy examination according to law, and so was not binding on her. 2. A deed of lease and release, executed by Bronaugh, dated the 3d April 1785, conveying the same land to the plaintiff's testator, Fitzhugh, in fee. 3. The record of an ejectment, in the district court of Fredericksburg, brought by two of the heirs and co-parceners of Mary, the wife of Threlkeld, against the plaintiff's testator, Fitzhugh, for two undivided third parts of the land, so sold and conveyed by Threlkeld to Bronaugh, and by Bronaugh to Fitzhugh, in which action judgment was rendered, on the 6th October 1808, against Fitzhugh, in his lifetime, for two undivided third parts. 4. Proof, that after this judgment of eviction, Fitzhugh, on some ground of equity alleged by him, obtained an injunction in chancery, to stay execution of the same, which was pending till 1816, when the injunction was dissolved, and the bill dismissed at Fitzhugh's costs; and, a short time afterwards, Fitzhugh was ousted of the possession of the land. And 5. proof that the price of £88. given by Bronaugh to Threlkeld for the land, in 1780, was at the rate of twenty shillings the acre; that its average value from 1780 to 1808 was forty shillings per acre; and that, at the time of the judgment of eviction in October 1818, the value of the land (which had increased, not by any buildings or improvements put upon it, or cultivation, 454 *in the meantime, but in consequence only of the progressive rise in the price of lands) was equal to ten dollars the acre. Whereupon, the plaintiff's counsel moved for an instruction to the jury, that

general good, to admit of doubt. RICHARDSON, J., delivering the opinion of the court in *Click v. Green*, 77 Va. 835.

The rule laid down in the principal case, as to the measure of damages to which the purchaser of land, upon eviction, is entitled, for breach of warranty of title, was also approved in *Abernathy v. Phillips*, 82 Va. 773, 1 S. E. Rep. 113; *Conrad v. Eminger*, 87 Va. 61, 12 S. E. Rep. 2; *Tod v. Baylor*, 4 Leigh 509, 511; *Tabb v. Blanford*, 4 Leigh 143; *Jackson v. Turner*, 5 Leigh 123, 124, 129, 131; *Thompson v. Guthrie*, 9 Leigh 106, 107; *Norman v. Cunningham*, 5 Gratt. 75; *Roller v. Eminger*, 88 Va. 641, 14 S. E. Rep. 347; *Moreland v. Metz*, 24 W. Va. 138; *foot-note* to *Jackson v. Turner*, 5 Leigh 119 (containing extract from *Moreland v. Metz*, 24 W. Va. 138); *Butcher v. Peterson*, 26 W. Va. 454; *foot-note* to *Thompson v. Guthrie*, 9 Leigh 101 (containing extract from *Butcher v. Peterson*, 26 W. Va. 454); *Smith v. Parsons*, 33 W. Va. 646, 11 S. E. Rep. 69; *Stuart v. Pennis* (Va.), 42 S. E. Rep. 667. The principal case was held in *Eminger v. Kenney*, 92 Va. 250, 23 S. E. Rep. 742, to have no application to such cases as the case at bar.

the proper measure of damages was the actual value of the land at the time of the above-mentioned judgment of eviction, namely, ten dollars per acre, with legal interest thereon from the date of the judgment of eviction: and it seemed, though it was not so expressly stated, that the court did so instruct the jury; and the defendant filed a bill of exception to the opinion, which was signed but not sealed by the judge.

The jury found for the plaintiff, and assessed her damages to 1724 dollars 80 cents, conforming (as it appeared) with the direction of the court as to the measure of damages, and giving the value of the whole land instead of two thirds recovered of Fitzhugh in the ejectment mentioned in the bill of exceptions: and the court gave judgment accordingly: from which Threkeld's administrator appealed to this court.

The cause was argued here, by Stanard for the appellant, and Leigh for the appellee. Several points were discussed at the bar, but the main question, and the only one which the judges thought the case really presented, was, Whether upon a covenant of general warranty in a conveyance of lands, or any covenant for the assurance of the title against future eviction or disturbance, the proper standard of damages, in case of eviction, is the value of the land at the time of eviction, or the value of the land at the time of the warranty or covenant made, with interest thereon from the date of the eviction? And this question was argued upon principle and authority; but the judges discussed it so fully, that it would be superfluous to report the arguments of counsel.

CARR, J. The instruction of the circuit court as to the proper standard of damages, presents the only point on 455 *which this court is called to decide; and a most important point it is, entering into almost every sale of real estate. It was argued at the bar, as an open question; and, I think, properly; for, though in *Mills v. Bell*, 3 Call, 320; *Nelson v. Matthews*, 2 Hen. & Munf. 164, and *Humphreys's adm'r v. McClanahan's adm'r*, 1 Munf. 493, the point was incidentally touched, it was certainly not before the court, nor at all involved in the decision of those cases. It is a settled rule, that these obiter dicta cannot be received as authority; a rule founded in sound reason, and, instead of detracting from the respect due to judges, necessary for the preservation of that respect; for when the mind is deeply engaged in the investigation of a particular subject, we know how eagerly we seize on any position, which strikes us as illustrating it, by analogy or otherwise, without inquiring into the correctness of such position, or following out its consequences, with that care and accuracy of discrimination, which we feel bound to bestow on the main question. There is another case, *Stout v. Jackson*, 2 Rand. 132, in which this question was before the court, and elaborately argued by the judges: but there, the court consisted of three members only, and one dissenting, the judgment, according to our rule, does not settle the law.

In considering this subject, it seems

proper to look back to the course of proceeding upon the ancient warranty, where the land was lost by eviction; for, though that course has long since become obsolete, it may reflect some light upon our path. We are told by Coke, 1 Inst. 365, a. that "a warrantie, is a covenant real annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same, and either upon voucher, or by judgment in a writ of warrantia chartæ, to yield other lands and tenements to the value of those that shall be evicted by a former title." The value, at what time? All the old books tell us, at the time when the warranty was made. Thus Bracton (Lib. 5, cap. 13, § 3), says, *Si autem de excambio fieri debet extensio et estimatio, estimari debet* 456 *res quæ amittitur, in eo statu in quo fuit quando primo data fuit. Non enim admittitur melioratio tenentis qui amisit, ut si post feoffamentum suum, ipse vel antecessores sui ibi ampla construxerit ædificia, sicut castra, parcos vel vivaria.* Thus Viner, vol. 22; Voucher, T. b. pl. 1, 2, p. 145, "a man shall recover in value, according to the value of the land at the time of the warranty made;" "as if the land be of greater value than it was at, the warranty made, by finding of a mine of lead or tin, he shall not render in value according to that, but as it was at the warranty made;" and he cites 19 H. VI. 46, 61; 3 E. III. 14, b. "So, if improved by building or otherwise;" Br. Voucher, pl. 69. "If the tenant be impleaded and vouches me, and at the grand cape ad valentiam, I come and cannot bar the demandant, I shall take issue with the tenant, of what value the land was at the time of the warranty, and shall not render more in value." Id. Ibid. "In no case was land, taken by purchase at all liable, nor was a person bound to warranty beyond the value of the land at the time of the donation." 1 Reeve's Engl. law 448; *Ballet v. Ballet*, Godb. 151, was a case of warrantia chartæ in the time of James I. and on demurrer, the court held, that if there be new buildings, of which the warranty is demanded, which were not at the time of the warranty made, and the deed is shewn, the defendant ought not to demur, but shew the special matter, and enter into the warranty for so much as was at the date of the deed, and not for the residue. I might cite other authorities, but it is useless to incumber the case with them: the doctrine is settled beyond all question, that the warrantor was liable only for the value of the lands lost, at the date of the warranty; and that he rendered that value in lands valued at the date of the eviction. This last is clear from all the forms of the writ of habere facias ad valentiam to be found in Rastall, Bracton &c.

Thus stood the law, while the ancient covenant real, the technical warranty, prevailed in the transfer of real estate; but that has long since given way to cov- 457 enants personal, introduced *into more modern conveyances, such as covenants of seisin, for quiet enjoyment &c. &c. These have rendered the remedy more simple, as well as more efficient; for they bind the personalty, as well as the realty. Thus Blackstone (vol. II. p. 304),

tells us, "If he (the vendor) covenant for his executor and administrators, his personal assets, as well as his real, are pledged for the performance of the covenant, which makes such covenant a better security than any warranty; and it has therefore in modern practice, totally superseded the other." But have these personal covenants abrogated also the fixed and settled rule of the common law, with respect to the measure of damages? Have they established the value at eviction, as the standard, instead of the value at the warranty? Where is the evidence of this? I have looked for it in vain: I cannot find a trace of it in any elementary writer or reporter in England. Is not this, though negative evidence, strong to disprove the existence of such a change? When Blackstone, for instance, was speaking of the preference of these personal covenants, in the increased security they furnish, is it conceivable that he would have omitted to notice a change still more important, which they had effected, in destroying the old standard of damages, and erecting a new one? It belonged directly to the subject he was treating. Where are we to look for the common law, but in the opinions of the judges, and the treatises of learned men? In these depositories we find abundant evidence of the old rule, but not a vestige of the new one; nothing which indicates a change: on the contrary, the english cases which I have found, subsequent to the introduction of personal covenants, though few and meager, do, so far as they go, support the ancient rule. Thus, in *Pomery v. Partington*, 3 T. R. 665, one holding under a will which gave a power of leasing part of the estate, demised to P. for ninety-nine years, a moiety of the tithes of corn and grain in St. Nyot in Cornwall. On the death of the lessor, the heir general of the deviser brought ejectment against P. and recovered the tithes. P.

458 *sued the executors of his lessor on the covenant of title in his deed. On the trial at nisi prius, the jury found a verdict for the plaintiff, subject to the opinion of the court upon a special case. The main question argued before the court of king's bench, was, whether the power in the will authorised a lease of the tithes? The court decided that it did not. The question then arose, whether P. should recover £30. which he had paid for the lease, and the costs of the ejectment, which would amount to £125. 17. 2. or whether the measure of his damages, should be the value of his interest in the term at the death of his lessor, which with the costs of the ejectment would amount to £500. The court said, that unless the counsel agreed upon the sum to be taken as damages, they must send the cause back to a jury to have the quantum of damages assessed; but as far as they could hint any opinion on the subject, they thought that the plaintiff ought only to take the smaller sum: on which it was agreed that the verdict should be entered for the £125. 17. 2. This case shews, that the old rule was recognized both by court and bar, as the true one. And if it be urged, that there was neither an argument at the bar, nor a regular opinion of the court on the point,

I answer, this is evidence that it was thought too clear and too well settled for argument. Can we suppose, that if the question had been considered either new or doubtful, the counsel for the plaintiff would have surrendered three fourths of the damages they claimed, upon the mere suggestion of the opinion of the court? Again: In *Flureau v. Thornhill*, 2 W. Blacks. 1078, Flureau, at an auction, bought a rent of £26. 1. 0. per annum for a term of thirty-two years. It was knocked down to him at £270. and he paid as a deposit £54. On looking into the title, the defendant could not make it out, but offered to the plaintiff either that he might take the title such as it was, or receive back his deposit, with interest and costs; but the plaintiff insisted on a further sum for damages in the loss of so good a bargain. The jury, contrary to

the direction of the judge, gave a verdict *for £74. 15. 6. allowing £20. for damages. On a motion for a new trial, De Grey, C. J., said, "I think the verdict wrong in point of law. Upon a contract for a purchase, if the title proves bad, and the vender is, (without fraud,) incapable of making a good one, I do not think, that the purchaser can be intitled to any damages for the fancied goodness of the bargain, which he supposes he has lost." The other judges were of the same opinion, and a new trial was granted. This case, though different in circumstances, seems to me to recognize the same principle which governed *Pomery v. Partington*. I will cite one other case, *Lewis v. Campbell*, 8 Taunt. 715; 3 B. & A. 392; 4 Eng. com. law rep. 258; 5 Id. 322. Barclay demised certain premises to Campbell, for twenty-one years: Campbell assigned his interest to Corp, who assigned to the plaintiff. Upon the assignment by Campbell to Corp, he covenanted with Corp and his assigns, for the quiet enjoyment of the premises. Barclay afterwards, for a forfeiture of the term, incurred by Campbell, entered upon and ejected the plaintiff, who sued Campbell upon his covenant for quiet enjoyment. In his declaration, the plaintiff stated as his damages, 1. the loss of the premises: 2. the sum of £300. which he had been forced to expend in endeavouring to defend his possession: 3. other large sums, expended in altering, improving and ornamenting the premises; in all, amounting to £2000. At the trial, it was proved, that the plaintiff had made several additions, consisting of coach houses, and out buildings, and had converted the lands into pleasure grounds; that the value of the property at the time of the assignment to Corp was £300. and that the value of the additions and alterations was £450. The jury having found a verdict for £750. it was objected, that the plaintiff could not recover more than the value of the premises at the time of the defendant's assignment to Corp; and this question was reserved for the opinion of the court. On the argument in bank, two points were made; 1. whether this was a covenant running with the land; 2. whether the verdict 460 *should not be reduced to £300? The court decided that it was a covenant running with the land: and Dallas, C. J.,

said, "Then as to the second point, I very much doubt, whether in any case, plaintiff can recover for the improvements and buildings he may choose to make and erect upon the land; but whether damages in respect of money expended in such improvements and buildings, can or cannot in any case be recovered, I am of opinion, that they cannot be recovered in this case, as the declaration is insufficient." All the court were of opinion to reduce the verdict to £300. the other judges going upon the insufficiency of the declaration, without speaking to the point generally. These are the cases I have met with in the english books: their tendency certainly is, to support the rule so clearly shewn to have been established under the old technical warranty. Upon the ground of authority, then, it seems to me, that we ought to receive this rule as a part of the common law.

But suppose this not so, and we were now about to establish a rule as to compensation for eviction of real estate, what would be the best and safest rule, looking at the same time, to a just exposition of the covenants in the deed, and the general convenience of the community? I strongly incline to think it would be, the purchase money with interest, and the costs of eviction; I mean, interest for such time as the covenantee is liable, on eviction, to be called on for rents and profits; for so long as he receives these to his own use, they stand instead of interest. We have seen that under the old covenant real, the rule was, the value of the land lost at the date of the warranty. Upon what ground was this so settled? It was not, that the ancient warranty was less comprehensive in its terms than the modern covenants: the warrantor bound himself to defend the land to the warrantee, his heirs and assigns, against the claims of all persons whatever. It was not, that feudal principles governed the decision: they, perhaps, so far operated as to make it a recovery in kind, land for land; but they could not at all have influenced the question, whether the land should be valued at

461 the date of the warranty, or the eviction. Why then was it restricted to the date of the warranty? I concur with chief justice Tilghman, who says, in *Bender v. Fromberger*, 4 Dall. 443. "The reason appears to be, that the intention of the parties was so understood, that the warranty should be limited to the value of the land, at the time of the executing the deed." If we consider the personal covenants (of good title, for quiet enjoyment, to warrant and defend the premises &c.) as inventions of the legal profession (which they no doubt were), what reason have we to suppose, that they meant to change the ancient rule? They found it established: they were habituated to it: they have used no words in the new covenants which indicate an intended change. Those covenants are not larger: they bind the personal estate, it is true, but not to answer damages larger or smaller, or in any manner different from the covenant real. But stripping the contract of its legal clothing, what is it that the parties, the vendor and vendee, mean? When land is sold, the existing state of things, the present value and situation of

the land, are the subjects in the minds of the parties: it is this land as it now is, that is bought and sold and warranted. Is it not most natural, then, to suppose that the parties mean, that the purchase money, the standard of value to which they have both agreed in the sale, shall be the measure of compensation if the land be lost? They seldom look into futurity to speculate upon the chances of a rise or fall in value. If they did, the views of buyer and seller would probably be very different; and, whatever they might be, could form no part of the contract, nor enter into its construction. What is it that the seller warrants? the land itself. Does this warranty, either by force of its terms, or by the intention of the parties, extend to any future value, which the lands may reach, when they have become the site of a populous city, are covered with expensive buildings, or mines of gold have been found in their bowels? such a state of things was probably not dreamed of. And how can these subsequent accessions be the subject of a warranty, made when they had no existence, nor were ever in the contemplation of the parties?

462 *But let us look at the rule, with an eye, to public convenience. This is by far the most important point of view. It is much better for the community, that a rule should be simple, clear and certain, than that it should attain exact justice. Upon the subject before us, we can establish no general rule, which will not, in particular cases, operate hardly. Those who contend for the value at eviction, as the best rule, do not, I believe, extend it to all cases; if so extended, it would be harsh beyond endurance. Numerous cases may be stated, where a party selling what he considers a barren worthless piece of ground for a trifling sum, may be called on for tens of thousands of dollars, and overwhelmed with ruin. But the difficulty here is, that if you do not go the whole length of the principle, you can have nothing like certainty. Say, for instance (with Justinian), that cases of extraordinary increase, and of very expensive improvements, shall be excepted from the rule; how will you draw the line? how present to buyers and sellers, that fixed standard, by an appeal to which they may ascertain, to what amount they will be bound, in any warranty they may make upon a contract of sale? It is impossible. A rule, thus surrounded with difficulty, danger and uncertainty, cannot be a safe one for the community. Look, then, at the rule of the common law; the purchase money, with such interest as is before stated, and the cost of the suit, by which the vendee was evicted. Here all is simple and certain. The vendor sells for a certain sum, and believing his title perfect, he warrants: all this is done in good faith (for if there be fraud or concealment the rule is different): the purchaser has precisely the same means of ascertaining the soundness of title, as the vendor: he may call in counsel to examine the chain of title. The parties know what to count on: if there shall be an eviction, at whatever time, the vendor knows what he is to pay; the vendee, what he is to receive. If the vendee does

not choose to rely on the common covenants, but to be secured also for the increase in value of the land, and any improvements he may put on it, let him insist on
463 particular covenants, expressly guarantying to him such increase and improvements?

I think, upon the whole, that in all cases where the parties have relied on the usual covenants only, the best and safest rule is, the purchase money with interest (as before qualified) and costs of suit. And I rest on this conclusion with tenfold confidence, when looking to the different states, I find their able and enlightened judges (so far as I have seen their decisions) coming to the same conclusion, with the exception of two states only. In Kentucky, see *Cox v. Strode*, 2 Bibb, 279; *Booker v. Bell*, 3 Id. 177. In Tennessee, *Talbot v. Bedford*, Cook's Rep. 447. In South Carolina, some early cases were contrary; but in *Furman v. Elmore*, 2 Nott and M'Cord, 189, the court of appeals of that state took up the subject, and after an elaborate discussion, established the common law rule: and in *Ware v. Weathnall*, 2 M'Cord, 413, the doctrine was again examined, and the point considered as settled. In North Carolina, the case of *Phillips v. Smith*, 1 No. Carolina Repos. 475, establishes the same rule. In Pennsylvania, in the case of *Bender v. Fromberger*, 4 Dall. 441, the subject was investigated with great learning and ability, and the common law rule settled. And it was approved in New York, after very profound examinations of the subject, in *Staats v. Ten Eyck*, 3 Cain, 111, and *Pitcher v. Livingston*, 4 Johns. Rep. 1. The exceptions are Massachusetts and Connecticut: *Gore v. Brazier*, 3 Mass. Rep. 543, and *Horsford v. Wright*, Kirby's Conn. Rep. 3. In both these cases, the judges admit the common law rule to be as I have stated; but, in the first, chief justice Parsons goes upon the early and settled practice of the state, a legislative interpretation &c. and, in the last, the court puts it on the practice simply. I think the judgment should be reversed.

GREEN, J. Some objections unconnected with the principle assumed by the instruction excepted to, were made at the bar to the finding of the jury. It was said,
464 that the "proofs set out in the bill of exceptions, only shewed an eviction of two thirds of the premises, and that the damages assessed obviously embraced the whole. I do not think we can notice the objection here, as it was not made in the court below, and, especially, as the declaration alleges an eviction of two thirds by judgment, and of the residue by the entry of one having a superiour title, and the bill of exceptions states that it was proved, that, a short time after the dissolution of the injunction in 1816, Fitzhugh was ousted from the possession of the land, in general terms. If the legality of the entry made under the superiour title, as to the one third not recovered in this ejectment, was intended to be questioned, it should have been done in some more distinct form.

From the exceptions it appears, that none of the covenants of Threlkeld's deed were broken, except that of warranty; for he

and his wife were seized of a fee simple estate, and had full power to convey it; nor was there any former gift &c. or incumbrance of or upon the land, made or suffered thereon afterwards by them, or any other: so that the case presents in the simplest form, the question discussed in *Stout v. Jackson*, 2 Rand. 132, as to the proper measure of damages, for the breach of a covenant of warranty. I have reconsidered that question, and my opinion remaining unchanged, I shall add but little to what I said on that occasion.

Since the decision of that case, I have met with that of *Pomery v. Partington*, 3 T. R. 665, (which, though as far as I recollect, it has not been cited in any of the american cases upon this subject, seems to me to have a strong bearing upon the question,) and the case of *Campbell v. Lewis*, 8 Taunt. 715. [He stated the circumstances of those cases, very particularly.] I think the clear inference from these cases is, that in Westminster hall this question was considered as settled beyond any reasonable doubt, and that the value at the time of eviction never occurred either to court or
465 counsel, as affording the proper criterion of damages. *The counsel for the plaintiff, in the first case, claimed the value at the time when the title, which was good for the life of the lessor, failed by his death, and when the plaintiff became liable to eviction, and referred not at all to the time of eviction. This value, without interest, although many years had elapsed since the death of the lessor and the subsequent eviction, together with the costs of the ejectment, was all he asked for his client. He readily yielded three fourths of that claim to the slight suggestion of the court. The rule adopted for the adjustment of the damages, was, to allow the costs, added to the price given for the property, with interest thereon from the time when the title of the lessor, and of course that of the lessee, ceased, and the latter became accountable to the true owner, for the profits, which he might have subsequently received; stopping the interest at the time of the actual eviction, namely, the time of rendering the judgment in the ejectment (which being for the recovery of an incorporeal hereditament, virtually executed itself) and not carrying on the interest up to the time of the judgment in the action of covenant, although many years had intervened between the two judgments. I have supposed, that the interest on the purchase money, was allowed only from the time of the lessor's death, though the report of the case is silent as to the time from which it was allowed; because there can be no conceivable reason, why interest should have been allowed during the life of the lessor, since the lessee during his life, had and enjoyed, without being answerable for the profits to any one, an absolute and indefeasible right to the titles under the lease.

The case at bar, in which the value of the land has not been increased by improvements in buildings, or by cultivation, or by any accidental circumstance, other than the gradual increase in the value of lands generally, is very well adapted to the practical illustration of the principle, upon

which damages should be estimated in cases of warranty and eviction. The purchaser from Threlkeld, and 466 *those claiming under him, enjoyed the profits of the land from 1780 to 1816, by virtue of his deed, and their possession acquired and held under it only, and for a greater part of that time (as long as Threlkeld's marital rights existed), with a clear title, and irresponsible to any one for the rents and profits received during that part of the time. Neither does it appear, that they have been subjected to the payment of any part of the rents and profits to the successful claimants: indeed, if no suit was brought against Fitzhugh or his executrix for profits, before the institution of this action (in 1823) they were then completely protected from any future demand on that account, by the statute of limitations, unless any of the claimants fell within some of the exceptions in the statute. Supposing the annual profits of the land to have been equal to the legal interest on its value, let us see the effect of the principle adopted by the circuit court, and ascertain the gain and loss of the purchaser, in consequence of the purchase and eviction. The average value of the land, from 1780 to 1808, was forty shillings, and afterwards ten dollars per acre: and in May 1798, the legal rate of interest was increased by one per cent. Upon these data, the purchaser was out of pocket, the amount of the purchase money and interest (allowing the intermediate increase in the rate of interest) at the time of the actual eviction in 1816, 882 dollars 73 cents; and he had received profits to the amount of 1313 dollars 8 cents; a difference arising from the increase of the rate of interest, and of the value of the land, both operating in his favor: in addition to which, the principle adopted by the circuit court gave him to be paid by the vendor, the value of the land in 1808, at ten dollars per acre, with interest thereon from October 1808, amounting to 1724 dollars 80 cents; making in all 3037 dollars 88 cents, more than three times as much as his actual loss, except the costs which he had expended in defending the title.

In *Stout v. Jackson*, I had occasion to collect and refer to many cases, shewing that after the statutes in England, 467 *allowing costs and damages in real actions, the warrantee upon voucher on warrantia chartæ, was entitled upon eviction, to recover not only the value of the land, as it was at the time of the warranty made, but the damages recovered against him, which damages included costs, for they were considered as damages, and assessed with them. And this is, in general, all that the warrantee can be said to have lost, in consequence of the warrantor failing to maintain his title, and the only loss that can be in the contemplation of the parties when they enter into their contract.

I think, therefore, that this judgment should be reversed, with a declaration, that the true measure of damages, is the value of the land at the time of the conveyance made in 1780, to be ascertained by the price given, if no better proof be offered, with interest thereon from the time Fitzhugh

was actually evicted, (not by the judgment of 1808, for that was no eviction, he continuing still to hold and enjoy the land under Threlkeld's deed; but by the actual entry of the true owners after the dissolution of the injunction) and the costs incurred by him in defending his title, and also any damages which may have been recovered against him, by those who evicted him, or which they may be now shewn to be clearly entitled to recover against his estate.

COALTER, J. I have the misfortune to differ from all my brethren upon this interesting question. My view of the subject was very fully stated in the case of *Stout v. Jackson*. My opinion remains unchanged. And I have nothing material to add to the reasoning upon which the opinion I entertained in that case (and still entertain) was founded.

CABELL, J. This case presents the important question discussed in *Stout v. Jackson*, as to the proper standard of damages, in an action of covenant for the breach of a covenant to warrant and defend the title of land sold and conveyed in fee simple; whether the proper standard be the value of the land, at the time of the sale, or at the time of the eviction?

468 *As the covenants inserted in modern deeds, were introduced as auxiliary to or substitutes for the ancient clause of warranty, it is important to ascertain the effect of the latter, before we proceed to decide the effect of the former. It is undeniable, that the only recompense for the breach of a strict technical warranty, was a recovery of lands of equal value, by voucher, or writ of warrantia chartæ. If there were no lands, the warrantee was without remedy. I think it equally certain that, in estimating the value of the land lost by the warrantee, for the purpose of determining how much land was to be given to him in exchange or by way of recompense, the value was estimated as it was at the time of making the deed. The authorities have been cited by my brother Carr. Indeed, I do not understand that any one contends, that, either on voucher or writ of warrantia chartæ, any increased value on account of buildings, or discovery of mines &c. was to be taken into the estimate: and it would seem to me, that, if the purchaser of lands was not to be compensated by the warrantor, for the value of even necessary buildings, on which he had expended his own money, he would have still less claim to be compensated for the increased value of the land growing out of accidental circumstances happening after the purchase. And the law is so laid down in the year book, 30 E. III., 14, b; 22 Vin. abr. Voucher, T. b, pl. 4, p. 145. 'If a man grants a ward, which creates a warranty in law, if after the grant other lands descend to the ward, by which he is of much greater value, yet he shall not render in value according to that, but only according to the value at the warranty created, though all the ward and marriage passes at the warranty created; for it is better by the descent after.' Such, then, was the effect of the ancient clause of warranty, viz. that the person evicted was to be compensated

only in lands, and that the value of the lands lost was to be estimated as at the time when the deed was made; and this compensation could only be recovered on voucher or warrantia chartæ.

469 *And thus the law continued, until comparatively modern times, when personal covenants were introduced into conveyances of land, as auxiliary to or as substitutes for the ancient warranty. Blackstone, in his commentaries (vol. II., p. 304), states the reason for the introduction of them, and says, that "the personal assets, as well as the real, are likewise pledged for the performance of the covenant; which makes such covenant a better security than any warranty." If, by these covenants, it was intended to change the standard of compensation, or if these covenants, or any of them, have really had that effect, it is very strange that so accurate a writer should have failed to advert to it; particularly, when he was engaged in detailing the comparative advantages of the covenants on one side, and of the warranty on the other. But Blackstone is not singular in his silence as to any such effect of the modern covenants. I have met with no such intimation in any book of english law; nor have I seen, even a complaint of the ancient standard of compensation. If so important a change in the law had been effected by the introduction of these covenants, it is impossible that the books should afford no traces of it. I infer, therefore, confidently, that though these covenants give a claim to a compensation in money, and not in land, and though they bind the personal as well as the real estate of the warrantor, for that compensation, yet the standard of compensation, based upon the principles of justice and sound policy, has undergone no change, but remains, as formerly, the value of the land at the time of making the deed. The land, as it then stood, was the subject of the contract between the parties: it was all that the vendor sold, and all that the purchaser bought: its then value was all that the purchaser paid, and all that the vendor received: it is, therefore, all that the purchaser ought to reclaim from the vendor, in case he loses the land. This standard is strongly recommended by its certainty, also: the parties know the ground on which it places them, and that ground is not liable to be changed by chance or accident.

470 *It is said, however, that an action of covenant lies on these covenants; and that, in covenant, the plaintiff is entitled to recover according to the loss he has really sustained. This position is sometimes found in the books. But it is not to be understood literally. There are very few cases, if any, in which the damages, even in ordinary actions of covenant, are not regulated by certain fixed rules, without any regard to the actual loss sustained by the party. Thus, in all covenants for the payment of money, the money which ought to have been paid, with the interest upon it, is the true standard of the damages recovered, though the damages actually sustained may have been a hundred times greater. In all executory contracts for the delivery of personal property, at a

future day, the established standard of damages, is the value of the property, at the time and place, when and where it ought to have been delivered. In all executory contracts for the conveyance of land at a future time, the established measure of damages, according to the unvarying decisions of this court, is the purchase money. So, also, as I conceive, the law has wisely ordered, that on a covenant to warrant and defend the title of land, the standard of damages shall be the value of the land, at the time of the sale, as ascertained by the purchase money, where that can be known.

I do not say that this rule is perfect, or that it will, in its application, be always free from objection: that merit cannot be claimed for any human regulation. But I am of opinion, that it is the rule which the law has established, and is the best rule that could have been established. If the parties choose to agree upon a different rule, it is competent to them to do so, by suitable special stipulations. In the absence of such special stipulations, the general rule must prevail.

I have only to add one other remark, in relation to the severity with which, it is supposed, the rule may sometimes operate on the purchaser of land, who, on the faith of his purchase, has erected valuable 471 improvements thereon. It is true, that the rule absolves the fair vendor from all obligation to pay for them. But it does not follow that the vendee will always be without redress. Judge Green, in *Stout v. Jackson*, has shewn how far he may, even in a court of law, set off the value of the improvements against the claim for mesne profits. But courts of equity will, sometimes, go much farther, and will not permit the rightful owner of the land to have the benefit of the improvements, without making a just compensation for them. And this court has gone so far as to restrict the claim of even the rightful owner of the land, to the value of the land in its unimproved state; permitting both the land and the improvements to remain with the person who made the improvements, or in the hands of his assignee. *Southall v. McKeand*, 1 Wash. 336. How far courts of equity will extend relief in other cases, remains to be decided when suitable cases shall present the question. Upon the whole, I am for reversing the judgment.

BROOKE, P. If the bill of exceptions in this record, though only signed, not sealed, by the judge as the statute requires (1 Rev. Code, ch. 133), is to be considered as properly allowed by the judge; and it is also to be intended, that he gave the instruction to the jury, which was asked for by the appellee's counsel, though it is not expressly stated in the bill of exceptions that he did so; then, this case presents the point, which was very elaborately argued, and decided, by a majority of the court (though I did not think the precise question arose) in the case of *Stout v. Jackson*. Upon that point, I have very little to add to what I said in that case. I think, after the greater light which has been shed on the subject by the bar and the bench, it must be admitted, that the value

in land, recovered by the warrantee on a technical warranty at common law, was the value of the land warranted at the time the conveyance with warranty was executed. This, I think, is fully demonstrated by the pleadings to be found in the old books, to which I referred in my opinion in 472 *Stout v. Jackson*. And that the *land recovered by the warrantee, as compensation for that which was warranted to him and of which he had been evicted, was valued as at the time of the eviction, is also demonstrated, I think, by the forms of the process, by which he was put into possession of the land recovered in lieu of the land lost. The writs of *habere facias seisinam ad valentiam* directed the sheriff to deliver lands of a certain annual value, at the then present value, I presume, since no other time was referred to by the writ. This being the settled law as to the measure of compensation for the breach of the ancient technical warranty, the question is, whether the covenants introduced into conveyances at a later period, were intended to give the covenantee an indemnity of a greater value than that given by the technical warranty? I think it quite obvious, that these covenants were introduced for a very different purpose; not to increase the amount of the indemnity in case of eviction, but to supply some defects in the technical warranty. That gave no remedy against the personal estate of the warrantor: it could be enforced only against the warrantor and his heirs: and if there were lands in the seisin of the warrantor, when the *habere facias seisinam ad valentiam* issued, there could be no recovery against him. So, also, when the writ of *warrantia chartæ* was resorted to, the warranty was unavailing, if the warrantor had no lands at the time of the writ purchased. *F. N. B. 134*. These were obvious objections to a reliance on the old warranty alone, for indemnity upon eviction of the land warranted, which became glaring when personal property came to be of more consideration, than in ancient times when the warranty was relied on for indemnity. The argument, that personal covenants having been introduced for the assurance of the title, these ought to be governed by the general principles of the common law touching other covenants, is plausible, but not sound. In a case in which there is a technical warranty and these personal covenants also, if the law applicable to the warranty might be departed from, and the law applicable to covenants 473 in other cases *might be applied to the personal covenants for the assurance of the title, an advantage would be given to the covenantee, which was certainly not in the contemplation of the parties: if the lands have fallen in value, he may resort to the warranty to recover the value at the time of the conveyance: if they have risen, he may resort to the personal covenants, to recover the value at the time of eviction. Now, it is impossible the parties should have intended, that there should be two measures of compensation. For these reasons, and for those which I stated in *Stout v. Jackson*, I think it very clear, that the personal covenants introduced into

modern conveyances, were so introduced only for the purposes above mentioned, and not with any view to vary or increase the amount of the indemnity to the covenantee; and the case of *Pomery v. Partington* satisfies me, that such is the understanding of the law on the subject in Westminster hall. I conclude, therefore, that the true measure of damages, is the value of the land at the time of the warranty or covenants executed, and that the amount of the purchase money ascertains that value, unless a greater value can be proved; to which may be added the damages recovered of the warrantee or covenantee, upon his eviction. Whether he may also recover interest on the purchase money, will depend on the amount of the profits recovered of him; if none have been recovered, no interest should be allowed, as the profits will generally be an equivalent for the interest.

The judgment entered by this court was to the following effect: The court is of opinion, that, upon the facts stated in the bill of exceptions, the true measure of damages was the price given for the land at the time of the conveyance thereof by Threlkeld to Bronaugh, with interest thereon from the date of the actual eviction of Fitzhugh, by the entry of those entitled, and the costs expended by him in the action in which he was evicted, and such damages as he or his representatives may have paid, or may be shewn to be clearly liable to pay: and that the judgment is erroneous. 474 *Therefore, it is considered, that the same be reversed &c. And it is ordered, that the verdict be set aside, and the cause remanded &c. for a new trial to be had therein, upon which no such instruction as that stated in the bill of exceptions, is to be given.

Pleasants v. Clements.

(Absent COALTER, J.)

February, 1831.

New Trial—Order Refusing or Granting—Review by Appellate Court.—As an appellate court will review an order of an inferior court overruling a motion for a new trial, and reverse the proceedings of new trial improperly refused, so it will review an order granting a new trial, and reverse proceedings if improperly granted.

Same—Erroneous Advice of Counsel.—An affidavit of a party, that he failed to summon material witnesses at the trial, owing to advice of counsel that their testimony was not necessary, no ground to set aside verdict and grant new trial.

Appellate Practice—New Trial Improperly Granted.—If appellate court reverses judgment, on ground that new trial has been previously improperly

***New Trial—Order Refusing or Granting—Review by Appellate Court.**—Whatever may be the practice in other States, it is well settled in this state, that the court of appeals may review the action of a circuit court in either granting or refusing a new trial in a common-law suit. *Tompkins v. Stephens*, 10 W. Va. 167, citing principal case; *Briscoe v. Clarke*, 1 Rand. 218, and *Knox v. Garland*, 2 Call 241. See also, *foot-note* to *Knox v. Garland*, 2 Call 242; monographic note on "New Trials" appended to *Boswell v. Jones*, 1 Wash. 822.

†Same—Erroneous Advice of Counsel.—See principal case cited in *Ruffner v. Love*, 24 W. Va. 185; *foot-note* to *Law v. Law*, 2 Gratt. 866 (containing extract from *Ruffner v. Love*, 24 W. Va. 185); *Shrewsbury v. Miller*, 10 W. Va. 125.

‡Appellate Practice—Two Trials in Lower Court.—The rule of the appellate court, where there have been two trials of a case in the lower court, is to look only to the proceedings on the first trial, and if it discovers that the trial court erred in setting aside the verdict on that trial, to set aside and

granted, it will examine the proceedings of the trial set aside, and if it find error in them reverse and correct them, otherwise affirm them.

Action at Law—Evidence—Depositions Taken in Chancery Suit.—On the trial of an action at law, depositions taken in a suit in chancery between the same parties, are not proper evidence, unless the witnesses be dead, or otherwise not capable of attending the trial.

Same—Same—Decree in Chancery Suit.—A suit in chancery and decree therein, can neither be pleaded in bar, nor given in evidence, in an action at law between the same parties, unless the very same matter of controversy was involved in both suits, and unless the court of chancery had competent jurisdiction to decide the matter.

Same—Same—Same—Case at Bar.—Therefore, where P. filed bill in chancery against C. charging fraud practised by defendant in sale of a slave, and praying that the contract might be rescinded, and that C. might be enjoined from taking measures to recover the purchase money of P. and the bill was dismissed on a hearing; and then P. brought an action at law against C. to recover damages for breach of warranty of the soundness of the slave: **Held**, the proceedings and decree in the suit in chancery could neither be pleaded by C. in bar of the action at law, nor was the record thereof admissible evidence on the trial of the action at law.

This was an action on the case, brought in the hustings court of Lynchburg, by J. H. Pleasants against Eliza Clements, upon a parol warranty of the soundness of a slave sold by the defendant to the plaintiff.

475 *There were two counts in the declaration. The first stated that the plaintiff bargained with the defendant to buy a male slave of her for 375 dollars, payable twelve months after the date of the sale, and that the defendant falsely and fraudulently warranting the said slave to be sound and in good health, sold him to the plaintiff for the price aforesaid; whereas, in truth, the slave was, at the time, and thenceforth always continued, incurably afflicted with scrofula; by means of which premises, the defendant falsely and fraudulently deceived the plaintiff in the sale of the slave aforesaid. The second count stated, that the plaintiff bargained with the defendant to buy the slave of her, and that she, by falsely and fraudulently warranting him to be sound, induced the plaintiff to buy him of her; whereas, in truth, the slave was, at the time, and thenceforth always continued, incurably afflicted with scrofula; and so the defendant falsely and

annul all the proceedings subsequent to said verdict, and enter judgment thereon. *Muse v. Stern*, 82 Va. 33; *Jones v. Old Dominion Cotton Mills*, 82 Va. 149; *Tucker v. Sandridge*, 86 Va. 557, 8 S. E. Rep. 650.

In *Johnson v. McClung*, 26 W. Va. 661, it is said: "It is well settled, that, where a case is tried and a verdict is rendered, which is set aside by the court, and a new trial is granted, and on the second trial the verdict is for the other party, and judgment is rendered thereon, to which a writ of error is obtained, the appellate court will look to the proceedings on both trials, and if the court below erred in setting aside the first verdict, the appellate court without considering the subsequent proceedings in the case will reverse the judgment and enter final judgment on the first verdict. *Pleasants v. Clements*, 2 Leigh 474; *Knox v. Garland*, 2 Call 241; *Briscoe v. Clarke*, 1 Rand. 218; *Tyler v. Taylor*, 21 Gratt. 700." To the same effect, the principal case was cited in *Tyler v. Taylor*, 21 Gratt. 702, and *foot-note*.

By statute (Pol. Suppl. § 3484), it is provided that where there have been two trials in the lower court, the appellate court shall look first to the evidence and proceedings on the first trial, and if it discovers that the court erred in setting aside the verdict on that trial it shall set aside and annul all proceedings subsequent to said verdict and enter judgment thereon.

See further, monographic note on "New Trials" appended to *Boswell v. Jones*, 1 Wash. 822.

fraudulently deceived the plaintiff in the sale &c. The defendant pleaded not guilty, and on that plea issue was joined.

At the first trial of the issue, the defendant offered in evidence, the record of a former suit brought by the plaintiff against her, in the superior court of chancery of Lynchburg, wherein, as she alleged, the very matter in controversy in this action, had been decided and concluded by the decree of the chancellor. The bill in chancery was exhibited by Pleasants before the purchase money of the slave fell due, and was verified by his oath: he set forth his contract with Mrs. Clements for the purchase of the slave, and that she, by her agent who made the sale to him, represented that the slave was sound and healthy, and that though he had been afflicted with the malady called the king's evil, he was intirely restored to health; that he was induced by these representations to purchase the property, at the price of 375 dollars, payable twelve months after the date of the sale, for which he gave his note negotiable and payable at the bank of Virginia at Lynchburg; that he took possession of the slave, but soon found he was incurably diseased with scrofula, and unable to endure the lightest labour, so that

476 *he became and must continue a charge upon him, instead of being at all serviceable; that Mrs. Clements was well apprised, at the time of the sale, of the unsoundness of the slave; and that he had proposed to her to cancel the contract, restore the property, and pay reasonable compensation for the time he had held it, but no answer had been returned to this proposition: and the bill prayed an injunction to restrain Mrs. Clements from transferring or negotiating the note which Pleasants had given her for the purchase money of the property, and from causing the note to be protested at bank for non-payment at its maturity; and an injunction also to restrain the bank from protesting it; and general relief. Mrs. Clements, in her answer, denied all the material allegations of the bill. The depositions of sundry witnesses were taken by both parties, and filed (these were, of course, part of the record offered in evidence). The chancellor, on a hearing, dismissed the bill with costs. Upon this record being offered in evidence by the defendant at the trial of this action, Pleasants objected that it was inadmissible, and the court sustained the objection, and excluded the evidence; to which Mrs. Clements filed exceptions. The trial proceeded; but as the jury could not agree in any verdict, the jury was by consent of parties discharged, and the cause continued it till the next term.

When the cause was called at the next term, Mrs. Clements tendered a special plea in bar, as follows, viz. *Action non*, "because the defendant says, that the matter in controversy in this suit has been fully heard and decided against the plaintiff, in a suit heretofore instituted and determined in the superior court of chancery of Lynchburg, a court of competent jurisdiction for the purpose, wherein the plaintiff in this action was plaintiff, and the defendant here was defendant, the decree in which suit in

chancery was not appealed from, and remains in full force and unreversed; and this the defendant is ready to verify by the record and proceedings of the said suit in chancery &c. Wherefore &c." But the court would not allow the plea to be put in; to which Mrs. Clements filed exceptions.

477 *The cause was then tried upon the plea of not guilty. Mrs. Clements again offered the record of the suit in chancery in evidence, the court again excluded it, and she again excepted to the opinion. The jury found a verdict for the plaintiff, for 300 dollars damages, and judgment was entered accordingly.

But the next day, Mrs. Clements filed an affidavit to the following effect: That H. F. and J. H. of Powhatan county, were, as she was informed and verily believed, two of the commissioners who divided her father's estate, and with others had appraised the slave she had sold to Pleasants, the subject of this controversy; and she was informed by her mother, that this slave in the division and appraisement, was valued as a healthy one: that she was also informed and verily believed, that one J. B. of Powhatan, was well acquainted with the slave, and was an important witness for her: that those persons would have been summoned to attend as witnesses for her at the trial, but for the circumstances that her counsel advised her, that, in his opinion, it was unnecessary, as well because of the testimony of another witness already taken in the case, as because the matter in controversy had been already determined in the court of chancery, a court of competent jurisdiction, in which the question of fraud had been fairly tried and determined: that owing to this advice she had been surprised at the trial; and she verily believed, that if she could obtain a new trial, she would be able to prove, by the above persons and others, that the slave sold to Pleasants, had been, and was at the time of the sale, as healthy as any man of his age. Upon this affidavit, she moved the court to set aside the judgment entered the day before, and the verdict, and to order a new trial; and the court, upon the strength of the affidavit alone, did set aside the judgment and verdict, and order a new trial.

The cause was accordingly tried again at a subsequent term; when the jury found for the defendant, and judgment was given for her.

478 *Pleasants appealed to the circuit court of Lynchburg, where the judgment was affirmed; and thence he appealed to this court.

Johnson, for the appellant, insisted, 1st, That the hustings court erred in setting aside the verdict found for Pleasants on the second trial, and granting Clements a new trial, on her affidavit; for the ground presented by the affidavit, to found the motion for the new trial, was surprise produced by the opinion and advice of her own counsel, as to the competency and sufficiency of the record of the suit in chancery between the parties, as evidence to repel Pleasants's claim in this action; but there could have been no such surprise, since that record had been offered as evidence at a former trial, and rejected; and, surely,

the mistake of counsel could not afford good ground for setting aside the verdict. 2ndly, That supposing the new trial to have been improperly allowed, this court ought to reverse the proceedings back to the order setting aside the verdict, and the judgment upon it, and allowing the new trial, and to leave the verdict and judgment thus improperly set aside, to stand. But, if the court would look farther back, then, 3dly, That there was no error affecting the verdict and judgment rendered for Pleasants at the second trial. 1. The special plea in bar, presenting the proceedings and decree in the suit in chancery between the parties, as a defence to this action, was properly rejected by the court: it was bad in form and substance; bad in form, because it neither made profert of the record and decree pleaded in bar, nor concluded to the court; bad in substance, because neither the plea, nor the record of the suit pleaded in bar, shewed, with certainty, the ground of the chancellor's decree, whether he dismissed Pleasants's bill upon the merits, or (which was more probable) for want of jurisdiction, and because the suit in chancery did not involve the same matter or controversy involved in the action at law, since the object of Pleasants's bill in chancery was to rescind the contract of

479 *sale on the ground of fraud, and to enjoin proceedings to recover the purchase money of the slave, whereas the object of this action was to recover damages for breach of the warranty of the soundness of the slave, to which he was entitled whether a fraud had been practised upon him or not. Besides, the plea was not offered in good time: it was offered after an issue made up and one trial, and just before the cause was called for the second trial. 2. The record of the suit in chancery was, as the court held, inadmissible evidence upon the trial of the issue, for some of the reasons he had urged against the plea founded on it, namely, that the chancellor's decree, for aught that appeared in the record, might have proceeded on the want of jurisdiction, not on the merits, and that the two suits did not involve the same matter of controversy; and for this additional reason, that the whole record, (depositions as well as pleadings and decree), was offered in evidence; but, certainly, the depositions in the suit in chancery, were not proper evidence on the trial of the action at law, unless it had been shewn that the witnesses were dead.

Stanard, for the appellee, said that this court had examined the grounds of applications for new trials, in cases where the courts below had improperly refused to set aside verdicts and order new trials, and had reversed judgments for that cause; but there was no case in which the grounds on which a new trial had been granted by the court below, had been reviewed, and the judgment reversed because the new trial was allowed on insufficient grounds. The case at bar shewed the propriety of the distinction: a verdict had been found for the plaintiff upon one trial, and then on the new trial, which was so full and fair that neither party could find cause for exception, there was a verdict for the defendant.

Supposing that Clements's affidavit shewed no sufficient ground for granting the new trial, still if injustice had been done at the former trial, this court should
 480 for that cause, *sustain the order allowing the new trial, and affirm the judgment; or, at least the court would look at the previous proceedings, and if it found error in them, would correct it by reversing the proceedings back to the error. And he insisted, that Clements's special plea in bar ought to have been received. The objection that it was not offered in time (supposing the plea good) was repelled by the authority of Tomlin's adm'r v. How's adm'r, Gilm. 1. As to the objection to the form of the plea, for not making profert of the record, and concluding to the court; the want of profert was a mere defect in form; and this plea, though it did not conclude prout patet per recordum, in strict technical form, concluded with a verification "by the record and proceedings of the said suit in chancery &c. wherefore &c." In substance, the plea was a good and complete bar: for Pleasants's bill in chancery charged a fraud practised upon him in the sale of the slave, and the action at law was case for a deceit of the vendor, and so the point in controversy was the same in both. The chancellor's decree was general, and concluded the whole controversy. And the plea alleges that the court of chancery was a court of competent jurisdiction to hear and determine the question in controversy; and truly so alleges, since the ground of complaint in equity was fraud, and at law, deceit, in the sale. But, if the plea should have been rejected as demurrable for want of form or precision, or because it was not offered in good time, still Clements ought to have been permitted to use it as evidence in her defence before the jury. Used as evidence, it would not have had the effect of an estoppel; but it was a judicial proceeding between the same parties, bearing directly on the matter in issue, and ought to have been suffered to go to the jury, to be weighed by them. If the suits in chancery involved and determined the same matter of controversy, and the pleadings and decree were therefore proper evidence, it would be very difficult to maintain, that the depositions contained in the record were improper evidence. But the court excluded the whole record; the
 481 *pleadings and the decree as well as the depositions, and even Pleasants's bill, which contained his state of the case upon his oath, and was certainly good evidence against him in this action.

CABELL, J. The first question which presents itself for consideration, is, Whether it is competent to this court to inquire into the propriety of the judgment of an inferior court granting a new trial, and in case it shall be of opinion that the new trial was improperly granted, to reverse the judgment, and render such judgment as the inferior court ought to have rendered? That this court may inquire into the propriety of the judgment of an inferior court refusing a new trial, and may affirm or reverse, according to its opinion of the propriety or impropriety of refusing the

new trial, is settled by such a series of uniform decisions, as no longer to admit of question. It seems to me impossible to distinguish, in point of principle, the case where a new trial has been improperly granted, from the case where it has been improperly refused; and I consider it to have been settled by the cases of Knox v. Garland, 2 Call, 241, and Briscoe v. Clarke, 1 Rand. 213, that the power of this court extends alike to both cases.

Then, was the new trial improperly granted in this case? The court below, proceeded solely on the ground of the matter contained in the defendant's affidavit. It appears that she was well acquainted with the facts necessary for her defence, and the persons by whom they could be proved: but she failed to summon some of these witnesses, or to use any means for procuring their attendance. She made no motion for a continuance, but went to trial voluntarily, the full confidence, inspired by the advice in of her counsel, that she had abundant testimony without that of the absent witnesses. She had the full benefit of all the testimony on which she thus relied, except that of the record of the suit in chancery, which the court had refused to allow on the former trial, and which she ought to
 482 have expected would *be again refused. Such a blunder, even if it be the blunder of counsel, affords no just ground for a new trial; for we cannot, in such a case, distinguish the party from the counsel. The new trial, therefore, was not justified by the matter contained in the affidavit of the defendant, on which the court granted it.

But it was contended, that though the new trial may not be justified on the ground on which the court placed it, yet that the court committed other errors which prevented the defendant from having a fair trial, and that the new trial ought to be supported on that ground. The acts of the court complained of as errors of this description, are the refusal to allow the record of the suit in chancery to be given in evidence, and its refusal to allow it to be pleaded in bar of the action.

Was it erroneous to reject the record as evidence? The record contained, in addition to the pleadings and decree, many depositions of witnesses taken in relation to the matter in controversy. Now, although depositions regularly taken upon a bill and answer in chancery, may be used as evidence in a trial at law between the same parties, provided it be proved that the witnesses are dead, or by reason of sickness are unable to attend, or that they cannot be found, or are absent from the country, or are otherwise not amenable to the process of the court, Com. Dig. title Testmoigne. C. 4, Deposition, 1 Atk. 445, yet they can be used only under the circumstances just mentioned. It was, therefore, proper in the court to withhold from the jury, the record containing depositions of witnesses, without proof of the circumstances which would justify the use of the depositions; and the bill of exceptions, in this case, does not shew that any such proof was given. Even if the defendant was entitled to the use of the record as evidence, no other parts of

it were proper for that purpose, but the decree and the pleadings on which it was rendered. It was offered as a whole, depositions and all; and it was rightfully rejected on that ground, if on no other. But
483 no part of this record *ought to have been received in evidence in this case, unless it were of such a character, that if specially pleaded it would have been a bar to the action. And this leads me to inquire, whether the court erred in rejecting the plea?

I will not inquire, whether the plea was tendered in proper time, or pleaded in proper form: admit it to be free from all objection in these respects; admit it to have fully stated all the important parts of the chancery record; would the matter of the plea have been a bar to the action? To make such a plea a bar to the action, it is necessary, that the decision relied on should be the decision of the very matter in controversy in this suit; and that the court making the decision, should be a court having competent jurisdiction to decide the matter in controversy. The matter in controversy in this suit, was a claim for damages for the breach of a warranty, and there could be no recovery without proof of such breach. The words in the declaration, "falsely and fraudulently" preceding the word "warranting," were mere surplusage, and unnecessary to be proved. If, then, this had been the matter in controversy in the court of chancery, that court would have had no jurisdiction to decide it; and, of course, the plea would have been no bar to the action. But, in truth, the matter in controversy in the suit in chancery, was a different matter: it was a claim to vacate the contract intirely, on the ground of fraud, over which that court had jurisdiction. But the decision of that question against the plaintiff is no bar to his action for damages for a breach of the warranty; for though the plaintiff was not entitled to vacate the contract on the ground of fraud, yet he would be entitled to recover damages for a breach of the warranty, even if that breach were unaccompanied by fraud. I conclude, therefore, that the matter of this plea would have been bad on general demurrer, and, consequently, that the court did not err in refusing to receive it.

I am of opinion, that the judgment of the circuit court ought to be reversed; that the judgment of the hustings court, setting aside the judgment and verdict
484 rendered for *the appellant, and granting the appellee a new trial, together with all the proceedings subsequent to that order, ought also to be reversed; and that the judgment, which was entered by the hustings court on the verdict for the appellant, ought to be reinstated and affirmed.

The other judges concurring, the judgment for the appellee was reversed, and the judgment for the appellant, which was set aside by the hustings court, was reinstated and affirmed.

Bishop's Ex'or v. Bishop and Others.

February, 1831.

(Absent COALTER, J.)

Chancery Jurisdiction—Suit by Executor to Restrain

Legatee for Life from Carrying Legacy Out of State.—Testator bequeaths slaves to his son G. for life, remainder to G.'s children: the executor, being apprehensive that G. will sell the slaves to persons who will carry them out of the state, applies to court of chancery to restrain G. from so doing, and to compel him to give security, that the property shall be forthcoming at his death for the legatees in remainder: the executor alleging that he had never assented to the legacy, and the legatee for life alleging that he had assented thereto: **Held**, if the executor had not assented to the legacy, he had plain remedy at law to recover the subject; if he had assented to it to the legatee for life, that assent enured to benefit of legatees in remainder, and though they might, the executor could not, ask the aid of the court to secure the subject to the legatees in remainder.

Edward Niblett executor of James Bishop of the county of Prince George deceased, exhibited a bill against George Bishop, John Avery and Thomas Comer, in the superiour court of chancery of Richmond, setting forth, that his testator James Bishop, having in his lifetime lent his son, the defendant George Bishop, three slaves, Edy, Jenney and Peter, afterwards, by his will bequeathed them to the son George, for life, and the remainder after his death to his children, and "that they should
485 not be sold, or go out of the *family;"

that the executor had never assented to this legacy, though as the slaves were in possession of George Bishop, the legatee for life, at the time of the testator's death, under the previous loan, he had allowed him to retain the possession; that George Bishop had sold the woman Edy to the defendants Avery and Comer, who were dealers in slaves, and purposed to send them out of Virginia; and the executor had reason to apprehend, that he would sell the other two slaves to dealers in slaves, who would send them also out of the state; and thus the legatees in remainder would be disappointed of the benefit of the legacy: therefore, the bill prayed injunctions to restrain the defendants Avery and Comer from removing the woman Edy from Virginia, and to restrain George Bishop from selling the other two slaves; and that the defendants, respectively, might be compelled to give bond with surety to have the slaves forthcoming at the death of George Bishop, for the legatees in remainder; and general relief.

Injunctions were awarded according to the prayer of the bill, to restrain the defendants, respectively, from making any disposition of the slaves till farther order, unless they should give bond with surety to have them forthcoming to abide the final decree; and if they failed to give such security, the sheriff of Prince George was directed to take possession of the slaves, and hire them out, and to hold them, and the profits, subject to the future order of the court. The defendants failed to give the security, and the sheriff took possession of the two slaves Jenny and Peter, and hired

***Legacies—Assent of Executor to Possession of Legatee for Life—Effect on Remainderman.**—It seems to be well established that the assent of an executor to the first taker's possession and enjoyment of a legacy, is an assent to the legacy to the remainderman. *Lynch v. Thomas*, 3 Leigh 693, citing principal case. To the same point, the principal case was cited in *Osborne v. Taylor*, 12 Gratt. 132.

See further, monographic note on "Legacies and Devises" appended to *Early v. Early*, Gilm. 124.

The principal case was also cited in *Polndexter v. Davis*, 6 Gratt. 502.

them out according to the order. The slave Edy could not be found.

The defendants Avery and Comer, answered, that they had not purchased the woman Edy of George Bishop.

George Bishop, in his answer stated, that he had sold Edy to one Pearson, a citizen and resident of Virginia, and intended to vest the proceeds in the purchase of another slave to be substituted in her place. He acknowledged, that he claimed and held

Edy under the will of his father, and
486 so *had only a life estate in her; and he said, she was delivered to him, after his father's death, by the executor. But, as to the other two slaves, Jenny and Peter, he alleged, that his father had, in his lifetime, given and delivered them to him, in absolute property; and he claimed them under that gift, and not under the bequest in his father's will.

The will of James Bishop was exhibited, containing the bequest of the slaves in question, as stated in the bill.

Upon the questions of fact, Whether the testator James Bishop had, in his lifetime, made an absolute gift to his son George of the slaves Jenny and Peter, or had only put them into his possession upon loan? Whether the executor had ever given his assent to the legacy? Whether Avery and Comer had not purchased the woman Edy of George Bishop, and removed her from the neighbourhood? there were many depositions taken and filed by both parties; the evidence adduced by the one conflicting with that of the other.

The chancellor was of opinion, that the plaintiff's case was fully proved; and he decreed, that the defendants Avery and Comer should deliver the woman Edy to the plaintiff as executor of the testator James Bishop, or if they failed to do so, should pay him her value, unless the defendant Bishop should pay the same to him; and that the executor not having assented to the legacy, still held the legal title of the other two slaves Jenny and Peter: and, an account of the profits of these two slaves since the commencement of the suit, having been reported to the court, he directed the amount thereof, 101 dollars, to be paid to the plaintiff.

The defendants Bishop and Avery appealed to this court.

Spooner, for the appellants, maintained, that, whatever might be the true state of the facts, taking the case upon the executor's own shewing, his bill ought to have been dismissed: for, if the executor had not assented to the legacy, he had a plain remedy at law, by detinue or trover, to recover the slaves, or their value, of George Bishop, or of any person claiming by purchase from him: and, if he had
487 *assented to the legacy, though the legatees in remainder might have asked security to have the subject forthcoming after the death of the legatee for life, the executor, having no longer any right whatever in the property, had no pretence to claim the interference of the court.

Allison, for the appellee, referring to the evidence to prove, that the executor had never, in fact, assented to the legacy, and that there was real reason to apprehend that

the legatee for life would sell the slaves in question, to dealers in slaves, who would remove them out of the state; insisted, that the executor's resort to the court of chancery was proper and necessary, to prevent the eloining of these specific slaves, which his testator had expressly desired should not be sold, or go out of the family; an object, which the powers of the court of chancery alone could accomplish; since, in trover, he could only recover the value, and in detinue also, he might, in the event, recover only the alternative value. And the chancellor having entertained the case for this purpose, most properly proceeded to do complete justice.

This was the point on which the cause turned, though the question of right to the property was discussed at the bar.

GREEN, J., delivered the opinion of the court. The court of chancery had no jurisdiction to entertain this suit, in any possible view of the case. Either the executor had assented to the legacy, and delivered the slaves in question to the appellee George Bishop, as legatee for life, or he had not assented to it, and only left them in his hands, as a loan or accommodation. If he had assented to the legacy in respect to the legatee for life, that enured as an assent to the legacy to the legatees in remainder after his death. And from that moment, he had no interest in the slaves legal or equitable, and could maintain no suit, either at law or in equity, in respect to the property, or any disposition of it.

No one but the legatees in remainder had an interest in the *remainder, that would entitle him to demand security for their enjoyment of that right when it should accrue. If, on the other hand, the executor had not assented to the legacy, he had a clear legal title to the slaves, if they belonged to his testator's estate, which he could have asserted at law as effectually as in equity. And as his testator's title to two of them was disputed, a court of law was the only proper forum in which the title could be investigated. In like manner, as to the slave sold, the legatees in remainder were entitled, if the executor had assented to the legacy, to sue all those who had participated in the act of eloining the slave, for damages at law, but not in equity. Yet the chancellor has entertained this suit in the name of the executor alone, determined the title of the two slaves in controversy as in an action of detinue, proceeded to ascertain the damages against the defendants concerned in eloining one of the slaves, and seized the other two, and condemned their profits to make good those damages, in favour of the executor. All this is beyond the proper province of a court of equity.

The decree is to be reversed, and the bill dismissed with costs.

Buckner v. Mackay.

February, 1831.

(Absent COALTER, J.)

Sealed Instruments — What Constitutes — Printed Scroll.—To a printed form of a bond, there are put

*Sealed Instruments—Scroll—Necessity for Recognition.—It is well settled in Virginia that in

printed stamps or scrolls by way of seals; the blanks are filled up; and the instrument executed by the obligors, by signing their names to the printed stamps or scrolls, which are recognized as their seals in the body of the instrument: this is a sealed instrument within the statute, 1 Rev. Code, ch. 128, § 94.

Supersedes to an order of the circuit court of Fauquier, made on the motion of Mackay, awarding execution on a forthcoming bond, executed by Thornton 489 and Sinclair his *surety therein, for the delivery, at the day and place of sale, of property taken by the sheriff under a fieri facias sued out by Mackay against Thornton.

The formal parts of the forthcoming bond were printed, and there were stamps printed at the foot of it, to serve the purpose of seals; thus [L. S.] The obligors signed their names opposite to these stamps; and the body of the bond stated, that it was sealed with their seals. And the question was, whether this was a sealed instrument, so as to make it good as a forthcoming bond? in other words, whether the printed stamps were scrolls, affixed by the obligors, by way of seals, within the meaning of the statute, that "any instrument to which the party making the same shall affix a scroll, by way of seal, shall be adjudged to be of the same force and obligation, as if it were actually sealed?" 1 Rev. Code, ch. 128, § 94, p. 510.

PER CURIAM. The construction of this statute, which was in affirmance of the immemorial usage of Virginia, and consequently of our common law, has uniformly been, and the practice accordingly, that the recognition by the party executing the instrument, that any scroll annexed to his name is his seal, whether put there by him or another, before or after the execution of the instrument, constitutes it his deed; in analogy to the common law, which holds, that the acknowledgment of a seal of wax, as his seal, by the party executing an instrument, makes it his deed, no matter when or by whom the seal was attached to the paper or parchment. Here, the parties executing the instrument in question, declare in writing, that the scrolls annexed to their names, or rather to which their names are annexed, put there by the printer who prepared the instrument in blank, are their seals. The judgment is affirmed.

Standard and Briggs, for the plaintiff in error.

Harrison, for the defendant.

cases of contracts which may be, indifferently, simple contracts or sealed instruments, the fact that a scroll is affixed to the name of the maker does not make it a sealed instrument unless there be a recognition of the seal in the body of the instrument. *Bradley Salt Co. v. Norfolk, etc. Co.*, 95 Va. 462, 28 S. E. Rep. 567, citing the principal case. For further information on this subject see discussion in *foot-note* to *Parks v. Hewlett*, 9 Leigh 511; *foot-note* to *Clegg v. Lemesurier*, 15 Gratt. 106; monographic *note* on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801; monographic *note* on "Deeds" appended to *Flott v. Com.*, 12 Gratt. 564.

To the point that the act of 1788 (1 Rev. Code, ch. 128, § 94, p. 510) is in affirmance of the common law of Virginia, the principal case and *Jones v. Logwood*, 1 Wash. 42, were cited in *Parks v. Hewlett*, 9 Leigh 513.

490

*Poage v. Willson.

February, 1881.

(Absent COALTER, J.)

Equity Jurisdiction—Account—Remedy at Law.—Bill in chancery, praying an account, and a decree for the balance, which should be found due, upon a claim, on which an action at law would have lain, without shewing any obstacle which would defeat or embarrass the legal remedy: HELD, the court of chancery has no jurisdiction.

By articles of agreement under seal, between Poage and Willson, executed the 27th December 1794, Poage covenanted, that he would locate land warrants, for and in the name of Willson, on waste and unappropriated lands in Virginia, to the amount of 50,000 acres, and survey and make out plats of the lands so located, with certificates of survey, so as to be received at the land office clear of all expense, on or before the 1st May 1795, and that Poage, at the time of delivering the plats and certificates of survey, would give Willson deeds for the lands, binding Poage and his heirs to warrant the lands in the plats contained, against all persons whatever. And Willson, covenanted that he would pay Poage 20 dollars 50 cents for every thousand acres of land, so located, surveyed, delivered and warranted; one third of the sum at the expiration of six months, one third, eighteen months, and the other third, two years after the delivery of the plat or plats at the land office.

After this contract was made, Willson put other land warrants into Poage's hands, to the amount of 100,000 acres, to be by him located and surveyed, for and in the name of Willson, and to be conveyed by Poage to him with general warranty, upon the same terms stipulated in the covenant of December 1794, as to the 50,000 acres therein mentioned. The evidence of the contract as to the additional 100,000 acres, was a letter from Willson to Poage on the subject, dated the 2d January 1795, wherein, referring to the covenant of December 1794, he said, "The contract we have made, is to regulate the whole of our business."

491 In 1820, Poage exhibited a bill against Willson in the superior court of chancery of Clarksburg, setting forth the covenant of December 1794, and the other contract of January 1795, and alleging a full performance of both contracts on his part; that he had located for and in the name of Willson, and surveyed, the full quantity of 150,000 acres of land, and delivered plats and certificates of the surveys at the land office; and had made deeds for the lands to Willson, with general warranty, though the plats and certificates of survey of the 50,000 acres mentioned in the contract of December 1794, were not delivered at the land office within the time thereby stipulated: that Willson had paid him 1025 dollars [which was the full compensation for the location &c. of 50,000

***Equity Jurisdiction—Account.**—In discussing the jurisdiction of courts of equity in matters of account, *Petty v. Fogle*, 16 W. Va. 513, and *Yates v. Stuart*, 39 W. Va. 129, 19 S. E. Rep. 426, cite the principal case. For further information on this subject, see cases and notes cited in *foot-note* to *Hickman v. Stout*, 2 Leigh 7; *foot-note* to *Watkins v. Young*, 31 Gratt. 85; *foot-note* to *Tyler v. Nelson*, 14 Gratt. 214; monographic *note* on "Jurisdiction" appended to *Phippen v. Durham*, 8 Gratt. 457.

acres, at 20 dollars 50 cents per thousand] and had, at several times, between the date of the service and September 1803, made him several payments, on account of the lands located by him, amounting to 685 dollars; and the balance was still due: that Willson, in 1811, and again as late as 1814, acknowledged the debt, asked indulgence, and promised to adjust and pay the balance; Poage being, at the dates of these acknowledgments and promises, and ever since a resident of the state of Kentucky: but Willson now refused, on various pretenses to settle the account of the balance, and to pay the same. The bill prayed an account of the moneys due Poage on the whole transaction, and a decree for the balance that should be due, and general relief.

Willson did not, in any form, object to the jurisdiction of the court, or rely on the statute of limitations in his defence. He put in an answer, acknowledging the contracts set out in the bill, and Poage's performance thereof on his part, as stated in the bill; and alleging, that Poage had received very nearly if not quite the whole amount of the compensation stipulated to be paid him, partly from Willson, and partly from Henry Lee, with whom Willson was jointly concerned in the location of the lands; in short, resting his defence on the merits.

492 *The chancellor doubted the jurisdiction of the court; but, reserving that point for future consideration, he directed an account, which was reported, and shewed a large balance due Willson. On the final hearing, the chancellor said the plaintiff had a plain remedy at law, which there was nothing to obstruct or to embarrass; there was no defect of proof; no discovery necessary; not a single feature to give the court of chancery even the colour of jurisdiction; and on that ground (though he was also inclined to discountenance the claim upon the merits) he dismissed the bill with costs.

Poage appealed to this court.

BROOKE, P. The contracts on which this suit is founded, are certainly not susceptible of any correct construction, by which the parties can be considered as vendor and vendee of land. The warranty relied on as giving that character to them, purports nothing more than an obligation on the part of Poage, to locate the land warrants furnished by Willson, on unappropriated and vacant lands. They are nothing but contracts for services to be rendered on the one part, and paid for on the other, at a stipulated rate, on which a suit at law was the plain and obvious remedy. The circumstance, that Poage had broken the covenants in the sealed contract, by failing to deliver the surveys within the stipulated time, in consequence of which he could not enforce it at law, does not obviate the objection to his coming into equity; because it appears by his bill, that that contract was satisfied by the payment, made by Willson, and the only claim he had, if any, was on the second contract for the location, survey &c. of the 100,000 acres; and this might have been enforced at law, if any thing was due on it, by an action of assumpsit upon the express prom-

ise of Willson to pay the stipulated compensation of 20 dollars 50 cents per thousand acres, for the location, survey &c. thereof. The decree is to be affirmed.

Stanard, for appellant; Johnson, for appellee.

493

*Gilliat v. Lynch.

February, 1831.

(Absent COALTER, J.)

Pawns—Lien of Pawnee for Debts Subsequently Contracted—If goods be pawned for the security of a particular specified debt, the pawnee has no lien on the goods pawned for any other or subsequent debt contracted by the pawner to him, without an agreement to that effect, either express, or implied from the nature or circumstances of the transaction.

Equity Maxims—He Who Asks Equity Must Do Equity—Application.—The maxim of courts of equity, that a plaintiff asking equity must do equity to the party against whom he asks it, applies only to cases where the plaintiff is wholly without remedy at law, and is entirely dependent on the court of equity for relief: per GREEN and CABELL, J.

Set-Off—Joint and Separate Demand.—Against a debt due by A. and B. jointly to C. a debt due by C. to B. alone, cannot be set-off in equity any more than at law: per GREEN, J.

In November 1818, Hughes & Armistead sold Perkins a parcel of tobacco, for 6773 dollars, payable in three equal instalments, at three, six and nine months; for which Perkins gave them his three notes negotiable and payable at the office of the bank of Virginia at Lynchburg; and as a collateral security for due payment thereof, he indorsed in blank, and deposited with them two notes of Lynch, negotiable at bank (of which he was the fair holder) for 3633 dollars each, dated in 1817, and payable the 1st March 1821, and the 1st March 1822.

Gilliat was jointly interested with Hughes & Armistead in the sale of the tobacco to Perkins; though it was doubtful, whether Perkins was apprised, at the time, of Gilliat's interest in the transaction; and it was certain, that the deposit of the notes of Lynch by Perkins with Hughes & Armistead, was intended as collateral security only for the purchase money of the tobacco he had bought of them, and not as a security to Gilliat for any debt then due, or which might afterwards be contracted, by Perkins to him, or for any other debt whatever.

In the course of the year 1819, Perkins became indebted to Gilliat 1343 dollars, upon an intirely distinct transaction, which had originated prior to the sale of the tobacco by *Hughes & Armistead to Perkins, but was consummated afterwards. There was no manner of agreement or understanding between Gilliat and Perkins, that this debt should be secured by, or charged on, the notes of Lynch previously deposited by Perkins with Hughes & Armistead: and there was an agreement, that Perkins should accept a draft at sixty days, payable at bank, for the debt he contracted to Gilliat.

***Equity Maxims—He Who Asks Equity Must Do Equity—Application.**—The principal case was cited with approval in Scott v. Scott, 18 Gratt. 163.

***Set-Offs—Joint and Separate Demand.**—See foot-note to Rose v. Murchie, 2 Call 406; Glazebrook v. Ragland, 8 Gratt. 332; foot-note to Perkins v. Hawkins, 9 Gratt. 650; Armistead v. Butler, 1 Hen. & M. 176.

The principal case was cited with approval in Hudson v. Kline, 9 Gratt. 381; Conaway v. Odbert, 3 W. Va. 37.

Perkins paid his note for the first instalments of the purchase money of the tobacco, at its maturity, to Hughes & Armistead, and then failed, leaving the notes for the other two instalments, amounting to 4515 dollars, yet to be paid.

Sometime before Lynch's notes came to maturity, he acquired and became the holder of two notes of Perkins, negotiable at bank, for 1115 dollars each, payable the 4th April 1819, and the 4th April 1820, which were protested for non-payment, Perkins having failed before they came to maturity. But Lynch produced and exhibited only one of these notes, that payable in April 1820. Neither did he shew how or when he acquired these notes of Perkins, whether before or after his failure, or whether he gave any, or if any, what consideration for them: he alleged, generally, that he gave a valuable consideration for them, and acquired them before his own notes came to maturity.

Of the two notes of Lynch for 3633 dollars each, which Perkins had deposited with Hughes & Armistead as collateral security for the debt he owed them, Lynch paid Hughes & Armistead the contents of the first, at its maturity in March 1821, and at the maturity of the last in March 1822, he paid them 1410 dollars in part thereof, that being the balance in full of the debt and interest to secure which his notes had been pledged to them by Perkins. But he refused to pay the residue of the contents of this note, and Hughes & Armistead insisted on still holding it.

In a suit brought by Lynch against Perkins, Hughes & Armistead, and Gilliat, in the superiour court of chancery of Lynchburg, (the object of which was to
495 join Hughes & Armistead from taking any measures to enforce the payment of the balance of Lynch's last note pledged to them by Perkins, which they continued to hold though the purpose of the pledge was accomplished, and to have that note delivered up and cancelled), Lynch claimed to set-off the contents of the two notes of Perkins, for 1115 dollars each, payable in April 1819, and April 1820, both of which Lynch alleged he yet held, and that the amount of both was still due, against the balance due on his last note pledged by Perkins to Hughes & Armistead. And Gilliat alleged that, though his individual advances to Perkins were not made upon any agreement that he should be indemnified out of the notes pledged to Hughes & Armistead, yet he looked to that pledge as his security; and he insisted, that, as he was jointly interested with Hughes & Armistead in the sale of the tobacco to Perkins, the deposit of Lynch's notes with Hughes & Armistead, to secure payment of the price of the tobacco, was a pledge thereof to him as well as to Hughes & Armistead, that he was a holder of Lynch's notes as well as Hughes & Armistead, and that, not having any notice of any set-off, till after he had advanced his money to Perkins, he had a right to retain the debt of 1343 dollars, which Perkins owed him on the distinct and subsequent transaction between them, out of the notes pledged to him jointly with

Hughes & Armistead to secure the price of the tobacco.

The chancellor held, that Lynch's claim was just; and (not advertg, apparently, to the circumstance, that though Lynch alleged that he held two notes of Perkins for 1115 dollars each, yet he produced and exhibited only one note, that payable in April 1820) he decreed a perpetual injunction to any proceedings against Lynch to enforce the payment of the balance of his last note for 3633 dollars, which had been pledged by Perkins to Hughes & Armistead.

Gilliat appealed to this court; where the cause was argued by the attorney general for the appellant, and Johnson
496 *for the appellee; but it was so fully discussed by the judges, that it would be altogether superfluous to report the arguments of counsel.

CARR, J. The only question I shall examine, is, Whether, under the circumstances of this case, Gilliat had any lien on Lynch's notes pledged by Perkins to Hughes & Armistead as a security for the price of the tobacco, for the debt subsequently contracted by Perkins to him individually?

Every lien must be the creature of contract either express or implied. In *Green v. Farmer*, 4 Burr. 2220, lord Mansfield said, "The convenience of commerce and natural justice are in favour of liens; and, therefore, of late years, courts lean that way, 1. where there is an express agreement; 2. where it is implied from the usages of trade; or 3. from the manner of dealing between the parties in the particular case; or 4. where the defendant has acted as a factor." None of these grounds seem to exist in the case before us: for here was no express agreement, but so far from it, Gilliat admits, that he advanced the money without any agreement with Perkins, for indemnity from the notes; there is no usage of trade even alleged, to justify the claim; there is nothing in the manner of dealing between the parties in this particular case, to shew that Gilliat's advances were made with an understanding that the notes deposited were to be bound for them; and no factorage in the matter is pretended. The case before lord Mansfield was, I think, quite as strong as that before us: nor does it make any difference, in this respect, that he was deciding a case at law, and we in equity; for the action there was trover, which is an equitable action; and our decision here must be exactly the same as if Perkins, having paid off the debt to Hughes & Armistead for which the notes were deposited, had brought trover against them, or their partner Gilliat, for these notes. The case before lord Mansfield, was this: *Heinzleman* bought of *Green* certain goods, which he delivered to *Farmer*, a dyer, to be dyed on his account;

497 afterwards, *H.* agreed with *Green*, that he should have his goods back again; *G.* demanded them of the defendant, the dyer, and offered to pay him for dyeing them; but the defendant insisted on being also paid a debt due from *H.* (who had failed) for dyeing other goods, over and above the price of dyeing these. Lord Mans-

field, after discussing the question with his usual learning and ability, concluded thus: "Here is no factor, no agent, concerned; no transaction but the mere manufacture of dyeing; no course of trade, or general usage, to create a specific lien; no particular circumstances of their method of dealing with H. The very manner of dealing shews they relied on his personal credit." And he held, that the defendant had no lien but for the price of dyeing the specific goods. In the course of his argument, he referred to two cases decided by lord Hardwick, *ex parte Deeze*, 1 Atk. 228, and *ex parte Ockenden*, Id. 235. The first was the case of a packer, who was allowed to retain cloth for other debts, besides what was due for packing: which, lord Mansfield says, when upon the ground, that by the course of trade, a packer has a lien upon all goods in his hands, being in the nature of a factor. The other case was thus: Matthews, a flour factor, employed Ockenden as his miller, who had considerable dealings with M. in grinding corn for him, on which account M. was generally indebted to O. in a large sum of money, who always had in his hands corn, meal, and sacks of M., sometimes more, sometimes less, but for the most part sufficient to answer the sum due to him; and for this reason, he gave M. a much greater credit than he otherwise would have done, as he always apprehended the corn, meal, and sacks, which he had in his hands, to be a security for the debt due from M. Matthews became a bankrupt, being indebted to O. in a considerable sum due by notes, and also leaving in the hands of O. a large quantity of wheat, some grinding and some ground into flour, with a great number of sacks, and which O. depended upon as having a security for his debt. The question before lord Hardwicke, on the petition of O. was,

498 *whether he should not be permitted to retain his whole debt out of the wheat, flour and sacks, or only his toll for grinding &c. Lord Hardwicke said, "It lies upon the petitioner to shew, he has any lien, on the corn &c. in his hands; and as to the specific lien he claims, I do not see there is a sufficient reason to consider it as such. In this case, no evidence has been produced of any contract, that the debt which was owing to the petitioner, should be a lien on the corn &c. Nor is there any evidence, that there is any general custom with respect to millers, that it should be a lien. There is then no specific lien, but what arises from that kind of bailment at law, proceeding from a delivery of goods for a particular purpose, as in the case of a horse standing in the stable of an innkeeper &c." And after going through the cases on the subject (and among them, *Demaindray v. Metcalfe*, Prec. in ch. 419, 2 Vern. 691, Gilb. Rep. 104,) he asked, "Suppose the corn factor had tendered the money for grinding the corn, and Mr. Ockenden had refused to deliver it, and he had thereupon brought an action of trover, could O. have set-off the antecedent debt? I am clearly of opinion that he could not, and would have had only an allowance pro tanto as was due for grinding the corn." The report in Atkins, states that the case was

adjourned at the request of the petitioner's counsel, to the next day of petitions, being an affair of great consequence to trade and creditors in general. Lord Mansfield in *Green v. Farmer*, says he has a note of the case, and that in December following, no precedents to the contrary being produced, lord Hardwicke decided according to his opinion as reported by Atkins. I consider that a much stronger case than ours; for in that case, there was a course of dealing, during which Ockenden credited Matthews much farther than he would have done, but for the corn &c. generally in his hands, to which he looked for security: yet, as there was no agreement proved, nor general custom shewn, there was no lien. This subject of personal pledges and lien, is very fully examined by the master of the rolls, in *Jones v. Smith*, 2 Ves. 499 *jr. 372. There, personal securities were pledged for a specific debt; then a mortgage of real estate on a distinct transaction was given to the creditor; and afterwards, the same personal securities (first pledged) with others, were pledged to him for the balance of an account, the question was, whether the personal securities could be redeemed, without discharging what was due for interest on the mortgage? The master of the rolls, in his discussion of the question, first examined the law with respect to tacking, in the case of mortgages: he considered the cases on the subject, as not satisfactory, and admitted that the present practice has not been always the course. That present practice he stated thus: "Now, at least by the modern cases, it is laid down, that a mortgagee cannot tack a bond against the mortgagor, nor against the creditors, but may against the heir, merely to prevent circuity of action: why not (he asks) against the mortgagor, if the rule is, that where a man, having one security, lends more money to the same party, that person shall pay his whole debt or shall not redeem at all?" In support of this position, he referred to the case of *Lowthian v. Hasel*, 3 Bro. C. C. 162, where lord Thurlow said, "The only reason why the mortgagee can tack his bond to his mortgage, is to prevent a circuity of suits: it is solely matter of arrangement for that purpose; for, in natural justice, the right has no foundation. The principle explains the rule; and therefore it can go no further: the creditor having another specific security, cannot give him, in justice, any priority. There being no foundation in justice the only question is, whether the court is in the practice of doing it; and it has not done it in any case, but that of the heir, and merely to prevent circuity." Having established this point, the master of the rolls proceeded to cite cases, shewing that where two separate estates are mortgaged (the legal interest being absolutely, and at law irredeemably, conveyed) equity will not interpose in favour of the redemption of one without the redemption of both. He admitted there is no reason for this distinction, as it is impossible to say

500 why a *bond may not be tacked to a mortgage, as well as one mortgage to another; but thus the decisions have settled it. He then took a distinction between

a mortgage and a pledge; "a mortgage is a pledge, and more; for it is an absolute pledge, to become an absolute interest, if not redeemed at a certain time: a pledge is a deposit of personal effects, not to be taken back, but on the payment of a certain sum, by express stipulation, or the course of trade, to be a lien upon them." In the case of a mortgage, the estate is absolute after forfeiture, and at law there is no remedy: equity, therefore, administers relief on its own principles. But, in the case of pledges, whenever the owner pays or tenders the money due, he may bring trover or detinue for the effects deposited; and when such cases come into equity, that court must decide them as a court of law would. In reviewing the cases on this subject, the master of the rolls took particular notice of *Demandray v. Metcalfe*, a case mainly relied on in the argument here. This case is differently stated in the several reports of it. In some of them it is simply the case of jewels pawned, and money borrowed on them; and afterwards two sums of money borrowed by the pawner, for which he gave notes; and the question was, whether his executor (the time for payment being passed) should redeem by paying the money taken up on the pledge, or should be held to pay that also subsequently borrowed? But the case appears to have been thus: Plaintiff for £110. pawned some jewels to Knight, who signed a writing that they were to be redeemed in twelve months, otherwise, for the £110. they were to be bought and sold: Knight, within a short time after, delivered over the jewels together with some plate of his own to Metcalfe, as a pledge for £200. Knight afterwards borrowed £38. and £50. of Metcalfe on promissory notes to be paid on demand: and Metcalfe by answer insisted it was agreed, that the pledge should be a security, as well for the money on the notes, as for that first lent; but could make no proof of any promise or agreement." The

501 Chancellor decreed, that the redemption *should only be, on paying for all the sums borrowed of Metcalfe, the goods of Knight which were pawned, being first applied. Though the master of the rolls in *Jones v. Smith*, did not expressly dissent from this decree, it is evident, I think, both from the principles he laid down, and the manner in which he treats the decision, that he disapproved of it: he noticed the *quære tamen*, annexed by Vernon to the case; and added, that, as reported by him, "it was as near as possible to the case of a mortgage: for a time was limited, viz. a year, when upon default, it was to be absolute;" and he proceeded immediately to cite with approbation, the cases of *Green v. Farmer*, ex parte *Ockenden*, *Lowthian v. Hasel &c.* which, in my mind, expressly overrule the principle of *Demandray v. Metcalfe*. He also cited *Vanderzee v. Willis*, 3 Bro. C. C. 21, where it was decided by lord Thurlow, that bankers having securities deposited for £1000. though the depositor at his death was indebted to them in a larger sum, had no lien further than the £1000. I know that the case of *Jones v. Smith* is said in 3 Ves. to have been reversed in parliament:

but the ground of reversal is no where stated, that I can find. The case is stated as authority in the later books, which treat on that subject, and in the books of general reference. I conclude, therefore, that the reversal was on some point of form or fact, not touching the authority of the case. Again, in ex parte *Langston*, 17 Ves. 227, lord Eldon lays it down, that if a pledge to secure money were made, and afterwards more money borrowed of the pawnee, and it is made out by his oath uncontradicted, that the subsequent advance was made on an agreement, that the pledge should stand bound for it, this would be supported by the court. In the case before us, Gilliat (the joint pawnee) so far from making oath, that his advance to Perkins was by agreement to be secured on the notes deposited, swears, that there was no such agreement. Ex parte *Whitbread*, 19 Ves. 208, was the case of a claim by the petitioner, of an equitable mortgage by a deposit of the lease of a public house to secure £1000.

502 *lent to the lessee on his promissory note; and the petitioner claimed also, a lien on the deposit for £100. subsequently advanced. Lord Eldon said, "When it was determined" (a determination against which he protested, though he felt bound by it) "that an actual deposit was to have the legal effect of an agreement in writing, it was for the money then due, and no more, unless the parol agreement, was also for future sums. If the original bargain did not look to future advances, no subsequent advance can be a charge, unless the subsequent transaction is equivalent to the original transaction. If it is equivalent to a re-delivery of the deed, receiving it back as a security for both sums, that will do; as it cannot depend on that mere form; but I shall require them to swear expressly, that when the sum of £100. was advanced, it was upon the security of the deposit." See also, *Mandeville v. Welch*, 5 Wheat. 277. From this review of the cases, it appears to me to be clearly settled, that no lien attached on the notes deposited, for the sum advanced by Gilliat to Perkins.

GREEN, J. It is affirmed both by Gilliat and by Hughes & Armistead, in their answers, that the tobacco sold to Perkins was their joint property, the sale a joint sale, and the notes of Lynch indorsed by him in blank, and deposited in the hands of H. & A. as a collateral security for the purchase money of the tobacco, were so deposited for their joint benefit, and that they were joint holders thereof. And the question is, Whether Gilliat is entitled to satisfaction out of the surplus of Lynch's rates, after satisfying the balance due at Perkins's debt to those parties jointly, for a debt due to him individually, contracted by Perkins, partly before and partly after the transaction of the sale of the tobacco and deposit of the notes, without any agreement by Perkins to that effect?

The deposit of Lynch's notes indorsed in blank, as a collateral security for a debt not equal to their amount, did not give to Gilliat and Hughes & Armistead, 503 an absolute property *in them on account of their negotiable charac-

ter. On the contrary, they were bound by their contract, jointly, to return the notes, precisely in the form in which they received them, without a re-transfer by their indorsement, if Perkins paid his debt otherwise; or if not, then the surplus money, if they became entitled by his failure to resort to that collateral security for payment, and received its amount, either directly from Lynch, or by discounting his notes with any other; and this joint responsibility arising out of the original contract, could not be rendered several as to Perkins, by any act which they could do without his concurrence, either by one of them only receiving the surplus money, and retaining it in his hands, or by indorsing the notes to another in succession, instead of jointly. For, as to the immediate parties to a negotiable note, and as between an immediate indorser and indorsee, such a note has no peculiar character whatever, distinguishing it from any other contracts, however evidenced. It is open to all objections to the consideration, or want of consideration, and all set-offs and equities between those parties, which would be available in all other contracts not founded on a deed. It is only where a third party acquires an interest by indorsement for full value, that it acquires as to him the character of a negotiable security, entitled to the benefits of the law merchant, against all the other parties except his immediate indorser. These principles are too familiar to require support or illustration by authorities. If, then, Gilliat and Hughes & Armistead, severally or jointly, had received that surplus, and Perkins had brought an action for money had and received against them jointly, they could not have defeated that action, by showing that they did not receive or hold it jointly, but one only had received and held it. And the question is, Whether a debt due from him to one of them could be set-off, in such an action, or pleaded, or given in evidence, as a payment: certainly not as a payment, unless the transaction upon which it arose was intended as a payment; and, in this case, that was impossible; for when it took place, Perkins

504 *was not in any sense their creditor in respect to Lynch's notes deposited with them, and could never become so, unless they at the end of four years, should receive from those notes more than they were entitled to retain for his tobacco debt, or such part thereof as he might not pay otherwise; all of which was contingent. And Gilliat made the advance in question, not as a payment in advance of a contingent debt, which might possibly become due to Perkins from him and H. & A. at the end of four years, but upon the express agreement that Perkins should repay it under a bank acceptance at the end of sixty days. Discount is not payment: one is the extinguishment of a debt, by an express payment for that very purpose; the other, by the set-off of mutual debts; but both having the same effect, it has given occasion to the loose expression, that discount is payment, and to our practice under our statutes allowing lawful discounts to be given in evidence under the plea of pay-

ment. At the common law, no discount was admitted at law, except in a few special cases, noted by Viner under the head of Discount, in which the mutual liabilities arose from the very same transaction: nor in equity, unless from the nature of the dealings of the parties, or other circumstances, or proofs, an agreement to that effect could be fairly presumed; *Downam v. Matthews*, Prec. in ch. 580; *Jeffs v. Wood*, 2 P. Wms. 128; *Hawkins v. Freeman*, 8 Vin. Discount, A. pl. 26, p. 560, and lord Mansfield's argument in *Green v. Farmer*, 4 Burr. 2220. To remedy this, the statute of 4 & 5 Anne, (which was followed by our act of 1706, ch. 34,) and in England, the statutes of 2 & 8 Geo. 2, allowed mutual debts to be discounted, whether the parties had agreed to do so, either expressly or by implication, or not. But neither before nor after the statutes, did the court of equity ever allow a joint debt to be set-off against a separate debt. It could not be done under the statutes, and (as was said by the master of the rolls in *Addis v. Knight*, 2 Meriv. 121, in which he considered the preceding cases) "it is quite clear,

that as at law, a joint cannot be set-off
505 against a *separate demand, the same rule prevails in equity." The only reported case to the contrary, is that of *ex parte quinten*, 3 Ves. 248, which is repudiated in *ex parte Twogood*, 11 Ves. 517. The case of *ex parte Stephens*, Id. 24, proceeded on the fraud. And the only case here, is that of *Dunbar v. Buck et al.*, 6 Munf. 34, which was founded upon the case of *ex parte Quinten*, and in which the court allowed, against an individual claim of one partner, unliquidated damages against the partnership to be set-off in equity, even if it should have the effect of calling the partner who was not a party in the cause, and could not be made a party for any other purpose, to settle, in that cause, the whole partnership accounts. This was contrary to the settled rules, that joint cannot be set-off against separate demands, and that unliquidated damages can in no case be set-off at law, *Freeman v. Hyett*, 1 W. Black. 394; *Howlett v. Strickland*, 1 Cowp. 56, and, a fortiori, not in equity, *Webster v. Couch*, 6 Rand. 519, especially, as a court of equity cannot decree damages against a defendant in any case. *Anthony v. Leftwich*, 3 Rand. 238, and contrary to the prior cases of *Scott v. Trent*, 1 Wash. 77. *Armistead v. Butler*, 1 Hen. & Munf. 176, and *Ritchie & Wales v. Moore*, 5 Munf. 388, (where, in an action against two upon their note, a debt due by the plaintiff to one of the defendants, as offered was a set-off, and rejected; the precise case at bar, except that this is in equity, that at law) and also to the subsequent case of *Porter v. Nekervis*, 4 Rand. 359. In *Rose v. Murchie*, 2 Call, 409, while the court affirmed the same rule, it held that the payment made to one partner, was in fact made on account of the debt due to the partnership. The debt of Perkins due to Gilliat individually, could not in such an action be used in defence, either as a payment, discount, or set-off; nor could it avail as a defence, in an action of trover by Perkins against them for the notes, now paid off, except as to the balance

due after satisfying the debt for which they were deposited as a pledge, *Green v. Farmer*,

4 Burr. 2214, nor in a suit in equity, since, if it were a defence in equity,

it would be so at law, either in an action for money had and received, or in trover, which are equitable actions, in which nothing can be recovered that the plaintiff is not *ex æquo et bono* entitled to claim, and a court of equity must determine such a case as the law would, and decide it exactly as if an action for money had and received or trover had been brought by Perkins against Gilliat and Hughes & Armistead. I adopt the expressions of the master of the rolls in a similar case, which will be presently more particularly noticed.

The maxim, that he who asks equity must do it to the person of whom he asks it, applies and can be enforced effectually against the plaintiff asking it, only in cases where he is wholly destitute of any legal remedy; as where he has incurred a forfeiture, the effect of which he cannot avoid at law; or made a conveyance, which he cannot impeach in a court of law; or there is a judgment against him, which cannot be reversed. In such cases, he is under a necessity of throwing himself on a court of equity for relief; which is only given by the court, exercising a sound equitable discretion, upon equitable terms. But where a party has a legal right, capable of being effectually asserted at law, and calls for the assistance of a court of equity, because of some serious though not insurmountable difficulty at law, such as the settlement of an account, connected with the necessity of a discovery, or arising out of an equitable trust (as in this case, in respect to the surplus), or upon a collateral ground, such as to prevent an improper disposition of a subject pledged for the security of a debt, by which the rights of the party complaining may be affected (as is this precise case), there, the court can impose no condition upon the mere ground that the party applies to it for relief, and is bound to give that relief according to the legal rights of the parties. To attempt to do otherwise, would be utterly vain as to all the purposes of justice; for it would only remit the plaintiff to his legal rights, and involve the parties in a new litigation, which must ultimately be determined according to

507 *their legal rights, instead of enforcing them in a cause originally instituted properly in a court of equity. As if, in this case, the court were to hold that no relief should be given to Lynch, unless he would submit to the discount claimed by Gilliat, all it could do would be to dissolve the injunction; and then his defence at law would be perfect. There is no foundation for the court to decree the recovery of any thing against him, unless there be some equitable right in Gilliat, which he could assert as effectually in equity, as plaintiff, as he could as a defendant.

It is insisted, however, that if Gilliat's individual claim could not be available at law, in any form, against Perkins, yet that it is so in equity, upon the equitable principle, that when one holding a security for an existing debt, makes further advances to the debtor, he cannot reclaim the secu-

rity, without first satisfying both the old and the new debt; and for this was cited the case of *Demaindray v. Metcalfe*, which is referred to in several books in an imperfect and confused way, but which may be ascertained from the whole, to have been thus: *Demaindray* borrowed money from Knight, and pawned jewels, to a much larger value than the money borrowed, as a security for its payment within twelve months, with a stipulation that in case of failure to redeem them, they should be the absolute property of Knight. Knight pawned them immediately, with some of his own plate, to Metcalfe, as security for a loan to the same amount; and afterwards borrowed of Metcalfe, two other sums, and died insolvent: after the expiration of twelve months, *Demaindray* having forfeited the property by his failure to pay, or tender what he had borrowed, filed his bill to redeem, upon the ordinary principle of equity relieving against forfeitures, as in case of mortgages of real estate. And the court held, that he could not redeem, but by paying his own debt to Knight, (which was equivalent to the original debt of Knight to Metcalfe) and also Knight's debts subsequently contracted to Metcalfe, after first applying the proceeds of the plate

508 pawned by Knight with the jewels. *It is impossible to conceive any reason justifying the imposition of Knight's debt upon the original owner of the jewels, as a condition upon which alone he was permitted to redeem them, except that, having forfeited the absolute property at law, he could have no relief but in equity, and there he could only have it upon doing equity to the defendant, who if he received the jewels from Knight without notice of *Demaindray's* equity, and as the property of Knight, and not otherwise, would be in the situation of a purchaser without notice, to the extent of his demands on Knight: no other case in respect to personal property pledged, upon any terms, has gone farther, or even so far as this; nor has any case ever occurred, in which a subsequent advance has been held to be a lien upon a prior security for a debt, unless by an agreement to that effect by the debtor, either express, or implied, from the nature or character of the transactions. It was on the principle of the last mentioned case, that the doctrine of tacking was founded in the case of mortgages; but that was applied only to cases of forfeited mortgages, never to those which were not forfeited; and that doctrine has been restrained by the more modern decisions to a very few cases. All the doctrine upon this subject, particularly in respect to the pledge of personal subjects as security, was very fully examined by the master of the rolls in *Jones v. Smith*, 2 Ves. jr. 372, in which he came to the conclusion, that, in such cases, subsequent advances cannot be tacked, unless by the agreement of the debtor, and decreed accordingly for the plaintiff, although there was strong ground to contend that there was an express agreement of the parties in writing to that effect. And in *ex parte Langston*, 17 Ves. 227, lord Eldon laid down the same principle, but allowed, that where the creditor affirmed on oath, that such an agreement was in fact

made, and that was supported by the circumstances of the transaction, and not contradicted in any way, it was sufficient proof of such agreement. The decree in *Jones v. Smith* was reversed in the house of lords, upon the question of fact (I am confident) for as far *as I can ascertain, the case, as it was in the house of lords, has not been reported, I suppose for that reason: and it is still cited as authority upon the questions of law, without noticing the reversal. I conclude confidently, that where personal property is pledged, generally, as a collateral security for a debt, or for any other specific purpose, without any agreement that it shall in any event be absolutely forfeited by the owner, no other lien can be imposed upon it for any other debt or purpose whatsoever, without an agreement to that effect, either express or implied from the nature and circumstances of the transaction; and that such an agreement cannot be inferred from the mere fact that a new liability has been incurred by the owner, especially if the holder claiming such a lien, does not affirm that there was such an agreement, and more especially, if he admits explicitly, that there was none such, as Gilliat does in this case. His declaration that he made the new advance, in the expectation that he would be indemnified out of Lynch's notes, cannot amount to a contract with Perkins to that effect, nor charge him with such an agreement. It is impossible to imply an agreement from any circumstances, short of positive proof of the fact, against the express admission that there was none; and if that were possible, an examination of the particulars of the transaction, out of which the new debt of Perkins to Gilliat arose, would conclusively negative the inference of any such agreement, and shew that Gilliat really had no such expectation that Lynch's notes would or could be made a source of indemnity to him, or if he had, that did not, in any degree, enter into the motives inducing him to make that advance.

Gilliat, then, has no lien for his individual advances to Perkins, on the notes of Lynch deposited by Perkins with Hughes & Armistead and Gilliat, for the single and specific purpose of securing his debt to them for the tobacco he had bought of them; nor has Lynch any qualified competitor in this cause, in respect to the balance yet due upon his notes. It is, therefore, unnecessary to make any inquiry as to the
510 *time or manner of his acquiring the notes of Perkins, which he claims to discount against the balance due upon his own notes, or as to the consideration he paid for them. If he holds them, he is entitled against Perkins to their full nominal amount, whenever and however he acquired them, and to a set-off accordingly.

But Lynch has exhibited only one of Perkins's notes, and adduced no proof as to the other; and the one exhibited is not equal to the balance due on his own notes. If he can offer no farther proof, what shall remain of that balance, after discounting them from the contents of the notes of Perkins which he has exhibited, will belong to Hughes & Armistead, as trustees for Perkins.

The decree should, therefore, be reversed, and the cause remanded, with directions to ascertain the amount of the discounts to which Lynch is entitled; and if they shall not be sufficient to extinguish the balance due upon his own notes, to dissolve the injunction as to the residue, perpetuating it as to the amount of the discounts established.

CABELL, J. This case presents the question, how far personal property pledged for the payment of a specific debt, shall be regarded as a security for a debt subsequently contracted?

The case may be simplified, by supposing that Gilliat was the sole creditor of the original debt, for which the pledge was made, as well as in that subsequently contracted; and that this suit had been brought against him, not by Lynch but by Perkins the debtor. This will be to place the case on a footing the most favourable to Gilliat. And I am clearly of opinion, that, even then, it must be decided against him, on principles which have never been departed from, in any english court of law or equity. The principles, on which this branch of the law depends, are most perspicuously laid down by lord Mansfield, in the case of *Green v. Farmer*. No man, having possession of the property of another, can resist the claim of the owner, either
511 *by set-off or otherwise, merely on the ground that the owner is his debtor.

To make such resistance, it is essential that he shall have a lien on the property; and a lien can be acquired only by contract express or implied. There is no difference, in this respect, between a court of law and a court of equity: for a court of equity will not regard any thing as a lien, which would not be regarded as a lien in a court of law also; as the case of *ex parte Ockenden* and *Jones v. Smith*, which have been mentioned by my brethren, clearly establish. Then, was there any contract, express or implied, in this case, that the pledged property should be a security for the subsequent debt contracted to Gilliat? Gilliat himself does not pretend that there was any express agreement: he admits there was none. Nor is there any circumstance from which we can imply an agreement, unless we can imply it from the single fact, that Gilliat required a pledge as a security for the first debt, and that he still held this pledge, at the time that he made the subsequent advance. But there never has been a case, in which that circumstance alone was held to amount to an agreement for a lien. Indeed, if that circumstance alone were sufficient, it would have put an end to almost all questions as to liens. In *ex parte Whitbread*, the lord chancellor said, "if the original bargain did not look to future advances, no subsequent advance can be a charge, unless the subsequent transaction is equivalent to the original transaction;" that is, as he explains himself, it must be "equivalent to a re-delivery of the thing pledged, and receiving it back as a security for both sums." So far from the circumstances of this case affording ground for implying a lien, they shew that none was intended by the parties. The doctrine, that he who

asks equity, must do equity, has no application to a mere pledge of personal property. That doctrine is applied, sometimes, to forfeited mortgages, where the mortgagor brings a bill to redeem: and it is applied then, solely on the ground, that the mortgagee having acquired the legal title by the forfeiture, equity will not take that title from him, until he is paid all that the mortgagor owes him.

512 *But the decree of the chancellor should be reversed, for the reason mentioned by judge Green, and corrected as suggested by him.

BROOKE, P., concurred. So that the decree, though reversed for error in the details, was unanimously approved as to the principle.

Heffernan's Adm'r &c. v. Grymes's Adm'r &c.

February, 1831.

(Absent COALTER, J.)

Administrator d. b. n.—Capacity to Sue—Case at Bar.

—An administrator makes sale of personal property of decedent, partly for cash, partly on credit, and says on oath, in answer in chancery, that he did not mean to convert proceeds to his own use: before credit payment due, his administration is revoked, and administration de bonis non granted to another: HELD, administrator de bonis non entitled to sue for and recover the deferred payment of the vendee.

Foreign Attachment—Appeal by Garnishee—Effect.

—Upon a foreign attachment in chancery, against absent debtor and home defendant as garnishee, decree against absent defendant for debt, and against home defendant for a debt due by him to absentee, to be paid plaintiff in part of debt due him by absentee, the absentee being in default: the home defendant appeals: HELD, the home defendant cannot in the appellate court, contest the justice of the decree as against the absentee, but only so much of it as affects himself.

Administrators—Compensation to Agent—Case at Bar.

—An administrator contracts to sell slaves of testator's estate, partly for cash, partly on credit: contract made by an agent of administrator, who receives cash payment: the administrator's powers are revoked, so that the slaves sold cannot be delivered according to contract: and then administrator authorizes agent to retain the cash payment received by him on the executory contract for sale of the slaves, as compensation to agent for services to decedent's estate: HELD, this is not money had and received by agent to use of the persons from whom, but to use of administrator for whom, he received it, and administrator had a right so to dispose thereof.

Samuel W. Sayre, administrator of Philip L. Grymes late of the county of Middlesex deceased, on the 20th October 1808, sold to Thomas Cardineaux, agent in making the purchase for James Mather and Abner L. Duncan of *New Orleans, 513 forty-three slaves of Grymes's estate, for 10,033 dollars, whereof Cardineaux paid Sayre 4,233 dollars in cash, and for the payment of the residue within twelve months, he stipulated, that he would give such security in New Orleans, as Henry Heffernan, who was to accompany Cardineaux and the slaves thither, should approve; and if he should fail to give such security, it was stipulated, that the purchasers should retain only so many of the slaves as at a fair average value should be equal to the

4,233 dollars that had been paid in cash; and, in that case, the purchasers were to bear the expense of transportation of the slaves retained by them, and Sayre the expense of transportation of those which should be returned to him; but the whole were to be transported at the risk of the purchasers.

Sayre at the same time, by letter of attorney, empowered Heffernan to transact for him at New Orleans, all the business arising from the contract with Cardineaux, and also to make sale there of the other slaves of Grymes's estate, without limitation as to the number to be sold, or the terms of sale; and as compensation for these, and for sundry services previously rendered by Heffernan to Sayre, in managing the affairs of Grymes's estate, Sayre agreed to allow Heffernan a commission of ten per cent. on the amount of the proceeds of the sale of slaves already made to Cardineaux, and on the amount of the sales which Heffernan should effect in New Orleans, together with his reasonable expenses.

Heffernan did not accompany, but promptly followed, Cardineaux and the cargo of slaves, to New Orleans; and, in a letter to Sayre, dated the 13th December 1808, he informed Sayre of his arrival, and that Cardineaux's principals, Duncan and Mather, had offered the uncle of the latter, James Mather the elder, as surety for the deferred payment (5,800 dollars) of the price of the slaves sold to Cardineaux, but that he did not approve, and should not accept, that security.

On the 31st December 1808, Heffernan on the authority of Sayre's letter of attorney to him, covenanted for Sayre, 514 *to sell and deliver to James Mather the younger and William Kenner, a hundred slaves of Grymes's estate, for 40,000 dollars; of which the sum of 5,242 dollars was to be paid to Heffernan in cash; 14,758 dollars, upon the delivery of the slaves at New Orleans (subject to a discount of ten per cent. on 20,000 dollars, the amount of the first two payments); and 20,000 dollars four years from the date of the delivery of the slaves.

And, on the same 31st December 1808, Heffernan accepted an engagement of Duncan and the younger Mather, indorsed on the contract between Sayre and Cardineaux for the sale of the forty-three slaves to them, that they, Duncan and Mather, would be responsible to Sayre, for the deferred payment of the price of those slaves (5,800 dollars) though, as Cardineaux was the agent of Duncan and Mather in the purchase, they were already bound for the debt, and their engagement to pay it was no additional security. And Heffernan, at the same time, professing to act as the attorney in fact of Sayre, made a contract with Duncan and Mather, also indorsed on Sayre's contract with Cardineaux, whereby he extended the credit for the 5,800 dollars, which they owed Sayre on account of their purchase of slaves from him through the agency of Cardineaux, to four years; which extension of credit was expressed to be "in consequence of an advantageous contract that day entered into with Mather, Duncan,

*Administrator d. b. n.—Capacity to Sue.—See monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

The principal case was cited in Wooddell v. Bruffy, 25 W. Va. 470.

*Foreign Attachments.—See monographic note on "Attachments" appended to Lancaster v. Wilson, 27 Gratt. 624.

&c." meaning (as it plainly appeared) the contract which he had made with Mather and Kenner, for the sale of an hundred slaves of Grymes's estate to them; and thus, it seemed, that Duncan, though not named in this contract, was interested in it.

Immediately after these transactions, Heffernan left New Orleans, and returned by sea to Baltimore; whence, on the 26th January 1809, he wrote a letter to Sayre, giving him a distinct and full account of what he had done in his agency, and explaining the reasons of his conduct therein; and mentioning particularly, that the cash payment of 5,242 dollars, which he had received upon the contract for the sale

515 of the hundred slaves of Grymes's estate, was the amount of his commission of ten per cent. (namely, on the aggregate of the proceeds of the sales of that parcel of slaves, and of the forty-three slaves sold to Cardineaux) and his expenses; and that he should retain that sum, being the stipulated compensation for his services. And, in this letter, he commended his transactions to Sayre's approbation, by telling him, that they "would secure to him (Sayre) a round sum of £8,000. which he thought, in honor and justice he might make his own:" (an intimation afterwards relied on to prove a confederacy between Heffernan and Sayre to defraud Grymes's estate). And, after Heffernan's return to Virginia, Sayre gave him a written acknowledgment, dated the 6th February 1809, that the 5,242 dollars he had received, was justly retained by him on account of his commissions and expenses, according to agreement.

Meantime, however, the court of chancery of Williamsburg, at the instance of the creditors of Grymes's estate, upon strong doubts of the fairness of Sayre's and Heffernan's conduct in respect to it, had taken all the slaves of the estate into its own keeping; and shortly afterwards, Sayre's letters of administration of Grymes's estate were regularly revoked, on account of his misconduct therein; and administration de bonis non was granted to Robert West, to whom possession of all the remaining slaves of the estate was delivered: and thus the delivery of the hundred slaves which Heffernan had sold in New Orleans as the agent of Sayre, was anticipated and prevented, and the execution of that contract intirely defeated.

In 1810, West as the administrator de bonis non of Grymes's estate, exhibited a bill (of foreign attachment) against Mather, Duncan and Kenner, residents of Louisiana, and Heffernan and Sayre home defendants, in the superiour court of chancery of Williamsburg; wherein, after setting forth the facts above stated, he charged, That the whole of the transactions were, on the part of Sayre and Heffernan, a confederacy to defraud the creditors 516 of Grymes's estate, *and others interested in it, and to share the plunder between them; inferring this fraudulent design from the circumstances of the transactions, and, especially, from the suggestion in Heffernan's letter to Sayre of the 26th January 1809, that his proceedings

would secure £8,000. to Sayre, which he thought, Sayre might make his own: That Heffernan betrayed his trust, when he accepted the engagement of Duncan and Mather, to fulfil the contract of Cardineaux, their own acknowledged agent in contracting the debt, instead of insisting on good security, or on a restoration of the property: That Heffernan had not the colour of authority to extend the credit of the debt of Duncan and Mather for the 5,800 dollars, the balance of the purchase money of the slaves they had bought of Sayre through Cardineaux's agency, from twelve months to four years; and therefore, that debt became due to Grymes's estate, on the 20th October 1809, according to the original contract; and West as the administrator de bonis non of Grymes, was entitled to demand it: that Heffernan having received of Mather and Kenner 5,242 dollars, on the executory contract made by him for Sayre with them, for the sale of the hundred slaves of Grymes's estate, and the execution of that contract having been defeated in the manner above mentioned, Heffernan was the debtor of Mather and Kenner, to that amount, as money had and received to their use; and this debt of Heffernan to the absent defendants Mather and Kenner, or at least Mather's moiety thereof, was liable to attachment in the hands of Heffernan, as a garnishee to satisfy the debt due from Duncan and Mather, to Grymes's estate. And the bill prayed, that Heffernan's debt to Mather and Kenner, should accordingly be attached in the hands of Heffernan, as garnishee, that he should be compelled to pay the same, and that the court would apply it to the satisfaction of the debt of Duncan and Mather to Grymes's estate.

Heffernan and Sayre, in their answers denied the fraudulent design and confederacy imputed by the bill, and Sayre's intention to appropriate the assets of 517 Grymes's estate *to his own use: and they insisted that they had full authority, respectively, for all they had done; that their transactions were advantageous to Grymes's estate; and that the money which Heffernan had received from Mather and Kenner, in advance, upon the executory contract for the sale of the hundred slaves, having been accounted for by him to Sayre, to his intire satisfaction, and appropriated to pay the stipulated compensation due Heffernan for his services to Grymes's estate, was Heffernan's own money to all intents and purposes.

There was an order of publication against the absent defendants, Duncan, Mather and Kenner; and they failing to appear and answer, the bill was regularly taken pro confesso as to them.

The chancellor dismissed the bill (with the plaintiff's consent) as to the defendants Sayre and Kenner; but he decreed, that the absent defendants Duncan and Mather should pay the plaintiff the balance of the purchase money of the forty-three slaves, bought by them of Sayre, through the agency of Cardineaux, with interest from the 20th October 1809, and that Heffernan should pay the plaintiff to be applied towards the satisfaction of the debt decreed against Duncan

and Mather, one half of the money (Mather's) which Heffernan had received of Mather and Kenner, on the executory contract for the sale of the hundred slaves, with interest from the time he received it.

Heffernan immediately appealed from the decree, giving bond with surety to prosecute the appeal &c. in a penalty equal to double the amount of the money he was decreed to pay. The hearing of the cause in this court was delayed by a tissue of abatements, owing to the death first of Heffernan, then of West, and afterwards, of several successive representatives of Heffernan, of West, and of Grymes's estate, and by the failure of the representatives of the parties, from time to time, to sue out process to revive the appeal, with promptitude. It was at length revived in the names of

Segar sheriff of Middlesex, and administrator *de bonis non of Heffernan, against Braxton, administrator de bonis non of Grymes; and was argued at this term, by Johnson for the appellant, and J. M'C. Wickham for the appellee.

I. Johnson objected, but neither the original plaintiff West, nor Braxton against whom the appeal was now revived, had any right, as administrators de bonis non of Grymes, to demand the debt due from Duncan and Mather to Sayre, the first representative of Grymes, upon the contract made by him with them, through their agent Cardineaux, whereby Sayre intended to convert, and did convert, the slaves of Grymes's estate to his own use. And he cited Wernick's adm'r v. M'Murdo, 5 Rand. 51, as fully sustaining the objection.

Wickham answered, that, supposing this would have been an available objection for the absent debtors Duncan and Mather (who had not and could not have appealed from the decree) Heffernan could not make the objection. But, in truth, if the absent debtors were before the court, making the objection, it would not avail them. For, as both Sayre and Heffernan, in their answers, declared that it was not Sayre's intention to convert the money to his own use, the administrator de bonis non was entitled to demand the debt, upon a principle recognized in Wernick's adm'r v. M'Murdo, that though the slaves of Grymes's estate were converted into another fund by Sayre, the property was not altered in the view of a court of equity, because Sayre did not intend by such alteration to convert it to his own use.

II. Johnson said the money received by Heffernan of Mather and Kenner, upon the second contract for the sale of the hundred slaves, could not possibly constitute a debt from him to Duncan and Mather, the debtors of Grymes's estate upon the first contract made by Sayre with Cardineaux. But waiving this consideration, the money received by Heffernan was his own. He received it under an ample authority given by Sayre, who had full power to give him

such authority: he was accountable to Sayre for it: he did *account to him for it; and Sayre authorized him to retain it, as the compensation for his services previously stipulated. Mather and Kenner had no right to recover the money they had paid Heffernan as money had and

received to their use; not of Heffernan, certainly, for they paid it to him to be paid or accounted for to Sayre; and as to Sayre, they were not bound to forego their specific remedy against him; an action to recover damages, for his breach of the covenant made for him by Heffernan, for the sale and delivery of the hundred slaves. And supposing Sayre had no right to authorize Heffernan to retain the money; that it is, therefore, to be regarded as money belonging to Grymes's estate; and that the representative of Grymes might recover it of Heffernan in an action at law; he surely could not recover it in this suit, a foreign attachment in chancery, to sustain which it is essential that there should be a subject within the jurisdiction of the court, belonging to the absent debtor.

Wickham said, that by express provision of law (1 Rev. Code, ch. 104, § 49, p. 387). Sayre had no right to sell, but on the contrary, was interdicted from selling, the slaves of Grymes's estate, unless the other personal assets were insufficient to pay the debts, which was not shewn; no right, consequently, to authorize Heffernan to sell, or contract to sell, any of Grymes's slaves; and no right to stipulate or give any compensation to Heffernan out of Grymes's estate, for doing what the law positively interdicted. The covenant for the sale of the hundred slaves, was a palpable violation of Sayre's trust as the representative of Grymes; and could never have been specifically enforced. The money paid to Heffernan by Mather and Kenner, upon that contract, was paid upon a consideration that failed in the very inception of the contract; it was, in effect, paid without consideration. It was, then, money had and received by Heffernan to their use; he was bound ex æquo et bono to refund it to them. In the engagement indorsed by Heffernan on Cardineaux's contract, to extend the credit for the balance due thereon,

from one year to four years, he declared *that his inducement to make that extraordinary agreement, was the advantageous bargain he had made for the sale of the hundred slaves, which he described as a contract made with Mather, Duncan &c. The &c. meant Kenner. Thus, it appeared, that Duncan was interested in the second as well as in the first contract. The money paid Heffernan on the second contract, was the money of Duncan, Mather and Kenner. And the portion of the debt thus contracted, by Heffernan to the three, which belonged to Duncan and Mather, or to either of them, was subject to be attached and condemned to satisfy the debt due by Duncan and Mather to Grymes's estate upon the first contract. Shaver v. White, 6 Munf. 110. As to Sayre and Heffernan, he said, it was impossible the court should countenance their conduct in these transactions: the actual sale of forty-three slaves of Grymes's estate, without occasion and against law (a proceeding, in which, obviously, Heffernan confederated with Sayre); the attempt to sell the residue by hundreds; the exorbitancy of the compensation stipulated to be paid Heffernan, for his assistance in this injustice to the estate; the fact of Sayre's allowing the

money received by Heffernan, to be retained by him as compensation for his services, after the court of chancery had taken the estate from him, on account of his misconduct, and when the revocation of his letters of administration was certain; every circumstance of these transactions evinced the iniquitous character of them, and took from the parties all claim to countenance or favour.

CARR, J. The first point made in the argument for the appellant, was, that the administrator de bonis non could not support this demand, because the first administrator by the sale of the forty-three slaves had so converted the property, that it amounted to an administration, and the covenant by which the vendees of the slaves were bound for the balance of the purchase money, would enure, not to the administrator de bonis non, but to the representative of the *first administrator. And for this position the case of Wernick's adm'r v. M'Murdo was relied on. This question might well have been raised by the absent defendants, if they had appeared and given security, before the decree, or had used their privilege to open the decree within seven years; and though they did not appear, it was proper matter to be considered, and we must presume, was considered by the court below. But it is very questionable with me, whether the home defendants can raise it. The foreign attachment had two objects, perfectly distinct, 1. to get a decree against the absent debtors for a debt claimed to be due from them; 2. to get an order against the home defendant Heffernan to pay to the plaintiff whatever sum (to the amount of that debt) he might be found to owe the absentees. With respect to the debt claimed of the absentees, the home defendant was not called on to answer, and had nothing to do with it: as to that, the plaintiff had to produce evidence of his claim, and the court, if satisfied therewith, would decree against the absentees. The home defendant was called on simply to say, whether he owed the absentees any debt, and to what amount? If he admitted that he had received property or money from them, but claimed it as his own, the court would judge upon the allegations and proofs, whether it was his or theirs: if it adjudged the debt to belong to the absentees, it would decree, that the home defendant should pay it, (or so much as was proper) to the plaintiff. Of this decree, the home defendant might complain, and take an appeal from it: but such appeal, I apprehend, would bring before the appellate court, that part of the case only which concerned the appellant: the residue would remain unappealed from, and therefore not subject to the revision of this court. That this is so, seems apparent from several considerations: 1. By what right should the home defendant be empowered to appeal for the absentees? His answer does not put in issue the justice of the plaintiff's demand against them: he is not their agent: he claims nothing jointly with them.

That part of the decree from which he 522 appeals, so far from *being against them, is in their favour; for the money which the home defendant claims

as his, that decree decides to be theirs, and orders him to pay it towards their debt to the plaintiff. Again: how can there be an appeal as to the absent defendants, when they have never entered their appearance in the cause? The law is express, that a day is to be given to the absentees to appear, and give security for performing the decree; if they fail, the court is to take such proof as the plaintiff offers, and, if satisfied therewith, shall make such decree as shall seem just &c. 1 Rev. Code, ch. 123, § 2, p. 474, 5. If the absentee, within seven years, shall return and appear openly, the plaintiff shall serve him with a copy of the decree; and thereupon, he may within twelve months, or if not served with the decree he may within seven years, appear in court, and petition to have the cause reheard; and upon giving such security as the court shall require, shall be admitted to answer the bill, issue may be enjoined, witnesses examined, and such other proceedings, decree &c. as shall seem just: but if the absentee shall not within twelve months after service of a copy, or if not served, within seven years after the decree pronounced, appear as aforesaid &c. the decree, so made, shall stand absolutely confirmed against such absentee. The decree of the court of chancery in this case, was pronounced in 1813, and in 1831, we are called on to reverse it; no appearance having been entered by the absentees; no security given. Suppose the absentees within seven years had wished to appear, where must such appearance have been entered? Assuredly in the court where the decree was pronounced. And this proves that the appeal of the home defendant did not bring up their part of the case; for it could not be depending both here and there at the same time. Again: the appellant gives a bond, which is saved if he prosecutes his appeal with success. Suppose the home defendant here had proved that he owed the absentees nothing, would he not have succeeded completely, and reversed the decree in every thing which connected him? One more consideration:

523 *the sum charged to be in the hands of the home defendant belonging to the absent debtor may not amount to a tenth part of the debt due from the absentee to the plaintiff: if the appeal brings up the whole case, there ought to be security given on the appeal, to cover the plaintiff's whole demand; for no one will deny, that if the absentees had appeared in the court below, and taken an appeal from that court, they would have had to give security to cover the whole demand against them; and yet would it not be most oppressive on the home defendant, to say that he should not be allowed to appeal, unless he gave security to cover the whole demand, when he has nothing to do with nine tenths of it? The appeal bond, in the present case, is not before us; but we see the amount in which it was directed to be taken; and that shews, that it was meant only to cover the sum which the home defendant was decreed to pay to the plaintiff. From these considerations, it is clear to me, that the case as between the plaintiff and absent defendants is not brought up by the appeal of Heffernan.

If it were, I should have no difficulty in saying, that trying the question by the very principles established in Wernick's adm'r v. M'Murdo, the administrator de bonis non might well recover against the absent defendants in the present case. This case falls within that class distinctly treated of there, where the executor has changed the property, as by investing money in the funds, transferring it from one particular stock to another, or the like, but this done for the benefit of the estate, and without intention of making the money his own, as is declared by Sayre in his answer, to have been the case here. In such cases, though the act may amount to a conversion at law, equity, looking at the quo animo, will follow the property, and consider it still unadministered.

It will be remarked, that the bill was dismissed by consent, as to Sayre the other home defendant, so that the single question before the court is this: did the chancellor err in decreeing that Heffernan should pay the money to the plaintiff,

524 *as so much money due from him, to the absent defendant Mather? I, to first thought the decree right; in which opinion, I was probably influenced by that strong disapprobation, which every ingenious mind must feel at the moral aspect of this whole transaction. But closer and more dispassionate examination has compelled me to change my first impression. Heffernan, in the sale of the hundred slaves to Mather and Kenner, acted solely as the agent of Sayre, under a written authority: he received the first payment in that character: and as there was no fraud practised by him towards Mather and Kenner (whatever he might have meditated towards the estate of Grymes) and as also, immediately on his return, he accounted with Sayre, to his satisfaction, for the money received, he could not in any point of view, be considered as having in his hands money or property belonging to Mather and Kenner or either of them. It is not material, therefore, to consider, whether, if the joint funds of Mather and Kenner had been in his hands, the interest of Mather in that fund could have been condemned to pay the debt of Mather and Duncan.

Upon the whole, I conclude, that the decree should be reversed, and the bill dismissed.

The other judges concurred.

525 *Lamb v. Harrison's Adm'r &c.

February, 1831.

(Absent COALTER, J.)

Guardian and Ward*—Indemnifying Bond by Ward*—Construction of—Case at Bar.—A. having been guardian of B. and C. and B. being out of country,

*Guardian and Ward.—See generally, monographic note on "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 398.

*Indemnifying Bond.—See generally, monographic note on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

Pleading and Practice—Declaration—Averment of Notice—When Necessary.—When the obligation to perform a promise is dependent on something else to be done, and when from the nature of the case the knowledge of whether this preliminary act has been done lies peculiarly within the knowledge of the plaintiff and could not reasonably be expected to be known to the defendant, unless the informa-

tion was given him by the plaintiff, then such information must be given to the defendant before he can be held bound to the performance of his promise; and therefore, in such case, notice must be alleged in the declaration. James v. Adams, 16 W. Va. 259, citing, among others, the principal case, Austin v. Richardson, 3 Call 201, and Pasteur v. Parker, 3 Rand. 458.

and C. the younger of the wards having attained to full age, A. delivers to C. six slaves, the property of both wards in equal shares, and takes bond and surety from C. with condition, that, if B. returns to the country, or in any other manner claims his proportion of said slaves and their hires, and receive satisfaction from C. then obligation to be void &c. HELD, C. and his surety are bound by this bond though B. die without ever returning to country, to indemnify A. against the claims, of B.'s representative.

Same—Same—Breach of Condition—What Constitutes.

—One of distributees of B. sues D. as executor of A. his former guardian, for her share of B.'s moiety of the slaves, and recovers decree in chancery for value of share, but no legal representative of B. is party to that suit; and this recovery and payment of amount recovered, are alleged as breach of condition of C.'s indemnifying bond, in an action thereon against C.'s surety: HELD, it is a breach thereof; and defendant cannot, in this action, contest the regularity of the decree in chancery, or take advantage of any error in it: neither can he plead, that D. was never the executor of A.

Same—Same—Action on by Administrator d. b. n. of Guardian.—The money decreed to the distributee of B. against D. as executor of A. his former guardian, is paid out of A.'s estate: HELD the administrator de bonis non of A. is entitled to an action on the indemnifying bond given by C. to A. to recover the amount so paid, from C.'s surety therein bound.

John Thompson with John Lamb and Robert Lamb his sureties, executed a bond to Braxton Harrison, dated the 12th April 1807, in the penalty of 1000 dollars, with the following condition: "Whereas Braxton Harrison did take upon himself the guardianship of Emery Thompson and John Thompson, and whereas the said Emery is now absent, and hath been for several years, and the said John, who is the younger of the two, hath reached the age of twenty-one years, and they the said Emery and John owning jointly six slaves (that is, three each) and the said Emery not being present or in any way represented so as to receive his proportion, they are given up to the said John by his late guardian Braxton Harrison; now, the condition of the above obligation is such, that if the above named Emery Thompson returns to this country, or 526 in any other manner claims *his proportion of the said slaves and hire, and doth receive full and complete satisfaction from his said brother John, or any other person or persons, then this obligation to be void &c."

Thomas Poythress administrator de bonis non with the will annexed of Braxton Harrison, the obligee, in 1825, brought debt upon this bond, in the circuit court of Charles City, against John Lamb, the only obligor then surviving; and, in his declaration, after setting out the condition of the bond in hæc verba, he alleged as breaches thereof, 1. that Emery Thompson had not returned to the country, or in any other manner whatever claimed his proportion of the slaves and their hires, and had not received full and complete satisfaction from his brother John Thompson, or any other person; 2. that Emery Thompson was dead, and that Sarah Harwood, one of his legal representatives, entitled by law to a distributive

tion was given him by the plaintiff, then such information must be given to the defendant before he can be held bound to the performance of his promise; and therefore, in such case, notice must be alleged in the declaration. James v. Adams, 16 W. Va. 259, citing, among others, the principal case, Austin v. Richardson, 3 Call 201, and Pasteur v. Parker, 3 Rand. 458.

share of his slaves and their hires, had never received the same of John Thompson, though she had often demanded it of him, and that James Harwood and the said Sarah his wife had brought suit in the superiour court of chancery of Williamsburg, against John Minge in the character of executor of Collier Harrison who was executor of Braxton Harrison, to recover the share of the slaves and their hires, to which the said Sarah was entitled as a distributee of the said Emery, in which suit the court of chancery decreed to Harwood and wife, against said Minge, as executor as aforesaid, the sum of 525 dollars, that being the share of the value of the slaves of Emery Thompson, to which they were entitled, which sum so decreed to Harwood and wife was actually paid to them by Minge out of the estate of Braxton Harrison.

The defendant Lamb put in, 1. a general demurrer to the declaration, upon which the court held that the law was for the plaintiff; and 2. the plea of conditions performed, on which an issue was made up.

And at the calling of the cause for the trial of the issue on the plea of conditions performed, Lamb tendered another
527 *plea, alleging, as a bar to the action, that John Minge in the declaration mentioned, against whom the decree in chancery was obtained by Harwood and wife, was not, at the time of that decree, or at any time before or since, the executor or the administrator or otherwise the representative of Braxton Harrison. But the court would not allow this plea to be put in; to which opinion Lamb filed a bill of exceptions.

At the trial of the issue on the plea of conditions performed, the plaintiff, to sustain the allegation in his declaration, of the payment, by Minge as executor of Braxton Harrison, out of the assets of his estate, of the amount decreed to Harwood and wife, offered in evidence, a *feri facias* sued out of the superiour court of chancery of Williamsburg, on the 11th February 1825 by Harwood and wife, against Minge as executor of Braxton Harrison, for the money decreed by that court to Harwood and wife, (amounting, principal and interest, to 525 dollars) to be levied *de bonis testatoris* if so much thereof should be found in Minge's hands, if not then *de bonis propriis*; and a receipt of Harwood, dated the 17th March 1825, and indorsed on the execution, for the 525 dollars the amount thereof, "received of Thomas Poythress." And then the defendant shewed, that the same Thomas Poythress, before the date of the *feri facias* and of his payment of the amount thereof, namely, on the 20th November 1823, was duly appointed the administrator *de bonis non* with the will annexed of Braxton Harrison. Whereupon the defendant moved the court to exclude the *feri facias*, and the receipt for the money from Poythress thereon indorsed, from going in evidence to the jury, as proof of the allegation in the declaration, of a payment by Minge out of the estate of Harrison: but the court overruled the motion, and admitted the evidence. Then the defendant moved the court to instruct the jury, that the plaintiff had no right to recover damages in this action, on account of

any payment made by Minge of the amount of the decree in the declaration mentioned; which instruction the court refused to
528 give to *the jury. And to these opinions of the court the defendant filed a bill of exceptions.

The jury found for the plaintiff, the amount paid to Harwood and wife upon their decree in chancery, in damages: whereupon the court gave judgment for the debt claimed in the declaration (the penalty of the bond) to be discharged by the payment of the damages assessed by the jury, and the costs &c. Lamb appealed to this court.

The cause was argued here, by the attorney general for the appellant, and Leigh for the appellee.

I. The attorney general said, the demurrer to the declaration ought to have been sustained. The sureties of John Thompson, in the bond to indemnify Harrison the guardian, were not bound beyond the express terms of the bond: they were bound to indemnify Harrison, only in case Emery Thompson should return to the country, or in any other manner claim his share of the slaves which had been delivered up to John; that is, in case he should return to claim, or should otherwise in his own person claim them. Now, the first breach assigned was, that Emery never returned, and never in any manner claimed, and never received of John, his share of the slaves: which shewed not any breach of the bond, but, in effect, that there was no breach of it. The second breach assigned, instead of shewing that Emery returned, or in any manner claimed his share, shewed that he was dead, and that one of his legal representatives had claimed and obtained a decree in chancery for her distributive share of his slaves; and then set forth a decree for a distributee of Emery, in a suit in which neither his administrator or other legal representative was a party, and in which the obligors in this bond were not parties; a decree, not against the plaintiff, the administrator *de bonis non* of Harrison, but against Minge his executor, and the amount of which, it was expressly averred, Minge had paid. But the condition of the bond imported no contract on the part of the obligors, to indemnify the obligee against
529 the claims *of the legal representatives of Emery, much less of his distributees: that was not in their bond. If the legal representative of Emery would have had a right to recover Emery's share of the slaves from his guardian, Emery's distributees had no right to sue for it, at law or in equity; and the obligors in this bond, not being parties to their suit, could not be affected by a decree, which, as described in the declaration, was plainly irregular and unjust. And as Minge paid the amount decreed to the distributee, Minge or his representative, if any body, had the right to demand indemnity of the obligors in this bond: the plaintiff, the administrator *de bonis non* of the obligee, was not entitled to the action. Besides, he said, though the condition of the bond bound the obligors to the indemnity, only in case Emery should return or in some manner claim his share, and in case John, or some other person for him, on such claim made, should not deliver him his share; yet the

declaration contained no averment of any special request to the obligors in the bond, by the distributee of Emery, or any other person, to make good her share to her, and no averment that it was not made good to her by any other person than John.

Leigh submitted, that the condition of the bond could not, upon any just construction, be restrained to an indemnity provided for the guardian, against a claim to be made by Emery, in person, for his share of the slaves: it stipulated an indemnity against Emery's just claim, in case he should return and claim in person, or in case his claim should in any other manner be asserted; against his claim, whether asserted by himself, or by his representatives, or others claiming under him. And then, though the first breach assigned were allowed to be insensible and nugatory, the second was in substance, well assigned. It set forth a claim by one of Emery's distributees, of her distributive share of his moiety of the slaves, and a decree in chancery for the distributee against the executor of the obligee, for her share: the decree declared this distributee a representative of Emery,

entitled to assert that claim; and
530 whether it rightly *so declared or not, the decree could not be questioned in this action; nor was its alleged irregularity at all material to the obligors in the indemnifying bond. It was, indeed, averred, that Minge the executor of the obligee, had paid the amount of the decree; but it was averred further, that he paid it out of the assets of his testator's estate; therefore the administrator de bonis non had a right to this action to recover the indemnity to the testator's estate, which, and not Minge the executor, had sustained the damage. As to the want of any averment of a special request upon the obligors to perform the condition of their own bond, or of the nonperformance of it by any other person than their principal, he submitted, there could be no necessity for any such averments, or at least, that the omission of them could not be fatal on a general demurrer.

II. The attorney general said, the plea that Minge was never the executor or otherwise the representative of Harrison the guardian of Emery Thompson, ought to have been allowed to be put in; because that fact evinced, that the decree obtained by Harwood and wife against him in that imputed character, which in truth did not belong to him, was collusive and fraudulent.

Leigh. The plea did not allege fraud or collusion. Minge did not deny in the court of chancery, that he was the representative of Harrison; and the decree was satisfied out of Harrison's estate. There could have been no collusion, no fraud, intended or practised.

III. The attorney general contended, that the evidence adduced to prove the breach of the condition of the bond alleged in the declaration, did not prove it: the probata, he said, did not correspond with the allegata. The allegation was, that the sum decreed to Harwood and wife, was actually paid by Minge out of the estate of Harrison; the proof, that it was actually paid by Poythress, and that, after he had been appointed administrator de bonis non of Harrison's estate,

and of course, after Harrison's estate was in his own hands. The evidence, therefore, ought to have been excluded.

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BROOKE, P., delivered the opinion of the court. This is an action on a bond of indemnity, entered into by the appellant and his co-obligors, to indemnify Braxton Harrison, for delivering up six slaves, the property of his two wards, Emery and John Thompson, to John, against the claim of Emery, who was out of the country, and of those representing him in case of his death. The condition of the bond is awkwardly expressed; but it is susceptible of this construction only, upon due attention to the nature of the transaction, and the object of the parties.

The defendant put in a general demurrer to the declaration, and the plea of conditions performed.

The first assignment of a breach in the declaration, conforms with the words of the condition of the bond, and not the substantial meaning of it; and, if taken literally, is a *felo de se*; because if found to be true by the jury, it would avoid the bond and defeat the action. But the second assignment of a breach of the condition, is substantially good: it corresponds with the evident intention of the parties, in the construction it gives to the condition; and though somewhat informal, is good on general demurrer. The objection, that this assignment of a breach is bad, because the proper parties were not before the court of chancery when it made the decree therein relied on as a breach of the condition of the bond, has nothing in it; since, though there may have been error in the decree, it cannot be availed of by impeaching it here. Nor is the last objection to the declaration more sound: that it does not allege a special request to the defendant to indemnify according to the condition of his bond. Where a defendant has contracted to do a thing, upon the performance of an act by a stranger, notice need not be averred in the declaration, for it lies in the defendant's knowledge as much as the plaintiff's, and he ought to take notice at his peril; and, on the same principle, if

532 one *be bound to another to indemnify him against the acts of a third person, no notice of those acts need be averred. 1 Chitt. plead. 320, 321; 1 Wms. Saund. 117, note 2, and the cases there cited.

There is no error in the opinions of the circuit court, given at the trial of the issue, and excepted to by the appellant. It must be taken, that the plaintiff Poythress paid the money due on the decree of Harwood and wife, against Minge as the executor of Harrison, as Minge's agent, out of the assets of Harrison's estate, which, though then in the hands of Poythress as the administrator de bonis non, were liable to satisfy the decree against Minge the executor. And as the decree was satisfied out of Harrison's estate, Poythress his administrator de bonis non is entitled to recover the indemnity in this action.

The judgment is to be affirmed.

share of his slaves and their hires, had never received the same of John Thompson, though she had often demanded it of him, and that James Harwood and the said Sarah his wife had brought suit in the superiour court of chancery of Williamsburg, against John Minge in the character of executor of Collier Harrison who was executor of Braxton Harrison, to recover the share of the slaves and their hires, to which the said Sarah was entitled as a distributee of the said Emery, in which suit the court of chancery decreed to Harwood and wife, against said Minge, as executor as aforesaid, the sum of 525 dollars, that being the share of the value of the slaves of Emery Thompson, to which they were entitled, which sum so decreed to Harwood and wife was actually paid to them by Minge out of the estate of Braxton Harrison.

The defendant Lamb put in, 1. a general demurrer to the declaration, upon which the court held that the law was for the plaintiff; and 2. the plea of conditions performed, on which an issue was made up.

And at the calling of the cause for the trial of the issue on the plea of conditions performed, Lamb tendered another
527 *plea, alleging, as a bar to the action, that John Minge in the declaration mentioned, against whom the decree in chancery was obtained by Harwood and wife, was not, at the time of that decree, or at any time before or since, the executor or the administrator or otherwise the representative of Braxton Harrison. But the court would not allow this plea to be put in; to which opinion Lamb filed a bill of exceptions.

At the trial of the issue on the plea of conditions performed, the plaintiff, to sustain the allegation in his declaration, of the payment, by Minge as executor of Braxton Harrison, out of the assets of his estate, of the amount decreed to Harwood and wife, offered in evidence, a fieri facias sued out of the superiour court of chancery of Williamsburg, on the 11th February 1825 by Harwood and wife, against Minge as executor of Braxton Harrison, for the money decreed by that court to Harwood and wife, (amounting, principal and interest, to 525 dollars) to be levied de bonis testatoris if so much thereof should be found in Minge's hands, if not then de bonis propriis; and a receipt of Harwood, dated the 17th March 1825, and indorsed on the execution, for the 525 dollars the amount thereof, "received of Thomas Poythress." And then the defendant shewed, that the same Thomas Poythress, before the date of the fieri facias and of his payment of the amount thereof, namely, on the 20th November 1823, was duly appointed the administrator de bonis non with the will annexed of Braxton Harrison. Whereupon the defendant moved the court to exclude the fieri facias, and the receipt for the money from Poythress thereon indorsed, from going in evidence to the jury, as proof of the allegation in the declaration, of a payment by Minge out of the estate of Harrison: but the court overruled the motion, and admitted the evidence. Then the defendant moved the court to instruct the jury, that the plaintiff had no right to recover damages in this action, on account of

any payment made by Minge of the amount of the decree in the declaration mentioned; which instruction the court refused to
528 give to the jury. And to these opinions of the court the defendant filed a bill of exceptions.

The jury found for the plaintiff, the amount paid to Harwood and wife upon their decree in chancery, in damages: whereupon the court gave judgment for the debt claimed in the declaration (the penalty of the bond) to be discharged by the payment of the damages assessed by the jury, and the costs &c. Lamb appealed to this court.

The cause was argued here, by the attorney general for the appellant, and Leigh for the appellee.

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The defendant put in a general demurrer to the declaration, and the plea of conditions performed.

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There is no error in the opinions of the circuit court, given at the trial of the issue, and excepted to by the appellant. It must be taken, that the plaintiff Poythress paid the money due on the decree of Harwood and wife, against Minge as the executor of Harrison, as Minge's agent, out of the assets of Harrison's estate, which, though then in the hands of Poythress as the administrator de bonis non, were liable to satisfy the decree against Minge the executor. And as the decree was satisfied out of Harrison's estate, Poythress his administrator de bonis non is entitled to recover the indemnity in this action.

The judgment is to be affirmed.

Bishop v. Harrison's Adm'r &c.

February, 1881.

(Absent COALTER, J.)

Assumpsit against Administrator d. b. n.—Joinder of Counts.—Statute of Limitations.—It seems, that in assumpsit against an administrator de bonis non, counts upon promises made by the executor or a former administrator of the deceased debtor, as such, may be joined with counts on promises by the deceased debtor himself, to save the statute of limitations; dubitante GREEN, J.

Same—Same—Averments.—But, in such case, the counts upon promises of the executor or former administrator, must distinctly aver the promises to have been made as executor or administrator; otherwise, they are bad upon general demurrer; per tot. cur.

Benjamin Harrison qualified, and acted for some time, as executor of William Harrison's will; but his authority (it appeared) was revoked; and administration de bonis non of the testator's estate with his will annexed, was granted to Richard Dunn. And then the appellant Bishop brought assumpsit, in the circuit court of Prince George, against
533 *Dunn administrator de bonis non &c. to recover a debt claimed as due him by the testator. His declaration contained eight counts; five, upon the promises of the testator in his lifetime; one, upon the prom-

ise of the defendant, the administrator de bonis non, made after the administration was granted to him; and two, upon the promises of Benjamin Harrison, made after his qualification as executor of William, and before his authority was revoked, in consideration of the debt due by the testator to the plaintiff; but these two counts did not aver that the promises of Benjamin Harrison, were made by him as the executor of William the testator. To the two counts founded on the promises of the executor before the revocation of his authority, the defendant demurred generally, and the court sustained the demurrer. To all the other counts he pleaded the general issue, upon which the jury found for him. And judgment being rendered for the defendant, the plaintiff appealed from it to this court.

Shands, for the appellant.

Spooner and Allison, for the appellee.

CABELL, J. The first question is, whether in this action of assumpsit against the administrator de bonis non, to recover a debt due from the testator, it was competent to the plaintiff to join counts on promises by the executor as executor, with counts on promises by the testator, in order to save the statute of limitations?

It is perfectly clear, that in an action against an executor or administrator (I mean an original administrator) such counts may be joined; and that that is the proper mode of declaring against executors, or administrators, to save the statute of limitations; 2 Wms. Saund. 117, e; 1 H. Black. 102; Epes's adm'r v. Dudley's adm'r, 5 Rand. 436. This position being admitted or established, it seems to me, that it must follow, as a necessary consequence, that such counts

534 *may also be joined, where the action is brought against the administrator de bonis non. It is clearly competent to an executor, by his promise to pay a debt of the testator, to exempt the case from the operation of the statute of limitations; and it is no devastavit in him to do so. If the executor die or be removed before he has paid the debt, it still remains a debt due from the testator; and the obligation to pay it devolves on the administrator de bonis non, who comes in the place of the executor, and is the representative of the testator. Why, then, may not the creditor, in an action against the administrator de bonis non, avail himself of the promise by the executor in the same manner as he might have done, if the action had been brought against the executor himself? It is said, there is no privity between the administrator de bonis non and the executor. Even if this were so, I do not see that it would affect the question under consideration. The right of the plaintiff to proceed against the administrator de bonis non, for a debt due from the testator, and which has been saved from the operation of the statute of limitations by a promise of the executor, depends, as I conceive, not so much on the idea of a privity between the administrator de bonis non and the executor, as on the right of the creditor to the debt due from the testator, and the obligation of the administrator as the representative of the testator, to pay all his debts, so far as the unadministered assets will extend. But, I am of

*Administrators.—Suits against.—Joinder of Counts.—It is perfectly clear that in an action against an executor or administrator counts on promises by the executor as such and counts on promises by the testator may be joined, and this is the proper mode of declaring against executors or administrators to save the statute of limitations. Braxton v. Harrison, 11 Gratt. 55, citing principal case.

See further, monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

Suits against Administrator d. b. n.—Promise of Administrator.—A suit may be brought against an administrator de bonis non on a promise made by the administrator to pay a debt of his intestate. Braxton v. Harrison, 11 Gratt. 57, citing principal case.

*Administrators.—Promise to Pay Decedent's Debt.—Effect on Statute of Limitations.—To the point that where a debt against an estate is known to be just, and is about to be barred by the statute of limitations, after the death of the testator or intestate, the personal representative may make a promise to pay, which will prevent the operation of the statute, the principal case was cited in Smith v. Pattie, 81 Va. 666.

In Seig v. Acord, 21 Gratt. 365, 370, it was held that a debt which is barred by the statute of limitation at the death of the debtor cannot be revived by the promise of the personal representative to pay it. ANDERSON, J. In delivering the opinion of the court, said that the principal case is not in conflict with this decision; that the opinion of the judges in the principal case were evidently given in reference to a case where the debt had not been barred in the life of the testator and the promise by the executor was not relied on to remove an existing bar, but to exempt the case from the statute of limitations. After quoting from the opinion of JUDGE CARR, to support his proposition, JUDGE ANDERSON says: "It seems to me, therefore, that as the law then stood [1831], as well as now, a debt against the decedent, barred by the statute of limitations in his lifetime could not be revived and made a charge upon the estate by the promise of the executor or administrator to pay it. And, consequently, if it was a debt due to the personal representative, in his own right, he could not obtain it out of the assets and charge the estate with it."

See further, monographic note on "Debts of Decedents" appended to Shores v. Wares, 1 Rob. 1.

*Same.—Suit against Representative Capacity.—In Kayser v. Disher, 9 Leigh 350, the first count in the declaration alleged "that the said defendant executor as aforesaid," by his promissory note, etc., was indebted, etc., to the plaintiff "as legatee;" and being so indebted, in consideration thereof, "he, the said defendant, as executor as aforesaid, promised, etc." This was held to be distinctly the form of the declaration against an executor in his representative character. Epes v. Dudley, 5 Rand. 437, and Bishop v. Harrison, 2 Leigh 532, were cited to support the decision.

opinion, there is a privity of estate between the administrator de bonis non and the executor. I know it was said by one of the judges of this court, in Wernick's adm'r v. M'Murdo, 5 Rand. 51, 55, that there is no privity between them. No person can respect that judge's opinions more than I do; but I must differ from him on this point. Besides, that was not the question before the court in that case: the real question was, whether it was competent for the administrator de bonis non to maintain a suit against the representatives of the deceased administrator, for assets of the intestate, which had been wasted, or converted to

his own use, by the first administrator; 535 *and it was decided, not on the ground of the want of privity, but on the ground that the commission of the administrator de bonis non did not extend to such assets. In Dykes & co. v. Woodhouse's adm'r, 3 Rand. 287, the question was, whether an administrator de bonis non was entitled to an action of debt, or scire facias on a judgment obtained by an executor for a debt due to the testator. It appears from the authorities cited in that case, that the courts of England had formerly, for a great length of time, decided that the administrator de bonis non had no such right; and the principal ground of their decision was, that there was no privity between him and the first administrator. Two of the three judges of this court, who decided Dykes & co. v. Woodhouse's adm'r, did not say whether, in their opinions, there was or was not a privity between them: they did, however, decide, in opposition to the former decisions of the english courts, that the administrator de bonis non might enforce the former judgment, either by action of debt, or by scire facias; and if I were called to judge, by their arguments as reported, I should say, they thought there was a privity. Judge Brooke, the other judge, expressed himself positively, that there is a privity of estate. And whatever may have been the opinion of the english judges in former times, I am inclined to believe, that at the present day, it is admitted in England, that there is a privity between the administrator de bonis non, and the former administrator. This manifestly appears to have been the opinion of lord Kenyon and of Ashhurst justice, who decided the case of Hirst, adm'r &c. v. Smith, 7 T. R. 182. That case was assumpsit by an administrator de bonis non, to recover a debt due to the plaintiff's intestate. The declaration contained one set of counts on promises made by the defendant to the intestate, and another on promises made to the former administrator. The plea was the statute of limitations. A verdict having been found for the plaintiff, the counsel for the defendant moved in arrest of judgment, "because no promises was laid

to have been made to the plaintiff, but 536 to the former *administrator, between whom and the plaintiff there was no privity." Lord Kenyon said, "The defendant's objection rests on this broad foundation, that there is no privity between the former administrator and the plaintiff, the administrator de bonis non. But that proposition certainly is not true in its extent. Suppose the former administrator

had entered into an agreement for the sale of the lease of a chattel interest belonging to the intestate, and had died before the agreement was completed, the administrator de bonis non, stands in such privity of estate, that he would be compelled to carry the agreement into execution." And Ashhurst, J., said, "As it is alleged that the promise was made to a person from whom the plaintiff deduces his title, and between whom and the plaintiff there is a privity of estate in law, it is the same as if it had been stated that the promise had been made to the plaintiff himself, because the law recognizes the relation." Here, then, is a case where the administrator de bonis non was plaintiff claiming the benefit of a promise made to the former administrator, and which was decided in his favor, expressly on the ground of privity. The case supposed by lord Kenyon, is more opposite to that now before us; a case where the administrator de bonis non would be defendant, and where the effort would be to bind him to the performance of a promise made by the former administrator; and he says he would be bound on the ground of privity. This produces a symmetry in all the parts of the law in relation to this subject. An administrator de bonis non, when plaintiff, will be entitled to the benefit of judgments and promises rendered for or made to the executor or former administrator, according to the case of Dykes & co. v. Woodhouse's adm'r and Hirst v. Smith; and, when defendant, he will be subjected to judgments and promises rendered against or made by the executor or former administrator, for debts due from the testator or intestate; Cro. Car. 167.

Upon the whole I am decidedly of opinion, that, if the two counts founded on the promises of the displaced executor, 537 *in this case, had been properly framed, the demurrers to them ought to have been overruled.

But there is a fatal objection to them. The promises laid in them, are not stated to have been made by the executor as executor; which is absolutely necessary to justify their being joined with counts on promises made by the testator; Brigid v. Parks & al. ex'rs &c., 2 Bos. & Pul. 424; 1 Chit. plead. 205, 6. The reason of this is obvious: the judgment on promises by the testator, would be de bonis testatoris; the judgment on promises by the executor not stated to have been made by him as executor, would be de bonis propriis. On this ground, I think the judgment should be affirmed.

CARR, J. Agreeing with my brother Cabell in the view he has taken of this subject, I should not have said a word but for the purpose of correcting or rather explaining a proposition of mine. too broadly stated, in Wernick v. M'Murdo.

The demurrer to the counts in the declaration founded on the promises of the displaced executor, presents two questions: Whether the assumpsit of the executor can bind the administrator de bonis non? and if it can, Whether the executor's assumpsit be well laid in those counts?

That the promise of an executor, or of an administrator to whom full administration is committed, will bind the estate of the testator or intestate, so far at least as to take the case

out of the statute of limitations, is well established. All the books of practice give us the forms of declaring in such cases, and shew us also, that these promises may be joined in the same declaration with counts on promises of the testator or intestate, for the reason, that the judgments will be the same on both, a judgment de bonis testatoris. But, it is said there is no privity between the executor or first administrator and the administrator de bonis non; and *Wernick v. M'Murdo* is referred to. Upon examining that case, I find that I have said, in so many words, there is no privity between them. I was speaking

538 ing then of the distinction *between the executor of an executor, and the administrator de bonis non: the privity of representation was in my mind; and, as the administrator de bonis non does not claim by, through or under, the former executor or former administrator, I said there was no privity between them. The proposition, taken as I intended it, is correct; but certainly not so, in its broadest extent. There is that sort of privity of estate between them, which enables the executor or first administrator to bind the administrator de bonis non, by his acts properly done while in office. The case put by lord Kenyon in *Hirst v. Smith*, is apt to illustrate this: he says "suppose the former administrator had entered into an agreement for the sale of a lease of a chattel interest belonging to the estate, and had died before the agreement was completed, the administrator de bonis non stands in such privity of estate, that he would be compelled to carry that agreement into execution." And this is the voice of reason, as well as authority. The executor or administrator represents the testator or intestate completely; he has the legal estate; and it is necessary that he should have it, both for its management, and for the safety of those who deal with him. When he has made a contract as to any of the property, which he had a perfect right to make, and another has thereby gained an interest in that property, his subsequent death or removal cannot affect that interest. In truth, the question does not seem to me to be one of privity, but of power. Here was a debt claimed of the testator: to whom was the creditor to look? To the representative. He applies to the executor while the debt is yet untouched by the statute of limitations, and tells him, here is a debt due me by your testator, and here is the proof of it: it is a debt due by simple contract, and I must sue at once. The executor replies, I see the debt is just, and I tell you before this witness, that I will pay it; therefore, you need not bring suit, but give me time, till money of the estate comes to my hands. The creditor waits; the executor dies; an administrator de bonis non is appointed: shall he say to the creditor, the promise of the executor does not

539 *bind me, nor take your debt out of the statute? Surely, no. The promise does bind him, or rather the estate, at least so far as to remove the bar of the statute; for the executor was clothed with full power to do what he did.

As to the other point, the counts in question are fatally defective. The promises of the executor on which they are founded, are not laid, as they ought to have been, as

promises made by the executor as executor.

GREEN, J. I concur in affirming the judgment upon the demurrer upon the defect of the counts in question, in stating the character of the assumpsit by the executor of Harrison. Upon the general question, whether in an action against an administrator de bonis non for a debt originally due by the decedent, the plaintiff can avail himself to any purpose of the assumpsit of the executor or former administrator, I refrain from giving any opinion, having formed no decided one, as the question does not arise in the cause. My impression is, however, that he cannot; and that there is a difference in principle, between the case of a suit by an administrator de bonis non and that of a suit against him, and between the effect of an assumpsit by a debtor of the decedent, made to the former administrator, and an assumpsit by a former administrator to a creditor of the estate.

BROOKE, P., said, his impressions upon the general question which had been discussed, concurred with the opinion of Judge Cabell upon it; but it was not necessary to decide it; since, upon the other point, the fatal defect of the particular counts in question, the judgment must be affirmed.

540 **Randolph v. Randolph &c.*

February, 1831.

(Absent COALTER, J.)

Equity Jurisdiction—Determination of Property Rights.

—Bill in chancery, stating that plaintiff is entitled to fee simple and absolute estate in certain real and personal property held by her; but that defendants insist she has only a life estate, remainder to them; and praying a decree declaring and settling her rights: HELD, the court has no jurisdiction to entertain such a bill.

Mary Tabb derived from her father, by descent and distribution, a large estate real and personal; and, in November 1800, she being then an infant, and about to marry Bathurst Randolph, articles of agreement were entered into between them, the declared object of which was, to settle her fortune (with certain exceptions) upon her and her heirs. The marriage took place; a son was born; she attained to full age: and then she and her husband joined in a deed con-

***Equity Jurisdiction—Determination of Property Rights.**—In *Bush v. Martins*, 7 Leigh 330, it was held that a party in possession of slaves, and claiming them by the former owner's absolute gift in his lifetime, cannot come into equity to be quieted in his title against the donor's executory legatee, to whom the slaves are bequeathed in the event of the claimant's death without leaving issue. CARR J., in delivering the opinion of the court, said: "I think there can be no sound distinction taken between this case and that of *Randolph v. Randolph*. The principle there decided, is, that the court has no jurisdiction to call before it a remainderman whose right may never come in esse, at the instance of a person in possession, and claiming a right adverse to his." TUCKER, P., in his concurring opinion, said: "The case of *Randolph v. Randolph* is, I think, conclusive of this: and it was decided, not only upon express authority, but in strict conformity with the general principles of the court of chancery, which disclaims any interference with legal titles. In this case, though the interest of the remaindermen is but contingent, yet their title, such as it is, is a legal title, and cannot be drawn in question in equity. The decision of that court upon the naked question of title, in a case where there is not, and never may be, a subsisting dispute with respect to the right of property, would indeed be an anomaly."

See further, monographic note on "Jurisdiction" appended to *Philpen v. Durham*, 8 Gratt. 487.

veying all of her estate comprised in the marriage articles, to R. E. Meade, who re-conveyed it to the husband. Upon this, her mother as the next friend of her infant son &c. exhibited a bill in chancery against Randolph and wife, to set aside their deed to Meade, and his re-conveyance to Randolph, and to have the marriage articles specifically executed. The chancellor dismissed the bill, but on appeal to this court, the decree was reversed. See the report of the case, *Tabb & al. v. Archer & al. and Randolph & al. v. Randolph & al.*, 3 Hen. & Munf. 399, 431, 2. And this court directed, that the deeds from Randolph and wife to Meade, and from Meade to Randolph, should be cancelled: and "That the said Bathurst Randolph and Mary his wife should, within a certain time to be limited by the court of chancery, by deed of bargain and sale or other sufficient conveyance, convey to such person or persons as the court of chancery should name as trustees for that purpose, all the estate, real and personal, which was of the said Mary on the 19th November 1800, (except as in the marriage articles was

excepted) together with the progeny of 541 the slaves, and the *increase of the stocks of horses &c. if any, which had come to the hands or possession of the said Randolph and Mary his wife, or either of them, or of any other person to the use of them, or either of them; the lands and other real estate, in fee simple, and the slaves and other personal estate in absolute property; upon trust, to permit the said Randolph to take and receive the rents, issues and profits of the same, during the joint lives of the said Randolph and Mary his wife and their issue (if any) without resorting to or applying any of the original stock to that purpose; and from and after the death of either of them the said Randolph and Mary his wife, to permit the survivor to take and receive the rents, issues and profits, in like manner, for the like purpose, under the like restriction; and from and after the death of such survivor, to hold the said estate real and personal so to be conveyed to them, to the use of all and every child or children of the said Mary, born or to be born of her present marriage, which should be living at the time of the decease of the said Mary, and the descendants of such of the children of the said Mary as might die before her (if any such there should be), as parceners, in parcenary, agreeably to the 16th section of the statute of descents; and in default of such issue of the said Mary living at the time of her death, then, from and after the death of the survivor of them the said Randolph and Mary his wife, the trusts so to be created to cease and determine, and the estate embraced by the said marriage articles, and settlement so to be made, to descend and pass to such persons, and in such proportions, as if such articles and settlement had never been made."

This decree was entered in the court of chancery in June 1809; the deeds executed in violation of the marriage articles, were annulled; and the chancellor appointed trustees, and directed Randolph and wife, on

or before the tenth day of the term next after they should be served with a copy of the decree, to make and execute to those trustees, a good and sufficient deed conveying and settling the subject in conformity *with the decree of this court.

But there the business stopped; no such deed was ever executed, and so the legal estate was never vested in the trustees named by the chancellor; nor did they ever take upon themselves the trust, nor even (it seemed) have any notice of their appointment.

Bathurst Randolph the husband, and the issue of the marriage (there were two children), being all dead, Mary the wife, exhibited her bill in the superiour court of chancery of Richmond, setting forth the facts as above detailed; complaining, that, though all possibility of issue of the marriage was now gone, and though all the purposes of the settlement were accomplished or at an end, yet her next of kin, namely, her mother, brothers and sisters, insisted, and counsel advised them, that she had only a life interest in the estate, with remainder to them, and this claim operated as a clog upon the property, which she insisted was now wholly and absolutely her own; making her mother, brothers and sisters, and the trustees named by the chancellor's decree of June 1809, parties defendants; and praying a decree of the court declaring and settling her rights. The trustees, in answer to the bill, said they had never had any thing to do with the subject, and had either never heard, or had forgotten, that they were appointed. And the defendants, the next of kin to the plaintiff, in their answer, said they did not admit the construction and effect of the decrees upon the subject, to be as the plaintiff claimed they were, and submitted the matter of law to the court.

The chancellor, declaring that it was not competent to him to give any other construction to the marriage articles than that which the court of appeals had given to them, without saying what that construction was, dismissed the bill.

The plaintiff appealed to this court.

The cause was argued here by Johnson for the appellant; briefly upon the merits, as to which he thought there could be no doubt; but he very earnestly endeavoured to maintain the jurisdiction of the court of 543 chancery to entertain *such a bill as this; which was the point of difficulty in this court.

CARR, J. The court has no difficulty as to the construction and effect of the former decree of this court, directing the settlement, according to the marriage articles between Bathurst Randolph and his wife Mary, the plaintiff in this suit. The whole aspect of the case, and all the reasoning of the court in its decree, lead to the same conclusion. Here was an infant with a large estate real and personal: it was important to protect her property from the marital rights of her intended husband, and to provide for the issue of the marriage: her mother, therefore, procured the marriage articles to be executed. The sole object of them, as this court properly concluded, was a provision for the wife, the husband, and the issue of the mar-

riage. The articles were between the intended husband and wife alone; no consideration moved from any other person; no collaterals were the objects of any of its provisions. The fee simple and absolute property being in the wife, was so far to be restricted as was necessary for these purposes, but no further. Therefore, this court, after directing a formal settlement to be made, in conformity with its understanding of the marriage articles, expressly declared and provided, that it should be inserted in the settlement to be made, that if, and whenever, those purposes should be accomplished, or become impossible, the trusts should cease, and the estate be and remain as if the settlement had never been made. And is not this precisely the present state of the case? The children of the marriage all dead without issue; the husband dead, so as to render it impossible that there ever should be issue of the marriage; the marriage agreement and settlement being now as if they had never existed; must not the plaintiff Mary have the same rights in her estate as she originally had?

This point of the case, therefore, has presented no difficulty to the court; and if the deed directed by this court
544 *to be made to trustees, had been made, and they had thus been clothed with the legal estate in the property, and the plaintiff had filed her bill to have the estate reconveyed to her, upon the ground that the purposes of the trust were satisfied; the court would have had no difficulty in decreeing the prayer of such a bill. But the present is a different case. By the decree of this court and the court of chancery, the deeds executed by Randolph and wife, to Meade, and by Meade to Randolph, were annulled; and the deed to the trustees, never having been executed by Randolph and wife, the original title, the fee simple in the land, and absolute property in the personality, are now vested in the wife, as at first, free from all control. She has also the use, possession and enjoyment of all her property, and no one is disturbing her. What right, then, has she to come into court? The trustees, clearly, can give her no interruption, and have never dreamed of interfering. But she complains that some of her next of kin, and some persons learned in the law, are of opinion, that under the decree of this court, she has only a life estate in her property, and her mother, brothers and sisters, and their descendants, are entitled to the remainder in fee; and it is to settle this question, that a decree is asked of the court. Has the court jurisdiction of such a case? This is neither a bill of peace, a bill quia timet, nor a bill to perpetuate evidence; but a bill calling on a court of equity to decide, whether the plaintiff has a fee simple, or an estate for life only, in real and personal estate; and the defendants, who are brought forward to litigate this title, are remaindermen, at most, whose titles, according to the plaintiff's shewing, may not come in esse during their lives. The cases are, we think, decisive to shew, that such a bill cannot be entertained. *Welby v. Duke of Rutland*, 2 Bro. P. C. 39; *Pelham v. Gregory*, 3 Id. 204; *Adderly v. Sparrow*, in *canc. Hill*, 1779, Mitf. plead. 154; *Devonsher v. Newenham*, 2 Scho. & Lefr. 197, in which last case, lord

Redeade reviews the cases on the point. And upon this ground, and on this only, the chancellor's decree dismissing the bill, is to be affirmed.

545

*Couch v. Miller.

February, 1831.

(Absent COALTER, J.)

Forthcoming Bond.—Motion to Quash—Record on Appeal.—Upon a motion to quash a forthcoming bond, for defects apparent on the face of the execution on which it was taken, an appellate court will regard the execution as part of the record, though not made so by any express order to that effect.

Same.—**Variance between Execution and Bonds.**—**Effect.**—A *fi. fa.* is directed to the sheriff of Campbell, but is delivered to and levied by the sergeant of Lynchburg, who takes a forthcoming bond upon it, reciting that the writ had been directed to the sergeant: **Held**, the writ gave no authority to the sergeant, and no warrant to him to take the forthcoming bond, and that the bond is variant from the execution, and therefore the bond ought to be quashed.

Same.—**Who May Move to Quash.**—It is competent to the obligors in a forthcoming bond to move to quash it for irregularity.

A writ of fieri facias sued out of the hustings court of Lynchburg, by Miller against Marshall Couch, was directed to the sheriff of Campbell county, but was delivered to the sergeant of Lynchburg, by whom it was levied on the property of Marshall Couch, who gave a forthcoming bond, with John Couch his surety, for the delivery of the property at the day and place of sale. The bond being forfeited, and the hustings court having, on the motion of Miller, awarded execution upon it against Marshall Couch the principal, Miller, at a subsequent term,

***Forthcoming Bonds.**—See generally, monographic note on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

†**Same.**—**Motion to Quash—Record on Appeal.**—It seems that on a motion to quash a forthcoming bond, the appellate court will regard the execution as a part of the record. *Harwood v. Creel*, 8 W. Va. 581, citing principal case.

And in *Central Land Co. v. Calhoun*, 16 W. Va. 372, it is said: "If there be a judgment by default on a forfeited forthcoming bond, the appellate court will regard the execution as a part of the record; but if there be a variance between it and the execution, the judgment will be reversed. When, therefore, there is a judgment by default, it is very proper to recite in it that the execution, as well as the bond was produced and inspected by the court; and such is the form of a judgment by default laid down by Robinson. See *Conway Robinson's Forms*, page 274, and *Glascok's Adm'r v. Dawson*, 1 Munf. 605, and *Preston v. The Auditor*, 1 Call 471. But the appellate court will not regard such a variance. If the defendant appeared in the court below and made no objection to such variance, and did not make the execution a part of the record by bill of exceptions or otherwise. See *Bonaughs v. Freeman's Ex'r*, 2 Munf. 236; *Burke, Adm'r v. Levy's Ex'r*, 1 Rand. 1. But if the record shows affirmatively, that it was objected to in the court below, because of defects in the execution, and that it was for that reason quashed, the execution will be inspected, though not more formally made a part of the record. See *Couch v. Miller*, 2 Leigh 545. The principal case is also cited in *Ayres v. Lewellin*, 3 Leigh 614.

‡**Same.**—**Variance between Execution and Bond.**—**Effect.**—Where there is a material variance between the execution and the forthcoming bond, the bond must be quashed. *Holt v. Lynch*, 18 W. Va. 571, citing principal case and *Glascok v. Dawson*, 1 Munf. 605. In this case (*Holt v. Lynch*), the execution was against four persons, but the forthcoming bond recited that the execution was against three. This was held to be a material variance for which the bond should be quashed.

Same.—**Quashing for Defects.**—To the point that it is competent for a court to quash a forthcoming bond for defects and irregularities, the principal case was cited in *Wallace v. McCarty*, 8 W. Va. 109. See also, *foot-note* to *Dowman v. Chinn*, 3 Wash. 109.

moved for award of execution against John Couch, the surety; and he made a cross motion to quash the forthcoming bond, "for defects apparent on the face of the execution upon which it was taken." The hustings court quashed the bond.

The fieri facias was not made part of the record, by any express order of the court, or by a bill of exceptions to the judgment spreading it on the record; but it was subjoined to the judgment by the clerk, and certified to be the execution on which the forthcoming bond was taken.

Upon comparison of the bond with the fieri facias, the bond appeared regular and corresponded with the execution, 546 *in all respects but this, that the execution was directed to the sheriff of Campbell, whereas the condition of the bond stated, that the writ was directed to the sergeant of Lynchburg, that it had been levied by him, and that he had taken the forthcoming bond.

From the judgment of the hustings court quashing the forthcoming bond, Miller appealed to the circuit court of Lynchburg. The circuit court held, that the fieri facias was to be regarded as part of the record, but that there were no defects, apparent on the face of the execution upon which the forthcoming bond was taken, as the hustings court supposed, nor any other error apparent on the record of the proceedings, to justify the quashing of the bond; and, therefore, reversed that judgment, and remanded the case to the hustings court, for further proceedings on Miller's motion for award of execution. And then Couch appealed to this court.

Johnson, for the appellant. 1st, If the fieri facias is not a part of the record, the judgment of the hustings court must be taken to be right, since there will then be nothing in the record by which it can be impugned, or by which, indeed, its correctness can be examined. And the fi. fa. is nowise made part of the record, nor can an appellate court look into it at all. Jones v. Hull, 1 Hen. & Munf. 212; Bronaugh v. Freeman, 2 Munf. 266; Burk v. Levy, 1 Rand. 1. 2dly, If the fi. fa. can be regarded as part of the record, it was directed to the sheriff of Campbell, and gave authority only to that officer; the sergeant of Lynchburg had no authority to levy it, and no warrant to take the forthcoming bond upon it; and the bond falsely reciting that the execution under colour of which it was taken, was directed to the sergeant, was fatally variant from the execution: therefore, the judgment of the hustings court quashing the bond, was right. So quacunqve via data, the judgment of the circuit court must be reversed, and that of the hustings affirmed.

547 *The attorney general, contra.

The fi. fa. is part of the record, and may be looked into here, since the forthcoming bond was impugned, in the court below, for defects apparent on the face of the execution on which it was taken, and may be impugned here, for variance from the execution, or for want of warrant given by the execution to take the bond. Glascock's adm'r v. Dawson, 1 Munf. 605. The reporter, indeed, seems to have thought, the court looked into the execution

in that case, because the judgment was by default: but the court intimated no such reason. The cases cited by Mr. Johnson only decide, that upon appeal from a judgment on a forthcoming bond, the execution cannot be looked into here, for the purpose of raising objections here, not taken in the court below. And if the execution is no part of the record, in this case, and so may not be looked into by this court; then, here is a forthcoming bond perfectly regular on its face, quashed by the hustings court, for no cause apparent on the record whatever. The court will not intend that such a judgment is right. Beale v. Willson, 4 Munf. 380. But, looking into the execution, and comparing the forthcoming bond with it, the bond is good. The only objection to it, that the execution was directed to the sheriff of Campbell, but was levied by the sergeant of Lynchburg, and the forthcoming bond of course taken by him, is obviated by the provision of the statute, that an execution or other process, appearing duly served in other respects, shall be deemed good, though not directed to any sheriff. 1 Rev. Code, ch. 128, § 107, p. 512. The plaintiff might have struck out the name of the sheriff, and inserted that of the sergeant. In our practice, the direction of the process has always been considered, and is, mere form. Purcell v. Richardson, per chancellor Taylor, 4 Hen. & Munf. 405. Besides, it seems very doubtful, whether a forthcoming bond can be quashed on the motion of the obligors. For, though the obligee may move to quash it for fatal irregularity, in order that he may have the benefit of his original

548 judgment, of which the forthcoming bond, however defective, operates *as a complete satisfaction, so long as it remains in force, yet a forthcoming bond, irregular and bad as a statutory bond, is good as a common law bond; and the obligee is entitled to an action upon it, though not to the summary remedy given by the statute. Hewlett v. Chamberlayne, 1 Wash. 367; Johnstons v. Meriwether, 3 Call, 523. To allow the obligors to quash their own bond, is to allow them not only to defeat the summary statutory remedy, but the common law rights and remedies, which accrue from it to the obligee.

Johnson said, the only effect of the statute referred to, was, that an execution or other process left blank as to the direction to the officer, should be regarded as directed to any officer to whose hands it should come; but this could not be, where the process was expressly directed to a particular officer. As to the right of the obligors in a forthcoming bond, irregularly taken or faulty on its face, to move to quash it, they were the parties especially entitled to such a motion; and it had been often done. He mentioned Meze v. Hoover, 1 Leigh, 442.

The attorney general said, the point was not made in that case, or in any other: it passed sub silentio.

CABELL, J., delivered the opinion of the court. It is objected in this court, by the counsel for the appellant, that the execution not having been made a part of the record, by any express order of the hustings court, or by a bill of exceptions filed for that purpose, it is not competent to the appellate

court, to look into it, and to compare it with the bond, for the purpose of ascertaining, whether it gave authority for taking the bond, or whether the bond was in any manner variant from it: and we are referred, in support of this objection, to the cases of *Jones v. Hull*, *Bronaugh v. Freeman*, and *Burke v. Levy*. It is true, that in those cases, the court did refuse to look into the executions. But, in all of them, the defendants, though they appeared in the court below, had made no objection to the bonds, on the ground of their being unauthorized

549 ized by or variant from *the executions. This court said, their failure to make such objections in the court below, furnished ground to presume that the bonds had been rightly taken, so far as related to the executions, and therefore it would not look into the executions, to see whether that was in fact the case or not. The principle on which those cases were decided, does not apply to that which is now before us; for here, it is expressly stated, that the bond was objected to by the defendant, and quashed by the court, on account of defects apparent on the face of the execution. This necessarily made the execution a part of the record, and imposes on the appellate court the duty to look into it, as the only means of testing the correctness of the judgment appealed from. The propriety of this course, in such a case, is much stronger than if the judgment had been by default, for want of the appearance of the defendant. Yet, it is clear, that even if the judgment had been by default, the court would look into the execution, and compare it with the bond, as was done in *Glascok v. Dawson*.

Looking then into the execution, the question arises, whether it was a warrant to the officer for taking the forthcoming bond? The execution was directed to the sheriff of Campbell but it was levied by the sergeant of Lynchburg, by whom also the bond was taken. It has been decided in England, that meane process, and even that kind of meane process, which operates only in the nature of a summons, can be executed, only by the sheriff of the county to whom it is directed. *Chase v. Joyce*, 4 Mau. & Selw, 412. See also *Grant v. Bagge*, 3 East, 128. And it never was doubted, but that this was the case at common law, as to final process of execution. This principal of the common law has not been changed by any of our statutes, except in one particular; that an execution, writ or other process, appearing to be duly executed in other respects, shall be deemed good, though it be not directed to any sheriff. That, however, is different from this case, where the execution was in fact directed to a particular sheriff. It

550 *gave authority to that sheriff, and to him only; nor could he transfer that authority to any other. And even the plaintiff himself, having once made his election, to direct his execution, to the sheriff of a particular county, cannot revoke that election, but by recalling the execution, and taking out a new one. On this ground, the judgment of the circuit court is to be reversed, and that of the hustings court affirmed.

Bowyer v. Anderson.

March, 1881.

(Absent COALTER, J.)

Partnership*—What Constitutes—Contingent Participation in Profits—Case at Bar.—B. owner of a public ferry, leases it to F. two years, in consideration of \$1000 paid him by F. in cash; and it is agreed between the parties, that if the neat profits of the ferry do not yield F. \$2000 within the two years, F. shall hold over the term, until the profits yield the \$2000, and if the profits give more than \$2000 within two years, the surplus shall be equally divided between them: H.L.D. this contract does not constitute a partnership between B. and F. in the ferry, and B. is not liable for losses by negligence at the ferry, during the term of F.'s tenancy thereof.

Case, in the circuit court of Greenbrier, brought by Anderson against Bowyer, as the owner and keeper of a public ferry at the Cliffs on New River, to recover damages for the loss of a horse and of a parcel of salt, put into Bowyer's ferry boat, to be safely transported across the river for the toll established by law, which the declaration charged to have been drowned and lost by reason of the insufficiency of the boat, and the negligence of Bowyer and his servants. Plea, not guilty. Verdict and judgment for Anderson, for 325 dollars damages.

At the trial, Bowyer, to prove that he was not liable to make good the loss, offered in evidence an agreement between him and one

Feamster; whereby, in consideration 551 of *1000 dollars cash, paid by Feamster to Bowyer, he let and leased the ferry to Feamster, for the term of two years, to commence nine months after the date of the agreement, at which time possession was to be given to Feamster; and Bowyer agreed to furnish Feamster good and sufficient boats during the term, a hand to assist in case of high waters or necessity, and board &c. for one ferryman to be employed by Feamster, for which the latter was to pay him 20 dollars per annum: and it was agreed between the parties, that if, in consequence of Feamster's expenses in hiring and keeping a ferryman, and the damages he might sustain by accidents, Feamster should not make the full sum of 2000 dollars by the profits of the ferry, within the term of two years, then he should remain, and keep full possession of the boats and ferry, from the expiration of that term, until he should make the intire sum of 2000 dollars; but if the money collected during the said term should amount to more than 2000 dollars, the surplus should be equally divided between the parties. It was during the term of two years, that the injury happened of which Anderson complained. Whereupon, the court instructed the jury, that the agreement between Bowyer and Feamster, proved a partnership between them in the profits of the ferry, at the time the injury happened to Anderson; and that Bowyer (and Feamster also) was liable to him for the loss he had sustained. To this opinion, Bowyer filed exceptions; and appealed from the judgment to this court.

The cause was argued here, by Johnson for the appellant, and Stanard for the appellee. The question was, upon the con-

*On matters pertaining to partnership, see monographic note on "Partnership" appended to Scott v. Trent, 1 Wash. 77.

struction and effect of the agreement between Bowyer and Feamster, whether that constituted a partnership between them in the ferry and its profits?

CARR, J. "Partnership," we are told, "is a voluntary contract between two or more persons, for joining together their money, goods, labour and skill, or either or all of them," upon an agreement that the gain or loss shall be proportionally divided between them, and having for its object, the advancement and protection of fair and open trade." Let us examine the agreement before us, and see how it comports with this definition. The first part of it, certainly, imports a lease of the ferry for two years, in consideration of 1000 dollars paid by the lessee to the lessor before the commencement of the lease, with an agreement on the part of the lessor, to furnish good and sufficient boats, a hand to assist on extraordinary occasions, and board &c. for the ferryman to be employed by the lessee, at the rate of 20 dollars a year. And if the agreement had stopt there, all must have agreed, that it had not a single feature of a partnership. The doubt arises upon the stipulations contained in the sequel of the agreement. Do they change the character of the contract, and convert it from a contract of lease into one of copartnership? Where is the community of interest, the community of profits, the community of possession, in the social subject? The first part of the contract expressly stated, that Bowyer leased the ferry to Feamster, for the full term of two years, to commence nine months after the date of the contract, when possession was to be given: that surely meant a several exclusive tenancy in Feamster, not that joint tenancy which partners have. The latter part of the contract nowise changed that feature of it: it not only contemplated the continuance of Feamster's possession for two years, but expressly stated, that if within that term he should not receive 2000 dollars, he should remain, and keep full possession, until he should make that intire sum. So far, there was certainly nothing social, either as to possession or profits. But it was added, that if during the two years, Feamster should receive more than 2000 dollars, the surplus should be divided equally between him and Bowyer: and this, it was contended, gave that participation in the profits, which made it a partnership. I cannot think so. It is a participation purely contingent, and seems to have been thrown in simply as some counterpoise to the provision which

553 *enabled Feamster to hold beyond the two years, if he should not within that time make the 2000 dollars. In 3 Kent's comm. 8, we find it laid down upon authority, that "the contract, must be for the common benefit of all the parties to the association, and though the shares need not be equal, yet, as a general rule, all must partake of the profit, in some rateable proportion, and that proportion, as well as the mode of conducting the business, may be modified and regulated by private agreement, at the pleasure of the parties." Upon every view I can take of the subject, there was no partnership here, and consequently, no right in the plaintiff to recover of Bowyer for the default of Feamster.

There is a feature in this contract between Bowyer and Feamster, which, it seems to me, may go a good way in explaining its nature. The consideration of the agreement was 1000 dollars, advanced and paid by Feamster at its date, though his lease was not to commence till nine months after. Rents are the fruits, the returns, of land; and it is very rarely that we see them paid in advance. Is it not natural to suppose, that Bowyer, being pressed for the immediate use of the money, fell upon this scheme for raising it, by anticipating the profits of his ferry; and that Feamster, seeing his necessity, took advantage of it, to insist on holding the lease, till he should receive from it double the sum advanced? It was thought two years would give this sum: but Feamster was determined to make assurance doubly sure, and therefore, had the provision inserted, that, if from the expenses incurred, or damages from accidents, he should not receive 2000 dollars, within the two years, he should hold on till he should receive that sum: and then Bowyer added, that if during the two years, more than 2000 dollars should be received, the surplus should be divided. This may be called conjecture; but it seems to me, the natural and probable explanation of the transaction; and I mention it as another consideration to shew that no partnership adventure was intended.

554 *BROOKE, P. There may be a partnership in a ferry; but, as a ferry is not ordinarily the subject of partnership and trade; the terms of the contract by which it is made so, ought to be more clear than in cases in which the subject is one of ordinary trade and partnership. It is not uncommon in farming leases, which are somewhat analogous to a lease of a ferry, that the rent is stipulated to be paid in a certain portion of the profits; yet no partnership is inferred from that circumstance. The lessor is not subjected to any claim for the expenses of cultivation &c. In the contract before us, the consideration paid by Feamster was the 1000 dollars: no partnership account was necessary to ascertain that. The stipulation in the lease, that if, in the event, he received more than 2000 dollars, within the term of two years, the surplus profits were to be divided between the parties, was entirely contingent; and the interest of Bowyer in them could not be considered as making him a partner in the whole trade of the ferry. It was only intended by the parties, to apportion the rent more nearly to the value of the ferry, in an event which, for aught that appears, never happened. A communion of interest in the profits and loss of a trade, is essential to a partnership. Coope v. Eyre, 1 Hen. Black. 37. There was no such communion of interest in this case. Feamster had paid his 1000 dollars in advance; and was to receive 2000 dollars in the profits of the ferry after deducting loss by accidents, such as freshes &c. and if not in two years, he was to hold over until he did receive that sum in those profits. Bowyer had no common interest in the profits; he was not to receive a cent of them. I think the circuit court erred in its instructions to the jury.

CABELL, J., concurred.

GREEN, J., dissented. He said, I think this is a case of partnership. The contract in

substance and effect was this: Bowyer agreed to put in his ferry, to keep up good and sufficient boats at his own expense, to furnish a hand to assist *on extraordinary occasions, and board &c. for a ferryman, to be employed by Feamster, at 20 dollars per annum: Feamster was to employ a ferryman to work the boats, and to superintend the ferry himself: and each was to receive a moiety of the profits (after deducting the expenses, namely, the wages of the ferryman, his board &c. and damages from accidents) for two years, or till the profits should amount to 2000 dollars, of which Bowyer's moiety was paid him in advance: and if more than 2000 dollars accrued within the two years, the parties were to divide the surplus. And the lease was given to Feamster for two years, as a security for Bowyer's performance of the contract on his part, in consequence of Feamster's advance of the 1000 dollars to him, and for no other reason.

Judgment reversed, and cause remanded to the circuit court for a new trial to be had, with directions that no such instruction should be given &c.

Garland v. Ellis.

March, 1881.

(Absent COALTER, J.)

Special Bail*—Sci. Fa.—Demurrer.—A demurrer to a sci. fa. upon a recognizance of special bail, is regular practice.

Same—One Sci. Fa. against Three Bail—Effect.—In a joint action of debt against three obligors, three persons severally undertake, by several recognizances, as special bail for each of the three defendants; after judgment, creditor sues out one sci. fa. against the three bail, upon their several recognizances: *HOLD*, they cannot be joined in one sci. fa. and that the sci. fa. is naught, and ought to be quashed.

In debt, in the county court of Amherst, by Ellis against Henry Ballinger, Richard Ballinger and Thomas Richeson, Garland, Muse and John Richeson, by several recognizances, severally undertook as special bail for the defendants; viz. Garland for Henry Ballinger, Muse for Richard *Ballinger, and John Richeson for Thomas Richeson. And Ellis having recovered judgment in that action, afterwards sued out one scire facias against the three special bail of the three defendants respectively, reciting their several recognizances, and requiring them to shew cause if any they could, why the plaintiff "should not have execution of their debt against them, according to the form and effect of their recognizances severally entered into as aforesaid &c." They all pleaded null tiel record; but Garland pleaded some special pleas in bar, and demurred generally to the scire facias. The county court sustained the demurrer and quashed the scire facias. Ellis appealed to the circuit court, which reversed the judgment, overruled the demurrer, and remanded the cause to the county court to be proceeded in. And then Garland appealed to this court.

Stanard for the appellant, maintained that the judgment of the county court was clearly right. Undertakings of the three special bail were perfectly several and distinct, each having entered into a several recognizance for one of the three defendants; and the plain-

tiff could no more join them in one scire facias, than he could join three distinct and several obligors in three separate bonds in one action of debt.

Johnson, contra, endeavoured to shew, that it was irregular to demur to a scire facias upon a recognizance of bail. It was not necessary to the defence of the bail. The scire facias shewed the whole foundation of the claim; and if it did not shew sufficient ground to charge the bail, no judgment could be given against him.

GREEN, J. There is no doubt a scire facias may be demurred to. Tidd's prac. 213; Wood v. Commonwealth, 4 Rand. 329. And the demurrer in this case was well founded. A scire facias against special bail is founded upon the recognizance, as the gist of the action, not upon the original judgment against the principal. That and the

557 proceedings *upon it are only inducement to the action, and to the proof that the recognizance has been forfeited. In this case, the three several persons entering into recognizances, severally, as the bail for the three defendants respectively, were under no joint obligation or responsibility to the plaintiff, and he could, in no possible event, be entitled to an award of execution against them jointly, on their several recognizances. The objection to a joint scire facias against them, is as fatal as it would be to a joint action against several upon several and distinct contracts. The demurrer was rightly sustained, and the scire facias quashed, by the county court.

Judgment of the circuit court reversed, and that of the county court affirmed.

Couch v. Hooper.

March, 1881.

(Absent COALTER, J.)

Assumpsit*—Conditional Promise to Pay Debt of Another—Condition Must Be Strictly Performed.—A. is prosecuting debt against B. the surety of C. and C.'s father agrees in writing to pay the debt with interest, if A. will dismiss his suit against B. at A.'s own costs: A. dismisses his suit generally: in assumpsit by A. against the father, upon his conditional promise to pay the debt: *HOLD*, A. was bound to perform the condition strictly, in order to entitle himself to enforce the promise, and having dismissed his suit generally instead of at his own costs, he cannot recover upon the promise.

Same—Same—Averment.—And though the father subsequently approved A.'s dismissal of his suit against the son's surety generally, yet A. not having averred such subsequent ratification in his declaration on the father's promise, that fact cannot avail him.

Assumpsit, in the circuit court of Buckingham, by Hooper against Couch, upon a special promise, which the declaration stated thus: Allen Couch (a son of Couch, the defendant in this action) and one Coughlan, his surety, executed a bond to Childers for 135 dollars, which Childers as-
558 signed *to Hooper, who brought suit upon it, against Coughlan, the surety; and pending that suit, Couch, the defendant in this action, wrote a letter to Hooper promising to pay him, within two years, from the date of the letter, the amount of the debt claimed of Coughlan as the surety of Couch the son, with interest from the date

*The principal case was distinguished in *Gedney v. Com.*, 14 Gratt. 329, 330.

*See monographic note on "Assumpsit" appended to *Kennard v. Jones*, 9 Gratt. 183.

of the bond, upon Hooper's dismissing the suit he had brought for it against Coughlan the surety, at his Hooper's own costs; upon the faith of which letter and the promise therein contained, Hooper did dismiss his suit against Coughlan, at his own costs; of which Couch, the defendant in this action, had notice; by reason whereof, Couch became bound to pay Hooper, the plaintiff, the amount of the said debt with interest; and being soliable, in consideration thereof, assumed upon himself and promised Hooper, to pay him the same &c. Couch pleaded the general issue. And at the trial, he filed a demurrer to the evidence, in which Hooper joined.

The evidence was, 1. The letter written by the defendant to Hooper, containing the promise laid in the declaration (the contents whereof were precisely as the declaration stated them) with proof of the genuineness of the letter. 2. Proof, that the letter was sent to Hooper by Coughlan's special bail in Hooper's action against him; that Hooper refusing, at first, to accede to the proposition it contained, the letter was held by the bearer, until about six months after, when Hooper acceded to the terms, and thereupon the letter was delivered to him; and that the defendant was informed of Hooper's rejection of the proposition when first made to him, and of his acceding to it afterwards, of the delivery of the letter to him, and of his dismissal of his suit against Coughlan, generally, and gave his approbation to that late delivery of the letter, and to this dismissal of his suit by Hooper (but of these facts the evidence, to say the least, was very doubtful). 3. The record of Hooper's suit against Coughlan; whereby it appeared, that Hooper dismissed that suit, not, however, at his own costs, according to the condition stipulated in Couch's letter, but generally.

559 *The jury found for Hooper, subject to the opinion of the court upon the demurrer to evidence. The circuit court held, that the law upon the demurrer, was for the plaintiff, and gave Hooper judgment for the damages found by the verdict. Couch applied to this court for a supersedeas, which was allowed.

Johnson for the plaintiff in error; Daniel for the defendant.

BROOKE, P. Upon the evidence adduced by Hooper, and demurred to by Couch, it clearly appears, that Hooper did not comply with the condition of the offer made him by Couch, to pay the debt specified in his letter making the offer. That condition was, that Hooper should dismiss the suit he was then prosecuting against Coughlan the surety of Couch's son, at his Hooper's costs. But instead of doing that, Hooper dismissed the suit generally, leaving the defendant in that suit to pay his portion of the costs. Nor can the supposed ratification of that dismissal of the suit, if established by the evidence (which is doubtful) avail Hooper; since this matter is not alleged in the declaration, or put in issue by the pleadings: so that, if the suit had been dismissed generally, as it eventually was, upon the first tender of the letter of Couch to Hooper, the objection to such a dismissal of the suit would not have been obviated.

The judgment is to be reversed, and judgment entered for the appellant.

560

*Fletcher v. Chapman.

March, 1881.

(Absent COALTER, J.)

Sheriffs*—Failure to Return Execution—Motion by Debtor in Creditor's Name.—A *fi. fa.* sued out by C. against P. is delivered to the sheriff, and P. the debtor pays the amount of the execution to C. the creditor; the sheriff fails to make due return of the execution: *Held*, P. the debtor cannot maintain a motion in the name of C. the creditor against the sheriff for a fine for failing to return the execution, even though the debtor were a party injured thereby.

Same*—Same—Motion against Sheriff—Judgment Discretionary.—Neither the statute which gives a motion against a sheriff for a fine for failing to return an execution, nor the statute which gives a motion to a sheriff against his deputy to recover the amount of fines imposed upon the sheriff for the alleged defaults of the deputy, is imperative on the court to give such judgments, but the court, in its sound discretion, may give or deny judgment in such cases.

Same*—Judgment against Sheriff for Default of Deputy—Liability of Deputy.—Judgment is rendered against a sheriff for a fine for the alleged default of his deputy, the sheriff making no defence, nor giving any notice to the deputy of the proceeding; this judgment is erroneous in point of law, and unjust upon the merits: *Held*, in such case, the sheriff is not entitled to recover the amount of the fine from the deputy.

A *fieri facias*, sued out in March 1812, returnable in May following, by Matthew Calvert against Lewis Parham and Robert Wallace, upon a judgment of the county court of Southampton, was delivered to Fletcher, the deputy of Chapman, sheriff of Brunswick. Fletcher indorsed the fact and the date of the delivery of the process to him; and then (it appeared) handed it to Wallace the surety, who was also a deputy of Chapman; and Parham (as he alleged) paid the amount to Wallace; but Wallace, if he received the money, never accounted for or paid it to Calvert, and the execution was not duly returned. Chapman afterwards found it among Wallace's papers, and indorsed upon it, that it had been put into the hands of his deputy Fletcher, who, so far as he could learn, never acted upon it; that he himself, owing to ill health and the belief that his deputy had done his duty, had not acted upon it at the time; and that it had since come to his hands too late to execute, having been found among the papers of Robert Wallace, another of his deputies.

Wallace, it seemed, was dead.

561 *It appeared, that Parham sued out a *fieri facias* in September 1812, returnable in November following, against one Harvey, upon a decree of the superiour court of chancery of Williamsburg, for 167 dollars with interest from the 2d May 1812, and costs; that he sent this execution, by the same Robert Wallace, to the sheriff of Southampton where the debtor resided, with an order to the sheriff, indorsed on the execution, to pay Wallace the amount thereof when made; and that Wallace delivered the execution to Samuel Calvert, sheriff of Southampton, and directed him when he should make the money, to satisfy the execution of Calvert against Parham out of it. Parham alleged, that this direction of Wallace was improper and unauthorized, as he had himself already paid the amount of Calvert's execution; but, in settling with the sheriff of Southampton, he allowed the amount of Calvert's execution to be deducted from the pro-

*See generally, monographic note on "Sheriffs and Constables" appended to Goode v. Galt. Gilm. 152.

ceeds of his own execution against Harvey, and to be retained, according to the disposition which had been made by Wallace, and received only the surplus. And thus, he paid the amount of Calvert's execution twice, though Calvert only received the money retained for him by the sheriff of Southampton.

Six years after these transactions, namely, in November 1818, a motion was made in the county court of Southampton by Samuel Calvert (the same who had been the sheriff of Southampton, to whom Parham's execution against Harvey had been delivered) as the executor of Matthew Calvert, against Chapman, the sheriff of Brunswick, for a fine, for the failure to make due return of Calvert's execution against Parham. The notice on which this motion was made, stated that it was made for Parham's benefit; but Calvert had not authorized the motion to be made in his name, nor was he even apprised of it. The notice (as appeared on the face of the proceedings) was insufficient, having been served only nine days before the motion, instead of ten days at least, as the law requires in such cases. But Chapman not appearing to make defence, judgment

562 *was given against him by default, for a fine of five per cent. per month, on the amount of the execution, from the return day thereof, amounting to 476 dollars. Chapman exhibited a bill to the county court of Southampton in chancery, setting forth all the facts of the case, of which he was then fully apprised and particularly, the error of the judgment in respect of the insufficiency of the notice on which it was rendered, and praying relief against an injunction to the judgment, on the ground that it had been obtained against him by surprise, and of its injustice; but, in the event, the injunction was dissolved and the bill dismissed, probably because the surprise was denied by the answer, and was not proved to the satisfaction of the court. Then Chapman obtained a supersedeas to the judgment from the circuit court of Southampton, by which the judgment was affirmed. Upon this, and upon Parham's release of all but 200 dollars of the fine he had recovered, Chapman acquiesced, and paid the 200 dollars to Parham.

And then he made a motion in the circuit court of Brunswick, against his deputy Fletcher, to whom Calvert's execution against Parham had been delivered (as was evidenced by his own indorsement upon it) to recover the 200 dollars of Fletcher, being the sum actually paid by him to Parham, on account of the fine which had been adjudged against him, for not making due return of that execution. The circuit court rendered judgment for Chapman against Fletcher, for the 200 dollars and costs. Fletcher filed a bill of exceptions to this judgment, setting forth all the facts of the case as above detailed, and appealed to this court.

Johnson, for the appellant, said, that the statute, which authorized the imposition of a fine upon a sheriff, for failing to make due return of an execution put into his hands, was not imperative upon the court to impose the fine, in every case in which an execution is not duly returned: it only enacted that, in such case, "it should be lawful

563 for the court, ten days previous notice being given, upon the motion of the party injured, to fine the sheriff, at its discretion," five per cent. per month on the amount of the execution. 1 Rev. Code, ch. 134, § 47, p. 542. The fine recovered by Parham in Calvert's name against Chapman, for the failure to return Calvert's execution against Parham, was, in every view, irregular, erroneous and unjust. The injustice done to Parham, was not done by Fletcher, but by Wallace whom Parham had trusted. Calvert had no pretence to demand the imposition of the fine, for he had received the amount due him six years before. Parham had no authority to use his name: Calvert gave him none, and he had no pretence to be substituted to the benefit of Calvert's remedy against the sheriff for this fine. And the notice on which this motion was made against Chapman was insufficient; being only nine days notice, whereas the law requires ten. The judgment was rendered against Chapman by his default, and his deputy Fletcher had no notice of the motion against his principal. If he had made the defence which was open to him, it was impossible such a judgment should have been rendered against him. It was owing, then, wholly to Chapman's own gross neglect to make defence, that this fine was imposed upon him; and accordingly he compromised the controversy with Parham; as he had a right to do, certainly; but that only served to evince, that he had no claim to retribution from his deputy. Neither was the statute providing the summary remedy by motion for the sheriff against his deputy, to recover from the deputy, fines imposed upon the sheriff on account of the deputy's default, imperative upon the court to give judgment of retribution to the sheriff, in all cases of fines imposed upon him for the alleged default of the deputy, without regard to the circumstances and justice of the case: that statute also only enacted, that in such cases, it shall be lawful for the court, to give judgment for the sheriff against that deputy, for the amount of the fines imposed on the sheriff on account of the deputy's default. 1 Rev. Code, ch.

564 *78, § 33, p. 283, 4. The sheriff suffering an erroneous judgment to be given against him, could never make that the ground of a claim to retribution from the deputy; *Drew v. Anderson*, 1 Call 51. Here the sheriff did submit to a judgment palpably erroneous (as being rendered on insufficient notice, if for no other reason) and so unjust, that, but for his own gross neglect, such a judgment never could have been rendered.

The attorney general, for the appellee, insisted, that the debtor as well as the creditor in an execution, might be, and often was, a party injured, within the meaning of the statute, by the failure of the sheriff to make due return of the process; and endeavoured to shew, that Parham was a party injured by the failure to make due return of Calvert's execution against him, and that he had a right to use Calvert's name to demand the penalty for that default. The amount of Calvert's execution against Parham, was certainly paid to Calvert out of the proceeds of Parham's execution against

Harvey; and due return of Calvert's execution, would have enabled Parham to recover the money he had himself paid upon it. But the proceeding on Calvert's motion could not now be examined: the fine had been imposed on Chapman; certainly, without any collusion between him and Calvert or Parham; imposed on him for his deputy Fletcher's default. To deprive him of redress against his deputy, it surely was not enough to shew that the judgment for the fine against him, was erroneous; seeing that the county court rendered the judgment, and that the circuit court to which he appealed, held that there was no error in it. He said, a judgment against the sheriff for the default of his deputy (no collusion appearing) bound the deputy: *Graves v. Webb*, 1 Call, 443; *Hooe v. Tebbs*, 1 Munf. 501. In the statute giving the summary remedy to the sheriff, the words that it may be lawful for the court to give judgment on motion upon ten days notice, refer to the summary nature of the proceeding, which but for the statute would

not be lawful, and only serve to
565 *shew, that it was not intended to take away the common law remedy; but, as to the case, in 'which it may be lawful for the court to give redress in this summary way, the words of the statute leave nothing to discretion: "where any fine &c. has been assessed &c. or may be assessed &c. against any sheriff &c. for or on account of the default or misconduct of any deputy of such sheriff" (that is, in all such cases, without any exception) "it shall be lawful for the court to give him judgment for the same against the deputy, in a summary way, upon motion &c."

GREEN, J. No court of justice, in the exercise of a sound discretion, could have imposed any fine whatever upon a sheriff, under the circumstances of the case upon Calvert's motion for the benefit of Parham against Chapman, if the facts now appearing, had been before it. The statute authorizing the imposition of fines upon officers failing to make due returns of executions, does not imperiously require that they shall be imposed in all possible cases of such failure, but leaves that (as it was at common law) to the sound discretion of the court, to be exercised in reference to the circumstances of each particular case; going beyond the common law only so far as to impose a limit upon the amount of the fines, and giving them to the party injured instead of the public. *M'Dowell v. Burwell's ex'ors*, 4 Rand. 317. In this case, Calvert, in whose name the motion against Chapman, the sheriff, was made, was not injured, nor was his testator, by the failure to return the execution in question; for the amount of the execution was satisfied to one or the other of them soon after the return day, and six years before the motion was made, out of the property of the debtor, by an arrangement sanctioned by him, if not made with his approbation. Neither the plaintiff in the execution, nor his executor ever complained of the failure to return the execution: for though the motion against the high sheriff was made in the name of the
566 latter, it was done without his authority or consent, by Parham, *the debtor in the execution, for his own benefit,

under an idea, that he being a party injured by the failure to return the execution, was substituted by law to the rights of the plaintiff, as against the sheriff. If it were true, that Parham was a party thereby injured, that fact, surely, could not lay the foundation of a recovery in the name of Calvert, who had suffered no injury, for his benefit; whether it would, or would not, have enabled him to recover by motion for a fine in his own name. The idea of substitution was unfounded, even if a court of law had the power of a court of equity on that subject; since the plaintiff in the execution having received full satisfaction, had no rights against the sheriff to which any one could be substituted. I can see the inducement that led Parham to take this strange course. The execution in question was against Parham and Wallace his surety, and was delivered to Fletcher, one of Chapman's deputies; Wallace was also a deputy, and Fletcher handed the execution to him. Parham in his answer to Chapman's bill in chancery, affirms that he paid the amount of the execution to Wallace, but he does not prove that affirmative allegation not responsive to Chapman's bill. He says too, that he confided an execution in his favor to Wallace, to be delivered for him to the sheriff of Southampton, and that Wallace appropriated a part of the proceeds of that execution to the discharge of Calvert's execution against him and Wallace, without his assent; but the payment in that way, is not only fully proved, but proved to have been made with the approbation or sanction of Parham. Thus Wallace was indebted to him according to his account to the amount of Calvert's execution, he having virtually paid it once to the plaintiff, and once to Wallace. And his scheme was, six years after the transaction, and after Wallace was dead, to charge this upon the sheriff, as an official transaction on the part of Wallace his deputy; but instead of pursuing that claim, directly in his own name, he resorted to the extraordinary contrivance of using

(upon the notion of a legal substitution)
567 tion) the name of his creditor who *was satisfied, but not more than satisfied, to get it of the sheriff, in the shape of fines for not returning the execution; and succeeded in getting the judgment for more than four times the amount of the execution.

With a full knowledge of all these facts, and with full proof of them in his power, the high sheriff made no defence; and a judgment was rendered against him, erroneous in point of law, being given upon a notice of nine days only. He then sought relief in equity upon the double ground of surprise, and upon the merits, (which he stated fully, and proved completely,) but failed in getting any relief. He then obtained a supersedeas to the judgment, which was affirmed by the circuit court; and he thereupon acquiesced in the judgment (Parham releasing all but 200 dollars of the fine) though manifestly erroneous in a point of which he was fully informed, as well as in the result of the suit in chancery, though that also was erroneous, if he really had a good excuse for failing to defend himself at law.

If this case depended upon the prin-

ciples of the common law, we could not hesitate to say, that such proceedings to which Fletcher was no party, and of which he does not appear to have had any notice, could not bind or affect him in any way, except to prove the fact that they existed. But we have a statute (upon which, I have no doubt, the judgment appealed from was founded) providing "That when any fine &c. has been or may be assessed &c. against any sheriff &c. for the default or misconduct of his deputy, it shall and may be lawful for the court, to give judgment against the deputy, his heirs, executors &c. for the full amount thereof against the deputy, upon motion &c." I cannot think that this statute imperatively requires the court to give judgment against the deputy, in all cases in which a judgment has been rendered against his principal, founded upon the deputy's alleged default, for the full amount of such judgment, without regard to the question, whether such a default had existed, as would be a just foundation for any fine against the principal, or to the default and neglect *of

568 the principal to make a defence, of which he was apprised, and which would have been effectually available, or to give notice to his deputy so as to enable him to make that defence for him. Such a construction would, in effect, prevent the inquiry, whether the deputy had been in default or not; and would take away the discretion, implied in the declaration, that it shall and may be lawful for the court to give judgment &c. contrary to the principles of the common law. If such be the intention explicitly declared by the statute, it must be carried into effect according to its literal terms, no matter how flagrant the wrong inflicted by it. But if it is in any degree equivocal in those points, we are bound to construe it according to the reason of the common law, as near as may be; 19 Vin. abr. Statutes, E. 6, p. 512, and the cases there cited. This statute is equivocal in those particulars: and I am of opinion, that the intention of the legislature was only to give a summary remedy by motion in lieu of the common law action, and to extend it (contrary to the common law maxim that personal actions die with the person) to the heirs and executors of the party offending.

The other judges concurred. Judgment was reversed, and judgment entered for appellant.

569 *Reed's Heirs v. Vannorsdale and Wife.

March, 1831.

(Absent COALTER and CARR, J.)

Specific Performance—Verbal Agreement to Convey Land*—No Consideration—Case at Bar.—J. being

***Specific Performance—Verbal Gift of Land.**—It may be regarded as settled law in this state, and in Virginia, that a verbal donee of land—a child, who, under the verbal gift, has taken possession of the land and improved it,—has a right to demand in a court of equity a specific performance of the contract by the execution of a deed by the father, thereby consummating his verbal gift. This was so held in *Shobe v. Carr*, 8 Munf. 10, decided as long ago as 1811, and this case has been repeatedly followed or recognized as law by numerous Virginia decisions ever since. See *Darlington v. McCoolle*, 1 Leigh 36; *Reed v. Vannorsdale*, 2 Leigh 569; *Pigg v. Corder*, 12 Leigh 66; *Cox v. Cox*, 26 Gratt. 305.—**GREEN, J.**, delivering the opinion of the court in *Frame v. Frame*, 32 W. Va. 476, 9 S. E. Rep. 908.

In *Burkholder v. Ludlam*, 30 Gratt. 262, the prin-

wealthy and childless, verbally agrees with his brother C. who is poor and has a large family of children, that if C. will forego his intention to move to the west, and move to and settle on a tract of land of J. near his residence, J. will convey the land to him in fee; C. induced by this promise, executes the agreement on his part, but without incurring any expense or loss in so doing: **Held**, there was neither a meritorious nor a valuable consideration to support the agreement, and equity cannot decree specific execution against J.'s heirs.

In a suit in the superiour court of chancery of Winchester by Charles Reed against Abraham Vannorsdale and his wife Anne, who was the devisee of her first husband James Reed deceased, the case alleged in the bill, and proved by the evidence, was thus:

Charles Reed was the brother of James Reed. Charles was poor and had a large family of small children; James was wealthy, and had no children. Charles resided in the county of Hardy, but had come to a fixed purpose to move to the western country, in the hope of bettering his condition, and making some provision for his family. James resided in Hampshire, and being apprised of Charles's purpose of migrating to the west, to divert him from it, he not only stated to him his ability, as well as his desire and intention, to place him in independent circumstances, and to make him and his children the chief objects of his bounty, but he purchased a tract of land near his own residence in Hampshire, and promised Charles, that if he would remove to this land, and settle himself upon it, he James would bear all the expenses of his removal, and would convey the land to him in fee simple. Induced by this promise, particularly, with other assurances of favor and bounty to himself and his children, Charles abandoned his design of moving to the western country, moved from Hardy to the land in Hampshire, (James defraying the expense, according to

his promise), settled himself upon it, 570 and enjoyed the use and profits of it during James's life. But it was not proved or alleged, that Charles incurred any

principal case was also cited as not being in conflict or at all inconsistent with the decision in *Shobe v. Carr*, 8 Munf. 10; and it is noted that **CABELL, J.**, in the principal case, took occasion to say that if it had appeared that expense or loss had been incurred by the donee in foregoing his intention to move to the West, and in moving to and settling on the land promised him by the donor, he would have been of opinion that specific execution ought to have been enforced. In this case (*Burkholder v. Ludlam*), it was held that a court of equity will compel the conveyance of the legal title of land claimed under a parol gift, supported by meritorious consideration, and by reason of which the donee has been induced to alter his condition and make expenditures of money and valuable improvements upon the land.

In *Cox v. Cox*, 26 Gratt. 312, 313, **STAPLES, J.**, speaking for the court, said: "This court has repeatedly expressed its disapprobation of those pretended contracts based upon declarations by parents of intentions to make certain specific provisions for children, in consideration of supposed services rendered or sacrifices made by the latter. Such promises are generally made in the freedom and confidence of domestic intercourse, and without a suspicion that they constitute legal obligations. The efforts constantly made to enforce them fully vindicate the statute of frauds and perjuries. *Reed's Heirs v. Vannorsdale & Wife*, 2 Leigh 569; *Pigg v. Corder*, 12 Leigh 66."

The principal case is also cited and its decision approved in *Goodwin v. Bartlett*, 43 W. Va. 334, 27 S. E. Rep. 325.

On the subject of specific performance, see further, *foot-note* to *Griffin v. Cunningham*, 19 Gratt. 571, and *monographic note* on "Specific Performance" appended to *Hanna v. Wilson*, 8 Gratt. 248.

expense, or loss of any kind, by his compliance with his brother's wishes. James, by his will devised the land in question to his wife Anne, who afterwards married Vannorsdale. And the object of the bill was to have a specific execution of James's promise to convey the land to Charles in fee simple.

The plaintiff died pending the suit, and it was revived by his heirs. The chancellor dismissed the bill; and the plaintiffs appealed to this court.

Johnson, for the appellant.
S. Taylor, for the appellee.

BROOKE, P. The promise and agreement of James Reed, alleged in the bill, is satisfactorily proved. Charles Reed being very poor, and having a large family, and James being relatively rich, and having no child, he was, in some degree, morally bound to provide for his needy brother and family: but a court of equity does not take cognizance of such imperfect obligations. Even in the case of parent and child, equity will not decree the execution of an agreement to provide for the child, though the parent is morally bound to provide for him, unless the agreement is under seal, so that at least nominal damages may be recovered upon it at law. In *Darlington v. McCoole*, 1 Leigh, 36, the principle was laid down by the court, that there must be a valuable or meritorious consideration, or a court of equity will not aid a defective conveyance, much less enforce a naked agreement, though it be in writing. In the case before us, there was neither a valuable nor meritorious consideration. And there is no case, in which equity has decreed specific execution of an agreement, even one in writing under seal, founded on the imperfect obligation to provide for a brother or other collateral relation. In *Vernon v. Vernon*, 2 P. Wms. 594, specific execution of the covenant was decreed, upon the consideration, that Henry, the elder brother of Thomas Vernon who executed the covenant.

571 He had devised *him an estate worth £10,000, with a limitation over to his brothers, upon his dying without issue; a limitation, which, though void, created a strong moral obligation on Thomas to provide for his brothers, which might have influenced him when he executed the covenant to do so. That was stronger than the mere natural obligation of one brother to provide for another. In the case before us, the promise to convey the land, was a naked promise, without any obligation of the character of that in *Vernon v. Vernon*; and it was a parol promise, on which an action at law for damages could not be maintained.

GREEN, J., concurred.

CABELL, J. I am of opinion to affirm the decree of the chancellor, on the ground of defect of consideration; the consideration proved, in this case, being neither valuable nor meritorious. But I take occasion to say, that if it had appeared, that Charles Reed had incurred necessary expense or loss in executing his part of the agreement, I should be of opinion that specific execution of it, on the part of James Reed and his heirs, ought to be enforced.

Decree affirmed.

572

*Hardin's Ex'ors v. Hardin.

March, 1881.

Chancery Jurisdiction—Title to Slaves—Discovery.*—

Bill in chancery, by plaintiff against the executors of his deceased father and a purchaser under them, claiming slaves under parol gift of the father in his lifetime, accompanied by delivery of possession, and praying discovery of the increase of the slaves, of which bill shews plaintiff was not ignorant, and a decree for the slaves, and their increase before suit brought as well as pendente lite, and an account of profits: HELD, the court of chancery has no jurisdiction to entertain such a bill.

Berry, Hardin exhibited a bill in the superior court of chancery of Staunton, against Benjamin Hardin and Nathaniel Landcraft executors of Isaac Hardin deceased, and Samuel Bailey; setting forth, that Isaac Hardin, who was the father of the plaintiff, in his lifetime, made a parol gift to him of two slaves, Anderson a boy, and Mourning a woman, and delivered him possession thereof, which he held for two years, and till the death of his father the donor: that, after the death of the donor, his executors claimed these slaves and the increase of the female, then three in number, as part of the testator's estate, (to be sold, and the proceeds divided among his children, according to his will and codicil) inventoried them as part of the testator's estate, and obtained possession of them: that they offered the slaves for sale at public auction, at which the plaintiff asserted his claim to them and forbade the sale, in which the executors persisted notwithstanding: that at the sale, the plaintiff bad for the slave Anderson, but he was sold to the defendant Bailey, a higher bidder, for 580 dollars, on a credit of twelve months: that the plaintiff also bad at the sale, for the woman Mourning and her three children; and they were cried out to him at the price of 900 dollars; but, he being unable to give security for the purchase money, according to the terms of the sale, it was agreed between him and the executor Benjamin Hardin, that Benjamin should take the woman and her children at the same price, and if the plaintiff could make good his claim to them under the gift of his father, they should be surrendered to him; and accordingly

573 *Benjamin took and had ever since

***Bill of Discovery—Facts Known to Plaintiff.—**In *Armstrong v. Huntons*, 1 Rob. 327, it is said: "It is perfectly clear as a general rule, that in a bill to substitute an equitable for a legal forum, a prayer for a discovery, without any averment showing its materiality or necessity, is naught. If this court has tolerated a departure from this rule, in regard to slave property (*Gregory's Adm'r v. Marks's Adm'r*, 1 Rand. 355), it has been where the necessity for a discovery was supposed to be incidental, at least *prima facie*, to the nature of the demand; as where the suit is to recover a stock of slaves, after a considerable lapse of time, and there has been such an increase as would raise a fair presumption that the plaintiff is ignorant of their names, ages, and residence. But even under such circumstances, if it may be inferred from the statements in the bill, or the evidence in the cause, that no such difficulty in point of fact exists, a court of equity will not take cognizance of the case, unless there be some other ground for the exercise of its equitable jurisdiction. *Hardin's Ex'ors v. Hardin*, 2 Leigh 572."

To the same effect, see the principal case cited in *Hale v. Clarkson*, 23 Gratt. 47. In each of these cases, it was held that, in a bill in equity to recover slaves, the only ground of equity jurisdiction be a call for a discovery of facts which the evidence shows the plaintiff knew at the time, or had the means of knowing, the bill should be dismissed with costs.

See further, monographic note on "Bills of Discovery" appended to *Lyons v. Miller*, 6 Gratt. 427.

held the possession thereof; that the plaintiff was advised, that his title to the slaves in question, under the gift of his father, was valid, and that his proper and most effectual remedy to recover them and their increase and hires and profits, was in the court of chancery; for that, in a court of law, several suits might be necessary, the recovery of the specific property might be avoided by the removal of it, the increase of the females pendente lite could only be recovered by a subsequent action, and some difficulty might be opposed to the recovery of the slave Anderson at law, in consequence of the plaintiff's public bidding for him at the sale: therefore, the bill prayed, that the defendant Bailey should be restrained from paying the purchase money of the slave Anderson, to the defendants the executors of Isaac Hardin, and should be decreed to deliver that slave and account for the profits thereof to the plaintiff, or to pay him the purchase money he had bidden for him with interest; and that the defendant Benjamin Hardin should declare on oath, how many children the woman Mourning now had, their names and sexes, and should be decreed to deliver them, and to account for and pay the profits thereof, to the plaintiff; and general relief.

The executors of Isaac Hardin, in their answer, denied the alleged gift of the slaves in question, by their testator to the plaintiff; and they said, he well knew the number, names and sexes, of the increase of the woman Mourning, of which he pretended to want a discovery; but, however, they gave a list of them. And the defendant Bailey answered, that he had bought the slave Anderson at a public sale, without notice of the plaintiff's claim, at which sale the plaintiff was also a bidder and his competitor; and that he had actually paid the purchase money to the executors before the suit was brought; and he insisted, that he had a right, at all events, to hold the property.

There was a volume of depositions touching the questions of fact in issue. The chancellor thought the parol gift of the

slaves to the plaintiff by his father, was satisfactorily *proved; and that the plaintiff was entitled to recover of the defendant Bailey, the purchase money of the slave Anderson, if he had not already paid it to the executors, and if he had, he was entitled to recover the same of them; and that he was entitled to recover of the defendant Benjamin Hardin, the woman Mourning and her increase and the profits thereof: therefore, he directed an account to ascertain whether Bailey had paid the purchase money of Anderson to the executors, or how much thereof he had paid them; and an account of the profits of Mourning, and her children. From which decree, the defendants the executors of Isaac Hardin, appealed to this court.

The cause was argued here, by Stanard for the appellant, and Johnson for the appellee. In this court, it turned chiefly on the question of jurisdiction, though it was argued on the merits also; and Johnson endeavoured to maintain the jurisdiction of the court of chancery, upon the grounds suggested in the bill.

GREEN, J. I have carefully examined the fifty depositions filed in this case, taken at an expense of more than a dollar each; and throwing out all the evidence of the appellants, and the circumstances which repel the claim of the appellee to the slaves in question, I do not think there is a scintilla of proof in the record, that they ever came into his possession, or remained with him, as a gift from his father, for one moment of time. I refrain from the discussion of this mass of evidence, because it is unfit for the decision of a court of equity, if it were doubtful, as perhaps it ought to be considered, from the circumstance that the court below thought the evidence sufficient to support the claim. A jury is a more competent tribunal to determine this question with the witnesses before it, than either this court or the chancellor; and might have determined it at an expense of one fifth or one tenth of the cost of this proceeding. Nor was there a shadow of ground upon which

575 *a court of equity could entertain this double suit, of detinue as to some of the slaves, and trover as to one of them, against different parties. There was no difficulty in prosecuting suits at law; no uncertainty as to the names, ages or sexes of the increase of the female slave; no discovery necessary; no difficulty as to a fair adjustment of damages; and the rights of the parties would have been settled not only at a tythe of the expense, but in one tenth of the time, which this suit has produced and consumed.

CABELL, J. I am also decidedly of opinion, that the evidence in this case, does not establish gift of the slaves contended for by the appellee; and that, even if that were a doubtful question, there was no ground for coming into a court of equity. The plaintiff could not, from the facts stated in the bill, have been ignorant of the names, ages or sexes of the slaves in controversy. The question of title, depending exclusively on parol testimony, was peculiarly proper for a jury; nor was there any other question in the cause, which could not have been decided as correctly by a jury, as by a commissioner.

The other judges concurred.

Decree reversed, and a bill dismissed with costs.

576

*Miller v. Crews.

March, 1831.

(Absent COALTER, J.)

Chancery Jurisdiction—To Injoin Proceedings under Execution*—Case at Bar.—M. a non-resident of the state, causes a fl. fa. to be levied on tobacco, corn &c. in possession of L. the debtor; and C. who claims a legal right to the goods, joins L. in a forthcoming bond for the delivery thereof at the time and place of sale: HELD, that C. if he has the legal right he claims, has a plain remedy at law, by action against the sheriff; and, therefore, cannot ask the interference of a court of equity to injoin M.'s proceeding under his execution and upon the forthcoming bond.

William Long, by deed dated September 18, 1819, duly recorded in the county court of Amherst, mortgaged to Thomas Crews,

*See generally, monographic note on "Jurisdiction" appended to *Phippen v. Durham*, 8 Gratt. 457; monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518; monographic note on "Executions" appended to *Paine v. Tutwiler*, 37 Gratt. 440.

and William, Betsey and Nancy Brydie, two tracts of land in Amherst, about forty slaves, some furniture, and stocks of horses &c. to secure a debt of 8,320 dollars due by him to Crews, and a debt of 10,081 dollars which he owed to the Brydies. The deed appointed the 20th day of the same month, for the payment of the first debt, and the 25th, for the payment of the last; and provided, that the mortgagor should hold and enjoy the subject till he should make default of payment, and that from and after such default, the mortgagees might "enter upon, have, hold, possess and enjoy," the whole subject, real and personal, "and receive and take the rents, issues and profits thereof, without hindrance &c. until the debts should be fully paid off and satisfied."*

In October 1819, the mortgagees exhibited a bill in chancery, against the mortgagor and sundry of his judgment creditors, who had levied executions on the personal part of the mortgaged subject, praying injunctions to restrain the creditors from proceeding on their executions, a foreclosure of the mortgagor's equity of redemption, and a sale of the subject to satisfy the debts due the mortgagees. And, on the hearing of that cause, in May 1822, the chancellor decreed, *that unless Long should pay the mortgagees the debts due them, and the costs of suit, within six months, his equity of redemption should be foreclosed, and that the marshal of the court should sell the whole of the mortgaged subject for cash, and after defraying expenses, pay the mortgagees the debts and costs due them, and pay the surplus, if any, to the mortgagor, and make report of his proceedings in order to a final decree.

At the same term, Boyd Miller, a creditor of Long, exhibited a bill against Crews and the other mortgagees, praying, upon grounds therein set forth, that the execution of the decree of foreclosure and for the sale of the mortgaged subject, should be suspended: upon which the chancellor, instead of suspending the execution of the decree, made an order, directing the marshal to retain in his hands till farther order, so much of the proceeds of sale as should be equal to the debt which Miller claimed of Long. This order was rescinded in October 1822.

In November 1822, Miller recovered a judgment for debt against Long as the surety of one Penn, in the county court of Amherst, upon which he ordered a fieri facias to be issued. While the clerk was in the act of making out this execution, Long came into the office with one Wright, and acknowledged a deed of trust, dated the 18th November 1822, whereby he conveyed to Wright the crop of tobacco, which had been made by Long in the year 1822, on the lands mortgaged to Crews and the Brydies by the mortgage of September 1819, (Long having continued to occupy the mortgaged premises during that year, and having worked the mortgaged slaves &c. on the land, to make the crop,) upon trust, to secure a debt which Long owed to Joseph Echols, and for which Crews was his surety. And this deed was thereupon duly recorded. But it appeared, that Echols

was not apprised of the execution of it at the time; and it did not appear, that he ever claimed under it.

Miller proceeded to take out his execution, delivered it to the sheriff, and caused it to be levied on the crop of *tobacco and 120 barrels of indian corn, and a small parcel of oats and fodder, then on the mortgaged lands, and in Long's possession, being parcel of the crops of 1822. Whereupon, Long gave a forthcoming bond, wherein Crews joined as his surety, for the delivery of the property at the time and place of sale.

And then Crews exhibited his bill against Miller, Long the mortgagor, and the Brydies his co-mortgagees, setting forth the facts above stated; and alleging, that the whole subject mortgaged by Long's mortgage of September 1819, was very inadequate to satisfy the debts thereby secured to him and the Brydies; insisting, that the whole profits of the mortgaged subject, accruing after forfeiture thereof by Long's default of payment, and during the pendency of the bill to foreclose the mortgage, and, particularly, the crops of 1822, made and reaped after the decree of foreclosure, were, by the express provisions of the mortgage, applicable to the mortgage debts; and if not, that Crews, who was the surety for Long to Echols, had a right to insist, that the tobacco should be sold, and the proceeds applied to the satisfaction of that debt, under Long's deed of trust of November 1822; and praying an injunction to restrain Miller from farther proceedings under the execution he had caused to be levied on the crops of 1822, and on the forthcoming bond taken thereupon; and general relief. The injunction was awarded.

Miller, in his answer, insisted that the mortgage of September 1819, itself, was a fraudulent contrivance to protect Long's property from his creditors, and if not, that the mortgagees, having permitted Long to retain the intire possession, management and control of the mortgaged subject, had no right, as against his other creditors, to the profits thereof that accrued during Long's possession; and that, as to the deed of November 1822 to secure the debt to Echols, that was manifestly a contrivance of Long, to anticipate and defeat Miller's execution, and a contrivance in which Echols took no part, and of which he had no knowledge, 579 *and neither had claimed under the deed, nor, as against Miller, could claim under it.

The chancellor on the hearing, supposing the mortgage of September 1819, and the proceedings of the mortgagees under it, to be fair, nevertheless dissolved the injunction, and dismissed the bill. From which decree Crews appealed to this court.

The cause was argued here, by Johnson for appellant, and by Stanard for the appellee, very fully upon the merits; but Stanard also contended, that, taking the case upon Crews's own shewing in his bill, it was not a proper case for relief in equity, since if Crews, or if Echols had right, they had also a plain legal remedy. And upon this question as to the jurisdiction, this court decided the cause.

CARR, J., delivered the opinion. It has been settled, by the case of Bowyer v. Creigh, 3 Rand. 25, and many other cases, that

*This was the same mortgage, which was the subject of controversy in the case of Crews v. Pendleton &c. 1 Leigh, 597.—Note in Original Edition.

where a party has a complete remedy at law, he shall not be entertained in equity. Here, if Crews had any title to the crops raised on the land during the year 1822, it was a legal title, the legal estate being in him after forfeiture of the mortgage. So if the deed executed by Long to Wright for Echols, was operative at all, it conveyed the legal title of the tobacco to Wright, the trustee, and he might have sued at law. Whoever had the legal title might have sued the officer in trespass or trover, and had no need to come into equity. Nor is this a case of that complexion which equity will look upon with favour. Decree affirmed.

580 *Overseers of the Poor of Brunswick v. Tucker.

March, 1881.

(Absent COALTER, J.)

Sheriff—Motion against—For Poor Rates—Lapse of Time.—T. sheriff of B. for the years 1803 and 1804, collects the poor rates; and in November 1823, the Overseers of the poor commence proceedings against him by motions for balances unaccounted for: HELD, after such a lapse of time the motions ought not to be entertained.

Heartwell Tucker was the sheriff of Brunswick for the years 1803 and 1804, and in each of those years, gave three official bonds with surety (according to the provisions of the statute, 1 Rev. Code, ch. 78, § 11, 12, p. 278), one for the due collection of the public taxes; one for the due collection of all levies, and all fines, forfeitures and amercements; and the other for the due collection of officers' fees, and the due performance of all of the duties of the shrievalty. In each of the years 1803 and 1804, the Overseers of the poor for the time being, assessed poor rates of 1s. 9d. on each tytheable in the county, and made orders directing Tucker, the sheriff, to collect the same; in pursuance of which he undertook and made the collection. But he did not settle his account of collections of these poor rates and of his disbursements, with the Overseers of the poor, at the expiration of his shrievalty; nor was he then, or shortly after, called to account by them. In 1810, the Overseers of the poor for the time being, made an order directing their clerk to call upon him, and other sheriffs, to settle their respective accounts as collectors of the poor rates, and in case they should fail to make such settlements, and to pay the balances due from them, respectively to make motions against them, respectively, for the balances. It did not appear, that any thing was done by the clerk under that order. In June 1816, the Overseers of the poor for the time being, appointed Thomas Gibbon their agent; and Gibbon, in 1817 or 1818, spoke to Tucker on the subject of the balance supposed to be due from him: Tucker

581 *said he owed nothing: he did not shew any discharge, but told Gibbon, that if he would go to his house, he would shew him his papers: Gibbon, however, without calling upon Tucker at his house, or even mentioning the subject to him again, put the case into the hands of the then commonwealth's attorney for the county, that he

might make motions for the balances claimed. But no motions were then made against Tucker.

In November 1823, the Overseers of the poor for the time being, gave two several notices to Tucker, of motions to be made against him in the county court of Brunswick, for the balances due from him upon his collection of the poor rates of the years 1803 and 1804. These motions, after several continuances, were tried in the county court: and upon the trial, the Overseers of the poor, after shewing the facts above stated, presented accounts officially stated by their clerk; wherein they debited Tucker with the gross amount of the poor rates for the respective years 1803 and 1804, at 1s. 9d. per tytheable; and credited him with his commissions on the same amount, for the collection, and with such disbursements as their books shewed to have been made by him; and thus shewed a balance of 496 dollars due from him for the years 1803, and a balance of 515 dollars for the year 1804. They gave Tucker no credit for insolvencies; and it was proved, that he never returned any list of insolvents, even with respect to the public taxes, for either year of his shrievalty. Whereupon, the county court gave judgments against Tucker, upon both motions, for the whole of the balances; that is, for 496 dollars on account of the poor rates of 1803, and for 515 dollars on account of those of 1804.

Tucker appealed from these judgments to the circuit court of Brunswick, which reversed them both, and dismissed the motions at the costs of the Overseers of the poor; and then, they appealed to this court.

582 *The cause was argued by Johnson for the appellants, and the attorney general for the appellee. Several objections were taken by the latter, to the proceedings and judgments of the county court, and discussed at the bar, which the court took no notice of, in giving judgment, and which, therefore, need not be stated. The court rested its decision upon a single point; the great length of time that elapsed before the Overseers of the poor asserted their claim.

BROOKE, P., delivered the opinion. Every plaintiff ought so to present his case to the court, that judgment may be rendered in his favor, without, in any degree, doing injustice to the defendant. From this principle, the proceedings and judgments of the county court, in these cases, exhibit a total departure. The judgments rendered against the sheriff, were for much larger sums than it was possible he could be justly accountable for. The court made no allowances for insolvencies, which must have amounted to a very considerable sum. The assessments for the support of the poor, were imposed, like the county levies, not upon property, but on persons: it was a capitation tax on all tytheables; that is, all males above the age of sixteen, and female slaves above that age: whereas the public taxes were assessed on property only. There would of necessity, therefore, be a greater loss in the collection of the county levies and poor rates, than in the collection of the public taxes. The levies and poor rates were assessed on all, whether they had property or not; and such of them as had none, could not be compelled to pay by distress, the only remedy for enforcing

*See generally, monographic note on "Sheriffs and Constables" appended to Goode v. Galt, Gilm. 152; monographic note on "Laches" appended to Peers v. Barnett, 12 Gratt. 410.

payments: in the case of the public taxes, those who had taxable property were generally able, and compellable to pay, by distress, if necessary. Now, we know, that the loss by insolvencies, in the collection of the public taxes, is always very considerable; the sheriff being required to return a list of insolvents as to public taxes, for the examination of the county courts, in order to enable the auditor to settle his accounts of the taxes col-

583 lected. *In the case of county levies

and poor rates, the sheriff is not required to make a return of insolvencies to the court, but is intitled to a credit for all insolvencies which he can shew on the settlement of his accounts. The failure of the appellee, therefore, to return a list of insolvents in respect to the public taxes, can have no effect in this case; since such a return would have afforded no information as to the amount of insolvencies, for which he ought to have credit, upon the settlement of his accounts of the collection of the poor rates.

Those insolvencies probably amounted to a large proportion of the balances claimed as unaccounted for. This state of things renders it really impossible to ascertain the insolvencies in the collection of the poor rates of 1803 and 1804; yet great injustice will be done the sheriff, if no allowance is made for them. This difficulty, it was argued, ought to have been removed by the appellee: but the answer is, that the negligence that has produced it, is in a greater degree imputable to the appellants than to him. Upon these notions made against the sheriff at so late a day, it is impossible to do him justice. In the case of *Ross v. Darby*, 4 Munf. 428, the court held, that a lapse of less than twenty-two years, connected with other circumstances, was sufficient to discharge a sheriff from a claim for clerk's fees, on the presumption of payment. The case is not exactly analogous to this: but the policy and justice of fixing some limitation to such claims, is not the less strong in the present case. The delay to prosecute these claims for twenty years in each case ought not, under the other circumstances attending them, to be countenanced.

The judgments of the circuit court are affirmed.

584 *Harris v. Harris.

April, 1831.

(Absent COALTER, J.)

Continuance—Absence of Material Witness*—Delay.—

Upon a motion for a continuance, upon the ground of the absence of a material witness, the court, if it sees cause to suspect that the party is mistaken or that his object is delay, may examine him as to what he expects to prove by the absent witness.

In an action for slander, brought by John Harris against William Harris, in the circuit court of Nelson, the following slanderous words were charged in the declaration, to have been spoken by the defendant of and concerning the plaintiff, viz. that the defend-

ant had said, "that the plaintiff, as the agent of William Moon, had defrauded Moon in the purchase of wheat." and "that the defendant had matters fixed to prove the plaintiff a rogue." And in justification of these words, the defendant pleaded, that the plaintiff as the agent of Moon, a purchase of wheat for Archibald Taylor, did defraud Moon, as purchaser for Taylor, in this, that the plaintiff had purchased a crop of wheat of one John Roberts, at the price of 175 cents per bushel, for and upon his own account, and the price of wheat and flour having greatly fallen in the market, the plaintiff afterwards imposed — bushels of that same parcel of wheat, by delivering the same to Moon or to Taylor, falsely and fraudulently representing and pretending, that he had purchased the wheat for Moon or Taylor, at the price of — per bushel as aforesaid, and requested Moon or Taylor to receive the wheat of him, and to allow him, as their agent, the said price of — per bushel for the same, when in fact, the plaintiff had purchased the said parcel of wheat, at his own risque and on his own account, and not as the agent of Moon or Taylor: wherefore, the defendant was well justified in speaking the said words &c. Upon this plea, an issue was made up.

When the cause was called for trial, the defendant moved for a continuance, on

the ground of the absence of Archibald 585

*Taylor, who had been duly summoned as a witness for him, and whose testimony he swore was material: and examined by the court, as to the points on which he deemed Taylor's testimony to be material, he stated, that he expected to prove by him, that a crop of wheat which the plaintiff had purchased from John Roberts at a high price, had afterwards been sent to Taylor, and delivered to him as wheat purchased for him by his agent Moon, through the instrumentality of his plaintiff, who was employed by Moon to purchase wheat for Taylor; that he Taylor had paid 175 cents per bushel for this wheat, the same price at which the plaintiff had bought it; and that when Taylor received it, he did not know that the plaintiff had purchased it on his the plaintiff's own account, but supposed that it had been purchased by his agent Moon, for account of him Taylor: and the defendant farther stated, that he expected to prove by other witnesses, that the plaintiff had in fact purchased the wheat on his own account at 175 cents per bushel, and had afterwards imposed it on Moon, as wheat purchased for Taylor at that price. Upon this, the plaintiff agreed to admit, that Taylor had received the wheat from Moon, as Wheat bought for him by Moon, and that Taylor when he received it, knew the plaintiff had bought it on his own account; and to admit also, that the plaintiff had bought the wheat at 175 cents per bushel, though not on Taylor's account, but for another person, who had thrown it on the plaintiff's hands; but he denied, that he had imposed the wheat on Moon, as wheat purchased for Taylor, and alleged, that he had sold the wheat as his own property to Moon for Taylor, at 162½ cents per bushel, which was the price Taylor paid him for it; all which he was ready to prove

*Continuance—Absence of Material Witnesses.—On this subject, the principal case was cited in *Walton v. E.* 32 Gratt. 865; *Welch v. Com.*, 90 Va. 821, 18 S. E. Rep. 378; *Phillips v. Com.*, 90 Va. 403, 18 S. E. Rep. 841; *foot-note* to *Hewitt v. Com.*, 17 Gratt. 627. For further information, see monographic note on "Continuances" appended to *Harman v. Howe*, 27 Gratt. 676.

by Moon, then present in court and attending as a witness. Upon this, the court not regarding the evidence which the defendant said he expected from Taylor, material to his defendant, and recollecting also that the cause had twice before been continued at the defendant's instance, under circumstances which induced the court to suspect that 586 *the object was delay, overruled the motion for the continuance: to which the defendant filed exceptions.

Verdict and judgment for the plaintiff for 500 dollars damages; from which the defendant appealed to this court.

Nicholas and Stanard for the appellant: Johnson for the appellee. The questions argued were, 1. Whether the evidence which the defendant stated he expected from the absent witness Taylor, was material; 2. Whether the court had a right to examine the party as to the testimony which he expected from the absent witness, and thus to compel him to disclose his defence? *Anthony v. Lawhorn*, 1 Leigh 1, and *Millstead v. Redman*, 3 Munf. 219, were cited.

CABELL, J. The first and main question is, Whether the evidence expected of Taylor as stated by the defendant, was material to his defence? To decide this question, it is necessary to compare the evidence with the facts stated in the plea; for when the defendants in an action of slander pleads justification, and the issue is made up, on the facts set forth in the plea, it is to those facts the evidence must relate. The substance of the plea is, that the plaintiff had purchased wheat on his own account, at 175 cents per bushel, and afterwards when the price had fallen, fraudulently delivered it to Moon or to Taylor, falsely representing that he had bought it as the agent of said Moon or Taylor, and requested Moon or Taylor to receive it, and to allow him as agent aforesaid, the same price of 175 cents per bushel. This plea would be supported by evidence, that the plaintiff, after having purchased the wheat on his own account, had made the fraudulent delivery and false representations, stated in the plea, either to Moon or to Taylor. Did the defendant expect to prove by Taylor, that the plaintiff had made the fraudulent delivery and false representations to Moon, or did he expect to prove that he had made

587 them to Taylor? Not to Taylor, certainly; for *his statement as to the evidence he expected to adduce, shews that he intended to prove that the plaintiff had imposed the wheat on Moon, as wheat purchased for Taylor; and that he expected to prove this, not by Taylor, but by other witnesses. He did not pretend, that Taylor could prove the price originally given for the wheat, or that it was sent or delivered to him by the plaintiff, or that the plaintiff had made any representations to him on the subject. The testimony of Taylor, therefore, was not material; and, consequently, his absence afforded no ground for the continuance of the cause.

I do not think that the question as to the propriety or impropriety of compelling a party to disclose what he expects to prove on the trial, arises in this case; for it does not appear that the defendant objected to being examined on the subject. I should not be disposed to encourage such a practice, except

in cases where the judge may suspect, that the party is mistaken as to the materiality of the testimony, or that he is influenced by a desire to delay the trial unnecessarily. And as, on such occasions, the judge, before whom the motion for a continuance is made, has better opportunities of forming correct opinions as to the motives of the party, than this court can have, I think a considerable latitude of discretion ought to be left to the judges of the courts below, on this subject.

The other judges concurred. Judgment affirmed.

588 **Linney's Adm'r v. Dare's Adm'r &c.*
and Others.

April, 1831.

(Absent COALTER and GREEN, J.)

Chancery Jurisdiction—Partnership Bonds—Complete Remedy at Law—Case at Bar.—M. and D. merchants and partners, contract debts to L. for which M. in the name of the firm of M. & D. with R. as surety, execute bonds to L. in 1799 and 1801: D. dies: M. lives till 1818, and then dies insolvent, the principal of the debts due L. with interest from 1816 remaining unpaid: R. the surety is perfectly solvent: in 1821 L. without bringing suit on the bonds against R. the surety, exhibits bill in chancery, against the representatives of D. the administrator of M. the surviving partner, and R. the surety, to charge D.'s estate with the debts, or to have payment of them from the parties, according to their respective liabilities. **Held**, that L. had a clear and complete remedy at law, by action on the bonds against R. the surety, and, therefore, the court of chancery has no jurisdiction to entertain such a bill.

***Chancery Jurisdiction—Partnership Debts.**—See principal case distinguished in *Sale v. Dishman*, 3 Leigh 560, in which case it was held that a court of equity has jurisdiction to subject the estate of a deceased partner to the payment of a partnership debt where the surviving partner proves insolvent. As to chancery jurisdiction, see generally, monographic note on "Jurisdiction" appended to *Phippen v. Durham*, 8 Gratt. 457.
Partnership—Bond of individual Partner for Partnership Debt—Effect in Equity.—Unless it appear that the note or bond of an individual partner is designed to be accepted in discharge of the partnership, it will not have that effect in equity. Thus, if a judgment be obtained against a surviving partner, on notes of the firm, the judgment is, at law, an extinguishment of the original notes (for, transit *in rem adjuclcatum*); and so in case of a bond, it would be, at law, an extinguishment of the simple contract; yet, in both cases, it would be in equity a partnership debt still. This principle, I understand, to be distinctly recognized by this court in *Williams v. Donaghe*, 1 Rand. 800, and in *Linney v. Dare*, 2 Leigh 588. **TUCKER, P.** in *Sale v. Dishman*, 3 Leigh 566, 568. See also, opinion of **CARR, J.** in same case (561).

Same—Death of One Partner—Liability of His Estate for Partnership Debt.—A court of equity has always looked upon the representatives of a deceased partner in the light of a surety for the partnership debts, as chargeable only in the event of the insolvency of a surviving obligor. **GALT v. Calland**, 7 Leigh 601, citing principal case, and *Sale v. Dishman*, 3 Leigh 448, 561, 567. To the same effect, the principal case was cited in *Jackson v. King*, 12 Gratt. 506, and *Foot-note* to *Galt v. Calland*, 7 Leigh 596, containing extract from *Jackson v. King*, 12 Gratt. 507. The right to charge the estate of a deceased partner for the debt of the firm is a creature of the court of equity, and it will be administered only upon its own terms and according to its general rules and principles. And, it may be waived by the creditor, or it may be lost by the course and conduct which he adopts; and thus the equity which he would otherwise have had, will be entirely repelled. This is recognized as the law by **J. CARR** in *Linney v. Dare*, 2 Leigh 588, 596, and by **J. TUCKER** in *Sale v. Dishman*, 3 Leigh 588, 567. **LAW, J.** delivering the opinion of the court in *Jackson v. King*, 12 Gratt. 507. And the creditor by his laches, may put an end to his equity against the estate of deceased partner. *Jackson v. King*, 12 Gratt. 514, citing principal case.

Same.—On the subject of partnership, see generally, monographic note on "Partnership" appended to *Scott v. Trent*, 1 Wash. 77.

Linney exhibited a bill in July 1821, in the superior court of chancery of Fredericksburg, setting forth that the mercantile house of Murray & Dare having become indebted to him, in the course of trade, in the sum of £254. a bond for the debt was executed to him, on the 16th November 1799, by Murray, in the name of the house of Murray & Dare, and by James Ross, in the name of the mercantile house of Colin & James Ross, as surety for Murray & Dare; and that Murray & Dare having contracted a farther debt to Linney of £440. and Dare having afterwards died, a bond for this debt also was executed to him on the 1st May 1801, by Murray as the surviving partner of that house, and James Ross in the name of the house of C. & J. Ross, as the surety. That the interest was regularly paid by Murray, upon the first debt, till the 1st December 1816, and on the last, till the 1st January 1817, but the whole of the principal of both debts, with interest thereon respectively from those dates, remained due. That Murray afterwards died insolvent, and administration of his estate with his will annexed was granted to Warren Ashley. That Dare died intestate; and administration of his estate was committed to Lewis Halliday deceased, then sheriff of Spottsylvania; to whose hands there came assets of Dare's

589 *estate, derived from the social effects of Murray & Dare, to a larger amount than the debts due to Linney, a great part of which assets he distributed and paid over to Dare's widow and children, his distributees; but there were funds of Dare's estate remaining in his hands at his death, of which he had rendered no account, and which had either been converted by him to his own use, or came to the hands of Waller Halliday his executor. That administration de bonis non of Dare's estate was committed to Hugh Mercer sheriff of Spottsylvania. And that Colin Ross of the house of C. & J. Ross was dead, and James Ross was his administrator. The bill made Waller Halliday the executor of Lewis, Mercer the sheriff and administrator de bonis non of Dare, the distributees of Dare, Ashley the administrator with the will annexed of Murray, and James Ross as administrator of Colin Ross, and as surviving partner of C. & J. Ross, parties defendants; and prayed, that the defendants, or some of them, according to their respective liabilities, might be decreed to pay the plaintiff the debts due to him with the interest thereon; and general relief.

The defendant Ross, in his answer, stated, that he joined in the bonds to Linney, as surety for Murray & Dare, who had jointly contracted the debts, that house being at the time perfectly solvent; that Lewis Halliday, the first administrator of Dare, received of Murray, the surviving partner, about 5000 dollars of the partnership funds, part of which he distributed to Dare's widow and children, and retained the residue in his hands till his death; and that Murray had died insolvent. And he insisted, that Dare's estate was still liable in equity for the debts due to Linney, and ought to be applied to the payment of them, in exoneration of the surety.

The defendant Waller Halliday answered, that though it was true, that administration

of Dare's estate was committed to his testator Lewis Halliday, as the then sheriff of Spottsylvania, yet he took no part personally in the administration; it was confided 590 to and conducted by Stapleton *Crutchfield, one of his deputies; and as no part of Dare's estate was ever in fact in his testator's hands in his lifetime, so none of it came to the hands of the defendant his executor.

The defendant Ashley answered, that his testator Murray died insolvent, and that he had fully administered the effects he left.

The distributees of Dare, in their answer, alleged that Ross, the surety in the bonds held by Linney, was perfectly solvent, and objected to the jurisdiction of the court: that the plaintiff's case was not proper for relief in equity. And they declared their belief, founded on circumstances which they stated, that the debts due to Linney, were not the social debts of Murray & Dare, but the individual debts of Murray, and that Ross joined him in the bonds, not as surety for Murray & Dare, but for Murray individually. But, if these were the social debts of Murray & Dare, yet they insisted, that Dare was not bound by the bonds which Murray executed for them in the name of the house; that the bonds, however, extinguished the simple contract debts for which they were given; but, supposing they did not, Linney must rest his claim, as against Dare's estate, on the original assumpsit of Murray & Dare; and against such claim upon the original assumpsit, they pleaded the statute of limitations.

As to Mercer, the sheriff and administrator de bonis non of Dare, the bill was regularly taken pro confesso.

There was proof, that the debts due to Linney, for which the bonds of the 16th November 1799 and the 1st May 1801 were executed by Murray and Ross, were the social debts of the house of Murray & Dare; that Murray was regarded as solvent as late as November 1817; that he had retained in his hands, out of the social funds of Murray & Dare, upon settling the accounts of that concern, ample means to satisfy the debts due to Linney, and it was owing to Linney's indulgence, that payment was not early obtained of him; that he died insolvent; and that Ross the surety was perfectly solvent.

591 *And it appeared, that Lewis Halliday the first administrator of Dare, obtained a decree of the county courts of Spottsylvania in March 1810, against Murray the surviving partner of Dare, for £1468. with interest &c. The accounts upon which this decree was founded, shewed, that this was Dare's share of the surplus of the partnership effects, over and above the debts due from the house; and, particularly, after crediting Murray for the amount of the debts due to Linney, for which Murray was liable though he had not paid them, which credit was allowed him by the commissioner, who stated the account, expressly "on the presumption that Dare's representatives would be absolved from any responsibility for those debts to Linney."

Linney died pending the suit, and it was revived in the name of his administrator.

The chancellor dismissed the bill with costs, without prejudice to any claim which the plaintiff could maintain at law against

the defendant Ross or against Dare's administrator.

Linney's administrator appealed to this court.

The cause was argued by Johnson for the appellant, and by Stanard and Harrison for appellees. The first question was, whether the case was proper for relief in equity? and upon the supposition that it was so, many other points were raised and discussed at the bar; but the cause was decided upon the point of jurisdiction.

CARR, J. There were many questions raised in the argument at the bar and ably discussed: but the first, necessarily, was as to the jurisdiction of a court of equity to relieve in such a case. It was objected to the jurisdiction, that Murray and Ross having executed bonds to Linney for the debts in question, and Ross the surety being proved, and admitted on all hands, to be perfectly solvent, Linney had a plain and complete remedy at law, and therefore, could not be entertained in equity. We have decided over *and over again, that equity

will not entertain jurisdiction, where the remedy at law is clear and complete: the general doctrine, indeed, is too well settled to be discussed. The case of Hoare v. Contencin, 1 Bro. C. C. 27, seems to me exactly like the present, so far as the question of jurisdiction is concerned. It was thus: the defendants being concerned in a speculation in tea, borrowed, by their broker, a large sum of money from the plaintiffs, who filed a bill, against two of the principals who were alive and solvent, the assignees of one who had become bankrupt, and the representatives of the other who had died; contending that they were all bound (though not named) by the act of their broker, and stating the whole as a partnership transaction. It was objected, for the defendants, that this was a matter merely at law; that the plaintiffs, upon their own shewing, ought to have brought their action against the two surviving and solvent partners who were liable to the whole demand. The plaintiffs' counsel contended, that the bill was well brought; and, among other arguments, urged, that, it would prevent circuity of action, for if a recovery was had at law against the solvent partners, they must go into equity, to recover against the assignees of the bankrupt, and the representatives of the deceased partner. Lord Thurlow said, "It is of great consequence, that it should be understood, what are the bounds between the jurisdiction of courts of law and courts of equity; because, otherwise, much difficulty will arise from parties being put to a great expense, to try here what should be tried at law; and, what is worse, a party would be permitted to go on here, for legal consequences, although the court must send it to law, to try the legal right. The question is, whether this case differs an iota from the common case of an action at law. What do you desire? Distribution? Do you not contend, that you have a right against all and each of these parties? Here all the equity is, that if one party cannot pay, the other shall; the question is merely between the defendants. Can the plaintiff bring all

the parties before the court, to try the right *between them, when he has

nothing of his own to try? It is true, that where he has an equitable demand, the plaintiff must bring all the parties interested before the court." After several other remarks, he concluded: "It would have been tried at law, at the expense of about £100. Here is an immense quantity of pleadings and depositions, an enormous expense, to bring in question a demand which is merely at law." And he dismissed the bill with costs. Let us see, for a moment, how aptly this case fits the one before us. Linney had a complete and plain remedy at law: he had only to sue Ross on his bond, get a judgment, and his money was made; for all admit that Ross is wealthy. Instead of this suit at law against one, he files a bill against numerous parties, whose responsibilities, if established, are several and various. He resorts to the expensive and cumbrous machinery of a suit in chancery, with bills, and answers, and depositions, and reports, and exceptions &c. instead of an action of debt on a plain bond. And the case has already been in court ten years, instead of as many months which it might have taken to get judgment on the bond. For this change of forum, the bill does not assign the semblance of a reason. But several were given in the argument. It was said, that it was to save circuity of action, and to put the burden at once where it ought to lie. But lord Thurlow tells us, it is no part of the plaintiff's business to be anticipating the equities which may arise between others, in consequence of his recovery at law; that he can come into equity, for no such reason; but must pursue his legal remedy, and leave it to those concerned, to fix the debt where it ought to rest. Again, it was said, that though the plaintiff might sue at law, he had an equal right to pursue Dare's representatives in equity; as a party, having a bond with surety and a mortgage for the same debt, may sue the surety at law, or go into equity to enforce his mortgage, or pursue his remedies in both courts at once, if he choose. It is certain he may do this: he proceeds, in each case, on the deed of the debtor, and the bill is to

enforce the *real security. But is the case before us like that? Murray & Dare owed these debts by simple contract to Linney: Murray with Ross as surety, executed two bonds for the debts: these bonds, at law, extinguished the simple contract debts: the execution of them, and the death of Dare, threw on Murray the whole legal responsibility. Dare's representatives could not be touched at law; and though, in equity, neither the giving of the bonds, nor the death of Dare, discharged them from the debt, yet it materially changed their situation. Their liability was, now, neither immediate nor absolute. Watson says, "At law the executor of the deceased partner is not liable to be proceeded against by the partnership creditors. But if they find the surviving partner not responsible, they may come upon the deceased partner's estate in equity." Gow also lays it down, that the surviving partner must in the first instance be called on; and it is settled he says, that upon the insolvency of the surviving partner, the representative of the deceased may be resorted to in equity. Wats. on Part. 368; Gow, 460. And lord

Eldon has said, (ex parte Kendal, 17 Ves. 527,) "that in many cases the representative may be entitled to say to the creditor, who chooses to make the demand, that justice requires the surviving partners to pay the debt: they are to be considered the principals: he is merely a surety." These authorities shew, that the two remedies do not exist simultaneously, but the creditor must first resort to the surviving partner, and on his insolvency, to the representative of the deceased partner. In all my examinations (and they have been laborious) I have not found one single case, where the creditor has been permitted to pursue the representative of the deceased partner in equity, until he had sued the surviving partner at law, and shewn a defect of assets, or such partner had been declared bankrupt. But it is said, that Murray is dead insolvent; and though Ross is bound in the bonds, he is only a surety. I answer, this does not authorise a resort to equity: while

Ross is solvent, the remedy at law is clear and complete; nor does the fact of his being a surety alter the case. There are thousands of bonds given with sureties, sometimes one, sometimes many: if this doctrine were correct, whenever the principals died, the obligee might file his bill in equity, either to make the representatives of the principal pay, or to settle the equities, and equalize the contribution between the sureties: but who ever heard of such a course? Linney, then, I think, with the bond of Ross in his hands, on which he had brought no suit, had no right to file this bill in equity against the representative of Dare. But, supposing this difficulty removed, we are told this right to pursue the representatives of the deceased partner, may be lost: that it is "a demand in equity only, and to be enforced only upon equitable principles;" and "the right standing only on equitable grounds, if the dealing of a creditor with the surviving partners has been such, as to make it inequitable that he should go against that fund" (the estate of the deceased partner) "he would not, upon general rules and principles, be entitled to the benefit of that demand;" per lord Eldon, in ex parte Kendal. [And judge Carr went into an examination of the peculiar circumstances of this case, and, upon the merits, declared his opinion to be, that Linney had no well founded claim in equity, against Dare's representatives; but, as the other judges concurred with him in declining the jurisdiction, his remarks on the case, in the other point of view, are not reported.]

CABELL, J. If Linney had pursued his legal remedy on the bonds in the proceedings mentioned, without being able to obtain satisfaction of his debts; or if it appeared that Ross, the surety to those bonds, was insolvent, as well as Murray; then he would have an equity to claim satisfaction from the estate of Dare, the deceased partner, unless that equity should be rebutted by circumstances sufficient to produce that effect. But as no suits at law have been prosecuted on those bonds, and as it is certain that Ross, the surety, is solvent, I am of opinion that Linney had no right to come into a court of equity against the representatives of Dare. Upon this ground, without

deciding any other question arising in the cause, or discussed at the bar, I am for affirming the decree.

BROOKE, J., concurred. Decree affirmed.

Young v. Gooch and Brown.

April, 1831.

(Absent CABELL and COALTER, J.)

Real Estate—Contract for Purchase of—Ratification by Commonwealth—What Constitutes.—A county court, empowered by act of assembly in 1784, to select a place on which to establish an inspection of hemp and hemp warehouses, and if the proprietor of the ground will not erect the warehouses, to cause them to be erected at public expense, but not empowered by the law to purchase the ground itself for the commonwealth, contracts with the proprietor to purchase the ground itself, and orders payment of the purchase money thereof out of the treasury, and the same is paid to the proprietor accordingly: the commonwealth holds the ground till 1797, when the inspection is discontinued, and thenceforth till 1816, when an act of assembly is passed, claiming this ground as the property of the state, putting it under care of the executive, and directing it to be sold: HELD, that the actual holding possession under the contract of the county court, and the assertion of the right of property by the act of 1816, are a ratification of the contract made for the purchase of the ground by the county court, and a sanction of the contract.

Same—Claim of Land in Possession of Commonwealth—Remedy of Claimant.—If the commonwealth is in actual possession of land, an individual claiming the same, cannot enter upon that possession, but must resort to his petition of right: and, if he enters, and is ousted by actual force, by the officers or agents of the commonwealth, having lawful orders to do the act, he cannot maintain trespass against them.

To a declaration in trespass *quare clausum fregit*, by Young against Gooch and Brown, in the circuit court of Henrico, the defendants pleaded, 1. The general issue: 2. A special plea, in substance, that the locus in quo was a lot in Richmond, which was, on the day of the supposed trespass complained of, the property and in the possession of the commonwealth, and so under the superintendence of the executive; and the plaintiff having, on the same day, unlawfully entered and trespassed on the lot, so being the property and in the possession of the commonwealth, by erecting a fence upon it, and digging the soil, the executive ordered the defendants, who were the lawful officers of the government bound to obey and execute its lawful orders in that behalf, to forewarn the plaintiff from persisting in his said trespass, and if notwithstanding such warning he still persisted, to remove the said fence; and the defendants gave the plaintiff warning accordingly, and he not regarding the same, and persisting in his said trespass the defendants in pursuance of the order of the executive, as lawfully they might and were bound to do, caused the fence so by him erected, to be pulled down, and the possession of the lot to be retained by the commonwealth, whose property it was, and in whose possession it then was and yet continued; which was the trespass supposed and complained of in the declaration: and 3. Another special plea varying from the other, in only alleging that the locus in quo was in the lawful possession of the commonwealth, at the time of the trespass complained of, without asserting also that it was the property of the commonwealth. Upon these pleas issues were made up.

At the trial, the plaintiff filed two bills of exceptions, and the defendants filed one, to opinions and instructions of the court given to the jury.

1. The plaintiff having adduced evidence, that the defendants had forcibly entered upon lot number 194, in Richmond, whereof he claimed the title and possession, and pulled down an enclosure recently put there by him, which was the trespass complained of; the defendants, on their part, shewed an order of the county court of Henrico, made in December 1784, in these words; "Charles Lewis, the proprietor of a piece of ground, on which it is intended to erect warehouses for the reception of hemp, in this county, agreeably to the act of assembly, for
598 establishing an inspection *of hemp,* appeared in court, and refused to build the same; whereupon it is ordered that J. Y., R. A., and J. B., or any two of them, be appointed commissioners to let the building of the said warehouses, agreeably to the directions of the said act." And another order of the same court, made in January 1787, in these words: "Ordered that the treasurer pay to Charles Lewis the sum of £145. for the lot number 194, on which the hemp-houses stand, agreeably to the valuations thereof made and returned." And a receipt of Charles Lewis for the £145. paid him at the treasury, on the 3d April 1787, "for the lot," according to the order of the county court. And then the defendants adduced evidence to prove, that the lot in question was put into the possession of the commonwealth in 1784, by consent of and contract with Lewis, the former owner; that a hemp warehouse was built upon it, and a public inspection of hemp there established; that the inspection having in fact gone down in 1797, the warehouses were removed by order of the government in 1801; that the lot was always reputed to be public property, and rated as public property on the books of the commissioner of the revenue and
599 by *the assessors of property in Richmond, and had been represented to be so by the plaintiff himself, prior to his taking possession thereof; and that the commonwealth, through the officers of government, had exercised divers acts of ownership over it from 1809 to 1814. The defendants also gave in evidence an act of assembly concerning the public property in the city of

*The act of May 1784, ch. 37, 11 Hen. stat. at large, p. 412. This statute provided, that public warehouses for the reception of hemp, should be kept at or near Richmond, Alexandria and Fredericksburg; and authorized and required the justices of the courts of the counties wherein the inspections were established, to select proper places for the warehouses and inspections; and to cause the owners of the places so selected to be summoned to court, there to declare whether they would undertake to erect good and sufficient warehouses; and if they undertook them, to require bond with surety of them for the due performance of such undertaking; and if they refused to undertake them, then to contract for the erection of such warehouses, and to certify the charge to the treasurer, who was directed to pay the same &c. The act also established the inspections at the places so to be selected; and authorized the inspectors to receive of the exporter or manufacturer, 1s. 3d. per cwt. of hemp inspected, and directed them to account for and pay one half thereof to the treasurer, or to the proprietor, as the case might be. It was agreed on all hands that this act gave no authority to the county court of Henrico, to purchase for the commonwealth, the property of the site it selected for the warehouse.—Note in Original Edition.

Richmond passed the 28th February 1816.† And they announced, that they should rest their defence on the ground, that the commonwealth had been in actual possession of the lot in question from 1784 till the passing of the act of February 1816, and thenceforth, till the plaintiff took the possession and made his fence thereon, which was some short time before the act complained of by him as a trespass; that the plaintiff had unlawfully intruded upon the lawful possession of the commonwealth; and that, though the defendants, being and acting as the agents and officers of the commonwealth, had forcibly entered and expelled the plaintiff from the possession of the premises so by him unlawfully acquired, yet the plaintiff could not maintain this action against them, for forcibly expelling him from such his possession acquired by such his unlawful intrusion on the lawful possession of the commonwealth. Whereupon, the plaintiff's counsel moved the court to instruct the jury, that under the act of May 1784, it was not competent to the county court of Henrico, or for any other officer or functionary of government, to acquire the fee and freehold of the lot in question; that, under that act, it was only competent to the county court to acquire, for the commonwealth, the use of the lot as a site for a hemp warehouse, and as an easement; that, as the fee and freehold of the lot could not, and no more than an easement could, be law-

fully acquired by or for the common-
600 wealth, so the fee and freehold *of the lot was not acquired, but only an easement therein, and the commonwealth never had any right to the fee and freehold, but only to the easement; that the commonwealth's possession necessarily followed and was co-extensive with her right; and that her possession of the easement did nowise divest, but was perfectly compatible with, the possession of the fee and freehold in the original owner of the soil. But the court refused to give this instruction, and gave a charge to the jury, to the following effect: That the act of May 1784 made no provision for acquiring title to the commonwealth of the lands on which the hemp warehouses were to be erected, or for the payment to the proprietor, of either the fee simple value or the annual rent of the lands; but only directed the county courts to select the sites for the warehouses, and if the proprietor refused to erect them, to cause them to be erected at public expense, and to certify the charge for erecting them, to be paid at the treasury; and authorized the inspectors to receive of the exporter or manufacturer 1s. 3d. per cwt. of the hemp inspected, and required them to pay one half to the treasurer or to the proprietor; that is (as the court supposed) to the former, in case the warehouses were erected at public expense, or to the latter, if they should erect them. That there was nothing in the statute, however, to prevent the commonwealth from obtaining the possession, not of an easement

†Acts of 1815-16, ch. 14, p. 28, the second section of which authorized the executive to cause to be sold among other public property in Richmond, "a lot which had been marked out as a site upon which to establish a hemp warehouse," (meaning the lot in question); and the 5th section placed the public property in Richmond, under the care and control of the executive.—Note in Original Edition.

merely, but of the land itself; since, though the only object of obtaining the possession, was to erect the warehouses, yet one and perhaps the best mode of effecting that purpose, was to obtain actual possession of the land, as, in case of destruction of the warehouses by accident or time, it might be proper to rebuild them; and it might be, that the proprietor would refuse to permit the warehouse to be erected, without being paid the fee simple value of the land, and the county court, acting for the commonwealth, might refuse to pay that value, without having possession of the land given to the public: that thus it might be, that the privilege of erecting the warehouses, could not

601 *in fact be exercised, without obtaining possession of the land itself. That there was nothing in the law to inhibit the commonwealth from holding such possession. That possession of the lot in question, might be lawfully acquired by contract with the proprietor. That, if the jury should find from the terms of the bargain appearing from the evidence above stated, or any other that should be adduced, that it was the intention of the proprietor to part with the possession of the lot itself, though he never conveyed, or made any formal contract in writing to convey the same to the commonwealth, and that the agents of the commonwealth, in conformity with that intention, did take possession of the lot in question, the commonwealth ought to be protected in the possession thereof, to the same extent as an individual would be protected, who should have purchased the lot, paid the purchase money, and became possessed thereof. That the actual possession by the commonwealth for a series of years, would enable her to maintain trespass, or to defend herself in an action of trespass. And that the commonwealth, being once in possession of the lot itself, must be presumed to continue in possession, till actual ouster, notwithstanding the removal of the hemp warehouse, and the discontinuance of the hemp inspection on the premises. To this charge the plaintiff filed exceptions.

2. The plaintiff then offered in evidence, a deed of gift, executed by Charles Lewis and Susan his wife, to their son Gilley Marion Lewis, dated the — day of — 1784, and recorded in Henrico county court on the 6th September 1784, conveying lands to G. M. Lewis, the son, whereof the lot in question was parcel; and a deed of bargain and sale, executed by G. M. Lewis and wife to the plaintiff Young, dated the 26th May 1818, and duly recorded in the same court in June following, conveying the lot number 194, now in question, to the plaintiff. In this last deed there was a special warranty

602 *effect: That whereas the lot conveyed by the deed, had been therefore in the possession and occupancy of the commonwealth, and used as a hemp warehouse; and whereas, by force of the provisions of an act of assembly passed in the year 1792,* and of the discontinuance of the warehouse and the inspection, the right and title of the

lot had reverted to the said G. M. Lewis, and he upon the resumption of his original estate therein, had become bound to pay the sum which had been before received of the commonwealth on account thereof, with interest from the date of the receipt: therefore, the lot was conveyed to Young without general warranty, and for the farther consideration that Young undertook to pay, or otherwise to acquit Lewis, of all sums which might be claimed by the commonwealth, for the purchase money paid for the lot. Upon this, the defendants moved the court to instruct the jury, that, unless the plaintiff shewed, that G. M. Lewis, from April 1787, the date of the receipt of the £145. for the lot, by Charles Lewis, from the treasury (as mentioned in the plaintiff's first bill of exceptions) to May 1818, the date of his deed to Young, made some claim on the commonwealth for that sum of money for which Charles Lewis's receipt was given on the treasury books, or asserted title to the lot for which the money was so paid, the jury ought to presume that the money was so paid to Charles Lewis in April 1787, with G. M. Lewis's assent; and that the deed of G. M. Lewis to the plaintiff, admitted that the money so paid, had been duly paid, and it was not competent to the plaintiff claiming under that deed, to question that fact. But the court, considering these as questions of fact, refused to give such instructions: and the defendants excepted.

3. The evidence mentioned in the first two bills of exceptions, having been given to the jury, and other evidence having been adduced by the defendants tending to prove a

603 *long possession by the commonwealth of the lot in question, and the evidence of both parties having been gone through, the defendants' counsel moved the court to instruct the jury, That if they found, that the commonwealth had been, for more than thirty years, in possession of the lot on which the trespass complained of was alleged to have been committed, and that possession continued until the plaintiff's entry; and that the plaintiff had entered upon the possession of the commonwealth; and that the defendants, as officers of government, acting under orders of the executive, had, within four or five days after such entry of the plaintiff, entered upon the lot: then, though the defendants so entered with force and with a multitude of people, but using no more force than was necessary to remove the enclosure recently put there by the plaintiff; and though the plaintiff's previous entry had been peaceable, there being then no actual occupant of the premises; and though, at the time of the plaintiff's entry, he was entitled to the mere right of property therein, and continued entitled to the mere right, at the time he was forcibly turned out of possession by the defendants; yet the plaintiff could not maintain this action. And the court did so instruct the jury. To which opinion and instruction the plaintiff excepted.

Verdict and judgment for the defendants; from which Young appealed to this court.

Johnson, for the appellant. The second bill of exceptions in the record, was filed by the appellees, and is of no other importance now, but that it serves to shew the character

*This was a mistake: there was no such act of assembly ever passed, that I can find.—Note in Original Edition.

of the intrusion of the citizen upon the property claimed by the commonwealth, which her officers thought themselves justified in repelling by actual force, and that it may also serve to introduce and explain the instruction last moved for by the defendants and given by the court. It was no lawless intrusion, but a peaceable entry of the citizen, under a claim of title, or rather under a title, paramount to any right of the commonwealth, upon property

604 which at the time was vacant. *The circuit court erred in refusing to give the instructions prayed by the plaintiff, and in the charge which it did give to the jury, stated in the plaintiff's first bill of exceptions. The only organ of the commonwealth competent to the acquisition of real property, is the legislature; and the acts of the legislature (public or private) the only authority, under which the officers of government can make such acquisition for the state; and to those acts only can the courts of justice look, to ascertain the nature and extent of the rights acquired. The act of May 1784, certainly, did not authorize the county court of Henrico to purchase the fee and freehold of the lot in question, or the officers of the treasury to pay the purchase money. The public wanted nothing but an easement: the legislature authorized the county court to acquire that, and no more: and no more could in fact be acquired than could lawfully be acquired. It is not certain (as the circuit court seems to have been aware) that the purchase of the fee and freehold of the lot was really intended: it is most probable, indeed, that the purchase of the easement was all that was intended. For though the order of court of January 1787, directs the payment of £145. for the lot agreeably to the valuation thereof made and returned; yet that might as well mean the easement as the property itself; in like manner as in the common order of a county court to pay the assessed value of a piece of ground, upon which a new road is opened, the language, however general, is always expounded by the law and the purpose, and understood to import a compensation for the easement, not for the property. It may be said, that the price, in this case, was the full fee simple value of the land, and, therefore, the contract was for the land; but non constat that it was the full value; and if it was, the full value ought to have been paid for an easement like this, which though it left the freehold in the proprietor, was likely to deprive him and his heirs forever of the beneficial use. The full fee simple value of lands upon which public roads are run, is generally paid to the

605 proprietor. But be this as *it may, the contract made by the county court of Henrico with Charles Lewis, ought to be expounded by the law under which the court was acting: the county court ought not to be charged with usurping powers not delegated to it, nor the officers of the treasury suspected of paying money out of the treasury without any appropriation, nor the citizen supposed to have parted with his rights of property beyond what was required for the public service: and, upon the facts then before the court and jury, it ought, in point of law, to have been intended, that the

county court meant only to acquire an easement, and Lewis to part with his rights only to that extent. It would be most strange and most mischievous, if a county court opening a new road, should make a general order to pay the proprietor the assessed value of the land, and then that the county should be allowed to claim the land, on the ground that the county had paid for it, and whenever the road should be discontinued, to sell the stripe of land to the highest bidder. In such a case, there can be no doubt, the law would hold that the fee and freehold remained in the proprietor, and would protect his right of property, not only after the discontinuance but during the continuance of the easement. Our case is the same in principle; the same in fact, except that the proprietor has not to contend with a single county, but with the whole commonwealth. And seeing that this act of May 1784 made no express provision for compensating the owners of the lands selected as sites for the hemp warehouses, in case they declined to build the warehouses, but in that case reserved one half of the fees of inspection to the treasury, leaving the other half to the inspector, it ought surely to be intended, that the county court, sensible of this gross injustice, meant to compensate the owner of the lot in question for taking his property, *nolens volens*, for public use as an easement, according to the constant and familiar course in like cases, rather than to purchase the property itself without warrant of law. The just legal inference from the facts before the court and jury, was,

606 that the commonwealth *had only acquired the easement. But the circuit court told the jury, if it found from the terms of the bargain, appearing from the evidence then before it, or any other that should be adduced, that it was the intention of the proprietor to part with the lot itself, and that the agents of the commonwealth took possession of it in conformity with that intention, the commonwealth ought to be protected in the possession, to the same extent that an individual would be in a like case; which certainly means, that the jury might infer a contract for the sale and purchase of the property from the facts then in evidence. The circuit court told the jury, there was nothing in the act of May 1784, to interdict the commonwealth from purchasing the fee and freehold. And surely there was not. But there was nothing in the law to authorize the officers of the commonwealth to make such a purchase; and the constitution forbade them to do it without warrant of law. Then, as to the possession of the commonwealth, that was only co-extensive with her rights: if she cannot be dispossessed, so neither can she be a disseisor. If she had only an easement, her possession ceased, when the inspection was discontinued. But this charge of the circuit court was erroneous, even upon the principles it assumed: the jury was told, that the actual possession of the commonwealth for a series of years, would enable her to maintain trespass, or to defend herself in an action of trespass. But how can the commonwealth sue or be sued in trespass?

The instruction stated in the plaintiff's last bill of exceptions, supposes this state of facts: that a citizen having the right of property in a parcel of land, and finding the

land wholly unoccupied and vacant, enters upon it peaceably, and encloses it; but the commonwealth had previously been in possession of this land for thirty years, and that possession continued till the time of the entry made by the proprietor of the mere right of property: and the jury is told, that, if within four or five days after his entry, the officers

of government expel the citizen by 607 actual violence * (not carried farther than the purpose required), the citizen cannot maintain trespass against them. How the law would have been, if the commonwealth, or her agents, or any person claiming under her, had been in actual possession at the time of the citizen's entry, and he had made a forcible entry, and her officers had peaceably re-entered, is not the question. The reverse of that state of facts was the case before the court. The property was unoccupied and absolutely vacant; the citizen, holding the right of property, entered in peace; the commonwealth's officers expelled him with actual force. The instruction given by the court contradicts the whole doctrine of forcible entry and detainer.

Stanard and Nicholas, for the appellees. Whether the county court of Henrico contracted to purchase for the commonwealth, and Lewis to sell, the lot itself, which had been selected for the site of the hemp inspection in 1784, was a question of fact, which the circuit court left to the jury, upon the evidence the parties had already adduced or might adduce. It was not the province of that court, nor is it of this, to decide upon the sufficiency of the evidence. The jury found the fact.

It is admitted, that the act of May 1784, did not authorize the county court to purchase the property of the land it selected for the hemp inspection, nor the treasurer to pay the purchase money, if the county court contracted for such purchase. But it cannot be denied, that it was competent to the legislature to have given such authority to the county court and to the treasurer; and, if it gave not the authority originally, to ratify and sanction the act after it was done. Now the purchase was ratified, on the part of the commonwealth, by the allowance of the payment of the purchase money out of the treasury; by the taking possession of the subject under the contract of purchase, and the holding thereof, not only during the continuance of the inspection, but long after the inspection had gone down, when the possession could only be referred to a contract and claim of

608 *complete purchase of the property; by the rating of the lot as public property, on the books of the commissioners of the revenue; and, finally and formally, by the act of 1816, asserting the right of absolute property in this very lot, putting it under the care of the executive, and authorizing the sale of it. And, certainly, Lewis had a right to sell the whole fee and freehold, and he could not object that the county court had not lawful authority to make the purchase, after the commonwealth had claimed under it, and the legislature had ratified and sanctioned it. The act of May 1784 did not authorize the county court to contract for the purchase of the easement, and to order payment of the purchase money thereof out of

the treasury, any more than to purchase the property itself: the one was not more without any express warrant of law, than the other would have been. It is obvious from Gilley M. Lewis's deed to Young, that they were both aware, that the property was in the commonwealth; for the claim to it is therein stated to be founded on an act of the legislature remitting it to the original owner, upon the condition of his refunding the purchase money paid out of the treasury with interest.

As to the last instruction, the law is well settled and clear. It is not lawful for a citizen to make entry upon property in possession of the state. Even in the case of an individual, a possession of twenty years takes away the right of entry from the owner of the mere right of property: it gives the right of possession. Young's entry, therefore, was every way wrongful. And if a person having a right of entry, enters with a strong hand, and forcibly ousts the party wrongfully in possession, the party ousted cannot maintain trespass. That is a possessory remedy. The rightful possessor may oust the wrongdoer by force, without giving him any civil remedy, though he may make himself liable to a criminal prosecution. *Argent v. Durrant*, 8 T. R. 403; *Doe v. Reade*, 8 East, 353; *Adams on Eject.* 76, 78; *Hyatt v. Wood*, 4 Johns. Rep. 152.

609 *Johnson, in reply, insisted that the authorities cited did not sustain the proposition contended for; and that no such principle could be applied, to the case of a party claiming, not under a conveyance, but under a mere verbal contract with another, claiming, in truth, only as the tenant at will or at sufferance of the owner of the legal title, so as to justify the claimant of the equity, in forcibly ousting the owner of the legal estate, from a possession peaceably acquired by him. The commonwealth never had any adversary possession: her possession was only permissive, from the beginning. Neither did the circuit court found its last instruction upon the supposition that her possession was an adversary one, but upon the fact of her possession, simply, whether adverse or otherwise.

As to the supposed ratification of the purchase made by the county court of Henrico in 1784, by the act of the legislature of February 1816; that argument assumes the very point in debate. If the county court contracted only for an easement, if by the law under which it was acting, it could acquire nothing more, it can hardly be pretended, that the act of the legislature in 1816, under pretext of ratifying the act of the court, can convert it into a purchase of the property, and ratify the supposed purchase. The act of February 1816, was probably passed under a misapprehension of the rights of the public: if not, it was an unjust and unconstitutional appropriation to the commonwealth of the property of the citizen.

CARR, J. The act of 1784, certainly gave the county courts no power to purchase ground for the erection of the hemp warehouses. It seems from the orders of Henrico court, that, in the commencement, it intended only to have the buildings erected, after the owner of the lot refused to undertake them; but it

is equally clear to me, that after the buildings were put up, the court found it could make no terms with the owner of the lot, short of paying him the full price of the fee; and then it decided (as in common sense
610 *and reason it must) that if the public was to pay the full value, it would buy the lot; and, therefore, in its order of January 1787, it directed the treasurer to pay Lewis £145. for the lot, on which the hemp warehouses stand agreeably to the valuation thereof made and returned. This speaks as plainly (to my understanding) as language can, that this money was paid (not for an easement, a privilege, or any thing, but) for the lot itself, which lot had been valued. And on a copy of this order, the treasurer took a receipt for the £145. as paid "for the lot." If in this purchase and payment, the court and the treasurer overstept the limits of their power, it was surely competent to the assembly to ratify their acts; and the maxim tells us *omnis rati habitio retro habitur atque mandato æquiparatur*. This sanction the legislature has given, I think, 1st, by taking and holding many years under the purchase, and 2ndly, by the act of 1816, expressly recognizing it as public property then in possession of the commonwealth, putting it under the superintendence of the executive, and directing the sale of it, and the application of the purchase money. It will be remarked, that both instructions of the circuit court, excepted to by the plaintiff, are predicated on the jury's being satisfied, by the evidence stated or any other evidence, that the commonwealth took possession of the lot, under the contract, and held it till the plaintiff entered upon it; and of this the jury must have been satisfied or they could not have found for the defendants. I feel justified, then, in taking it as proved, that the possession of the commonwealth, was of the lot itself, claiming it as public property. And this being so, I am very clear, that the plaintiff could not lawfully enter upon the commonwealth. Such an entry seems utterly incompatible with the idea of sovereignty which belongs to the state. The citizen who claims land of which the state is in possession adversely, must resort to his petition of right, and if he enter illegally, upon her, may properly be ousted, as Young was in this case. Thinking, then, that the record shews a case, in which
611 the plaintiff could in no event be entitled to recover, though I may not in all respects agree with the instructions given to the jury, I am for affirming the judgment.

GREEN, J. I think that both the instructions of the court excepted to by the plaintiff, were substantially right, but for a reason different from those assigned by the court below.

The case is shortly this: The commonwealth had been in possession of the lot in question ever since 1784, under a contract made with the proprietor thereof, by the county court of Henrico, acting professedly on behalf of the commonwealth, and which was executed by the payment of the money, the consideration of the contract, by the treasurer, upon the warrant of the auditor. The county court had no authority to make any contract with him in respect to the lot,

nor had the auditor and treasurer any authority to pay the money for the commonwealth. And it does not appear, that the proprietor entered into any written contract in respect to the property, or made any conveyance. The legislature, however, ratified and adopted the contract, whatever it was, and the payment of the money, by the act of 1816, claiming it to be a purchase in fee simple, placing this lot, with all the other public property in Richmond, under the care and control of the executive, and directing the lot to be sold. Whether this contract was a sale and purchase of an easement or of the absolute property, was properly left to the jury, upon the evidence. But, whether it was of the one or the other character, the possession of the commonwealth under it, and the ratification of it, and the claim made to hold the lot absolutely by the act of 1816, did not vest any legal title whatever in the commonwealth: that remained in the proprietor. The plaintiff claiming under him, entered upon the property, and in a few days was expelled from it by the defendants acting under the orders of the executive. The commonwealth, however, acquired by this possession, and ratification of, and claim under, the contract, all the right which an individual could have acquired
612 *under similar circumstances; that is, an equitable right to the easement, or to the property itself, as the case might be. For, the ratification of a contract made by a stranger in the name of another, confers upon that other all the rights which he would have acquired, if he had been an original party to the contract. And if it be true, that the commonwealth can acquire no right or property but by virtue of some legislative act, that circumstance is found in the act of 1816.

The court below held, that under such circumstances, an individual purchaser, in possession under a contract of sale, having paid the purchase money, might defend his possession against the vendor, or enter upon him if he regained the possession; and that the commonwealth had the same rights. This was a mistake; such a possession, not being adverse, even if exceeding twenty years, could not be set up against the legal title in a court of law for any purpose. And even if such a possession of twenty years could operate between individuals, it could not as between the commonwealth and an individual; for she can neither disseise nor be disseised by any one.

There is, however, another principle of the common law, which barred the right of entry of the plaintiff, and justified his expulsion by the public officers entering under the orders of the executive charged by statute with the care and control of this property specifically. There would be an extreme inconvenience, if an individual were allowed, at his own pleasure, to enter upon the possession of the commonwealth, whenever it happened that property in her possession, was held under a defective title, and he was its legal owner, and to hold her out until the mischief could be remedied by an appropriate legislative act, giving compensation and condemning the property for public use, or till the question of right could be investigated and settled in a due course

of law. If such a right was allowed, in respect to property in the possession of the commonwealth, though not in actual use, it must extend to those cases in which it is in her actual occupation, for purposes
613 indispensable, as the *capitol, barracks, armory, arsenals, and the like. I am confident no government in the world allows the existence of such a right in individuals. It certainly was not allowed by the common law: for, in England, if property is in possession of the king, in his political capacity, without title, the true owner cannot regain the possession by entry, but must resort to his petition. 9 Vin. Abr. Disseisin, D. pl. 19, p. 96. And the same remedy exists here, both as at common law and under our statutes. Upon this ground, I think the instructions were right, and that the judgment should be affirmed.

BROOKE, P. The commonwealth can acquire, or assert or defend, her rights to property, only through her agents. In this respect the commonwealth holds a position as to her property, and the manner of acquiring it and defending it, somewhat different from a natural person. In the acquirement of land, it is not necessary that the title should pass to her by deed, in the ordinary forms of law, as in the case of a natural person. It has been her practice, justified by the acts of the legislature, to acquire title to land, by the contracts of her agents designated by law for that purpose, and the payment of the purchase money, as in the case before us. That it has been her practice to acquire lands in the manner stated, is evidenced by the circumstance, that none of the acts of the legislature, authorizing the purchase of land for any public purpose, have provided any other mode by which title to the same was to be acquired; no regular conveyance of the title from the vendor ever being provided for, nor any organ of the government designated to receive it; and the payment of the purchase money having been, it seems, the only requisite to consummate the title of the commonwealth, under purchases made by her agents. That the commonwealth holds a position with regard to her title to property, differing from that of a natural person, results from the circumstance, that she can only act by her agents, and is otherwise intirely passive.
614 Thus, no time runs against *her rights. She cannot be a disseisor or a disseisee, though her agents may be both; and if they act with good faith and under her authority, she makes herself responsible for the consequences. In this view of the rights and condition of the commonwealth, the case before us will be examined.

And the first inquiry is, as to the right of the commonwealth to the lot, on which the trespass complained of is alleged to have been committed by the appellees. On the sound construction of the act of 1784, I think it must be admitted, that the county court of Henrico was not authorized to purchase for the commonwealth, the fee simple interest in the lot in question. But upon the facts of the case, I think it can yetless be doubted, that the court of Henrico did, in fact, purchase for the commonwealth, the fee simple title to the property; that its purchase was

consummated by the payment of the purchase money to Lewis the vendor, by the authorized agents of government for that purpose; and that, though the county court of Henrico was not authorized by the act of 1784, to make the purchase, yet the purchase was, by those acts, ratified by the commonwealth, and gave her the absolute legal title to the property.

The next inquiry is, as to the character of the possession of the commonwealth, at the time the supposed trespass was committed by the defendants, and into the authority by which they entered upon the lot, and the justification of that entry. As to the character of the possession, the facts are, that in pursuance of the object of the act of 1784, a warehouse for the inspection of hemp, was erected on the premises; that there was a regular inspection of hemp established there, and conducted according to law, until about the year 1797, when the inspection was discontinued; that the warehouse was soon afterwards removed; and that, after that period, there was no actual occupancy of the lot by any one, until the plaintiff, more than thirty years after the title and possession of the commonwealth accrued, entered upon it, and enclosed it; a few days after which, the supposed trespass was committed by the entry of the defendants, and ouster of the plaintiff, under the authority of the execu-
615 tive. *Upon these facts, collected

from the bills of exceptions filed in the cause, and others that will be noticed, the correctness of the instructions given by the circuit court to the jury, is to be tested. In doing this, I premise, that if the circuit court stated the law upon the case in evidence, to the jury, more unfavorably to the defendants than to the plaintiff, it is not for the latter to object. And that, I think, was clearly the case. Upon a very argumentative statement of the evidence, on which the instruction was asked for by the counsel for the plaintiff, in the first bill of exceptions, the judge instructed the jury, that if they should be of opinion, from the terms of the bargain appearing from the evidence there stated, or any other evidence in the cause, that it was the intention of the proprietor to part with the possession of the lot itself (though he never conveyed the same to the commonwealth, or made any formal contract in writing to convey), and that the agent of the commonwealth, in conformity with that intention, did take possession of the lot itself; the commonwealth ought to be protected in that possession, to the same extent as an individual would be protected who should have purchased the lot, paid his money, and became possessed thereof. This part of the instruction, I think, was most favorable to the plaintiff: the court might have instructed the jury, on the facts stated, that no deed or formal conveyance from the proprietor to the commonwealth, was necessary; and that the commonwealth, upon the facts admitted as the ground on which the instruction was asked for, had an absolute legal title to the property, and full right to the possession of it, when its agents entered upon it, built the warehouse, and established the inspection

of hemp, as an individual would have had under a conveyance from the proprietor, followed by similar acts, instead of leaving it to the jury, whether the proprietor intended to part with the possession, either from the terms of the bargain, or any other evidence. The error in this part of the instruction, then, was favorable to the plaintiff, and cannot be objected to by him. The remainder

of the instruction I think was correct enough: it was, that the actual *possession by the commonwealth for a series of years will enable the commonwealth to maintain trespass, or to defend herself in an action of trespass, and further that the commonwealth being once in possession of the lot itself, must be presumed to continue in possession until actual ouster, notwithstanding the removal of the hemp warehouse, and the discontinuance of the inspection on the premises. However this might have been as to an individual (which it is not necessary here to decide), as no time runs against the commonwealth, this was, as before remarked, correct enough.

The only remaining question is, whether the instruction stated in the third bill of exceptions, which was asked by the defendants, given by the court, and excepted to by the plaintiff, was correct? That instruction, I think, though in some respects erroneous, was more favorable to the plaintiff than the defendants: it admits a mere right in the property intirely incompatible with the absolute title which was in the commonwealth; and, as no time runs against the commonwealth, and as her possession was adverse to the title of G. M. Lewis at the time when the deed from him, under which the plaintiff claims, was executed, that deed passed no title to the plaintiff, even if G. M. Lewis had title; but, in truth, he had no title; and he was sensible he had none, as appears by the deed itself. The title was vested in the commonwealth, in the manner before stated. As to the previous part of the instruction; it is certainly well settled law, that a party having title to the possession may enter upon it, and defend that entry in an action of trespass against him; and if so, where he uses no force, he may also justify his entry in an action of trespass, though he may have used force, for which he may be prosecuted criminally. As to the authority of the executive, under the act of 1816, placing the public property in Richmond under its care, and as to the authority of the defendants under the order of the executive; both were left to the jury, and must be presumed to have been proved by proper evidence, or the plaintiff would have excepted to it. The judgment is affirmed.

617 ***Currie and Others v. Page and Others.**

April. 1881.

(Absent COALTER, J.)

Privy Examinations.—Who May Take.—Aldermen of Richmond.—Under the statute of conveyances of 1785, ch. 62, the aldermen of the city of Richmond, not being justices of the peace of Henrico, had no authority to take privy examinations and acknowledgments of femes covert residing in Richmond to conveyances of land.

Statute.—Explanation by General Usage.—When the words of a statute are doubtful, general usage may serve to explain them: but the maxim com-

munis error facit jus, has no application to the usages of particular corporate towns or other places.

Ann Currie, the wife of James Currie of the city of Richmond, being entitled in her own right and in fee to an undivided twelfth part of a parcel of land in Chesterfield, called The Black-heath coal pits, and of all the coal and coal pits thereto belonging, the said James Currie and Ann his wife, by deed, dated the 26th September 1796, conveyed the premises to David Ross in fee; and Ross, by deed executed the next day, conveyed the same to Currie, the husband. The deed executed by Currie and wife to Ross, was acknowledged by the wife, on privy examination, before James M'Clurg the recorder, and William Richardson an alderman, of the city of Richmond, where Currie and his wife resided at the time; but the magistrates were not justices of the peace of the county of Henrico. The deed with the privy examination and acknowledgment of the wife, was recorded. Mrs. Currie died a few days after the execution of it, without issue. Currie died in 1807.

The appellees, Page and others, the heirs at law of Mrs. Currie (who were under disabilities at the time of her death, and long after) exhibited a bill in the superior court of chancery of Richmond, in March 1830, against the heirs of Currie and mortgagees claiming under them, and the tenants in common of the eleven undivided twelfth parts of The Black-heath coal pits; insisting, that the deed of Currie and wife, of the 26th September 1796, was null and void as to the feme covert, because her privy examination *thereto and acknowledgment thereof were not taken by justices of the peace of the county of Henrico, who were the only magistrates authorized by the law, as it then was, to take her privy examination and acknowledgment, but by aldermen of Richmond, who had no legal authority for the act; claiming Mrs. Currie's undivided twelfth part of the land in question, as her heirs at law; and praying that Mrs. Currie's deed might be declared null and void; that her undivided twelfth part might be severed, and assigned to the plaintiffs, her heirs; and an account of profits &c.

The defendants, in their answers, insisted, that the deed of September 1796 was duly executed by Mrs. Currie; for that, by the laws, as they stood at the time, and according to the just construction thereof ascertained by long and constant practice under them, the mayor, recorder and aldermen of Richmond, had authority to take the privy examinations and acknowledgments of femes covert residing in Richmond, to deeds of conveyance of lands by them.

The defendants exhibited certificates of the clerks of the general court, of the district court of Richmond, and of the hustings court of Richmond, shewing fourteen instances of privy examinations and acknowledgments of deeds of femes covert, taken by aldermen of Richmond, between the years 1785 and 1794, and the deeds, with the aldermen's certificates of such privy examination and acknowledgment, admitted to record without question.

The chancellor declared, that as M'Clurg and Richardson, who took the privy examination of Mrs. Currie to the deed in question, were not then justices of the peace of Henrico, but one the recorder and the other an alderman of Richmond where Mrs. Currie resided, and as they had no authority to take her privy examination and acknowledgment, that deed was as to her null and void; and he made a decree according to the prayer of the bill.

The defendants appealed to this court; where the cause was argued by S. Taylor and Forbes for the appellants, and 619 *by Johnson for the appellees. All the statutes in any way relating to the subject, were referred to and examined at the bar. The following brief account of them will suffice to shew the grounds of the controversy.

The statute of 1734, ch. 6, § 7, 4 Hen. stat. at large, p. 400, re-enacted by the statute of 1748, ch. 1, § 6, 5 Id. p. 410, provided, that a commission might be issued by the clerk of the general or of any county court, to two or more commissioners, being justices of the county where the feme should reside, to take and certify the privy examination and acknowledgment of femes covert, to deeds of conveyance of lands.

The act of May 1782, ch. 25, 11 Id. p. 45, entitled an act for incorporating the town of Richmond and for other purposes, provided for the election and appointment of the mayor, recorder, aldermen, and common council, of the city, and established the hustings court; and it was enacted by the 6th section, "that the mayor, recorder and aldermen, shall each be vested with the powers of justices of the peace within the said city, and shall have jurisdiction for the space of one mile on the north side of James river, without and around the said city, and every part thereof; for matters arising within the same, according to the laws of the commonwealth." The act of 1736, ch. 24, 4 Id. p. 441, 2, for confirming the charter of the borough of Norfolk, and enlarging the jurisdiction of the hustings court of the city of Williamsburg, contained similar provisions: it gave power to the mayor, recorder and aldermen (of Norfolk) to be justices of the peace within the said borough; and provided, "that the mayor, recorder and aldermen (of Williamsburg) shall have, use and exercise, all the powers, jurisdictions and authorities, out of court, which any justice or justices of the peace of a county now have or can, or may use and exercise."

The statute of 1785, ch. 62, 12 Id. p. 154, made a slight alteration in the general statute of 1734; requiring, that the commission to take the privy examination and 620 acknowledgment *of femes covert to deeds, should issue from the court where the deed ought to be recorded, and be executed by two justices of the peace of that county in which the feme dwelleth.

By an act, entitled an act concerning corporations, passed the 22d December 1796 (after the deed in question was executed, and the privy examination and acknowledgment of Mrs. Currie thereto was taken) it was enacted, "that the magistrates of any corporate town shall have the same power

to examine privily, and take the acknowledgment of a feme covert to a conveyance, and to certify the same, as is by law given to justices of the peace of a county. 1 old Rev. Code, Pleasants's edi. of 1803, ch. 208, § 2, p. 366.

CARR, J. The cause depends wholly upon the question, Whether the magistrates who took the privy examination of Mrs. Currie, were authorized by law to do so? The question is one of positive law.

At the common law, a feme covert could make no deed. By statute she can make a valid deed, if it be executed under those forms and with those solemnities required by law; but if any of these be omitted or mistaken, the deed is void. With respect to our early legislation on this subject, it is briefly but accurately stated in a note of the learned editor of the Revised Code of 1819, vol. I, p. 366. "By the acts of 1674, 1705 and 1710, the privy examination and acknowledgment of femes covert to deeds, could only be taken of the femes personally, by the general or county court, where the deed was recorded. The act of 1734 provided, that a commission might be issued by the clerk of the general, or any county court, to two or more commissioners, being justices of the county where the feme shall reside, to take and certify her privy examination and acknowledgment; and the law was declared to be, that such privy examination and acknowledgment were not binding on the feme, unless recorded.

And the provisions of this act of 1734 621 were substantially re-enacted *by the act of 1748. The report of the committee of revisors of 1784, and after them, the assembly of 1785, made a slight alteration; requiring that the commission should issue from the court where the deed ought to be recorded, and be executed by two justices of the peace of that county in which the feme dwelleth." Thus stood the law, at the date of the deed in question; requiring that the feme should be examined in open court, or before two justices of the peace of that county in which she dwelleth. The commission for taking the privy examination, in the case before us, issued to and was executed by the recorder and an alderman of the city of Richmond, where the feme covert resided.

It was insisted, that this was not a good privy examination, because the recorder and alderman of Richmond could, by no intendment of law or reason, be regarded as two justices of the peace of Henrico, the county in which the feme dwelt. On the other hand, the examination was asserted to be good, 1. because the law incorporating the city of Richmond, enacts, that the mayor, recorder and aldermen, shall each be vested with the powers of justices of the peace within the city; 2. because, if this law did not clothe the magistrates of the corporation with the power of privy examination, such had been the general opinion and practice, and communis error facit jus.

As to the first, it is obvious to remark, that we should naturally expect to find the manner of taking privy examinations, and the persons empowered to take them, set out and regulated in the general law of con-

veyances, rather than in a local act establishing a corporation. In the general statute, the subject was directly before the legislature: its title was, an act to reduce into one, the several acts for regulating conveyances. Accordingly, we find many pages taken up in the most particular and minute details of all the forms and ceremonies, necessary to the perfection of deeds of every kind; and this, among others, who shall take the privy examination of femes covert, and how they shall be taken, is most particularly attended to, and settled (with some slight variation) in the same way in which it had stood *for fifty years. It is most evident, that the legislature supposed it had regulated the whole subject by this law. If, then, the law of the corporation and this general law bore even date, I should hardly look to the local act, to narrow or extend the range of the general law, on a subject not local but general. The laws, however, are not of the same date. The general law is the latest. But let us look to the particular words of the act of incorporation of 1782. [The judge read them.] It seems very clear to me, that in using the words of that act, the legislature never thought of deeds or privy examinations. This subject was not in the slightest degree connected with that they were upon. They were meting out the judicial powers necessary to the officers of the corporation. The words profess and clearly purport this. Their powers in court had been described; it was necessary to give them judicial powers out of court; and the act says, they shall each be vested with the powers of justice of the peace, within the city, and for a mile round it, for matters arising within that space. What matters? evidently matters touching the internal police, and affecting the peace, quiet and order of the city. Could the taking privy examinations of femes covert, enter into this class of matters, arising within their jurisdiction? But again; they were to take jurisdiction of these matters, according to the laws of the commonwealth: the established laws, then, were to be their guide. This is perfectly right and intelligible, if we understand the powers as relating to the peace, order and other judicial duties of justices of the peace out of court; but not at all so, if we make it relate to the privy examination of femes covert. It would certainly be contrary to the settled rules of construction to take the words, "shall be vested with the powers of justice of the peace," separate from the other words of the sentence, when those other words were so clearly meant to explain, limit and circumscribe their extent. But even if we should take them without their context, I think they may be plainly and fairly satisfied, without making them embrace the power of privy examination.

Justices of the peace are well known, both *to the common law, and to our statutes from the earliest date, as judicial officers of the counties, holding courts, and exercising, in their counties, certain judicial powers, as conservators of the peace, and in other respects. When,

therefore, this law creating judicial officers of the corporation, vests them with the powers of justices, the words, I think, are fully satisfied by giving them those judicial powers which were exercised by justices, and should not be extended, to any ministerial powers which the legislature had, for convenience, thought proper to vest in justices of the peace. This is clear enough without the context; with it, it is certain. But even suppose this act of 1782, should be taken to empower magistrates of the corporation to take privy examinations; would not this be repealed by the statute of 1785, saying that the feme must be examined in open court, or before two justices of the peace of the county in which she dwelleth? If the maxim be true, that *leges posteriores priores contrarias abrogant*, this last law must have repealed the former; or it must be contended, that they are not *leges contrarias*, but may well stand together; in other words, that an alderman of the city of Richmond is a justice of the peace of Henrico.

I do not think it worth while to notice, particularly, the different laws creating the different corporate towns in the state (six, I believe, in number). The powers which they vest in the corporate magistrates, are pretty much the same with those of Richmond; and if they were different, could not affect the question. The legislation on this whole subject of corporate powers, satisfies me, that it was never intended to give any of them, or their officers, the power of taking the privy examination of femes covert. Their courts, indeed, were not made courts of record, for deeds or wills, until long after the laws establishing them as corporations. But if any doubt as to the legislative meaning remained, it would seem to be removed by the statute of December 1796, concerning corporations; which enacts, that, from and after the passing thereof &c. the magistrates of any corporate town, shall have the same power to examine *privily, and take the acknowledgment of a feme covert to a conveyance, and to certify the same, as is by law given to justices of the peace of a county." I conclude, that the act incorporating Richmond did not give to M'Clurg and Richardson the power to take the privy examination of Mrs. Currie.

But 2dly, it was argued, that though the actual legislation may not have given this power to the corporate magistrates of Richmond, the general opinion and practice of the town has given it to them, and this makes the law. From this position I dissent intirely. We have six corporate towns (I believe) in the state; all of them, except Petersburg, older than Richmond. We have not an atom of proof that this taking of privy examinations, was the practice of any corporation but Richmond; and yet if it was the practice, the records would shew it at once. But if we had the amplest proof from the records of all these corporate towns, I should deny that it would change the acts of the legislature, plainly set down. I shall not go into the discussion of the phrase *communis error facit jus*, which we find loosely used in some of the

old cases; for I hold, that the local construction of these corporations can in no sense be considered communis error. That means an universal opinion and usage. The case of *The King v. Hogg*, 1 T. R. 721, seems very apposite to this point. The question there was, whether under the statute 43 Eliz. ch. 2, a machine, which was in a house but not fixed to it, could be rated to the poor, so as to increase greatly the rate as against the occupier of the house and machine. The occupier thus rated appealed to the court of sessions, where the rate was confirmed, and they stated a case for the court of king's bench, of which it was a part, "that the usage of the town of Ribchester (where the house was) had been, not to rate personal property." In the argument of the case, the counsel in support of the order of session, quoted the case of *The King v. Saltrem*, where it was decided, that the usage of a particular parish, could not control the construction of an act of parliament; and *The King v.*

625 Harman, where Probyn, *J., said, "usages that can vary the construction of an act of parliament, must be universal, and not only the usage of a particular parish." On the other side, it was admitted, that the usage of a particular place could not control an act of parliament, but contended, that general usage might explain it. The court established the rate, in opposition to the usage without difficulty. Buller, J., said, "we are not to make, but to explain the law." Grose, J., said "it has been argued, that this rate can not be supported, because it has not been the usage of Ribchester, to rate personal property. But we are interpreting an universal law, which can not receive different constructions in different towns. It is the general law of the land, that this kind of property should be rated; and we cannot explain the law differently by the usages of this or that particular place. If there had been an agreement entered into by all the inhabitants of the town, not to rate any particular species of property, for their own accommodation, that might have been binding upon themselves, as an agreement; but if a case be stated for the opinion of this court upon the law on the subject, we cannot construe the act of parliament, according to their agreement. As to usage, I am clearly of opinion that it ought not to be attended to, in construing an act of parliament, which cannot admit of different interpretations. Where the words of the act are doubtful, usage may be called in to explain them." I see other cases referred to, as supporting this doctrine; but I have not looked to them; for the case does not seem to me to need them. The statute of 1785, the last on the subject of taking the privy examination of femes covert, existing at the time of the deed in question, provided, that it must be by two justices of the peace of the county in which the feme dwelleth. No usage can control this law, if such had been proved: no usage of the city can make an alderman of the corporation a justice of the peace for Henrico.

The other judges concurred. Decree affirmed.

626

*Fitzhugh v. Gordon.

April, 1831.

(Absent COALTER, J.)

Cases Reviewed.—The principle of *Marks v. Morris*, 2 Munf. 407, and *Martin v. Lindsay's* administrators, 1 Leigh, 499, again brought under review; and the court, four judges sitting, divided on the point.

Deed of Trust—Usury*—Injunction—Quære.—F. contracts usurious debt to G. and gives him a deed of trust of land to secure it; F. exhibits bill in chancery, against G. and the trustee, charging the usury, disclaiming any demand of discovery from the creditor, insisting that deed of trust is null and void, and praying that plaintiff's testimony may be perpetuated, and defendants enjoined from selling trust subject till the validity of the deed can be tried at law; G. denies the usury; but it is proved: Quære, whether, in such case, the court of chancery ought to enjoin the trustee from selling under the deed of trust, till the creditor claiming under it shall establish its legal validity in some proper forum where the debtor may have an opportunity to contest it?

Fitzhugh exhibited a bill against Gordon and Ford, in the superiour court of chancery of Fredericksburg, stating, that in May 1821 he executed a bond to Gordon, for 2400 dollars, payable in May 1823, and to secure the payment thereof, executed, at the same time, a deed of trust, conveying to Ford a tract of 401 acres of land in Fauquier, upon trust, in default of due payment of the debt, and upon Gordon's request, to sell the land and satisfy the debt out of the proceeds of sale: charging, that the debt, for which the bond and the deed of trust were given, was usurious, and that Fitzhugh was apprehensive, from Gordon's conduct (the circumstances of which he detailed) that it was his design to forbear proceeding to enforce payment of the debt, till the evidence of the true character of the transaction should be lost: disclaiming all benefit of a discovery from Gordon, and undertaking to prove the charge of usury by evidence now in his power, without resort to Gordon's answer, or to any discovery he should make: and praying, that Gordon, and Ford the trustee, and all others might be enjoined from proceeding on the deed of trust, until the question of usury should be tried at law; that the testimony of

627 Fitzhugh's witnesses might be perpetuated, *and general relief. Gordon's answer was somewhat argumentative, but, in substance and effect, it denied the imputed usury. As to Ford, the bill was taken pro confesso. Fitzhugh adduced his proofs of the usury. The chancellor dismissed the bill with costs. He did not declare the reasons of his decree: he probably thought, either that the evidence of the usury was not sufficient to prove the charge, or that the bill was prematurely filed. Fitzhugh appealed from the decree to this court.

The cause was argued here by Briggs and Johnson for the appellant, and Standard for the appellee, 1. upon the question of fact, whether there was usury or not? (as to which this court considered the proof

*Usurious Debt—Bill for Relief—Measure of Relief.—See on this subject *foot-note* to *Spengler v. Snapp*, 5 Leigh 478; *foot-note* to *Turpin v. Povall*, 8 Leigh 93, and other *note* there cited; monographic *note* on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 686.

The principal case was cited on the subject in *Turpin v. Povall*, 8 Leigh 97, 101; *Davis v. Demming*, 12 W. Va. 266, 267, 275, 276.

complete and satisfactory to establish the usury); and 2. supposing the usury proved, what ought to be the mode and measure of relief? This last question brought under review again, the principle of the cases of Marks v. Morris, 2 Munf. 407, and Martin v. Lindsay's adm'rs, 1 Leigh, 499.

CARR J. This case is, in principle, the same with Marks v. Morris. In Martin v. Lindsay's adm'rs, I have given my views on this subject, at large, and it is by no means my intention now to repeat them. I was overruled there; and, though I adhere to that opinion, I have no idea of embarrassing this case, because there happen to be only four judges sitting, and two of them think Marks v. Morris wrong. I consider the question settled in favor of that case, and shall not attempt again to disturb it, while the court is constituted as it now is. I have said thus much, merely to prevent the conclusion, that my opinions on the subject have undergone any change.

GREEN, J. This court is unanimously of opinion, that the chancellor's decree is erroneous; but is equally divided as to the measure of relief which should be given to the appellant; whether according to

628 Young v. Scott, 4 Rand. *415, or to Marks v. Morris and Martin v. Lindsay's adm'rs: for I agree intirely in the opinion given by judge Carr in the case last mentioned. This division leads us to the alternative of affirming the decree, or that some one of us shall yield an opinion upon the question of relief, and accede pro hac vice, to the principle of Marks v. Morris, which those who have heretofore approved of it, will not abandon. The decree involves a judicial decision, that the transaction in question in this cause, was not affected by usury, and that adjudication, if the decree be affirmed, would be a perpetual bar to any future relief to the appellant, at law or in equity, since it would estop him from alleging the fact of usury, and thus inflict an irreparable injury upon his rights by an erroneous decision upon a matter of fact. On the other hand, it can only be reversed by a judicial declaration, that the transaction was usurious; which would be conclusively binding upon the appellee, and estop him from denying the fact in any future contest touching it: thus assuming for a court of equity, a jurisdiction to do indirectly, what no one has ever claimed that it can do directly; to enforce or aid in enforcing a penalty, by sending, or rather leaving, the parties to proceed at law, with a judicial declaration, that there is usury in the transaction, which is conclusive. With this alternative presented, I think, the lesser injustice and injury will be done, by reversing the decree. To affirm it, would be to deprive the plaintiff in equity, who has completely proved the case stated in his bill, of all future relief, at law or in equity, to which he would be entitled, but for such a judgment: while to reverse it, and pronounce a judgment against the defendant, as in Marks v. Morris, will be only to deprive him of the opportunity of prosecuting his claim at law with little hope of success. For, he must have encountered the objection of usury there, whether he proceeded

on the bond or the deed of trust. I, therefore, consent to reverse the decree, and enter such a one as that in Marks v. Morris.

629 *CABELL, J. This case comes within the principle decided in Marks v. Morris, and acted upon in Martin v. Lindsay's adm'rs. It must receive the same direction.

BROOKE, P. As some pains were taken to state the grounds on which the case of Marks v. Morris was decided, in my opinion in Martin v. Lindsay's adm'rs, I shall add very little to what was said in that opinion. If it is supposed, that the court meant to decide the question of usury conclusively, in those cases, there is a manifest mistake. On the contrary, the whole object, as to the relief asked for, was, to open the door of the court of law, which had been closed against the plaintiff by the deed of trust, and to leave the party to prove the usury in that forum, if he could, by such proof as would be proper in a court of law, after proceedings in equity, as in other cases; the evidence of the usury adduced in the court of equity, if the best the nature of the case admitted of, to be resorted to by either party in the court of law, as in like cases, but the decree permitting the plaintiff in equity, to defend himself at law, if sued there, to have no effect in the court of law. This obviously resulted from the disclaimer of the court to grant relief on the merits of the controversy. In doing this, the court acted on the parties only, and violated no principle of a court of equity, applicable to cases in which a judgment at law had been rendered. The relief granted in such cases is totally different from the relief prayed for and granted in the cases alluded to. The case before us must be admitted to come with the principle of the cases of Marks v. Morris, and Martin v. Lindsay's adm'rs, since the facts in it sufficiently establish the usury in the deed of trust.

The decree is therefore reversed; and this court proceeding to render such decree as ought to have been rendered by the court of chancery, it is decreed and ordered, that the injunction be reinstated, until the appellee shall establish the validity of the bond or deed of trust, in a court 630 *of law, or other proper tribunal; and in that event, the injunction is to be dissolved, and deed of trust held, if necessary, as security for the amount due; or, otherwise, the injunction is to be perpetuated; and the cause is remanded &c.

Crawford and Others v. Jarrett's Adm'r.

April, 1831.

(Absent CABELL and COALTER, J.)

Parol Evidence—Written Instrument.*—Parol evidence is not admissible to vary, contradict, add to, or explain, a written agreement; but, in cases of equivocal written agreements, the circumstances under which they were made, may be given in evidence to explain their meaning.

***Parol Evidence—Written Instrument.**—Parol evidence cannot be admitted (unless in case of fraud or mistake) to vary, contradict, add to, or explain, the terms of a written agreement, by proving that the agreement of the parties was different from what it appears by the writing to have been. The

Executions—Contract of Indemnity—Signing by One Not Named in Instrument—Effect—Consideration.—A constable levies sundry executions sued out by A. on property of the debtors; the removal and sale of the property is forbidden by the landlords of the debtors, claiming that it was liable for the rents; and A. the creditor, and B. enter into a written agreement, to indemnify the constable "agreeably to law;" which agreement is signed by A. and B. and by C. also, though C.'s name is not in the body of the instrument; and this agreement is delivered to the officer, on the day and at the place of sale; A. B. and C. all acknowledging it as their act, and B. and C. declaring verbally, that they are A.'s sureties: **Held**, this is the joint assumpsit of A. B. and C. to indemnify the constable, for removing and selling the property under A.'s exe-

cutions and paying the proceeds to him, and the sale of it by the constable is a consideration to support the assumpsit as to them all.

Same—Same—Action on—Effect of Judgment against Officer—Quære.—An officer is indemnified for selling property taken under execution, the sale whereof is forbidden by landlords of the debtor, claiming payment of rents in arrear; the officer sells; the landlords bring action against him and recover judgment for damages: **Quære**, under what circumstances, in an action brought by the officer upon the contract for the indemnity, it may be competent to the defendants to prove the real value of the property to be less than the damages assessed in the action against the officer, or what is the effect of the judgment against the officer, as against the persons bound to indemnify him?

Same—Removal of Goods without Paying Rent Due—Measure of Damages.—An officer takes under execution, and removes, goods of a lessee, without paying the rent in arrear due to the landlord: **Held**, in an action by the landlord against the officer for so doing, not the amount of the rent arrear, but the value of the goods, is the just measure of damages.

This was an action of assumpsit, brought by Jarrett's administrator against Crawford, Gardner and Shrewsbury, in the circuit court of Greenbrier.

631 *The declaration contained three special and two general counts. 1. The first stated in substance, that Jarrett in his lifetime, being a constable of Kanawha, at Crawford's special instance and request, levied seven writs of fieri facias, sued out by Crawford upon judgments of a justice of the peace of Kanawha, on warrants against Wood and Brown, upon goods the property of those debtors, found on certain premises leased to them and others, by one Warth, and by Alderson and Slack; out of which premises there were rents reserved, and then in arrear and due, namely, 75 dollars and 120 bushels of salt to the lessor Warth, and 1068 dollars to the lessors Alderson and Slack; and, at the time Jarrett levied Crawford's executions on the goods of the lessees, those goods were taken and held in distress by the lessors, for rents in arrear to them, respectively; and they requested of Crawford and Jarrett, that the rents due them, respectively, should be paid; whereupon, and in consideration, that Jarrett would sell the goods taken by him under Crawford's executions, and satisfy the same out of the proceeds of sale, Crawford, Gardner and Shrewsbury (the defendants in this action) made and signed a written agreement with Jarrett, whereby—reciting, that Jarrett had levied Crawford's executions, on the following property of Wood and Brown, viz. seven chairs &c. [specifying some other trivial articles of furniture] the sale of which was forbidden by the lessor Warth, and two yoke of oxen and one cart, the sale of which was forbidden by the lessors Alderson and Slack, they Crawford, Gardner and Shrewsbury, agreed to indemnify Jarrett, the constable, agreeably to law; and thereupon, Jarrett sold the goods under Crawford's executions, and

the instrument. Yet the said security was held bound upon proof that he executed the instrument with the intention of becoming a party thereto. In the case of a sealed instrument declared upon, proof of the execution thereof becomes necessary by the plea of *non est factum* at law (or the answer in chancery, if a case in equity), putting that fact in issue. The circumstance that the writing declared on in *Crawford v. Jarrett*, was not under seal, does not affect the principle involved in this question. The intention to become a party to, and be bound by the instrument, is the fact to be determined in either case."

rule of evidence, thus stated by JUDGE GREEN in the principal case, has met with approval in numerous subsequent cases. See *Towner v. Lucas*, 13 Gratt. 710; *foot-note* to *Woodward v. Foster*, 18 Gratt. 200 (collecting many cases in point); *Colhoun v. Wilson*, 27 Gratt. 646; *Southern Mut. Ins. Co. v. Trear*, 29 Gratt. 258; *Tait v. Central Lun. Asylum*, 84 Va. 280, 4 S. E. Rep. 697; *Bonsack Mach. Co. v. Woodrum*, 88 Va. 516, 13 S. E. Rep. 994; *Kline v. McLain*, 33 W. Va. 36, 10 S. E. Rep. 13; *Johnson v. Burns*, 39 W. Va. 661, 20 S. E. Rep. 687; *Howell v. Behler*, 41 W. Va. 617, 24 S. E. Rep. 646. Yet, in cases of equivocal agreements in writing, the circumstances under which they were made, may be given in evidence, to explain their meaning. For this proposition, the principal case was cited with approval in *Towner v. Lucas*, 13 Gratt. 711; *Woodward v. Foster*, 18 Gratt. 208; *foot-note* to *Talbot v. Richmond*, etc., R. R. Co., 31 Gratt. 685; *French v. Williams*, 83 Va. 466, 4 S. E. Rep. 598; *Richardson v. Planters' Bank*, 94 Va. 130, 26 S. E. Rep. 418; *Crislip v. Cain*, 19 W. Va. 488.

See further, monographic note on "Evidence" appended to *Lee v. Tapscott*, 3 Wash. 276.

Bill of Exceptions—Reference to Another Bill.—The facts stated in one bill of exceptions cannot be noticed by an appellate court in considering another, unless the first bill is referred to in the second, and adopted as part of it. To this effect, the principal case is cited in *Dishazer v. Maitland*, 12 Leigh 529; *Zumbro v. Stump*, 38 W. Va. 386, 18 S. E. Rep. 447; *Klinkler v. Wheeling*, etc., Co., 43 W. Va. 221, 27 S. E. Rep. 288.

And in *Hall v. Hall*, 12 W. Va. 21, it is said: "It has been repeatedly decided by the court of appeals of Virginia that facts stated in one bill of exceptions cannot be noticed by an appellate court in considering another, except the first bill of exception should be referred to in the second, etc., and except also when a bill of exceptions is taken after all the evidence has been submitted to the jury, and it purports to set out all the evidence, it seems that the evidence set out in this bill of exceptions may be looked to in considering the question raised in another bill of exceptions taken in the progress of the trial. *Brooke v. Young*, 3 Rand. 106; *Crawford, etc., v. Jarrett's Adm'r*, 2 Leigh 639; (*Perkins v. Hawkins*) 9 Gratt. 649; 1 vol. of *Robinson* (old) Prac. 346, 347."

See further, on this subject, *foot-note* to *Perkins v. Hawkins*, 9 Gratt. 651; monographic note on "Bills of Exception" appended to *Stoneman v. Com.*, 26 Gratt. 587.

Contracts—Signing by One Not Named in Instrument—Effect.—In *Beery v. Homan*, 8 Gratt. 51, it is said: "The court is of opinion, that to constitute a valid bond of the party, the intention to bind himself must appear on the face of the instrument; that the signature and seal form a part thereof, and furnish *prima facie* evidence that the person so signing and sealing the bond intended to make himself a party thereto, and to be bound by the stipulations thereof; although the name of the party so signing, sealing and delivering the bond, may not be inserted in the penalty or recited in the condition. The case of *Bell v. Allen's Adm'r*, 3 Munf. 118, does not actually decide that the bond there offered in evidence, was not the bond of the security because his name did not appear in the body of the instrument, but it was rejected when offered in evidence, on the ground of an alleged variance between it, and the bond described in the declaration. If, however, it is to be inferred that the case was decided upon the ground that the bond was invalid as to the surety for the cause aforesaid, the authority of the case is impaired by the decisions of this court in the cases of *Bartley v. Yates*, 2 Hen. & Munf. 398; *Beale v. Wilson*, 4 Munf. 380; *Raynolds v. Gore*, 4 Leigh 376; and was in effect overruled in *Crawford v. Jarrett*, 2 Leigh 639. In that case the name of one of the sureties, Shrewsbury, did not appear in the body of the writing; and there was no blank left for the insertion of other names; which has sometimes been supposed to shew an intention not to exclude other parties who have signed

paid him the proceeds, in satisfaction of his executions, which amounted to 145 dollars, besides interest and costs; and, afterwards, Warth brought two suits against Jarrett, in the circuit court of Kanawha, for his so taking and selling the said goods, and recovered judgments, in one suit for 81 dollars, and in the other for 64 dollars, damages, and the costs; and Alderson and

Slack brought a suit against Jarrett, 632 *in the same court, for his so taking and selling the said goods, and recovered judgment against him for 1163 dollars, damages, and the costs; which judgments against Jarrett remained in full force, nowise vacated, reversed or annulled (except that 581 dollars of Alderson and Slack's judgment had been released by them) as would more fully appear by the record of the said suits and judgments, reference thereto being had; yet the defendants Crawford, Gardner and Shrewsbury, or either of them, had not indemnified Jarrett agreeably to law, or in any way saved him harmless, in manner and form as by their said agreement provided, but on the contrary, Jarrett had been compelled to pay and satisfy the said judgments so recovered by Warth, and by Alderson and Slack, to those parties respectively. 2. The second count did not allege, that the goods of Wood and Brown, taken by Jarrett under Crawford's executions, were on leasehold premises, held by the debtors under Warth, or Alderson and Slack, or that the lessors had taken the goods in distress for rent, or that they claimed satisfaction of any rent in arrear and due to them, or that they had forbidden the sale; and it alleged, generally, that the defendants, Crawford, Gardner and Shrewsbury, in consideration that Jarrett would sell divers goods of Wood and Brown, which he had taken under Crawford's executions against them, and would pay the proceeds to him in satisfaction thereof, undertook and promised Jarrett, that they would indemnify and save him harmless for so selling the goods, without stating, that the undertaking and promise of the defendants was in writing. In other respects, this count was like the first. 3. The third count stated, that the defendants Crawford and Gardner, by an agreement in writing, bound themselves to indemnify Jarrett for selling the goods taken by him under Crawford's executions, and that Shrewsbury signed the same agreement, as surety with Gardner for Crawford, and thereby became a joint promiser with Crawford and Gardner, and then all three of them delivered the agreement to Jarrett, as their joint agree- 633 ment *to indemnify him for selling the goods. In all other respects, this count was like the first. The 4th and 5th counts were general counts in assumpsit, for money paid, laid out and expended, and for money had and received.

The defendants demurred generally to the three special counts in the declaration: the court held the counts good, and overruled the demurrer. And they pleaded in bar, 1. That the plaintiff's intestate, Jarrett, had impleaded the defendants in a former action for the same causes, and for non-performance of the same promises, in the

declaration alleged, in which former action, there was a verdict and judgment for the defendants: the plaintiff replied, nul tiel record: the defendants shewed the record of a former action of Jarrett against them, and judgment for the defendants, but in that case, the actual agreement of the defendants for the indemnity of Jarrett, offered in evidence by him, was excluded on account of material variance from the agreement laid in the declaration, and so the jury found for the defendants: and, upon inspection of this record of the former action, the court held, that there was no such record as that alleged in this plea. 2. The defendants pleaded, that the plaintiff had never made any demand upon them to indemnify him; to which plea the plaintiff demurred generally; and the court held the plea naught, and sustained the demurrer. 3. The defendants pleaded the general issue, upon which the cause was tried.

At the trial, the defendants filed four bills of exceptions to opinions and instructions of the court given to the jury.

1. The plaintiff offered in evidence the agreement of the defendants to indemnify Jarrett, which was as follows: "Whereas E. Jarrett, constable of Kanawha county, hath, by virtue of seven executions in the name of B. A. Crawford against A. Wood and J. Brown, levied the same on the following property, seven chairs, &c. [specifying a few articles of furniture] the sale of which is forbidden by J. Warth, and the sale of the balance of the property, viz. two yoke of oxen and one cart, by S. 634 Slack; and the said *B. A. Crawford, plaintiff in the above named executions, and N. Gardner, his surety, bind themselves, &c. to indemnify the above named constable agreeably to law. Witness our hands &c." This instrument was signed by Crawford, Gardner and Shrewsbury (though the last was not named in the body of it), and the plaintiff offered parol proof of their signatures, and that it was delivered, signed as it is, to Jarrett, on the day of the sale, by Crawford, and that Gardner and Shrewsbury acknowledged it, and that they were sureties in the same. Upon which, the defendants objected to the admission of the paper as evidence, and of the parol proof of Gardner and Shrewsbury's acknowledgment that they were sureties, on the ground that the instrument did not shew a joint assumpsit of the defendants, such as was stated in the declaration; but the court overruled the objection, and admitted the evidence. The defendants excepted.

2. The plaintiff offered in evidence the record of the action brought by Alderson and Slack against Jarrett mentioned in the declaration: that was an action under the statute 1 Rev. Code, ch. 113, § 7, p. 448, by A. and S. as landlords, against Jarrett, for his taking, removing and selling, under Crawford's executions, the two yoke of oxen and cart of the plaintiffs' tenants Wood and Brown, and also for taking, removing and selling divers goods of other tenants of the plaintiffs, without paying the landlords the rent in arrear; the whole of the goods having been found on the demised premises, and so liable to the landlords for the rent

in arrear, and having been actually taken by Jarrett himself under a distress warrant for the rent; and there was a verdict and judgment for the plaintiffs A. and S. for 1163 dollars, damages and costs, whereof they entered a release of 581 dollars. Whereupon, the defendant's counsel objected to the admission of this record in evidence, on the ground that it was variant and different from that described in the declaration; but the court overruled the objection, and admitted the record as

635 evidence of the damages, *which Jarrett had been compelled to pay, on account of his sale of the property under Crawford's executions, for the recovery whereof this suit was brought. The defendants excepted.

3. The plaintiff offered in evidence, three receipts of Reynolds, a deputy sheriff of Kanawha, for moneys paid by Jarrett in satisfaction of Alderson and Slack's execution on their judgment against him, and offered proof of the deputy sheriff's hand writing to the receipts; to which the defendants objected, because no reason was shewn for not bringing Reynolds himself as a witness; but the court overruled the objection, and admitted the evidence of Reynolds's hand writing to the receipts. The defendants excepted.

4. The defendants offered evidence to prove the value of the property in the declaration mentioned, sold by Jarrett under Crawford's executions, and that the value thereof was trivial; but the court would not admit any evidence as to the value of the property; and instructed the jury, that if it should find, from the evidence, that the defendants were bound to indemnify Jarrett, then the amount of the judgments recovered against him for selling the property for Crawford, was the measure of his damages, and that the defendants could not, in this action, go into evidence to shew that the damages assessed and adjudged against Jarrett, were beyond the real value of the property, and exorbitant, that being a proper subject of inquiry in the suits against Jarrett, as well as any other damages which the plaintiffs in those suits had sustained by the sale of the property. The defendants excepted.

Verdict for the plaintiff for 821 dollars, and judgment accordingly: from which the defendants appealed to this court.

Johnson, for the appellants: Stanard, for the appellee. The reporter was not present at the argument, and no note of it was preserved.

636 *GREEN, J., without noticing the demurrer to the special counts of the declaration, or of the plea of a former action and judgment for the defendants and the judgment of the circuit court thereon, that there was no such record, said: This case comes up on several exceptions to opinions of the court given upon the trial; the first of which was to the allowing an instrument of writing to be given in evidence, with parol proof as to the time, manner and circumstances of its execution, as not proving a joint assumpsit by the appellants, such as is stated in the declaration. The matter of this exception suggests several ques-

tions, which were discussed at the bar: 1. Whether the signing of his name to the writing, without any other proof, made Shrewsbury a party thereto, and amounted to an assumpsit by him, jointly with Crawford and Gardner, to indemnify Jarrett, according to its terms? 2. If not, then whether parol proof, that he executed it with that intention avowed, was admissible? 3. If either of these questions are decided in the affirmative, then whether the paper upon its face states a consideration such as is alleged in the declaration? 4. If not, then whether such a consideration can be proved by parol evidence? 5. Whether the promises alleged, or any of them, are supported by the paper itself? for it is admitted, that if the promise was collateral, it cannot bind Gardner and Shrewsbury, unless it be found in the writing. And lastly, whether the promise be not original and equally binding on all for the same consideration? Of these questions, the first, third and fifth are the most important: if they are decided in the affirmative, the others will be thereby superseded.

As to those three points: It is true, that parol evidence cannot be admitted (unless in case of fraud or mistake) to vary, contradict, add to, or explain, the terms of a written agreement, by proving that the agreement of the parties was different from what it appears by the writing to have been. Yet, in case of equivocal agreements in writing, the circumstances under which

they were made, may be given in

637 *evidence, to explain their meaning;

of which there are many examples in the books; as in *ex parte Aduey*, 2 Cowp. 460, and in the judgment of the chancellor reversing that of the master of the rolls in *Bellamy v. Burrow*, Ca. Temp. Talbot, 107. In this case, on the day and at the place of sale of the property taken under Crawford's executions, the instrument in question was prepared, reciting the levy of the executions, and that the sale of the property was forbidden by certain persons, and binding Crawford as principal, and Gardner as his surety, to indemnify the constable according to law, and was executed and delivered to the constable by those persons, and by Shrewsbury, who was not named in it, but who signed it, as a party. These circumstances, in connexion with the terms of the instrument, I think, prove without any other evidence to that effect, that Shrewsbury intended to bind himself, jointly with the others, for its performance, to the full extent to which they were bound; and that they were bound to indemnify the constable, not for what was past, (the seizure of the property under the executions, for that was not unlawful) but for selling and disposing of the property under the executions, and paying Crawford the proceeds of the sale to the amount of his executions; and this was the consideration of the agreement to indemnify him against such a disposition, as is alleged in the declaration.

The next exception is to the admission of the record of a judgment recovered by Alderson and Slack against Jarrett, as evidence, upon the allegation that there was a variance between it and the judgment de-

scribed in the declaration. All the special counts in the declaration under which it was possible to offer in evidence, any judgment by those parties against Jarrett, describe it as one recovered upon the sole ground of the sale of the property of Wood and Brown, taken under Crawford's executions, without paying to them the arrears of rent due to them from the debtors in those executions; which arrears amounted to 1068 dollars. The record offered in 638 evidence, contained *a declaration of one count only, and claimed damages against Jarrett, not only for removing the property of Wood and Brown, taken under Crawford's executions without paying the arrears of rent, but for selling other property of other persons also tenants, which he as constable had taken by order of the plaintiffs as a distress for the satisfaction of the arrears of rent, and paying the proceeds of that also to Crawford, in satisfaction of his executions. The jury found a verdict, and the court gave judgment, upon that declaration for 1163 dollars and costs; and the damages must be taken to have been given upon both the complaints set forth in the declaration. Consequently, the judgment given in evidence, was not such as was alleged by the declaration in this case. It is possible, and indeed seems to be indicated by the fact of the amount of the verdict corresponding with the amount of the arrears of rent and interest thereon, that the court and jury proceeded upon the ground, that an officer taking goods, to however small a value, under execution, found upon demised premises upon which arrears of rent were due, and removing them without the payment of the arrears to the landlord, was responsible for the whole amount of the rent in arrear, though the value of the goods so taken and removed did not amount to a hundredth part of the amount of the rent. If so, the decision was palpably wrong. It is impossible to give such an effect to the statute, under which alone the landlord can assert a claim in such a case; and it is settled by authority, that the officer is only liable to the amount of the sales of the goods so removed and sold. *Henchett v. Kimpson*, 2 Wils. 140. We cannot presume, that any such error entered into those proceedings, unless it appeared explicitly on the record. The judgment offered ought not to have been allowed to be given in evidence; the consequence of which was to charge the appellants with damages to the amount of that recovery against Jarrett, in consequence of their engagement to indemnify him for the sale of four oxen and a cart.

639 *The next exception, in relation to the admission of the sheriff's receipts to Jarrett, is of no consequence; since the question presented could have no proper effect upon the result of the cause; the judgment against Jarrett, having the same effect, as proof that he was damnedified, whether he had paid it or not.

The last exception is to the refusal of the court, to admit the evidence offered by the defendants to prove the value of the property taken and sold under Crawford's executions. The bill of exceptions states no facts, upon

which this question turned; and though we see them in the other exceptions, we cannot notice them in considering this, as has been repeatedly decided. If such evidence, under all circumstances that could exist would be proper evidence for the defendant, then the evidence was improperly excluded; but if it might be proper evidence under some and not under other circumstances, we cannot say that the rejection of it in this case, was wrong, upon any thing appearing in this bill of exceptions. Now, such evidence might be proper or improper, according to varying circumstances: if for instance, the plaintiff in this case, had produced a record, shewing that the recovery against him was solely on account of the estimated value of the property sold under Crawford's executions, and for the sale of which the defendants were bound to indemnify him, the real value could not have been given in evidence to contradict the verdict against Jarrett, however extravagant it might have been in the estimate of the value of the property; for that would be still the real amount of the damages, against which the defendants contracted to indemnify him. But, if the declaration had been so framed as to describe the record in the suit against Jarrett, and it had appeared that the aggregate damages given against him, was partly for removing the property taken under the executions and partly for the improper disposition of the other property distrained for the rent; then, evidence of the value of the property sold under the executions

would not only have been proper on 640 the part *of the defendants, but indispensably necessary on the part of the plaintiff, in order to separate that portion of the damages given on account of the property sold under the executions, in respect to which the defendants were bound to indemnify him, from that portion given on account of the other property, as to which the defendant was under no such obligation. Or, if it had appeared, that the whole amount of the arrears of rent and interest on them, had been adopted by the court and jury, as the measure of the damages given against Jarrett, without regard to the value of either description of the property; then, a question would have arisen (as it would, if it appeared that no wrong had been done by Jarrett to the landlord, but by the taking of property under the executions) whether evidence of the value of the property so taken, would or would not be proper in that case? a question which the court declines to give any opinion upon now, because it is not presented by the exception. And, for the same reason, we decline to give any opinion upon other points that have been discussed; such as the effect of the judgment against Jarrett, as against the appellants.

CARR, J. This case has been so fully investigated by my brother Green, and I agree with him so exactly in the general current of his remarks, that I shall be very brief: indeed, I should say nothing, but to exclude a conclusion, as to a particular point, which might follow from my silence. I think the written promise of indemnity, with the parol evidence of the time and

manner of its execution and delivery, was properly admitted under the declaration; and that Shrewsbury was bound by that written promise. With respect to the record of a recovery by Alderson and Slack against Jarrett, offered as evidence by the plaintiffs, and objected to, and that objection overruled; I am clearly of opinion, that the court erred in admitting that record, because it differed, in a very material point, from the record described in the declaration; and on this point I con-

641 cur *that the judgment must be reversed, and the case sent back with proper directions. As this record is excluded, I do not think it necessary to the decision of this case, that the court should pronounce upon the weight, effect and conclusiveness of it, in case it had been so described by the declaration as to have made it evidence. And this is the point on which I wish to declare (not that I differ with my brother Green, for my impression is that he is right, but) that I have not so examined the question, as to have made up an opinion on it: and as we are but a court of three, and are just at the busy close of a long session, I have thought it best to leave this point open for future discussion, so far as this case may have a bearing upon it. As to the other points upon the subsequent exceptions, I think with judge Green.

BROOKE, P., concurred with the other judges, in the judgment that was entered; which was to the following effect: That the circuit court erred in allowing the record mentioned in the second bill of exceptions, to go as evidence to the jury, there being a material variance between that and the record described in the first three counts of the declaration; and that the judgment is erroneous: therefore, it is considered that the same be reversed &c. and it is ordered, that the verdict be set aside, and the cause remanded to the circuit court, for a new trial to be had therein, in which the said record is not to be allowed to be given in evidence, if offered.

642 *Frazier &c. v. Frazier's Ex'ors &c.

April, 1881.

(Absent COALTER, J.)

Decrees by Default—Reversal.—Decree in chancery, upon default of defendants, though they are not in contempt upon any proper process, reversed for this irregularity.

Administrators—Official Bonds—Form—Failure to Conform to Statute—Effect.—Bond with surety taken from an administrator with will annexed, with condition, not in form prescribed by law for official bond of administrator with will annexed, but in form prescribed for an administrator, and

not exactly conforming even to that: HELD, this is not a good statutory bond, and no suit, either at law or in equity, can be maintained against the surety, for the benefit or at the relation of a legatee.

Same—Same—Same—Same—Quere.—Whether such a bond be good as a common law bond, for the indemnity of the justices to whom it was given?

Wills—Bequest to "Next of Kin" Subject to Appointment—Failure to Appoint—Effect.—Testator bequeaths his personal estate to his brother J. to be sold,

form to law, and did not extend to the liability asserted."

And in *Gibson v. Beckham*, 16 Gratt. 330, 331, 332, 333, it is said that the principal case did not decide that the bond under consideration was void and invalid for any purpose provided for in the condition; but that the decision and opinion of JUDGE GREEN was carefully restricted to the case of the legatee suing, and for whom no provision had been made.

In this case (*Gibson v. Beckham*), it was held that where a court or officer has authority or capacity to take a bond and makes a mistake by omitting some condition prescribed, or inserting a condition not authorized or illegal, unless the statute by express words, or necessary implication, makes it wholly void, a bond is not void; and it may be sued on, as far as the conditions are good, as a statutory bond.

The review and explanation of the principal case and *Roberts v. Colvin*, 3 Gratt. 358, made by JUDGE ALLEN, in *Gibson v. Beckham*, 16 Gratt. 321, is approved in *Reed v. Hedges*, 16 W. Va. 206.

In *Morrow v. Peyton*, 8 Leigh 54, after the death of an executor who had qualified as such, administration was committed to an administrator *d. b. n. c. t. a.* but the bond was in the form prescribed for administration *d. b. n.* Instead of administration *d. b. n. c. t. a.* The form of the bond adopted contained a condition for the benefit of creditors and creditors were suing; but the court held, on the authority of the principal case (pp. 75, 79), that the bond was void and the sureties not bound by it.

But see *foot-note* to *Morrow v. Peyton*, 8 Leigh 54, where it is shown that in *Gibson v. Beckham*, 16 Gratt. 331 *et seq.*, the court disapproved the broad proposition laid down in *Morrow v. Peyton*, that a bond not conforming to the requisitions of the statute is void to all purposes, saying the decision was based on a hasty consideration and misconception of the decision of the principal case; and that if the court has not been misled by the mistake as to the effect of the decision of the principal case, they would not have decided that such a bond was void entirely and the sureties not bound by it.

See principal case also cited in *State v. Purcell*, 31 W. Va. 67, 5 S. E. Rep. 318; *foot-note* to *Morrow v. Peyton*, 8 Gratt. 54, which quotes at length from *Gibson v. Beckham*, 16 Gratt. 321.

See further, *foot-note* to *Gibson v. Beckham*, 16 Gratt. 321; monographic note on "Statutory Bonds" appended to *Goolsby v. Strother*, 21 Gratt. 107; monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

Wills—Bequest to "Next of Kin" Subject to Appointment—Failure to Appoint—Effect.—In *Milhollen v. Rice*, 13 W. Va. 568, it is said: "In the case of *Frazier v. Frazier's Ex'rs*, 2 Leigh 642, the syllabus says: 'the testator bequeathed his personal estate to his brother, J., to be sold, and the proceeds to be distributed by the brother among testator's next of kin, according to their deserts, as he should see at a future time, what may turn up; the brother dies without making an appointment. HELD, that the testator is to be regarded as intestate quoad this subject; and the same is distributable among the next of kin according to law.' The court however says nothing on the subject. The property was held to be distributable among the next of kin, I presume, not because the testator was to be regarded as dying intestate as to it, but because it was either a trust or a power in the nature of a trust, which being unexecuted, the property must go to the next of kin of the testator, as the legatees under the will."

In *Fontaine v. Thompson*, 80 Va. 229, 232, a testatrix devised her estate to a trustee to be distributed among her "next of kin who may be needy," in such proportions and at such times as in the opinion of the trustee (who was also made executor) might be best. The trustee did not qualify and died; and the administrator *d. b. n. c. t. a.* brought suit to construe the will. In delivering the opinion of the court, LACY, J., said: "There is certainly no reason why the devise should be held to be void on the ground of the uncertainty of the class which is to take. The distribution is to be

*Decree by Default.—See generally, monographic note on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

Administrators—Official Bond—Failure to Conform to Statute—Effect.—In *Roberts v. Colvin*, 3 Gratt. 359, 363, it was held, on the authority of the principal case, that where an administration bond does not conform to the requisitions of the statute, and contains no provision for the benefit of creditors, no decree can be rendered in their favor against the sureties therein.

In *Monteith v. Com.*, 15 Gratt. 187, it is said: "The cases of *Frazier v. Frazier's Ex'ors*, 2 Leigh 642, and *Roberts v. Colvin*, 3 Gratt. 358, merely decide that the parties could not be charged beyond the stipulations of their contract. The bonds did not con-

and the proceeds to be distributed by the brother among testator's next of kin, according to their deserts, as he should see at a future time what may turn up; the brother dies without making any appointment: HELD, the testator is to be regarded as intestate quoad this subject, and the same is distributable among his next of kin according to law.

Lapsed Legacies Fall in Residuum—Rule Inapplicable to Residuary Legacies.—Case at Bar.—Testator bequeaths residuum of his estate to the four children of a deceased brother; two of the legatees die before testator, whereby the intended legacy of the moiety of the residuum to those two lapses: HELD, this moiety does not go to the two residuary legatees that survived testator, but as to it he was intestate, and it is distributable among his next of kin according to law.

Same—Same.—The rule, that all legacies which fail by lapse or otherwise, fall into the residuum and go to the residuary legatees, applies to specific or

among her next of kin: that much is distinct and clear enough; the persons to be benefited are the most needy in that class (designated as her next of kin), according to the opinion of the trustee. If the persons to be selected out of this class cannot be determined for any cause, then the selected persons will not take, because they are unknown; but the class being clearly and distinctly designated, out of which the selection was to be made, there is no reason why the devise should be declared void as to the class, although it might be void as to the person to be selected out of the class, because of uncertainty. The courts have passed upon these words, 'the most needy,' or their equivalent, in cases which we have examined, and they do not seem to have taken the same view of the question in every case. In *Frazier v. Frazier*, 2 Leigh 642, this court held the words 'to be distributed by the brother among the next of kin, according to their deserts, as he should see at a future time what may turn up,' to pass no estate, and the testator to be regarded intestate as to this subject. This case was decided in 1881. In 1880, the supreme court of errors of Connecticut, in the case of *Bull v. Bull*, 8 Conn. 47, took what seems to be an opposite view, holding that 'it can be ascertained who are the most needy of the brothers and sisters and their children,' so stating a similar devise in that case as in this." Continuing, JUDGE LACY shows that the case of *Hill v. Bowman*, 7 Leigh 650, does not overrule the principal case, as contended by counsel, and says that, in the principal case, while the devise was for the benefit of the testator's next of kin, to be selected by a rule held to be too uncertain and void, the devise was in effect sustained as to the class ascertained and certain, to wit, the next of kin.

In discussing the effect of a power of appointment remaining unexecuted, *Thrasher v. Ballard*, 35 W. Va. 580, 14 S. E. Rep. 234, cites the principal case.

Trustees—How Discretionary Power Conferred on.—See, citing the principal case, *Whelan v. Reilly*, 3 W. Va. 611; foot-note to *Shearman v. Hicks*, 14 Gratt. 96 (containing extracts from *Whelan v. Reilly*, 3 W. Va. 611).

Will—Devise to Several Devisees—Death of One Devisee before Testator—Effect.—In *Hoke v. Hoke*, 12 W. Va. 467, it is said: "As we have seen where the devise of real estate is to a plurality of devisees or legatees jointly, and one of them dies before the testator, his share will not lapse, but ordinarily, the devise shall enure to the surviving devisees, except where the will otherwise directs, and except as hereinafter qualified. 2d Ed. of Minor's Institutes, vol. 2, p. 947. William Green's Exposition, Wythe's R. p. 361, and authorities cited in notes. 3d vol. of Lomax Digest, 2d Ed. page 186, note 2; 2d vol. Lomax on Executors, 2d Ed. page 106, note 3. In the case of *Frazier*, etc., *v. Frazier's Ex'or*, etc., 2 Leigh 642, it might be understood from the syllabus and statement of the case by the reporter, that the devise of James Frazier by his will to four of the children of his brother Samuel, who was dead, was a devise to them in joint tenancy, but it will be seen by reference to the opinion of the court delivered by JUDGE GREEN that the devise to said four children was a devise to them as tenants in common. It would seem that the manner this case is reported may have misled JUDGE TUCKER into the views expressed by him on the subject in the 1st vol. 2d book of his Commentaries, published in 1836, page 298, as he cites that case as supporting his views."

The general doctrine at common law is, that a devise lapses in all cases where the devisee dies before the testator, and if the devise be to several, as tenants in common, and one of them dies in the testator's lifetime, his share lapses. *Furbree v. Furbree*, 49 W. Va. 191, 38 S. E. Rep. 515, citing principal case.

Lapsed Legacies Fall in Residuum—Rule Inapplicable to Residuary Legacies.—See principal case cited on this point in *Tebbs v. Duval*, 17 Gratt. 360.

pecuniary legacies, but not to the subject of the residuary legacy itself.

Chancery Practice—Evidence—Record in Another Chancery Suit.—In a suit in chancery, the defendants are in default; yet the record, or proceedings in another suit inter alios, is not competent evidence against them.

This was an appeal from a decree of the superior court of chancery of Staunton.

The proceedings in the court of chancery were very irregular. The subpoena was in the names of Hugh Paul and James Coursey executors of John W. Frazier deceased, plaintiffs, against James Frazier executor of James Frazier deceased, William Hillis father and next friend of Eliza Hillis, and George Coiner, defendants. This subpoena was returned "executed on Frazier's executor; Coiner, the other defendant, 643 not an inhabitant of the state." *The bill was exhibited by Paul and Coursey executors of John W. Frazier, and Eliza Hillis, an infant, by W. Hillis, her father and next friend, plaintiffs, against James Frazier administrator with the will annexed of James Frazier and executor of John Frazier, and G. Coiner. The defendants, not appearing to answer the bill, there was a decree nisi entered, in the names of the plaintiffs in the bill, against James Frazier executor of James Frazier and G. Coiner (though Coiner had not been served with the subpoena). This decree nisi was served on both the defendants; and they still failing to appear and answer, there was a decree against them by default; and this decree was entered not as between the parties named in the decree nisi, but as between the parties named in the bill. Thus, the parties named in the bill, and between whom the final decree was made, were different from the parties named in the process, that is, the subpoena and the decree nisi; the parties named in the decree nisi were different from those named in the subpoena; and the subpoena not having been served on the defendant Coiner, no such decree nisi could regularly have been entered against him.

The bill set forth, that John Frazier died in 1809, leaving a will, whereby he bequeathed one moiety of the personal estate to his brother James, and the other to the children of his deceased brother Samuel, namely, James, Samuel, Bella and John W. Frazier, and appointed his brother James his executor, who proved the will and took upon himself the executorship, but never made any distribution of the estate among the legatees. That James Frazier, the executor of John, died in 1814, leaving a will made in 1810, whereby he bequeathed the residuum of his estate to be sold, and the proceeds to be equally divided among the above named children of his deceased brother Samuel, viz. James, Samuel, Bella

able to Residuary Legacies.—See principal case cited on this point in *Tebbs v. Duval*, 17 Gratt. 360.

For full discussion of the subject, see monographic note on "Legacies and Devises" appended to *Early v. Early*, Gilm. 134.

Legatees—Suit to Settle Decedent's Estate—Parties.—Legatees or distributees may maintain a suit in equity to settle the decedent's estate, but they cannot have a decree for distribution among them without making the personal representative of the decedent a party. To this effect, the principal case is cited in *Hansford v. Elliott*, 9 Leigh 80, 95, and foot-note. *Robertson v. Gillenwaters*, 25 Va. 118, 7 S. E. Rep. 371, and foot-note to *Moring v. Lucas*, 4 Call 877.

and John W. Frazier; and administration of this testator's estate with his will annexed was granted to another James Frazier, a distant relative, who gave an administration bond, wherein George 644 Coiner *was his surety. That the legatees Samuel and Bella Frazier named in the will of the testator James, died before that testator, so that the legacies bequeathed by his will to them, lapsed, and the legatees, James and John W. Frazier, became entitled to the whole residuum of that testator's estate. That Bella Frazier died the wife of William Hillis, and leaving one child, the plaintiff Eliza Hillis, to whom her father had relinquished all claim he might have. That John W. Frazier was also dead, and the plaintiffs Paul and Coursey were his executors. That, in a suit, which had been brought by James Frazier, the son of Samuel the elder, against James Frazier the administrator with the will annexed of the testator James, it became necessary to ascertain the amount in his hands, as administrator of the testator James, and as executor of the first named testator John, in which character he had possessed himself of some of the assets of John's estate that had not come to the hands of his testator James in his lifetime; and it was ascertained by an account taken in that cause, that James Frazier (the administrator &c.) had in his hands in August 1815, the sum of 963 dollars of his testator James's estate, and in August 1816, the sum of 365 dollars of the first named testator John's estate. That the plaintiffs, executors of John W. Frazier, were entitled to a moiety of the 963 dollars of the testator James's estate; and that the 365 dollars of the testator John's estate, belonged to the plaintiffs executors of John W. Frazier, to his brother the legatee James Frazier, and to the plaintiff Eliza Hillis, in equal shares. The bill made James Frazier the administrator of the testator James, and as executor of the testator John, and George Coiner, the surety in his administration bond, parties defendants; and prayed a decree for the money, with interest, claimed by the bill as due to the plaintiffs respectively, and general relief.

There were exhibited with the bill, 1. the will of the first named testator; 2. the will of the testator, James Frazier; and 3. the account taken in the suit brought by James Frazier the younger, mentioned and referred to in the bill.

645 *1. The will of John Frazier, after devising his real estate, contained the following bequest: "In respect to my personal estate, I leave it to the management of my brother James: which property consist of cows, horses and hogs, and perhaps some household furniture, together with notes and bonds; and that he shall see all the debts of my estate punctually paid; and that he make public sale of said estate, and at a future day make a distribution among the legatees of my personal estate, according to their merit or deserts, as he may see at a future day what time may turn up; and he may call in his nephew Samuel Frazier as his assistant in this business." The phrase "among the legatees of my personal estate," referred to the

testator's next of kin; for the will named no such legatees. James Frazier the brother, never executed the power of appointment.

2. In the will of the testator James Frazier, there was the following residuary clause: "all the residue of my estate, be it of what kind soever, I desire may be sold by my executor (after my wife's death) and the proceeds of such sale, after paying my just debts, legacies, and funeral charges &c. to be equal divided among all my brother Samuel Frazier's children, to wit, John W., James, Samuel, and Bella Frazier, which I give to them and their heirs forever."

3. The account taken in James Frazier's suit, shewed a balance in the hands of the defendant James Frazier, of his testator James's estate, of 963 dollars, bearing interest from August 1815, and a balance in the same defendant's hands, belonging to the first named testator John's estate, of 365 dollars, bearing interest from August 1816. But the defendant James Frazier was not executor of the testator John.

The bond given by the defendant Frazier, with Coiner as his surety, for the due administration of the estate of the testator James Frazier with his will annexed, was exhibited. It was dated the 27th June 1814. And the condition of it was, "That if the above bound James Frazier administrator with the will annexed of all the goods, 646 chattels *and credits of James Frazier deceased, do make or cause to be made a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come to the hands, possession or knowledge of him the said James Frazier, or to the hands or possession of any other person or persons for him; and the same so made do exhibit, or cause to be exhibited, to the county court of Augusta, at such time as he shall be thereunto required by the said court; and the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased, at the time of his death, which at any time after shall come to the hands or possession of the said James Frazier, or into the hands or possession of any other person or persons for him, do well and truly administer according to law; and further, do make a just and true account of all his actings and doings therein, when thereto required by the said court; and all the rest and residue of the said goods, chattels and credits, which shall be found remaining upon the said administration account, the same being first examined and allowed by the justices of the court for the time being, shall deliver or pay unto such person or persons, respectively [as the said justices by their order or judgment shall direct, pursuant to the laws in that case made and provided]; and if it shall hereafter appear, that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said court, making request to have it allowed and approved accordingly, if the same James Frazier, being thereunto required, do render and deliver up his letters of administration, approbation of such tes-

tament being had and made in the said court; then this obligation to be void and of no effect, or else to remain in full force and virtue.'''*

647 *The chancellor's decree (taking the bill pro confesso on the default of the defendants) was, that the defendants Frazier and Coiner should pay to the plaintiffs executors of John W. Frazier, one half of the 963 dollars of the testator James's state, and one third of the 365 dollars of the first named testator John's estate, and to the plaintiff Eliza Hillis, one third of the same 365 dollars, with interest &c.

The defendants applied to this court, by petition, for an appeal from the decree, which was allowed them.

Johnson for the appellants: Stanard for the appellees.

GREEN, J., delivered the opinion of the court. The decree is liable to many well founded objections. It is a decree by default against parties who were not in contempt by any proper process. Neither the subpoena nor the decree nisi required the defendants to answer any such bill as was in fact exhibited; and the parties named in the decree nisi are different from those between whom the decree was made. There are variances at every step of the proceedings. No such decree nisi could regularly be entered against Coiner; though, upon the return that he was not an inhabitant of the state, a decree nisi with an order of publication, might have been entered, if the proceedings had been in other respects regular. If there were no other objections to the decree, the irregularities in the process would be sufficient to reverse it.

648 *The next objection is, that the bond, upon which the decree is founded against Coiner, as the surety of the other defendant, does not conform, in substance, to that prescribed by the statute, for the official bond of an administrator with the will annexed. It was intended to be in the form of that prescribed for an administrator, but it does not even conform to that. The form of the condition of the bond, is that given by the act of 1711, which was altered by the act of 1785, and retained as altered, in all the subsequent revisions. The stipulation to administer the goods &c. according to law, found in this bond, and which is found also in the forms prescribed by law, for the bonds of both executors and administrators with the will annexed, and other administrators, does not embrace the surplus assets payable

to legatees or distributees, but only extends to receipts and disbursements made in the expenses of the administration and the payment of debts. If it went further, and embraced that surplus, there would have been no necessity or propriety in making any difference in the form of the stipulations of the bonds in respect to its disposition, and to provide (as the statute does, in the bond of an executor or administrator with the will annexed) that the balance upon the account of the administration, remaining unadministered, shall be paid and delivered in satisfaction of legacies given by the will, as far as the goods, chattels and credits will extend according to the value thereof, and as the law shall charge; and, in the case of an administration, "to such person or persons respectively as are entitled to the same by law." The bond in this case, though it may be good as a common law bond, for the indemnity of the justices to whom it was given, (as to which I give no opinion,) is not a statutory bond, upon which any suit at law or in equity can be maintained for the benefit, and at the relation, of a legatee. And, therefore, the bill ought to be dismissed as to the appellant Coiner.

The appellant Frazier is, however, responsible to the legatees for the surplus assets of James Frazier his testator 649 *in his hands, independently of the bond. But he was not responsible to the legatees of John Frazier, for the assets of his estate which came to his hands. As to them he was executor de son tort, and as such liable to John Frazier's creditors at law, but not to legatees in equity, without setting up an administrator de bonis non, and making him a party; for, otherwise, a recovery by them would not protect him from the demand of any subsequent administrator de bonis non, as he would be protected by the recovery of a creditor. *Edlows v. Deane*, Bunb. 36, cited in *Wernick v. M'Murdo*, 5 Rand. 75.

But even if he was responsible in respect to the assets in his hands of John Frazier, in this suit, the principle upon which that fund was distributed by the decree is erroneous. John Frazier died intestate in respect to that fund; and his surviving brother was entitled to a moiety of it, as a part of his general assets, and the four children of his deceased brother Samuel, to the other moiety; two of whom having since died, one of them intestate and unmarried, that moiety was equally distributable between his surviving brother, and the representatives of his deceased brother and sister, respectively.

The residuary assets of James Frazier (in which is included a moiety of the residue of John Frazier's assets) was also distributed by the decree, upon mistaken principles, which excluded the infant party from any participation in it. James Frazier bequeathed the residue of his estate to the four children of his brother Samuel (who was dead) as tenants in common. Two of them died in the lifetime of this testator; one of them leaving issue. The consequence was, that as to a moiety of that residue, the residuary legacy lapsed; as to it the testator was intestate; and it

*This condition follows the form of the condition of an administrator's bond, which was prescribed by the act of 1711, ch. 2, § 12, 4 Hen. stat. at large, p. 19, but being applied, in this case, to the obligation of an administrator with the will annexed, for which the form was not intended, it is, of course, variant from the form given in that statute.

The form of the condition of the bond of an executor, and of an administrator with the will annexed, was also prescribed by the same statute: *Id. ibid.*

The form for the condition of an administrator's bond, was altered by the statute of 1785, ch. 61, § 29, which instead of the words in the form of the statute of 1711, requiring the administrator to deliver and pay the estate of the deceased, to such person or persons, respectively, "as the justices by their order shall direct, pursuant to the laws in that case made and provided," requires him to deliver and pay the same to such person or persons, respectively "as are entitled to the same by law." See 1 Rev. Code, ch. 104, § 86, p. 883.—Note in Original Edition.

was distributable among his next of kin, his two surviving nephews, and the proper representative of his deceased niece, who was entitled to one-third of that moiety so lapsed. But the whole has been equally divided between the two surviving nephews, upon the ground, I suppose, of the 650 general rule, *that all legacies failing by lapse or otherwise, fall into the residuum, and pass to the residuary legatees; which is true, in respect to all specific or pecuniary legacies, but not as to the subject of the residuary legacy itself; for, if any part of that fails to take effect, by lapse or otherwise, it becomes so far an intestacy, and goes to the next of kin as undisposed of.

There is yet another error in these proceedings: the admitting in evidence against the appellants, and taking as the foundation of the decree, the record of another cause, to which the plaintiffs in this suit were neither parties nor privies.

The decree must be reversed; the bill dismissed with costs as to Coiner, and the cause remanded with directions to send it to the rules, with leave to the plaintiffs to amend their bill, if they shall be advised to do so; and to be further proceeded in there.

Rootes v. Stone.

April, 1831.

(Absent COALTER, J., and BROOKE, P.)

Attorney and Client—Negligence—Liability—Interest.*
—An attorney at law is employed to collect debts.

***Fiduciaries—Loss of Debt through Negligence—Liability for Interest.**—To the point that, independent of statute, in Virginia, executors and other fiduciaries are not held liable for interest upon debts lost by their negligence or other misconduct, the principal case was cited in *Chapman v. Shepherd*, 24 Gratt. 382, 383. But, in this case (*Chapman v. Shepherd*) it was held that where executors fall by their negligence to collect a debt due to their testator by a bond under a penalty, the debtor being good for the money at the death of the testator and continuing good for it for fourteen years, when he failed, the executors are chargeable with the principal and interest thereon up to the time of the failure of the debtor but that they are not chargeable with interest after that time. JUDGE STAPLES, in delivering the opinion of the court, said, p. 385: "The rule of law which exempts a fiduciary from the payment of interest upon a debt lost through his default, is a hard one, and has been remedied by statute (for statute, see below.) Neither sound policy, nor any well-settled principle, requires that the court shall extend this exception to interest which was as easily collectable as the principal. It is supposed, however, that this is in conflict with *Rootes v. Stone*. A copy of the decree of this court in that case has been furnished by the counsel for the appellee. This decree charges the attorney with the debts lost by his negligence. But we have no means of ascertaining what these debts were. It may be that no interest had accrued upon them, or that by the form of the contract or the nature of the debt, the creditor was entitled to interest only from the date of the verdict of a jury. Upon these points the report of the case in 2 Leigh 650, furnishes no information. Indeed that report is too meagre and obscure to render the decision a conclusive authority upon this court, in determining the questions involved in the present case."

To the point that, where an attorney at law has lost debt by negligence he is liable for the principal of the debts, but not with interest thereon, the principal case was cited in *Stearns v. Mason*, 24 Gratt. 494.

But, by statute (Va. Code 1849, p. 548, ch. 132, § 6, Code 1867, § 3076), it is provided that if any fiduciary mentioned in the chapter, or any agent, or attorney at law, shall, by his negligence or improper conduct, lose any debt or other money, he shall be charged with the principal of what is so lost, and interest thereon, in like manner as if he had received such principal.

and some of them are lost to his client through his negligence: HELD, the attorney is chargeable for the principal of the debts so lost, but not with interest thereon.

On an appeal from a decree of the superior court of chancery of Williamsburg, upon a bill exhibited by Stone against Rootes, shewing that Stone had placed a large number of bonds, notes, and other evidences of debts, in the hands of Rootes, for collection, as an attorney at law, and praying an account of Rootes's transactions in that agency; a question arose, whether Rootes ought to be charged with interest on the amount of some of the debts, which he might have collected with proper 651 diligence, but which were *wholly lost to his client through his negligence, and with which he was therefore held chargeable, or only with the principal of the debts so lost?

And, per curiam, he ought to be charged with the principal only.

Garlands v. Jacobs & C.†

November, 1830.

(Absent COALTER, J.)

Indemnifying Bond—At Whose Relation Action Must Be Brought.—An indemnifying bond given to a sheriff, under statute 1 Rev. Code, ch. 134, § 25, 26, can only be put in suit at the relation of the person having the legal title to the property taken in execution and sold by the sheriff, not at the relation of any person having an equitable right therein.

Hudson Kidd, by deed dated the 20th May 1820, and duly recorded the same day, conveyed sundry articles of personal property to Spottswood Garland, in trust, to secure a debt of 134 dollars due from Kidd to Whitehead & Co. An execution, sued out by James and William Garland against Kidd, was levied on the property mortgaged by the deed of trust, by Jacobs sheriff of Nelson; and James and William Garland with Spottswood Garland their surety, executed an indemnifying bond to Jacobs, to indemnify him for selling the property under the execution. Spottswood Garland the surety was (it seemed, though it was not expressly so stated in the record) the same person who was the trustee in Kidd's deed for the security of the debt to Whitehead & Co.

An action of debt (founded on the statute, 1 Rev. Code, ch. 134, § 25, 26, p. 533, § 4,) was brought on this indemnifying bond, in the name of Jacobs the sheriff, at the relation and for the benefit of Whitehead & Co. against the *obligors 652 James, William and Spottswood Garland, in the circuit court of Nelson. The declaration was in the form approved by this court in the case of *Carrington v. Anderson*, 5 Munf. 32, with this peculiarity, that the declaration shewed, that the legal title of the property, which the bond was taken to indemnify the sheriff for selling, was not in Whitehead & Co. the relators, but in Spottswood Garland, under Kidd's

†This and the two following cases are not printed in the exact order of time in which they were decided.—Note in Original Edition.

‡See the principal case cited with approval in *Poage v. Bell*, 8 Leigh 607; *foot-note* to *Leightons v. Hinchman*, 1 Gratt. 156; *Calahan v. Depriest*, 13 Gratt. 276.

deed of trust of May 1820. The defendants demurred generally to the declaration; and pleaded, that they had not broken the conditions of the bond, but had well and truly kept and performed the same; and an issue was made up on the plea. The court overruled the demurrer; and upon trial of the issue, the jury found for the plaintiff, and the court gave him judgment. The defendants appealed to this court.

Johnson for the appellants: Leigh for the appellee. The only question was that which arose on the demurrer to the declaration, Whether Whitehead & Co. not having the legal title of the property, but only an equitable interest therein, could prosecute a suit on the indemnifying bond, in the sheriff's name, at their relation and for their benefit?

GREEN, J., delivered the opinion of the court. The objection taken by the appellant's counsel to the judgment, is perfectly well founded. The literal terms as well as the spirit of the statute, in force when the bond, upon which the action was brought, was executed, authorized no one to sue upon it but the person, who, if the statute had not been made, would have been capable of recovering in an action against the sheriff for the wrongful seizure and sale of the property taken in execution. To protect the sheriff against such action, by throwing the responsibility from him upon the plaintiff, was the sole purpose of the statute: and to extend it further, and to equitable rights or interests of any sort, which could not have been originally asserted in any action against the sheriff,

would produce inextricable confusion, 653 *as was justly urged in the argument of the appellant's counsel. Besides, after the equitable claimant had recovered on the bond, the trustee upon the strength of his legal title, could recover the specific property from the purchaser under the sheriff's sale.

The judgment is to be reversed, the demurrer sustained, and judgment entered for the defendants.

Watts v. Cole and Wife and Others.

December, 1830.

(Absent COALTER, J.)

Writ of Right—Infant Tenant—Objection in Appellate Court—Quære.—In a writ of right, the præcipe and count describe tenant as an infant: tenant appears, pleads, and defends himself by attorney, no guardian ad litem being assigned him; nor does it appear he came to full age pending the writ: verdict and judgment for demandants; tenant in person appeals to this court: Quære, whether he can object to the proceedings on account of his infancy here, or ought to have resorted to writ of error coram nobis?

Same—No Replication—Effect—Quære.—In a writ of right, there is a count and plea, in the statutory forms, but no replication: the assize is regularly charged to make recognition: verdict and judgment for demandants: Quære, whether the mise was joined by the count and plea, without a replication? and whether the irregularity was not cured by the verdict?

Same—Upon What Seizin Writ May Be Sustained?—Case at Bar.—S. W. tenant in tail, in 1752, covenants

to stand seized to use of L. W. his then eldest son and his heirs, and his heirs, in fee simple; and then subjoins a covenant, that L. W. may immediately after his S. W.'s death enter upon and enjoy the land: L. W. died before S. W. who always continued in possession: *Held*, this conveyance worked no change in S. W.'s estate, but he continued seized of an estate tail as before it was made, and therefore, the limitation of the estate to L. W. after S. W.'s death, was void: neither did L. W. acquire any seizin in fact or in law, upon which a writ of right could be sustained.

This was a writ of right for 150 acres of land in the county of Elizabeth City, originally brought in the county court, in May 1817, by Cole and wife and others, heirs and devisees of Robert Bright, de- 654 mandants, against Watts, *infant son and devisee of Thomas Watts, tenant.

The præcipe, the count and the plea, were in the forms given by the statute for reforming the proceedings in writs of right, 1 Rev. Code, ch. 118, p. 463. But there was no replication to the plea; and though the præcipe and the count described the tenant as an infant, yet no guardian ad litem was assigned him, and he appeared and pleaded by attorney. The assize was charged to make recognition, in the statutory form; and it found a special verdict, upon which the county court gave judgment for the tenant. The demandants appealed to the circuit court. And there, at May term 1822, the following order was entered: "This day came the parties by their attorneys; and thereupon, the transcript of the record of the judgment aforesaid being seen and inspected, by consent of the parties it is considered by the court, that the judgment be reversed and annulled, and the special verdict in this cause set aside, and that a new trial be had of the issue joined, and that the cause be retained in this court for a trial to be had of the issue joined therein." Still, no guardian ad litem had been assigned for the infant tenant, nor was one afterwards assigned to him, nor was it suggested on the record that he attained to full age pending the suit.

Upon the trial in the circuit court, the assize found a special verdict, stating the following case:

That Thomas Watts, being seized in fee simple of the land in question, duly made and published his last will in April 1726, which was duly proved and recorded in 1727, and thereby devised the premises to his son Samuel Watts, in tail general, under which devise Samuel entered, and was seized in tail general accordingly.

may maintain a writ of right and says: "It remains but to observe that JUDGE GREEN, in *Watts v. Cole and Wife, etc.*, has strongly expressed the contrary opinion; but as it was not a question in the cause, the case furnishes no authority. And yet he admits that a devise of a right of entry is good, and gives the right to sue in ejectment. Now a devise of a right of entry does not cast the freehold or possession on the devisee, as it does where the devisor is seized. The plaintiff in ejectment therefore must avail himself of the devisor's possession. And hence it seems to me, that if the devise of a right of entry gives the remedy by ejectment, the devise of the right of property carries along with it the power of maintaining a writ of right." To the point that in Virginia a devise of a right of entry may maintain ejectment, the principal case is also cited by TUCKER, P., in his opinion in *Taylor v. Rightmire*, 8 Leigh 478.

Seizin—Presumption by Court.—To the point that seizin cannot be presumed by the court, even if the jury have found facts from which they might have properly presumed it, the principal case is cited in *Dawson v. Watkins*, 2 Rob. 207.

***Writ of Right—Who May Maintain.**—In *Taylor v. Rightmire*, 8 Leigh 478. It was held that, in Virginia, a writ of right may be maintained by a devisee, upon the possession or seizin of his testator. In delivering his opinion, TUCKER, P., lays down the proposition that the devisee of a mere right of property

That Samuel Watts, being so seized in tail, by deed, dated the 16th September 1752, and acknowledged in court and recorded in April 1753, "conveyed the land to his [then eldest] son Littleton Watts, in fee simple;" which deed was found in hæc verba. This deed was in its form a feoffment, whereby Samuel Watts, in consideration of natural *love and affection for his son Littleton, and for his better advancement and preferment, gave, granted, enfeoffed and confirmed, the land to the son Littleton and his heirs: and there was a covenant subjoined to the conveying part of the deed, whereby the grantor "covenanted and agreed to and with Littleton, his heirs and assigns, that he and they should and might, immediately on the death of Samuel (the father and grantor) and thenceforth forever after, peaceably and quietly have, hold, occupy, possess and enjoy, the premises, free, clear and discharged, of and from all former and other gifts, grants, feoffments, jointures, dowers, and all other incumbrances whatsoever." No livery of seizin was found. Nor was it found, that Littleton, the son, was ever in possession.

That Littleton Watts, by deed of bargain and sale, dated the 2d December 1777, and duly recorded, "conveyed the same land in fee simple to Robert Bright;" which deed was also found in hæc verba. It was a deed of bargain and sale, the premises whereof, in consideration of £100. paid by Bright to Littleton Watts, conveyed the land (describing it as the same given him by his father's deed of September 1752) to Robert Bright and his heirs begotten by Mary Bright, the bargainor's sister; but the habendum was, "to have and to hold the same, immediately after the death of the said Littleton and Samuel his father, to the said Robert Bright and Mary his wife, until either of them should marry again, and then, to their heirs which should proceed from the said Robert and Mary;" and the said Littleton covenanted with the said Robert, "that he the said Robert and Mary his wife, immediately after the death of the said Littleton, and Samuel his father, might and should take full possession, have, hold, use, occupy, possess and enjoy, the premises, without let, suit, hindrance, disturbance or molestation of any person or persons whatsoever, until either of them should marry again, and then their heirs, which should proceed from the said Robert and Mary."

656 *That Samuel Watts, the grantor in the deed of September 1752, survived his son Littleton, the grantee therein, and died in 1797, having first duly made and published his last will, which was duly proved and recorded in 1798, whereby he devised the same premises, so before conveyed to his son Littleton in fee simple, to his [then eldest] son Thomas Watts in fee.

Under which devise, Thomas entered, and held possession until 1815, when he died, having first duly made his last will, which was duly proved and recorded, whereby he devised the premises to his son Thomas, the tenant in this action.

And it was found, that the demandants

were the heirs at law and devisees of Robert Bright, to whom Littleton Watts conveyed the premises by the deed of December 1777; but it was not found, that they were also the heirs of Mary Bright therein mentioned, or which survived the other, Robert or his wife Mary.

The question referred by the verdict to the court, was, whether upon this state of facts, the law was for the demandants or for the tenant?

The circuit court held, that the law was for the demandants, and gave them judgment for the land; from which the tenant prayed an appeal to this court, and he himself executed the appeal bond.

The cause was argued here, by R. G. Scott for the appellant, and Johnson for the appellees.

I. Scott objected, that the proceedings were fatally irregular. 1. There was no replication to the plea, and so no mise joined; and though it may not be necessary, that the mise should be joined in the precise form given by the statute, yet it is necessary it should be in some way and in substance well joined. *Taylor v. Houston*, 2 Hen. & Munf. 161; *Chichester v. Boggess*, 5 Munf. 98; *Green v. Bailey*, Id. 246. 2. The tenant was described in the writ as an infant, and a guardian ad litem ought to have been *assigned him, before the count was filed (since matter might be pleaded for him that would abate the writ) or, at all events, before any rule was taken against him: he could only appear and plead by guardian, and not by attorney. If he attained to full age pending the suit, that should have been suggested on the record, and thenceforth he might have appeared and defended the action by attorney. 3 *Bac. Abr. Infancy and Age*, K. 2, p. 616, and seq.; *Cole v. Pennell*, 2 Rand. 174. But here, not only the infant tenant appeared and pleaded by attorney, but after trial and verdict, and judgment for him, in the county court, that judgment was reversed by the circuit court, upon consent of parties, the infant still appearing by attorney: but no one could give such consent for him. The writ of error coram nobis would have been his proper remedy, if the fact of infancy had not appeared on the record; but the tenant's infancy being affirmed by the demandants on the record, there was no question of fact to try. 9 *Vin. Abr. Error*, I. pl. 13, 18, I. 2, pl. 11, p. 488, 489, 491. It was error in law appearing on the record: therefore, the plaintiff's proper and only remedy was by appeal to this court. His appeal bond bound his surety, and even as to himself, it is not void, but only voidable; *Walmsley v. Lindenberger*, 2 Rand. 478.

Johnson answered, 1. that the want of a replication was wholly unimportant. The statute is not imperative, that the forms therein given shall be pursued; it provides, that the pleadings shall be in the forms given, or to the same effect. *Snapp v. Spengler*, ante, 1. The count and plea make a complete issue; an affirmation and negation of the right; and the plea prays, that recognition be made &c. so that the replication, which the statute gives the form of, is nothing but a similitur, the

want of which is cured in this, as in all other cases, by the verdict. In *Taylor v. Houston*, the record stated, that the tenant put in the usual plea; but as there is no plea that can be called the usual plea, in such cases, and as the pleadings must be in writing, the court held, that for the want of a plea, there was no assize 658. joined. *In *Chichester v. Boggess*,

the count was by two; the plea defended the right as to one only, and was held naught, because it was a departure. But in *Turberville v. Long*, 3 Hen. & Munf. 209, the record stated, that the demandant replied generally to the plea; and though there is no general replication in such cases, yet this was held good after verdict; which shews, that the want of a replication is immaterial. 2. As to the infancy of the tenant: it is true the præcipe and the count describe him as an infant; but he might have attained to full age before appearance and plea pleaded, and then it was right he should defend himself by attorney. And it is to be presumed the fact was so; for he appeared by attorney, and defended himself in the county court; he appeared by attorney in the circuit court, and consented to reverse the judgment of the county court; and he prayed this appeal in person, and executed the appeal bond. At all events, the writ of error coram nobis was his proper remedy; for the error complained of is, in its very nature, an error in fact; and if he had resorted to that remedy, and assigned his infancy as error, it might have been pleaded that he attained to full age pending the suit. But if the tenant must be taken to have been an infant in the court below, he is still an infant; he could not appeal; he could not give the appeal bond; he cannot appear here, as he does, by attorney; he must assign errors by guardian ad litem; he cannot assign error in law and error in fact at the same time. *Frescobaldi v. Kinaston*, 2 Stra. 783; *Sheepshanks v. Lucas*, 1 Burr. 410, 2 Bac. Abr. Error, K. 2, p. 487, 3 Id. Infancy and Age, I. 6, 607, K. 2, 616; *Bingham on Infancy*, 121, *Coke's entries*, 289.

II. Scott contended, that, upon the merits, the demandants shewed no right to the land. The deed made by Samuel Watts to his son Littleton in 1752, could not enure as a feoffment, for want of livery of seizin; it could only enure, possibly, as a covenant to stand seized to use; and then, it was a covenant by Samuel the father, tenant in tail to stand seized to the use of Littleton, his eldest son and *heir apparent in tail, after the covenantor's own death. This is the intent of the instrument clearly expressed; and why not also the effect of it? Taking it so, the estate tail continued in Samuel the father, unaffected by the conveyance: for, "where a tenant in tail limits an estate to commence after his own death, it is absolutely void, and he continues tenant in tail as before; because there, the issue in tail has a right paramount, per formam doni. Therefore, where tenant in tail covenanted, to stand seized to the use of himself for life, and after to the use of his eldest son and his heirs, it was resolved, that the son should not have the land by this covenant; for

when the tenant in tail covenanted to stand seized to the use of himself for life, it was as much as he could lawfully do; the limitation over was void, and he was seized as before." 1 Cruise's Digest, Tit. II. Estate tail, ch. 2, § 13, 14, 15; 4 Id. Tit. XXXII, Deed, ch. 10, § 31. Then, Littleton Watts, never having had the seizin or possession of the land, his deed of bargain and sale to Bright and wife, passed nothing. *Duval v. Bibb*, 3 Call, 362; *Tabb v. Baird*, Id. 475; *Hopkins v. Ward*, 6 Munf. 38. The deed to Bright and wife, was an attempt by Littleton Watts, to limit a future use to them upon his own future use, which had been limited by his father's deed to him, and which was yet unexecuted. However, this deed of Littleton Watts cannot be regarded as a conveyance to Bright alone, much less a conveyance to him in fee; it is a conveyance to Bright and his wife, until they or either of them shall marry, remainder to the heirs of their bodies begotten; that is their children, who could only take under this deed as purchasers under the bargainor; so that they cannot claim as heirs or devisees of Bright. And, whether they claim as heirs of Bright, or as purchasers under Littleton Watts, neither he nor Bright ever had seizin of the land, in any sense, upon which the demandants can maintain the writ of right. If the deed to Bright and wife could be regarded as conveying an estate of inheritance to them, it was a joint estate 660 tail special to them both; and *which ever survived took the whole; *Thornton v. Thornton*, 3 Rand. 179, and the statute of 1776, abolishing entails, gave the survivor a fee simple. Now, it is not found, that Bright survived his wife; and, therefore, the demandants, who are only found to be his heirs, have shewn no title.

Johnson. The effect of the deed of 1752, executed by Samuel Watts to his son Littleton, as well as the intent of it plainly expressed, was, to convey the land to Littleton, immediately, in fee simple, reserving to the father only the usufruct during his life. The deed may well operate as a feoffment; since, the jury find, that the estate was thereby conveyed to the son in fee, which finding includes the livery of seizin necessary to perfect the conveyance, and the court must intend that it was proved; and besides, the deed was duly recorded, which is tantamount to enrolling in England; and there, livery of seizin is not necessary, when the conveyance is by deed intended and enrolled; *Shep. Touchs*. 210. But, certainly, if the deed cannot enure as a feoffment, it may be, for that very reason, and (being to the grantor's son) is, good and effectual as a covenant to stand to use. *Rowletts v. Daniel*, 4 Munf. 473. Then, to say that this was a covenant by the father to stand seized to his own use for life, and after to the use of the son, instead of a direct immediate conveyance to the son, with a covenant that the father might enjoy the usufruct for life, would be to make the covenant subjoined to the conveyance the only operative part of it; to give an effect to that covenant, which would control all the conveying parts of the instrument, and

defeat and render them wholly nugatory. Taking this as an immediate conveyance to the son in fee, reserving the usufruct to the father for life, in other words, giving the instrument the very effect its terms import; though, as the law was at the time, it would not have discontinued the estate tail, and prevented the heir in tail from entering as such after the tenant's death yet it conveyed all the grantor's estate out of him to the grantee, and gave him the legal seizin. Neither was the grantor's enjoyment of the usufruct,

661 *according to the covenant subjoined to the conveyance, at all incompatible with the title and seizin before conveyed to the grantee: the possession of the grantor was not adversary to the grantee. The deed was a conveyance by tenant in tail of the fee simple, at a time, indeed, when he had no right so to convey; but the statute of 1776, for abolishing entails, perfected the conveyance according to its intent; *Orndoff v. Turman*, ante, 200. There was nothing, then, to disable the grantee Littleton from making an effectual conveyance of the fee by deed of bargain and sale. *Rowletts v. Daniel* shews, that the possession by the covenantor to stand seized to use, he claiming only the usufruct for life, did not at all impede or impair the covenantee's power to convey the estate.

And he did convey it to Bright by his deed of December 1777; to Bright and the heirs of his body by Mary his then wife; an estate tail special, which the statute of 1776, converted into a fee simple in Bright. Bright was the purchaser; Bright paid the consideration of £100. and, accordingly, the premises of the deed import a conveyance to Bright and his heirs by Mary his wife. The habendum to Bright and his wife Mary till they marry, and then to the heirs of their bodies, can no more vary the effect of the premises, and convert the conveyance from one to Bright alone into a conveyance to Bright and his wife jointly, than it can change the conveyance of an estate of inheritance declared and effected by the premises, into an estate only till Bright or his wife should marry.

Littleton Watts had the seizin in law of the land in question; he conveyed the same seizin to Bright by his deed in 1777. And seizin in law is enough to maintain the writ of right.

Even supposing, that the deed of 1752, was only a deed of covenant by Samuel Watts, the tenant in tail to stand seized to the use of his son Littleton, after his own death; though such a conveyance exceeded the power of the tenant in tail, according to the law existing at its date, yet, 662 surely, *it no more exceeded his power, than an immediate alienation of the land in fee simple to a stranger, would have exceeded it. If the tenant in tail had aliened immediately in fee simple, the case of *Orndoff v. Turman* shews, that the statute for abolishing entails, would have perfected such a conveyance. Much more must the statute perfect a conveyance by a tenant in tail of the reversion in fee after his death. And it can hardly be doubted, that if one convey an estate to another in fee, reserving a life estate to

himself, the grantee acquires a vested remainder expectant on the grantor's life, and has such a seizin thereof, that he may convey it by deed of bargain and sale. So that, in whatever light the deed of 1752, from Samuel Watts to his son Littleton, may be viewed, Littleton's conveyance to Bright is good and effectual; and the only question is as to the effect of that conveyance.

GREEN, J., delivered the opinion of the court. The deed from Samuel Watts to Littleton Watts cannot operate as a feoffment for the want of livery of seizin, which is not found by the jury, and could not be presumed by the court if the jury had found facts from which they might have properly presumed it. They have not however found any such fact; not even that the grantee entered and was seized according to the conveyance; nor could they have properly found any fact, from which they could have inferred the fact of livery of seizin; since, according to the terms of the deed, taking it all together, the grantee was not authorized to enter until after the death of the grantor. So that Littleton Watts never had any seizin, actual or legal. Nor could the deed operate as a deed of bargain and sale, for the want of a valuable consideration. But it might operate as a covenant to stand seized for the use of the grantee after the death of the grantor; the consideration expressed being perfectly appropriate to the support of such a conveyance; unless, indeed, the conveyance is liable to some other fatal objection, as I think it is.

663 *The laborious investigations imposed upon the court in *Orndoff v. Turman*, having taught me, that, at the time when this deed was made, our law in respect to estates tail and all their consequences, was the same as the english, except that an act of 1748 prohibited the docking of entails by fine or fines and recovery, as in England, and allowed them to be docked only by an act of assembly, or, in respect to estates of small value (of which this was probably one), by proceedings under a writ of *ad quod damnum*: that a conveyance in fee by tenant in tail, by covenant to stand seized to uses, with or without warranty, produced no discontinuance, but that it conveyed to the covenantee a base fee, which might be converted into a pure fee, by a fine and recovery in England, or writ of *ad quod damnum* or act of assembly here: and that if the tenant in tail, notwithstanding such a conveyance, continued seized, and, consequently, a good tenant to the *præcipe* (as he might be, if the covenant was, to stand seized to his own use for the life of another, and after the death of that other to the use of a third, in fee) and by any legal means docked the entails, with intent to vest the fee in himself or a stranger, the proceeding enured to the benefit of the first covenantee, and operated as a corroboration of the former conveyance, and made it indefeasible: and so, in respect to all charges and incumbrances imposed upon the estate by a tenant in tail. But if a tenant in tail covenant to stand seized to the use of himself for life, and afterwards of his heir apparent or a stranger in fee (which would be good in

the case of a fee simple owner, *Pybus v. Mitford*, 2 Lev. 77,) it would operate no change in his estate, and he would be seized as of his former estate, and the remainder consequently utterly void: and if he afterwards docked the estate tail, by any lawful means effectual to bar his issue and those in remainder or reversion, and thereby settled the estate in fee in himself or a third person, that would be good, and would prevail against his first deed, which would not be set up and corroborated by docking the entail, as in the former case; 664 because in the first case the *deed is good and passes a base fee capable of being corroborated into a pure fee; and in the last, the deed is void, making no change in the estate, and incapable of being set up by the docking of the entail. This was the precise case, and so decided in *Higham v. Bedingfield*, Noy, 46, Cro. Eliz. 895, by the unanimous opinion of the court, and approved by *Bacon* in his law of uses, 111. See also *Machell v. Clarke*, 2 Ld. Raym. 779, 2 Salk. 619. The statute of 1776, converting this estate tail remaining in *Samuel Watts* to a fee simple, cannot have a greater effect, than docking such an estate in England, by fine and recovery, or here by a writ of *ad quod damnum*, would have had in favour of the covenantee *Littleton Watts*, and those claiming under him.

There is another fatal objection to the right of the demandants to recover in this case. If they claim as heirs, neither they nor their ancestor as whose heir they claim, have ever been seized in law or in fact of the premises in question; and without a seizin of the demandant or his ancestor in fact, by the actual possession and receipt of the esplees, by the common law, or a seizin in law, under our statutes, no writ of right can be maintained, even though some right may exist in the demandant. It is for this reason, that a writ of right cannot be maintained by a devisee, unless upon his own seizin; *Co. Litt.* 111, a. 240, b. 2 Scho. & Lef. 104, per Lord Redesdale in *Saunders v. Ld. Annesley*. If a right of entry is devisable under our statute of wills, as I think it is, though it is not in England (*Goodright v. Forrester*, 8 East, 552), the devisee can recover only in ejectment; and if the demandants claim as such, in a writ of right, they are not only incapable of maintaining the writ of right, but are barred of their ejectment by the statute of limitations.

The law being for the tenant on the special verdict, he may well waive the objection of infancy, and the failure to make up the issue: and the demandants have no interest in taking up the last of those objections, since they would gain 665 *nothing by it. We may, therefore, properly end this controversy, without noticing those objections, by entering a final judgment on the special verdict for the tenant.

Judgment reversed, and judgment entered for the appellant.

Gregory v. Baugh.

March, 1831.

(Absent COALTER, J.)

Suit for Freedom—Proof of Pedigree—Hearsay Evidence.

—Quære, whether, in the case of a person claiming freedom on the ground of descent from a female indian ancestor, hearsay be admissible, not only to prove the plaintiff's pedigree, but also to prove that the female ancestor, from whom he derives his descent, was an indian? The court, four judges sitting, being divided on the point.

Same—Onus Probandi When Plaintiff Proves Descent from American Indian.—Quære also, whether, if a person claiming freedom on the ground of indian descent in the maternal line, prove his descent from a native american indian female ancestor, the onus probandi lies on the defendant, to prove, that such female ancestor was brought into the country, at a time and under such circumstances that such indians might lawfully be enslaved, or on the plaintiff, to prove that such his ancestor was brought into the country, at a time and under such circumstances that she could not lawfully be enslaved? The court being divided on the point.

Same—Hearsay Evidence—Declarations Post Litem Motam—Case at Bar.—A woman named S. brought a suit for her freedom in 1772, and dying soon after, that proceeding was abated: some 25 or 30 years after, one W. an old person, informed her son, that S. was free, and her family, in consequence of their indian descent from the mother: in a suit brought by S.'s grandson to recover his freedom, W.'s son testifies to those declarations of his mother, as to the plaintiff's ancestor S. HELD, that this hearsay evidence in not objectionable on the ground, that the declarations of W. were made post litem motam: dissentiente BROOKE, P. **Instructions—Erroneous Statement as to Matter in Depositions—Effect.**—A circuit court, in a charge or instruction to a jury, states matter as being in a

***Boundaries—Evidence—Declarations of Deceased Person.**—In *Harriman v. Brown*, 8 Leigh 712, JUDGE TUCKER said that he understood JUDGE BROOKE, in the principal case, to admit that, in our country, in cases of boundary, declarations of deceased persons must be admitted in evidence as to particular facts.

As to when the declarations of a deceased person is admissible in evidence to prove boundary, see foot-note to *Harriman v. Brown*, 8 Leigh 697.

***Instructions—Weight of Evidence.**—The Virginia authorities on the subject of instructing the jury upon the weight, effect and sufficiency of evidence evince a jealous care to watch over and protect the legitimate powers of the jury. They show, that the court must be very careful not to overstep the line, which separates law from fact. They establish the doctrine, that where parol evidence is submitted to a jury, any opinion as to its weight, effect or sufficiency, any assumption of a fact proved, or even an intimation, that written evidence states matters, which it does not state, will be an invasion of the province of the jury. *Nicholas v. Kershner*, 20 W. Va. 268, citing *Ross v. Gill*, 1 Wash. 88; *Keel v. Herbert*, 1 Wash. 203; *Gregory v. Baugh*, 2 Leigh 665; *McDowell v. Crawford*, 11 Gratt. 405; *State v. Hurst*, 11 W. Va. 75; *State v. Betsall*, 11 W. Va. 740. To the same effect, the principal case was cited with approval in *McDowell v. Crawford*, 11 Gratt. 403, 404; *State v. Hurst*, 11 W. Va. 75, 76.

And, in *Whitelaw v. Whitelaw*, 83 Va. 43, 1 S. E. Rep. 407, it is said: "However it may be elsewhere, in Virginia the courts have never indulged in the practice of making observations to the jury concerning the evidence. It is considered as encroaching too much upon the province of the jury. The jury, and not the court, are conclusively and uncontrollably the judges, whenever the question depends upon the weight of the testimony. The court responds to questions of law, the jury to questions of fact. The court instructs the jury upon questions of law, but the court cannot instruct the jury as to the weight of evidence, or the sufficiency of proof. The legitimate powers of the jury in this state have been maintained by many decided cases in this court, and the cases all seem to be the same way, and there has been but little difference of opinion among the judges. The cases show that the court must be very careful not to overstep the line which separates law from fact. These cases, from *Ross v. Gill*, 1 Wash. 90, down to *Gregory v. Baugh*, 2 Leigh 665, are cited by Mr. Conway Robinson in the first volume of his old Practice, p. 338, and the later cases by Mr. Barton in his Law Practice, p. 214. See, also, the late case of *Cornett v. Rhudy*, 80 Va. 710."

The principal case was also cited in *Neill v. Rogers*, etc., Co., 38 W. Va. 231, 18 S. E. Rep. 564, to the point that, if the question depends upon the weight of testimony, the jury, and not the court, are exclusively and uncontrollably the judges.

See further, monographic note on "Instructions" appended to *Womack v. Circle*, 29 Gratt. 192.

written deposition, and instructs the jury that that matter is legal evidence, but in point of fact no such matter is in the deposition: HELD, this was calculated to mislead the jury, and is error, for which the verdict should be set aside and the judgment upon it reversed.

This case, which was a suit in forma pauperis to recover freedom, brought in the circuit court of Chesterfield, by 666 *the appellee against the appellant, was before this court in 1827, when the court reversed a judgment and set aside a verdict rendered for the appellee, on the ground of misdirection of the circuit court to the jury at the trial, and remanded the cause for a new trial. See 4 Rand. 611. After several continuances in the circuit court, the new trial was had at June term 1829, upon which the jury again found for the appellee, that he was free, and the court gave him judgment accordingly. But the appellant filed three bills of exceptions to opinions of the court and instructions given to the jury at this trial, and appealed from the judgment to this court.

The bills of exceptions (disregarding some minor points that involved no principle) stated, in substance:

1. That the plaintiff offered in evidence the affidavit of William Clarke (which had been taken by consent, before the former trial, to be read in chief) who deposed, that the plaintiff was the son of Biddy, who was the daughter of Sybill, who lived with or belonged to Peter Ashbrooke, and who, it was understood, had brought a suit for her freedom; that he believed Sybill died while her suit was pending, without having recovered her freedom; that the affiant supposed he was between five and seven years old at the time of Sybill's death; and being interrogated, whether he had understood, that Biddy and her mother Sybill, were of indian descent, and what was the complexion and appearance of Biddy? he answered, that "he always understood they were descended from indians, and upon that ground, he understood, Sybill brought her suit; but whether it was from the mother's side or father's he was unable to say; and that Biddy had some appearance, in her looks and complexion, of an indian." The defendant objected to the reading of this affidavit. But the court overruled the objection, because the personal attendance of Clarke had been dispensed with by the consent of the parties to take his affidavit; and then instructed the jury, "that so much of the affidavit, as stated that the deponent had always understood

667 *that Sybill was an indian, might be received by them, as evidence tending to prove the general reputation of the neighbourhood, to have such weight as they might think it entitled to, but that the residue thereof was not legal evidence. To this opinion and instruction the defendant excepted.

2. The plaintiff offered in evidence the deposition of Littleberry West, taken in 1828, under a commission de bene esse, the witness being then above eighty three years old, infirm and incapable of attending at the trial. This deposition was taken in the form of question and answer, and was of the following tenor: "1. Question

by plaintiff's agent: Did you ever know Sybill, or any of her family? if so, whom, and when and where? and what was her and their colour, appearance, condition, treatment? Ans. I know nothing about her or her family. 2. Were you connected with, or acquainted in, the family or families, in which Sybill, or any of her kindred lived? If so, how was Sybill, or her kin treated or regarded? as free or not? or entitled to freedom or not? and if entitled to freedom, why? because she was descended in the maternal line from indians, or from what other cause? Ans. I know nothing of the families. Was your father or mother, or any other of your ancestors, connected with the family or families in which Sybill or her kin lived? if so, how? if not, was your father or mother, or any other of your ancestors, well acquainted with the family or families in which Sybill or her kin lived, and residing in the same neighbourhood? if so, state what you have heard your father or mother or any of your ancestors say, concerning the general reputation in the family or families, or neighbourhood aforesaid, in relation to Sybill, or her kin, as free or not, or entitled to freedom or not? and if reputed to be entitled to her freedom, why? because she was descended from indians by the mother's side, or why else? Ans. My mother stated to me that Sybill was free, and her family, in consequence of their indian descent from the mother: my mother further stated,

668 *that they lived three years together, on a plantation belonging to one John Pride; it was also stated by the neighbours, that the said Sybill was free. 4. Have you ever heard, that Sybill or her kin were free, or reputed in the neighbourhood, where she or they lived, to be free? if so, when, from whom, and what? and why was she or her kin reputed to be entitled to freedom? Was it because she was an indian of the whole blood, or so reputed? or was it because her mother was an indian, or so reputed? Was Sybill reputed to have negro blood? if so, in what proportion? and how was she so reputed to have derived it, from the father or mother's side? Ans. I have heard my mother say, that Sybill's mother was an indian, and that Sybill herself was one, and was entitled to her freedom. 5. Have you ever heard of any male indians of Sybill's kin? if so, from whom, when, what? Ans. I have never heard that there was any male indian kin to Sybill. 6. Have you ever heard any thing of Sybill's mother? if so, from whom, when, what? Ans. Yes; she was an indian and free, as my mother stated to me. 7. Have you ever heard how and when Sybill came into the country? if so, from whom, when, what? Ans. I never did hear how Sybill came into the country. 8. State what your own age was, about the time you heard your mother make the above statements about Sybill? Ans. I must have been fifty or sixty years old." The plaintiff also offered in evidence, the transcript of an order made by the general court on the 13th October 1772, in these words: "On the motion of Sybill, who is detained in slavery by Joseph Ashbrooke of Chesterfield county, she is allowed to sue her master

in forma pauperis, and Mr. Jefferson is assigned her counsel to prosecute the said suit: and it is ordered, that her master do not presume to misuse her on this account, and that he allow her to come &c. and attend &c." Whereupon, the defendant's counsel objected, that all the evidence contained in West's deposition was incompetent, because the statements made by Mrs. West, his mother, were made after the commencement of Sybill's suit in the

669 *general court; because her statement as to the mother of Sybill, appeared not to have been made from any knowledge she had of that person; and because the statement of the neighbourhood report of Sybill's right to freedom, was not legal evidence. But the court "instructed the jury, 1. that if it was proved, that Sybill was dead ten or fifteen years before the statements made by Mrs. West to the deponent her son, then her declaration, that she had lived on the same plantation with Sybill, that she was an indian woman, and had the appearance of an indian, was competent evidence, to have such weight as the jury might think it entitled to; but 2. that her declarations concerning Sybill's mother, and concerning the report of her right to freedom, were not competent evidence." To the first part of which instruction, the defendant excepted.

3. The plaintiff then adduced the testimony of several witnesses, tending to prove, that Sybill was the mother of Biddy, and Biddy the mother of the plaintiff, and that Sybill was a native american indian. Upon which the defendant moved the court to instruct the jury, that if the plaintiff founded his right to freedom upon those facts, it was incumbent on him, in order to maintain the issue on his part, to prove that Sybill was brought into this country, at a time or under circumstances, which rendered it unlawful to enslave her. But the court refused to give that instruction; and instructed the jury, "that if they believed the evidence last mentioned, the plaintiff was entitled to recover, unless the defendant should prove, that Sybill had been lawfully made a slave; which fact the jury might presume from the long time during which she and her posterity had been held in slavery, and other circumstances; but it was competent to the plaintiff to rebut that presumption, by proving the ignorance and helplessness of the plaintiff and his said ancestors, and other circumstances." To which opinion and instruction the defendant excepted.

Leigh, for the appellant. The circuit court told the jury, that so much of Clarke's affidavit as stated, "that he had 670 *always understood that Sybill was an indian," was to be regarded by them as evidence. But Clarke did not say that: he only deposed, "that he always understood, that Biddy and her mother Sybill were descended from indians, but whether from the mother's side or the father's he was unable to say." The difference is obvious. If what the judge attributed to the deponent, was his own inference from the evidence, the just effect or amount of it in his own opinion, he went beyond his province, and instructed the jury upon a mere

question of fact. The circuit court told the jury too, that Mrs. West's declaration to her son, that Sybill was an indian, and had the appearance of an indian, was competent evidence; though the deponent West did not say, that his mother told him Sybill had the appearance of an indian. The difference is, that people are often called indians from the reputation of indian extraction, when from mixture with the european or (with us more commonly) the african race, all traces of the indian have disappeared; and so, hearsay evidence that a person was an indian, is not so strong as hearsay evidence that such a person had the appearance of an indian. The charge to the jury, in these particulars, was calculated to mislead them.

It is an established exception to the general rule which excludes hearsay evidence, general reputation, or tradition, that it is admissible to prove pedigree; but it is not admissible to prove the national character, the quality or the rights, of the ancestor from whom the pedigree is derived, or any other specific fact. *Mima Queen v. Hepburn*, 7 Cranch, 290; *Davis v. Wood*, 1 Wheat. 6. And the principle is supported by other american as well as by english authorities; 1 Stark. on Ev. (Boston ed. of 1828) part I., § 42, p. 63, note (d) and the cases there cited. There are cases, pauper cases, in this court, which seem otherwise; but it is doubtful, to say the least, whether, in those cases, the point was discussed, or carefully examined; and they were decided at a time when the judgments of the court seem to have been influenced by quite too strong a leaning in favorem 671 *libertatis (as the phrase was).

There is nothing peculiar in cases of this kind, to require a departure from the common law of evidence; nothing, surely, to justify the courts of justice in disregarding or altering them.

There is another fatal objection to the competency of the evidence of Clarke, as well as to that of the deponent West as to the declarations of his mother. It appears by computation, that those declarations of the mother were made to the son, sometime between 1795 and 1805, many years after the woman Sybill's death, indeed, but also after she had claimed her freedom, and proceedings had been instituted to recover it for her. And as to what Clarke says he understood concerning Sybill, he must have heard it after Sybill's claim to freedom had been asserted, and allowed to be prosecuted, since he was not more than seven years old when Sybill died. Therefore, both the hearsay account which Clarke retails, and Mrs. West's declarations to her son, were post litem motam; and for that reason, if for none other, they were not competent evidence even on the question of pedigree. The present case is very apt to illustrate the wisdom of this qualification of the exception which admits a hearsay evidence as to pedigree: we are informed by Clarke, that it was understood (that is, understood in Chesterfield) that Sybill claimed freedom on the ground, that she was descended from an indian mother; and the order of the general court allowing her to sue her master in

forma pauperis, assigns Mr. Jefferson her counsel to prosecute the suit for her; and, we know, this order must have been founded on Mr. Jefferson's professional certificate, that he was of opinion she was justly entitled to her freedom, and stating the grounds of that opinion: this alone was enough to produce a general opinion in Chesterfield, that the woman was entitled to her freedom, as being an indian, or the descendant of a female indian, illegally enslaved. It was thus, or most probably thus, that Clarke's informants, and Mrs. West, received the impression, which he deposes to, and which she many years after communicated to her son.

672 *Neither of them were relations of or had any connexion with Ashbrooke, the owner of the woman Sybill, or with his family, so as that it was probable they got their information of them; neither of them had any interest, or any peculiar opportunity, to ascertain the truth: and this is another substantive objection to the competency of the evidence. 1 Stark. on Ev. part I. § 41, 43; 3 Id. part IV. p. 1101-5, and the cases there cited, particularly that of the Berkeley peerage.

The last instruction given by the court to the jury, was every way wrong, and in one part of it, indeed, incongruous and insensible. It is now well ascertained, that native american indians could not lawfully be made slaves in Virginia, after the year 1705, but that there was a long space of time preceding that date, when they might lawfully be enslaved; Robin v. Hardaway, Jefferson's reports, 109. There is no principle of justice, upon which the owner of a slave, who, and whom progenitors for generations, have been held in slavery, shall have the onus probandi cast upon him, to prove that the ancestor, who was first enslaved, was lawfully enslaved, or upon which a plaintiff claiming title to freedom should be exempted from the burden of proving his title, any more than a plaintiff claiming any other title. If it be said, that, owing to the great lapse of time, it would, generally, be impossible for the plaintiff to prove the unlawful enslaving of his ancestor; the same circumstance renders it equally impossible for the owner to prove that the ancestor was lawfully enslaved. The actual status of the party, and of his progenitors for generations, is obviously, the best evidence of his and their legal status. But the circuit court told the jury, that the actual state of slavery, in which the female ancestor of the plaintiff, in this case, and her posterity, had been held, was competent to raise a presumption, that she had originally been lawfully enslaved; and, on the contrary, that the ignorance and helplessness of the plaintiff and his said ancestors, (the ignorance and helplessness, namely, incident to a state

673 of slavery, for there *was none other) was competent to rebut the presumption of lawful slavery; in other words, that the actual state of slavery, is presumptive evidence of lawful slavery, and presumptive evidence of rightful freedom. In the case of a negro claiming freedom on the ground that he was imported into Virginia contrary to law, the fact of the

master and importer having complied with the statutory provisions to legalize the importation, is presumed from twenty years possession without claim of freedom on the part of the slave, so as to throw the onus probandi on the slave; and though this presumption, like all other presumptions, may be rebutted by circumstantial as well as direct proof, and though the infancy of the plaintiff is a circumstance which may be relied on to rebut it, yet such infancy (combined with the ignorance and helplessness incident to slavery is not a circumstance which will defeat it. Garnett v. Sam, 5 Munf. 542; Abraham v. Matthews, 6 Id. 159; George v. Parker, 4 Rand. 659. We are in a court of justice, whose province it is to administer municipal law, not in a school of ethics or of politics. And in this country, where the status of slavery is allowed and established by law, and must continue to exist; a status, which no human wisdom or policy can devise the means of abolishing or materially altering, without incurring the danger, or rather the certainty, of evils equally destructive of the happiness of both races, the bond as well as the free; a status, which I firmly believe, was imposed by a dispensation of Providence, whose ways are inscrutable to men, and which Providence alone, in its own good time, can change or determine: in this country, I can discern no reason, why the status of slavery, the right of property in a man, may not as well be settled by prescription as any other right of property: and I can really imagine no reason, why the facts which infer the lawful slavery of a negro, may be presumed from his actual state of bondage for twenty years without claim of freedom, and even the natural incapacity of infancy, added to that of slavery, shall

not suffice intirely to repel and defeat 674 that presumption; *and yet, as to one of indian extraction claiming freedom, no prescription shall avail to determine his legal status, and the presumption of lawful slavery, arising from the actual slavery of him and his progenitors, for a time whereof, literally, the memory of man runneth not to the contrary, shall have no influence on the question of his freedom or slavery, or (which is the same thing) shall be repelled and extinguished by an opposite presumption arising out of that very fact of actual slavery. Neither have I ever been able to understand the reason, or the feeling, that has led many wise and good men among us, at the same time that they tolerate, without any difficulty, the bondage of the african race, to revolt at that of any man of indian extraction, or who may possibly have sprung from a remote female indian ancestor, though the actual claimant, owing to the mixture of his progenitors with the negro race for generations, has lost all traces of the red man of the forest, intellectual, moral and physical. The rights of the white race, and the rights or the subjection of the black, the indian or the mixed races, all depend on the law, and must be ascertained and determined by the law.

Johnson, assigned counsel for the appellee. The remarks, which have been made

upon the variances between the statement of the evidence of Clarke, and of the declarations of Mrs. West, as contained in the judge's charge to the jury, and the actual evidence contained in the depositions, are surely hypercritical. The judge in his charge, intended only to sum up the evidence concisely, referring the jury to the depositions themselves, for the full and exact import of the evidence they contained; and he did no more. It is impossible he could have intended to deceive or mislead the jury. [Leigh, I did not say, nor do I suspect, that he did.] It is equally impossible, that the charge could have deceived or misled the jury: the depositions were before the jury; the cause turned chiefly on them; they were, doubtless, the subject of minute examination and

675 discussion *at the bar; and, it is to be presumed, they were carried by the jury from the bar to the jury room, read there, and considered. Neither does it appear, that the judge's charge was complained of, as to this particular, in the court below: the objection seems to have occurred to the appellant's counsel here, for the first time. Besides, as the court excluded all of Clarke's affidavit, except so much as stated that he understood Sybill was an indian, and there was no such evidence in the affidavit, the whole was, in effect, excluded.

It has been settled, by repeated adjudications of this court, that hearsay, general reputation or tradition, is not only competent evidence to prove pedigree, but also to prove that the ancestor from whom the pedigree is derived, was an american indian. *Jenkins v. Tom*, 1 Wash. 123; *Shelton v. Barbour*, 2 Id. 64; *Pegram v. Isabell*, 1 Hen. & Munf. 388; 2 Id. 193. Nay, the principle seems to have been distinctly admitted in this very case of *Gregory v. Baugh*, when it was before this court in 1827. And it is right it should be so; for, in fact, the proof of pedigree from a particular person, involve of necessity, to every practical purpose, the proof of the identity of the ancestor, and consequently, a description of his person, and an account of his quality, as an essential part of the proof of pedigree. Hearsay is admitted on a principle of necessity, as being the best evidence the nature of the case admits of; and the rule ought to be extended to every case within the reason of it. And in most cases like the present, it must be impossible, in the nature of things, to adduce any other proof. No written documents can exist to prove the facts. The decisions of the supreme court of the U. States cannot prevail here, against the authority of the solemn adjudications of this court. But in *Davis v. Wood*, the court, in a suit for freedom, rejected hearsay, and general reputation, as evidence that the plaintiff's ancestor was a white woman (not absolutely, but except so far as it was applicable to the fact of the plaintiff's pedigree. And this exception is enough to justify the admission of the evidence in the case before the court, and all like cases.

676 *So too, it has been solemnly adjudged by this court, that when a party claiming freedom by reason of his descent

from a female american indian ancestor, proves his descent from such an ancestor, he shews a prima facie title to freedom, and the onus probandi of the ancestor having been brought into the country, at a time and under such circumstances that she might lawfully be made a slave, rests on the party claiming to hold her posterity in slavery. *Coleman v. Dick*, 2 Wash. 234; *Hudgins v. Wright*, 1 Hen. & Munf. 134; *Hook v. Nanny Pagee*, 2 Munf. 379. It is too late now, even to question a principle, so long, so repeatedly, so solemnly settled, as the law of the land, and by which so many cases have been tried and adjudged. But it was rightly so settled; as whoever will examine the history of the subject, given by the judges in their discussion of this cause when it was here in 1827, cannot fail to acknowledge,.

The last instruction given by the circuit court to the jury, was, in effect, that though the actual state of slavery, in which a female american indian and her posterity for generations have been held, may afford a presumption that the indian ancestor was originally lawfully enslaved, yet that presumption is met and rebutted by an equipollent presumption in favour of the right to freedom, arising from the ignorance and helplessness incident to a state of slavery; and that it is open to either party to adduce other circumstantial or presumptive evidence. And experience, reason, and justice, equally approve the opinion.

CARR, J. The questions decided by the court in this case, when it was here before, were, in their general complexion, pretty much the same with those now presented to us; both sets of questions depending on the law of evidence, principally, and growing out of the testimony offered by the plaintiff, in tracing his pedigree and fixing the character of his female ancestor. I may refer, therefore, to the view then taken by me of the general rule excluding 677 hearsay evidence, *and the exceptions to that rule, particularly, that which embraces questions of pedigree. Looking to Clarke's affidavit, the circuit court seems to have understood his evidence to mean what his own words do not import: for it told the jury, that so much of it as stated that the witness had always understood that Sybill was an indian, might be received, and weighed by them. But Clarke said he had understood, that Sybill was descended from indians, but whether on the father's or mother's side, he was unable to say. The difference is most essential. As the judge interpreted the evidence to the jury, the reputation was, that Sybill was herself an indian; thereby reaching, at once, the point which the plaintiff had in view, descent from an indian woman: but, as the affidavit really was, it only proved, that the witness had understood that Sybill was, (not an indian, but) descended from indians, and whether on the father's or mother's side he was unable to say; and this, so far from proving descent from an indian woman, left that point wholly unsupported by the reputation to which the witness testified. This misapprehension of the judge was doubtless produced. by the hurry and confusion of a jury trial. It was contended

at the bar, that as the court excluded all the affidavit but that part which stated the hearsay, that Sybill was an indian, and there was no such statement in it, the whole was in effect excluded. But this was not the meaning of the court, nor the practical construction given to its opinion. The affidavit went to the jury; and, it was said, the jury would read it for themselves, and not take the court's version of it. This they might do, as in any other case where the court undertook to instruct them on the weight or effect of evidence: they might disregard such an instruction; yet it would be error in the court to give it. On this ground, without touching any other, I think this instruction wrong.

We come next to the exception taken to reading West's deposition. It was moved to exclude it, because it detailed the statements made to West by his mother, 678 and these were *made after Sybill had brought suit for her freedom. The court instructed the jury, that if it was proved that Sybill was dead ten or fifteen years before that statement was made, then the declaration of Mrs. West, that she had lived on the same plantation with Sybill, that she was an indian woman, and had the appearance of an indian, was competent evidence to have such weight as the jury should think it entitled to, and that her declaration about Sybill's mother, and about the report of her right to freedom, were inadmissible evidence. As to the first objection, that the statement of Mrs. West was post litem motam; I was a good deal inclined to think that this was an objection of weight; for on examination, I found that the courts, conscious of the intrinsic weakness of hearsay evidence, and anxious to confine it to the exceptions long since established, had, with strictness and even jealousy, excluded it, wherever the statements had been made post litem motam; and the lis mota, is not confined to the institution of the suit, but to the origin of the controversy, nor is it necessary to prove (in order to the exclusion of the evidence) that the person making the declaration, knew of the lis mota. From these considerations, I was at first inclined to give this objection much weight: for the lis now prosecuted by the plaintiff, is the same which Sybill moved in the general court in 1772. But we are told she died about that time. The suit now before us, was not brought till near half a century afterwards; and it seems from the deposition of West, that his mother made the declarations to him when he was from fifty to sixty years old; some twenty or thirty years after the death of Sybill. I rather think, that, after such a lapse of time, the doctrine of lis mota cannot exclude these declarations.

Next, was the court right in admitting the hearsay evidence given by West, namely, the statements of his mother that Sybill was an indian? This question was much discussed at the bar. On the one side it was insisted, that we ought to hold strictly to the rule excluding hearsay, and 679 *not enlarge the exceptions already established; that the question of what country, nation or tribe a person was, is not a question of pedigree, and there-

fore cannot be proved by hearsay: and the cases in the supreme court of the U. States, of *Mima Queen v. Hepburn*, and *Davis v. Wood*, were cited in support of this position. On the other side, it was insisted, that the reason on which hearsay was admitted in any case, was, that it was the best evidence the nature of the case would admit; and that the rule ought to extend to every case within its reason: that in cases like the present, if you exclude hearsay and reputation, you shut the door completely against every claim to freedom, which depends on tracing back the line of pedigree to an indian woman, as there can be no living witness to speak from his own knowledge of transactions so remote, and no written documents exist to fix the fact. It was insisted too, that this court has by many decisions, settled the rule, that in suits for freedom, hearsay evidence may be received to establish a descent from an indian woman. My own opinion on this subject, was pretty plainly intimated, when this case was formerly before us. The precise point then raised, was, whether the "current report and belief in the neighbourhood, in 1770, that Sybill was entitled to her freedom," should be given in evidence to the jury. But in discussing that question, I relied on principles and authorities, which seem to me equally to reject hearsay evidence to prove the country, nation or tribe, of the claimant's ancestor. Such facts do not belong to pedigree. To take them in, you must add another exception to the rule that hearsay evidence is inadmissible. This, I am not disposed to do. I consider hearsay evidence so weak intrinsically, so incompetent to satisfy the mind of the existence of facts, so liable to become a cover for fraud and fabricated evidence, that I cannot agree to enlarge its sphere, even though the refusal should seem to operate harshly on the class of cases now under consideration. Such was the decision of the federal court, in *Mima Queen v. Hepburn and Davis v. Wood*; 680 and I think it the sound and safe course. It is true, as asserted at the bar, that the decisions of this court, in several cases, have gone to let in hearsay to prove descent from an indian woman; and this is the consideration which I have found it most difficult to get over; for I am exceedingly reluctant to unsettle what is at rest. But all who have examined the earlier cases in our books, must admit, that our judges (from the purest motives, I am sure) did, in favorem libertatis, sometimes relax, rather too much, the rules of law, and particularly the law of evidence. Of this, the court in later times, has been so sensible, that it has felt the propriety of gradually returning to the legal standard, and of treating these precisely like any other questions of property. Those decisions admitting hearsay, I have considered as instances of this departure from strict rules, which I should be well pleased to see corrected, if my brethren should think with me: but if they shall think me wrong, and those decisions right, I shall rest perfectly contented with their opinion.

The next exception states, that the plaintiff then introduced the testimony of sev-

eral witnesses tending to prove, that Sybill was the mother of Biddy, who was the mother of the plaintiff, and that Sybill was a native american indian. Whereupon the defendant moved the court to instruct the jury, that if the plaintiff founded his right to freedom on these facts, it was incumbent on him to prove, that Sybill was brought into this country, at a time or under circumstances which rendered it unlawful to enslave her; but the court refused; and instructed the jury, that if they believed the facts last mentioned, the plaintiff was entitled to recover, unless the defendant should prove, that Sybill had been lawfully made a slave; which fact the jury might presume from the long time during which she, and her posterity, had been held in slavery, and other circumstances; but it was competent for the plaintiff to rebut this presumption by proving the ignorance and helplessness of the plaintiff and his ancestors, and other circumstances.

681 I *cannot approve of this instruction. We know, that by our laws of a former day, indians might be held in slavery. This court in *Hudgins v. Wright*, and some other cases, carried back the repeal of these laws to 1691. This was upon the idea, that a law of that date, granting free trade with the indians, had been decided by the old general court, to have repealed all laws tolerating indian slavery: but by the publication of Jefferson's reports (*Robin v. Hardaway*, p. 109), we see, that in 1772, this point was most ably discussed before the general court; and they decided that the act of 1691 did not repeal the indian slave laws, but that they were repealed by that part of the act of 1705, enacting who should thenceforward be slaves. And there can be no doubt, I think, that this is the correct exposition of the laws. Prior to 1705, then, our laws justified indian slavery. When a plaintiff, therefore, traces back his descent to an indian woman, unless he proves also that she was brought into the country since 1705, he has not made out a case for freedom. The indian woman may have been lawfully held in slavery: and whether she was or not, is a matter depending on facts, as to which I do not think the court should give the jury any instruction, or decide on whom the onus lies. Observe the effect of the instructions in the present case. The jury are told, that if they believe Sybill was a native american indian, the plaintiff was entitled to recover, unless the defendant should prove that she was lawfully made a slave. How could he prove it? There are no written documents of such facts: you do not suffer him to resort to reputation and hearsay: and no living witness can speak to facts happening a hundred years back. During this hundred years, the defendant and those under whom he claims, have held the plaintiff and his progenitors in slavery: and this holding, the court tells the jury, is a fact from which they may presume slavery; but this presumption, they are instantly told, may be rebutted by the ignorance and helplessness of the plaintiff and his ancestors; an ignorance and helplessness, not particular and
682 personal to these parties, but *in-

herent in their condition, always existing as to those held in slavery. Of what avail, then, is this presumption, derived from a slavery of a hundred years, when it is, and must always be rebutted, in other words destroyed, by the very slavery which gives it birth? It is a mere delusion of words; and the instruction amounts simply to this, that whatever slave, by rumour, reputation, hearsay (the loosest and weakest of all possible evidence), can carry back his descent to an indian woman, shall be free; for it is vain to add, unless the defendant can prove the indian woman was lawfully enslaved, when you take from him the only possible means after the lapse of a hundred years, of proving it. I think the judgment should be reversed, and the case sent back for a new trial &c.

GREEN, J. The first question, I shall advert to, is that presented by the last exception taken at the trial: Whether, evidence being given by the plaintiff, tending to prove, that he was descended in the female line from a native american indian woman, and nothing more being proved on either side, the *prima facie* presumption was that she was free, or on the contrary a slave? This question as to the *onus probandi*, in such cases has been several times considered and decided in this court, particularly in *Hudgins v. Wright* and *Hook v. Nanny Pagee*. In the first of them, the circumstance that the granddaughter was white, had no influence further than to repel the idea, that any female negro had been amongst her female ancestors: the plaintiffs proved that they were descended from an old indian, the time of whose introduction was not ascertained, and besides, neither her mother nor grandmother were white, there being gradual shades of difference in the colour of the three: and the judges, Fleming, Carrington, Lyons and Tucker held, unanimously, either that all indians introduced into our community, at any time, were *prima facie* to be presumed to be free, or that, if the date of their introduction did not appear, that the *prima facie* presumption was, that they were
683 american *indians, and brought in after the act of 1705, and therefore free; at the same time agreeing, that such presumptions might be rebutted by proper proofs. All the judges did not give their opinions *seriatim*, but the facts of the case were such, as that it must necessarily have been decided upon one or the other of those alternatives. In *Hook v. Nanny Pagee*, the doctrine asserted in the foregoing case, was fully recognized by the whole court, Brooke, Cabell and Coalter; and they went a step farther; for, upon a verdict that the jury had, upon their own inspection, ascertained that the plaintiffs were white, they held that they were free, although a white person may be a slave, according to our laws, if all his female ancestors were slaves; as would be the case, if any one of his remote female ancestors was an indian or negro slave, though he would be a white person, unless one of his great grandfathers or great grandmothers was a negro, all his other ancestors being white. This *prima facie* presumption could only be justified by the historical fact,

that a greater number of indians had been incorporated into our community, as servants than as slaves, and that the descendants of the females of those introduced as servants, born during their service, continued in servitude to an advanced age in successive generations; facts, probably, well known to the elder judges who decided the case of *Hudgins v. Wright*, as well from their acquaintance with the history of the condition of the indians found amongst us, and the descendants of the females of them, derived from our legislation in respect to them, as from the proceedings and evidence in the multitude of cases upon that subject, decided in the general court in June 1772, in which parol evidence was given reaching back to the close of the century before the last, part of which now exist in the form of depositions filed in those cases. These were the depositions of persons at that time very old. I have examined them. When this case was formerly under consideration here, I endeavoured to shew from the authentic sources of our legislation, that, in fact, the class of indian
684 *servants, and the descendants of the females of them bound to service until an advanced age in all successive generations, always greatly exceeded that of indian slaves, and the descendants of the females of them: further sources of information have fortified that conclusion, and enabled me to correct some errors in the views which I then took of that subject: these I shall now refer to as succinctly as possible.

In 1671, sir William Berkeley, in answer to the inquiries of the lords commissioners, informed them, that there were then in Virginia no slaves but negroes. And there was no statute afterwards, authorising native american indians to be enslaved, until that of 1682, (which related only to those of remote tribes, and not those in our neighbourhood, who were our confederates and tributaries) with the following exceptions: that the acts of 1676 and 1677 allowed prisoners taken in the then war to be held as slaves (that war ended in 1677, and was not afterwards renewed); and that those taken by the small garrisons stationed at the head of tide water in our four great rivers, were allowed to be enslaved by an act of 1679. From the character of the service, as ascertained by our legislation, there could have been few or no indians enslaved under the acts of 1676, 1677 and 1679; and whatever were enslaved under the act of 1679 were emancipated by a subsequent act of 1684, repealing and declaring it null and void to all intents and purposes, as if it had never been made. (As to the effect of such a repeal, see 19 Vin. Abr. Statutes, E. 9, pl. 3, p. 532.) So that no native american indians were held in slavery after the act of 1684, repealing that of 1679, except those taken in the war of 1676 (which continued only one year after the act authorizing captives to be enslaved) and those enslaved under the act of 1682, before the passing of the act of 1705, by which the act of 1682 was repealed, as well as those of 1676 and 1677, in respect to all native american indians. That this was the effect of the repealing clause of the act of 1705,

concerning servants and slaves, was decided by the general court, in the 685 case of *Robin v. Hardaway*, *in June 1772, and in *Hannah v. Davis*, in April 1787, and by this court, in *Coleman v. Dick* and *Shelton v. Barbour*. The court, in *Robin v. Hardaway*, as reported by Mr. Jefferson, decided, that the act of 1691 allowing a free trade with all indians, did not repeal the act of 1682. And in the case of *Henry & al. v. Atty & al.* the same court in June 1772, decided upon a special verdict, that the act of 1682 continued in force until 1705, and gave judgment against many descendants of indians introduced and held as slaves between 1682 and 1705.

The sources for the supply of indian slaves, natives of the continent of America, between 1682 and 1705, must have been very scanty, adverting to the state of things with respect to our neighbouring indians during that period; and there was never any source of a supply from abroad, except such as might be kidnapped in the West Indies, for there slaves were more valuable than here.

In respect to the sources for the supply of indian servants, in addition to what I said on that subject on the former occasion, I find, that all such female servants who had bastard children of any sort, were bound to add to their previous term of service (which was generally thirty-one years) one year on account of each child: and considering their condition, and their habitual and early connexions with negroes, they could hardly, in any case, be entitled to be discharged from service until they were past child bearing. Their children, in turn, were bound to serve until thirty-one, and as long after, as the addition of a year for each child they had during their time of service would amount to. I find further, that the act of 1765, carefully discriminated between the children of mulatto servants (the bastard children of white women by negroes, and their descendants) and those of such indian servants; discharging the former thereafter born from any obligation to service, and requiring them to be bound out as apprentices; while the former acts requiring a service to the age of thirty-one, from the children of indian women servants, in all genera-
686 tions, with the addition *of one year's service for every child born during their service, were left in full force as to them, and so continued until the general repealing clause of the act of 1819. So that as our laws were framed, the females of this class of servants were almost always bound to service until they were past the prime of their lives.

No possible contrivance, short of reducing the whole race to absolute slavery, could be better calculated to obscure and confound their right to freedom, and to destroy the evidence of it.

Considering these facts, in respect to the condition of indians introduced from time to time into Virginia, as slaves or servants, respectively, and of their descendants; facts derived from infallible sources of information; I cannot for a moment doubt the propriety of the former decisions of this

court, and of the instruction under consideration, that proof that a party is descended in the female line from an indian woman, and, especially, a native american, without any thing more, is prima facie proof of his right to freedom; liable to be repelled by proof, that his race has been immemorially held in slavery; which may be in turn rebutted by the consideration of the ignorance and the helpless condition of persons in that situation, aided by other circumstances, such as that many such were bound by law to a service, equivalent in all respects to a state of temporary slavery, until they attained the age of thirty-one years, and in many cases (according to circumstances existing in almost every case) for an uncertain term beyond that age. These circumstances, whether sufficient or not to repel the presumption founded upon a long continued state of slavery or service, are proper to be submitted to the consideration of the jury for their determination as to their weight and effect. And they may be properly strengthened by other circumstances (if proved by competent testimony) submitted to the jury for their consideration, and to have such effect as to them may seem proper; as, that one or more of such ancestors had openly asserted her or their right to freedom,

687 *or had instituted proceedings in a court of justice to assert such right, at a time when the evidence supporting the claim, or condemning it decisively, must have existed, but was prevented from prosecuting those proceedings with effect, by death or some other uncontrollable or reasonable cause; or, that deceased persons, who were in a situation to know the facts upon which the right depended, with no motive to misrepresent them, had declared the existence of those facts (I say, those facts) which would give the freedom claimed, such as that she was the child of an indian servant woman by a negro or mulatto, or that she was a native american indian introduced here since 1705.

This introduces the consideration of another point, strongly insisted on by the appellant's counsel, that hearsay evidence is not admissible to prove any specific fact, such as the race or nation to which the ancestor to whom the party traces his pedigree belonged; and this upon the authority of two cases in the supreme court of the U. States, in which the court laid down that principle in those very terms, and applied it, in one case, to hearsay evidence that the ancestor was a south american indian, and, in the other, an english woman, the one born in South America, the other in England. This was in direct opposition to the uniform course of decision, in such cases, in the courts of Maryland, where the cases arose, as was affirmed by the counsel, and by judge Duvall, who dissented, and who was peculiarly experienced in the administration of the laws of that state; and is in the very teeth of the whole course of decision in the supreme courts of this state. Thus, in *Jenkins v. Tom*, a witness having testified, that another who was dead, told him, that when he was about twelve years old, the women in question were brought to Virginia, in a ship, and were

called indians, and had the appearance of indians; and this evidence was sanctioned by the unanimous opinion of the court. The decision was afterwards approved in *Shelton v. Barbour*. And in *Pegram v. Isabel*, a witness testified, that an old man whose name he did not recollect, had given evidence *in a former suit between a female ancestor of the plaintiff, and another under whom the defendant did not claim, that she was descended, according to general reputation, in the maternal line from an indian ancestor, who was imported into this state since the year 1705. This evidence, the hearsay in respect to general reputation testified by an old man, in a cause between other parties, to neither of which was the defendant a privy, and that extrajudicially (for it was given upon a writ of inquiry), was unanimously sanctioned by the court, as proper to go to the jury. In these cases, the court admitted hearsay evidence of general reputation as well as particular declarations in respect to the specific facts of the race and nation of the ancestor, her appearance and complexion and the manner and the time of the importation, which were very material. I confess, I do not comprehend the rule laid down in the cases in the supreme court of the U. States, which have been cited, that hearsay evidence and general reputation are inadmissible to prove specific or particular facts. All evidence, both direct or by hearsay and reputation, consists in the proof of specific and particular facts: I can conceive no other object of any proof, which can be offered as evidence in a court of justice. The general rule is, indeed, such as is there laid down; but there are admitted exceptions to it, depending upon no arbitrary decisions of the courts of justice, but upon sound principles of necessity and reason, according to the nature of the facts, and the circumstances of each particular case, and, particularly, upon the fundamental maxim of evidence, which requires only the best evidence which the nature of the case admits, in the ordinary course of human affairs and transactions. If the fact be of such a nature, as that in the ordinary course of things, if it really existed, it might reasonably be expected that direct evidence of it would also exist, hearsay or reputation is inadmissible. Such was the case in which this rule was first distinctly applied, in terms, to the exclusion of hearsay evidence by lord Kenyon, with the concurrence of another

689 *judge, where the question was, whether a particular spot called the Cow-cloze was a part of a particular estate. *Outram v. Morewood*, 3 T. R. 123, 14 East, 131, in notis. But it is universally admitted, that pedigree is an exception to this general rule, and may, according to the circumstances of the case, be proved by hearsay and reputation. Now, proof of pedigree consists exclusively of specific facts, and many of them, such as marriage, birth, death, consanguinity, and in England seniority, and in many cases, nationality, and finally and above all, identity; without which all the rest would be unavailing. If any one of these facts were indispensable to make out a title in any

particular case, the exclusion of hearsay evidence as to that fact, might frustrate the direct evidence proving all the other points necessary to the title, for the want of direct evidence of that also. I have met with no case in the english books, in which hearsay evidence has ever been rejected in respect to any one of those facts: but there are cases, in which such evidence has been admitted to establish each of those facts, and especially, seniority and identity. Thus, in *Doe v. Pembroke*, 11 East, 504, the question was, which of two brothers was the elder; and an old unexecuted paper, purporting to be the will of the grandfather of the person last seized of the estate in question, who was dead, and the paper found in a drawer in his house, was received as evidence of the fact of seniority, and had the effect of proving it. And in *Zouch v. Waters*, 12 Vin. Abr. Evidence, T. b, 87, pl. 5, p. 244, the question was, who was the heir of William Zouch: the plaintiff proved that he was descended from William Zouch; but it was shewn on the other side, that the property in question belonged to William Zouch of Pilton (and it would have been the same question, if it had belonged to William Zouch, the scotchman, or the irishman, or the indian) and an old book from lord Oxford's library, containing the pedigree of William Zouch of Pilton, and signed by him, was admitted to prove that the plaintiff was not a descendant of

William Zouch of Pilton, though he
690 *was of some other of the name of William Zouch. These papers were received as evidence of the declarations of their authors, and therefore hearsay evidence, to all intents and purposes as it would have been if those declarations had been proved by parol. And reputation, though somewhat differing in its character from hearsay, is admissible in all cases where hearsay is. 3 Stark. on Ev. part IV. 1178, 10 East, 120. I cannot think that an estate in England could be lost by the rejection of hearsay evidence in respect to the country or county or other place of the nativity of an ancestor, or of the colour of his hair, or any other quality which served as a circumstance to identify him; and if not, is there any difference in the cases, or any reason in law and justice, that the descendant of an indian here, shall not recover his freedom upon the precise evidence, which would enable a peer of England to recover his estate there?

In respect to the descendants of a female indian servant, in the female line, it might happen, that, in a succession of generations, none of them would live until their term of service expired; for not only such who were the children of a negro or mulatto man, but all their descendants born during their service, were bound to serve till their ages of thirty-one, and an additional year for every bastard child (as all their children were) born during their obligation to service; and they were moreover liable to an additional service of six months from a very early period of our legislation, for every instance of fornication. In such a case, if in every generation, witnesses had gone to court and testified to their knowl-

edge of their state of service, and the testimony had been committed to record, even that precaution would have been unavailing, if, when the first of the race entitled to be exempt from service, sued for freedom, all who knew the remote ancestor and her condition were dead, and hearsay were inadmissible to prove that she was a free indian servant.

I have perhaps spent too much time upon this point; but it is important to the descendants of all female indian servants, 691 ants, *many of whom are still legally bound to a temporary service, and to a large stock of emancipated slaves, who are bound to service in all generations to the age of thirty years, under Pleasants's will. *Pleasants v. Pleasants*, 2 Call, 319. All of the former class now, and all of the latter in a few years, must be reduced to unconditional slavery, if it shall become the settled law, that the identity and condition of their remote ancestors cannot be proved by hearsay evidence or traditionary reputation.

I proceed to the next general question presented in this case. An objection was taken here, which was not insisted on in the court below, to the character of all the evidence adduced to prove the pedigree of the plaintiff: that it does not conform to the rule, that hearsay evidence and reputation of pedigree, to be admissible, should proceed from the family of the party or those intimately connected with it, and so having the best opportunity of knowing, and having at the time no inducement to misrepresent, the facts. This objection is, I think, sufficiently answered by referring to all the cases without exception, in which hearsay has been admitted, in such cases, by this court; and there have been many. Such a rule is utterly inapplicable to any case like this; and if necessity affords any exception, in any case, to a general rule of evidence, those cases form an exception to that rule, which is founded in good sense, and dictated by the circumstances prevailing in England. The family, relations and intimates of the parties, in such causes as this, are disqualified as witnesses by their class and condition, and the master and his family by their interest. The respectable neighbours of the parties who have the best opportunity of knowing, and no motive to misrepresent the truth, are alone competent to speak with effect upon the subject. Such was Mrs. West in this case; and her declaration comes fully up to the spirit of the rule alluded to, which has its source in the all pervading principle that lays at the foundation of all the laws of evidence, that the best competent evidence the nature of the case admits of, is required.

692 *But the evidence of her declarations are objected to, because they were made after an order in the general court authorizing Sybill to sue for her freedom. This order was made in October 1772, probably suggested by the decisions of the court at the preceding term, but was never prosecuted even by taking out a writ; for what reason, does not appear. The declarations of Mrs. West were made twenty or thirty years after the death of

Sybill; and the objection is that they were made post litem motam, and therefore were wholly inadmissible. The reason of the rule on this point, is, that in such a state of things, the declaration may be made with a view to influence the event of the contest, or upon the suggestion of a party, or if evidence of reputation be offered, it might have arisen out of that very contest. None of these reasons apply here. No contest was then depending or in contemplation; and it is impossible to imagine a motive for misrepresentation on the part of Mrs. West. She spoke of her personal knowledge of Sybill, and probably of her mother; for her son who testifies, was born about 1744, and she, consequently, as early as 1728; and I see no reason for excluding that part of her declaration which relates to Sybill's mother. In the case of the Berkeley Peerage, the father had made an entry on the leaf of a bible, stating the time of the birth of his eldest son by his wife A. and declared at the time, that he made it for the purpose of proving the age and legitimacy of his eldest son, in case the same should be questioned in any case or cause whatever, by any person, after his death. He died, and the very controversy he anticipated and provided against, ensued. This declaration was admitted by all the judges to be competent evidence, although the circumstances in which it was made went greatly to its discredit. Is there any thing in this case, so strongly calculated to discredit the declarations of Mrs. West, as there was in that, to discredit the declaration of the father? or any thing to discredit her's in any degree? It would, indeed, be a singular result, if

the proof that Sybill, had been allowed by the court to institute *a suit for her freedom as an indian, (a circumstance well calculated to repel the presumption of legal slavery from her long continuance in servitude) should have the effect of excluding the proof of the fact, that she was in truth an indian, and that her mother was one also, by the declaration of one now dead, who was personally acquainted with her, having resided on the same plantation with her, and who might have known her mother personally.

The remaining ground of exception to the instruction given to the jury, in respect to part of the depositions, of Clarke and West, is, that in truth, there were no such declarations in them, as were stated by the court to be admissible; Clarke not stating, that he had always understood that Sybill was an indian, nor West, that his mother had said, that she had the appearance of an indian. This exception is, I think, well founded. The instructions were calculated to mislead the jury, more or less, by inducing them to believe, that the court was of opinion, that such was the effect of the depositions. And for this cause the judgment should be reversed.

CABELL, J. I concur in the opinion just given by my brother Green, in all points.

BROOKE, P. The points which have been argued, and on which the merits of this case depend, arise out of the exceptions taken at the trial. As to the first, I think

the instruction of the court would have been wrong, even if he had correctly stated the import of Clarke's evidence to the jury: but the judge's statement of the evidence of that witness, was materially different from the evidence itself, unless, indeed, there be no difference (as the judge is presumed to have supposed) between the fact that Sybill was an indian, and the fact that she was descended from indians (as the witness stated) whether from the mother's or father's side he was unable to say. Nor is that objection to the instruction obviated (as was argued by counsel) by the
694 circumstance *that the evidence was in writing, and would be seen by the jury, who might correct the mistake of the judge. The jury, most probably, would take it for granted the judge was right, and that there was no difference between the evidence as stated by him, and the real evidence of the witness.

The next objection taken by the counsel for the defendant, was to the reading of the deposition of West, detailing the information he had heard from his mother. This was hearsay evidence; and his answer to the 4th interrogatory, particularly, ought to have been struck out, before the deposition was allowed to go to the jury. He said, he had heard his mother say, that Sybill's mother was an indian, and that Sybill herself was one, and was entitled to her freedom. When this cause was formerly before this court, it was decided, that hearsay evidence that Sybill was entitled to her freedom, was inadmissible; and if hearsay evidence that she was an indian is to have the same effect, as seems to be considered, it appears to me, that that was equally inadmissible. But it was inadmissible evidence, according to the settled rules of evidence. I concur, intirely, with the president of this court, in his remark in *Shelton v. Barbour*, which was repeated by judge Roane in *Pegram v. Isabel*, that though liberty is to be favored, the court cannot on that or any other favored subject, infringe the settled rules of law; and with lord Kenyon, in *Rex v. Eriswell*, 3 T. R. 721, that rules of evidence are not technical refinements, but founded on good sense, and the preservation of them is the first duty of judges. To admit hearsay evidence that Sybill was an indian, or that her mother was an indian, would, I think, violate the rule which excludes hearsay evidence, except in cases of pedigree, prescription, custom and (in this country) boundary. The rule admits it in those cases, not on the ground that it is the best evidence the nature of the case admits of, because that would let in hearsay evidence, in a great many cases in which it is always excluded; but on the ground, that those cases, in which hearsay evidence is admitted,

695 are *not, in all respects, susceptible of direct and positive evidence of any degree. Nor do I think that there is any thing conclusively settled on this point, in the decisions of this court. I know, hearsay evidence has been silently permitted to go to juries, to prove the condition of a person, from whom pedigree has been deduced; but there is no adjudication of this court, that the settled rules of evidence are

not applicable to cases in which freedom is controverted. On the contrary, the departure from these rules of evidence in such cases, was strongly reprobated by Pendleton and Roane; by the remarks of the one, repeated by the other, before alluded to: nor have I been able to find, that the point now in question, was ever made and controverted. If it had been, I think it would have been decided here, as it was decided in the supreme court of the U. States, in the cases of *Mima Queen v. Hepburn* and *Davis v. Wood*: cases, which, though not authority here, are entitled to great respect. In the latter case, hearsay evidence was offered to prove, that Mary Davis, long dead, and from whom the plaintiffs had deduced their descent, was a white woman, born in England, and that such was the general reputation in the neighbourhood where she resided: the court rejected this evidence, except so far as it was applicable to the pedigree of the plaintiffs; not because (as seems to be supposed) the court thought there were no specific facts in the chain of pedigree, but because the fact that Mary Davis was a white woman, born in England, was not part of the pedigree of the plaintiffs, but a specific fact susceptible of other proof than hearsay evidence.

But the instruction of the judge on this point, in the case before us, was wrong in another respect. It was calculated to leave the impression on the mind of the jury, that proof of the fact that Sybill was an indian, was equivalent to proof that she was free, without evidence that she had been illegally held in slavery; thereby putting it on the defendant to prove that she was legally held in slavery. Until the act of 1705, it is now well ascertained, 696 that indians might be held *in slavery, as well as africans; and it is settled law, that a person of african race, held in slavery, and suing for freedom, must take upon himself the burden of proving his right to freedom; and *e converso*, in the case of a person of a white race, suing for freedom, the burden of proving him a slave, rests on the defendant; as, in the case of *Hook v. Nanny Pagee*, where the jury having found, on inspection, that the plaintiff was a white woman, it was thought sufficient, to establish her right to freedom, the defendant having offered no evidence of her descent from a slave race in the maternal line. But hearsay evidence, that any ancestor of her's was an indian woman, if contested, would have been rejected. When the law permitted indians to be made slaves (as Sybill's mother and herself were held in slavery) that doctrine was as applicable to those of that race held in slavery, as to those of african race. The circumstance that some indians were only held to service until thirty-one, does not relieve the plaintiff from the burden of proving his female ancestor to have been illegally held in slavery, or that she was one of those who were held to service until thirty-one only. That she might have been so held to service, is a circumstance that weakens the presumption that she was legally held in slavery, applicable to those of african race; but it does not extinguish

it. In making title to freedom, the claimant is exposed to the same burden that is imposed on those making title to property. In the latter case, a right to property is not conclusively made out by proof of descent from a particular ancestor, without full proof also, that the title was in that ancestor. Thus, in the case before us, if hearsay evidence was admissible to prove that Sybill was an indian held in slavery, the title of the plaintiff to freedom was not established, until he also proved, that she was illegally held in slavery, or was one of those indians held to a limited service only.

But there is another objection to this hearsay evidence. It seems to me well settled, that declarations made by a person, 697 after a controversy begun, when the mind of the person *making the declarations, is not in that even position, that qualifies him (though not under the influence of the sanction of an oath) to speak impartially, though such declarations are testified to by a competent witness, are intirely inadmissible. That this controversy existed at the time the declarations of Mrs. West to her son were made, I think is very clear. We know, that it was begun by the plaintiff's mother in 1772: and though much time had elapsed before the declarations were made, there is no cause to believe, that, though the suit of the plaintiff's mother went off the docket (how, we know not) the controversy was at an end. It is settled law, that proof that the controversy was known to the person making the declarations at the time, is not necessary to disqualify the persons to make them: and, I think, it is as well settled, that the continuance or the existence of the *lis mota*, at the time the declarations were made, is also unnecessary, if it appear that the controversy existed. The declarations of Mrs. West bear internal evidence, that the controversy existed, and was known to her, when she made the declarations. The witness in answer to the third interrogatory, said, his mother stated to him, that Sybill was free, and her family, in consequence of their indian descent from their mother. She would have hardly said she was free, and assigned the reason why, unless she had been apprised of some controversy on that point. In answer to the fourth interrogatory, the witness said, his mother told him that Sybill's mother was an indian, and that Sybill was one herself, and was entitled to her freedom. These declarations are of the same import, and strongly imply a controversy at the time. But it is not to be inferred, from the circumstance that the suit of Sybill for freedom, in the general court, went off, that there was an end of this controversy. That, at the time the declarations of the mother were made to the witness there was no *lis mota* actually pending, was not material to exclude evidence of her declarations. In the case of the *Berkeley peerage*, it was held by a majority of the judges, that it was the existence of the con- 698 troversy *at the time, and not the *lis mota*, that disqualified a person to make declarations that could be testified to, even as hearsay evidence as to pedigree. In that case, Mansfield, C. J., denied the

rule to be, that the *lis mota* is necessary to exclude the evidence: the time of the declaration, in that case, he said, was the origin of the controversy, and not the *lis mota*; in which lord Eldon concurred. Wood, J., said, after a dispute has arisen, the presumptions in favour of declarations fail: to admit them would lead to the most dangerous consequences. The dispute, in the case before us, certainly had arisen, and existed, at the time Mrs. West made the declarations, to which her son testified: her mind was not in that even position, which would qualify her to make impartial declarations as if upon oath. The whole of her declarations ought therefore to have been expunged from the deposition of the witness.

But the court agree, on another point,

that the judgment is to be reversed.

The judgment entered by this court, was to the following effect: The court is of opinion, that the circuit court erred, in intimating to the jury, that Clarke had stated in his evidence, "that he had always understood that Sybill was an indian," and that West had stated in his evidence, that his mother had said, "that Sybill had the appearance of an indian;" those witnesses having used no such expressions: and that the judgment is erroneous: therefore, it is considered, that the same be reversed &c. and it is ordered, that the verdict of the jury be set aside, and the cause be remanded to the circuit court, for a new trial to be had therein, on which no instruction giving any such intimation, is to be given.

REPORTS OF CASES
ARGUED AND DETERMINED IN
THE GENERAL COURT OF VIRGINIA,
AT JUNE AND NOVEMBER TERMS, 1830.

701

*JUNE TERM 1830.

JUDGES PRESENT.

<i>Brockenbrough,</i>	<i>Parker,</i>
<i>Smith,</i>	<i>Summers,</i>
<i>Saunders,</i>	<i>Upshur,</i>
<i>Daniel,</i>	<i>Field,</i>
<i>Semple,</i>	<i>May.</i>

Moore v. The Commonwealth.

June, 1830.

Criminal Law — Confessions — When Admissible Evidence.*—Case at Bar.—If a threat be made, or promise held out, to a person in custody on a charge of felony, to induce him to make confession, and he denies his guilt at the time, but afterwards makes a confession, which appears, from the time and circumstances, not to have been induced by such previous threat or promise, this confession, so afterwards made, is a voluntary one, and proper evidence against him on his trial.

Same—Larceny of Bank Notes—Production of Notes.†—In an indictment for larceny of bank notes, it is not indispensably necessary to produce the stolen notes upon the trial.

Moore was indicted and tried, in the circuit court of Shenandoah, for stealing bank notes of the farmers' bank of Virginia, of the value of thirty dollars, the property of William Lauck. Verdict, guilty: sentence, imprisonment in the penitentiary for the term ascertained by the jury.

702 "Upon the trial, the prisoner filed a bill of exceptions, stating, in substance, That William Lauck a witness for the commonwealth, testified, that having locked up in his store house, four farmers' bank notes amounting to thirty dollars, he missed the notes on his return to the store the next morning; and, believing they had been stolen during the night, he directed Peter Lauck, a boy who assisted in the store, to make a search for them; but the witness left home before they were found: that he returned in the evening of the same day, and was informed, that Peter Lauck had found some bank notes and silver, in a pair of pantaloons of the prisoner, hid in the hay in a stable, and that the prisoner had been arrested: that the prisoner was carried before a magistrate, after dark, the same evening; the witness was present; and the prisoner confessed before the magistrate, that he had taken the money from the witness's store house; and at the time this confession was made, no threats were

made against the prisoner, and no promises to induce him to make the confession: that the prisoner, at the time of the theft, was in the service of the witness: that when the witness was before the magistrate, he was called upon to describe the bank notes; whereupon he said, he remembered there were two ten dollar notes, and two five dollar notes of the farmers' bank, but he could not describe them more particularly; notes were then produced, answering that description, and delivered to the witness by the justice; upon which the witness testified, that he could not swear to the identity of the notes, but he believed them to be his, and he also believed them to be genuine notes of the farmers' bank. The notes were not produced at the trial, and there was no proof that they had been lost or destroyed: the witness said, he had passed them off, and did not know where they were. Peter Lauck testified, that in the course of the morning after receiving the directions from William Lauck stated in his testimony, he found a pair of pantaloons hid in the hay in W. Lauck's stable, where the prisoner attended; the pantaloons belonged to the prisoner;

703 and in the pocket, *he found the four bank notes, which were exhibited before the justice, and then delivered to W. Lauck, and also some silver coin. The prisoner then introduced a witness, J. Aleshire, who testified, that after Peter Lauck found the pantaloons and money, the witness apprehended the prisoner, and charged him with having stolen the money; the prisoner denied it; Aleshire said to him, "you had as well confess it, for it will be worse for you if you do not," or words to that effect; but the prisoner still denied that he had stolen the money: that Aleshire then confined him in a room, and went to him, about two hours afterwards, shewed him the money and notes which had been found, and asked him, "how much silver did you get?" The prisoner answered, "it was all together." Aleshire asked, "how did you get into the store?" The prisoner answered, "the door was not locked; I went in and got the money," or words to that effect; which was all that passed between this witness and the prisoner at that interview. Upon this state of the testimony, the prisoner moved the court, 1. to exclude the evidence of the confession of the prisoner before the magistrate, stated in the testimony of the witness William Lauck; but the court overruled the motion, and admitted the evidence of confession: 2. to instruct the jury, that as the bank notes mentioned in the indictment, were not produced at the trial, nor shewn to have

***Criminal Law — Confessions — When Admissible Evidence.**—On this subject, see monographic note on "Confessions" appended to Schwartz v. Com., 27 Gratt. 1025.

†**Same—Larceny of Bank Notes—Production of Notes.**—See principal case cited in Kirk v. Com., 9 Leigh 681.

On the subject of larceny, see generally, monographic note on "Larceny" appended to Johnson v. Com., 24 Gratt. 555.

been lost or destroyed, and as it was not shewn, that the prisoner had, by any act of his, prevented the production of them, the jury could not, under such circumstances, convict the prisoner; but the court refused to give the instruction. To which opinions the prisoner's counsel excepted.

And now, he presented a petition to this court, for a writ of error to the judgment.

Philip Williams argued, for the petitioner, 1. That the confession made by him to the witness Aleshire, was induced by a previous threat and promise made by Aleshire, and could not be admitted as evidence; 704 and if that confession *was inadmissible, on that ground, all subsequent confessions should be excluded; since the motive that led to the first confession, might have continued to operate afterwards; and it ought to be supposed, that it did so operate, unless some caution or warning had been given the prisoner, in the interview between the first and second confession. See Stark. on Ev. (Boston edi. of 1828), part IV. vol. 2, p. 49, and seq. and the cases there cited; East's C. L. 658; Thompson's case, 1 Leach, 293.

2. That the bank notes ought to have been produced at the trial, to ascertain, 1. their identity, and 2. whether they were genuine. If they were not genuine, they were of no value, and no offence had been committed: the notes ought to have been produced to prove the value, and then it would have appeared whether they were genuine or counterfeit: and no evidence of the value, but the notes themselves, ought to have been received, unless the production of them had been rendered impossible by the act of the prisoner himself, or by accident, or unless they had been passed away by him as genuine. Cummings's case, 2 Virg. Ca. 128; Pomeroy's case, Id. 342.

BROCKENBROUGH, J., delivered the opinion of the court. The first question is, Whether, under the circumstances of the case, the circuit court erred, in refusing to exclude the prisoner's confession made before the justice of the peace, stated in the testimony of W. Lauck? When the confession was made before the magistrate, there were no threats or promises made. This confession, therefore, was at the time, perfectly voluntary. But it is contended by the prisoner's counsel, that as he proved that a previous threat had been made by Aleshire, the confession made before the magistrate must be understood to have been induced by that threat. It is unnecessary to discuss the question, whether, when a confession has once been induced by the improper influence of a threat, or promise, all subsequent confessions of the same facts ought to be 705 excluded, because this case *does not come within such a rule. When

Aleshire made the threat (admitting what he said was a threat) the prisoner did not confess, but persisted in denying his guilt, as he had done when first arrested. It was not until the expiration of two hours, nor until the money and notes were shewn to him, that he made any confession. Thus, the first confession does not appear to have been extorted from him by the threat, but rather to have been produced by the sight

of the notes and money in the hands of a third person. It was, probably, the result of his own reflection on the facts, that the notes had been found in the pocket of his pantaloons, which had also been found concealed in a place to which he himself had constant access. He most probably thought it useless any longer to deny the fact, as the circumstances were now so strong against him. The court was justified in believing, that the first confession was voluntary, and a fortiori the second, which was not made till the lapse of some further time. We are of opinion, that the evidence was properly admitted.

The second question is, in effect, whether, in every prosecution for the larceny of bank notes, it is necessary for the conviction of the prisoner, that the notes should be produced on the trial? Conceding, for the sake of argument, that, in prosecutions of this kind, the jury cannot convict, unless they are satisfied that the stolen notes are genuine, we yet deny, that the production of them is indispensable to prove that fact. Indeed, it seemed to be admitted by the prisoner's counsel, that if they are lost or destroyed, or if the prisoner prevents the production of them, they need not be produced. If the production of them be indispensable, it is not easy to perceive, how the loss or destruction of them obviates the necessity. It is the province of the jury to judge of their genuineness, by the evidence. If they are not produced, that circumstance weakens the proof, and may put at hazard the conviction of the accused: but though it may diminish the weight of the evidence, the non-production of the notes does not destroy the compe-

706 tency of the *other evidence adduced to prove them to be of value. If they are produced, it has never been held necessary to prove by the officers of the bank, that they are genuine. If such was the law, it would be impossible to carry on prosecutions for larceny of bank notes in the various counties of the commonwealth. Resort must be had to the evidence of persons, accustomed, in the way of trade, to receive and pay them away, and the non-production of them does not prevent such evidence from being given. In this case, the witness, William Lauck, had seen and owned them: he not only believed them to be genuine, but the act of receiving and paying them away, as things of value, proved that his belief was real. The other two witnesses had seen them; and the magistrate, who re-delivered them to their owner as things of value, had also an opportunity of ascertaining whether or not they were genuine. It was competent for the commonwealth to introduce such evidence, which though not so full, yet was of the same kind as that which might have been given, if the notes had been before them.

It is a case of frequent occurrence, in prosecutions for larceny at common law, that the jury are required to decide on the value of the article stolen: on that value depends the question, whether the offence be grand or petit larceny, and consequently the degree and kind of punishment to be inflicted; and the jury are to ascertain that

value. Suppose the article stolen to be flour in barrels: must the flour be brought into court, in order that the jury may judge of its value? It has never been deemed necessary. The evidence must prove, that the person charged, feloniously took and carried away the article stolen; and as to the value, witnesses must be called to prove it; which may be done, though it has been restored to the owner, and he has parted with the possession of it.

We are of opinion, that the non-production of the notes, furnished no reason why the court should have given the instruction that was asked for.

Writ of error denied.

707 *Hay's Adm'rx v. Pistor.

June, 1830.

Circuit Court—Appellate Jurisdiction—Jurisdictional Amount.—Judgment of a justice of the peace, affirmed by the county court, for debt, principal, interest, damages and costs, not amounting to \$3 dollars 33 cents: HELD, circuit court has no appellate jurisdiction to review such judgment.

This was a case adjourned to this court from the circuit court of Mason. Pistor recovered judgment, upon a warrant, before a justice of the peace of Mason, against Hay's administratrix, for a small debt. Hay's administratrix appealed to the county court, where the judgment was affirmed, with damages and costs. And then, she moved the circuit court for a writ of certiorari, to remove into that court the record of the judgment of the county court, though the judgment (debt, interest, damages and costs) did not amount to thirty-three dollars thirty-three cents. Upon this application, the circuit court adjourned the following questions to this court: 1. Whether a judgment of a county court, affirming or reversing the judgment of a single justice of the peace, can in any case, be reviewed in a circuit court? And, 2. What judgment ought to be given upon this application?

MAY, J., delivered the opinion of the court. The principles upon which this writ is demanded, would require the circuit courts to award one to a judgment of a magistrate for one cent; and would constitute them appellate tribunals, to revise all judgments of the county courts and justices of the peace, however small the amount in controversy. Such a course would be in opposition to the plain meaning of all our statutes in relation to small debts, to the construction of them which has universally prevailed, and to the uniform practice of the country, under every modification of them. The court would be reluctant to sustain a proceeding, which might lead to such consequences; and especially one, which, for the purpose now sought to be effected, may be regarded as almost obsolete in this commonwealth. We know

708 of no instance, in which this writ has been used in Virginia, as a mere

substitute for the writ of error or super-sedeas.

But the circuit court law, 1 Rev. Code, ch. 69, § 9, p. 230, which limits the jurisdiction of these courts to "causes, matters and things, which shall amount to one hundred dollars, whether brought before them, by original process, habeas corpus, appeal, writ of error, super-sedeas, mandamus, certiorari to remove proceedings for any purpose, or by any other legal ways and means whatever," furnishes a conclusive answer to all the arguments which have been urged in support of this application. There are some exceptions to the limit here prescribed (as, for example, writs of super-sedeas to judgments of the county courts for thirty-three dollars thirty-three cents) but there is no one of them, which can by implication even, comprehend this novel, extensive and mischievous jurisdiction.

Without deciding any other question, therefore, this court unanimously certifies to the said circuit court, that it hath no power to award the writ of certiorari as prayed for in this case.

The Commonwealth v. Cousins.

June, 1830.

Larceny—Jurisdiction.—If goods be stolen in one county, and carried into another, the thief may be indicted in either, the offence being complete in both.

This was a case adjourned to this court from the circuit court of Petersburg.

Cousins, indicted for horse stealing in that court, and found guilty by the jury, moved the court to set aside the verdict, and order a new trial, upon the ground that the verdict ought not to have been found upon the facts in evidence at the trial; which were, that the prisoner had stolen the horse in the county of Pittsylvania, and afterwards brought the horse, so stolen, to Petersburg, where he was arrested with the horse in his possession. Upon this state of facts, the following questions were adjourned to this court: 1. Whether the circuit court of Petersburg had jurisdiction to try the prisoner? 2. Ought a new trial to be granted?

MAY, J., delivered the resolution of the court. All the writers on common law, lay

*Larceny—Jurisdiction—Goods Stolen in One County and Carried to Another.—In Strouther's Case, 92 Va. 791, 22 S. E. Rep. 852, it is said: "It has been a settled principle of the common law, from an early day, in England, that where property is stolen in one county, and the thief has been found, with the stolen property in his possession, in another county, he may be tried in either. This practice prevailed notwithstanding the general rule that every prosecution for a criminal cause must be in the county where the crime was committed. The exception to the general rule grew out of a fiction of the law, that where property has been feloniously taken, every act of removal or change of possession by the thief constituted a new taking and asportation; and as the right of possession, as well as the right of property, continues in the owner, every such act is a new violation of the owner's right of property and possession. There is no principle, in respect to larceny, better settled than this, and it has received repeated sanction in this state. *Cousins' Case*, 2 Leigh 709. This rule of the common law, however, was never extended farther than to counties." In this case (Strouther v. Com.) it was held that, where a person steals property beyond the jurisdiction of Virginia and brings the same into Virginia, he cannot be lawfully convicted of the larceny in Virginia. See generally, monographic note on "Larceny" appended to Johnson v. Com., 24 Gratt. 555.

*Appellate Jurisdiction—Jurisdictional Amount.—On this subject, see monographic note on "Appeal and Error" appended to Hill v. Salem, etc., Turnpike Co., 1 Rob. 263.

The principal case was cited in Dryden v. Swinburn, 15 W. Va. 254, to the point that a judgment of the county or circuit court cannot be reviewed by a writ of certiorari.

it down, that, if goods be stolen in one county, and carried into another, the offender may be indicted in either, because the offence is complete in both. If the original taking, be felonious by the common law, the felon can acquire no colour of right thereby, and every act of possession constitutes a felony. No principle in respect to larceny seems to be more clearly settled than this; and it has been repeatedly sanctioned in this state.

It is, therefore, to be certified to the circuit court, that it hath jurisdiction of the offence aforesaid; that the motion for a new trial ought to be overruled; and that judgment be pronounced according to the verdict.

Jacobs and Others v. The Commonwealth.

June, 1880.

Justice of Peace—Misbehavior in Office—Indictment—Allegations.—"In an indictment against justices of the county court, for misbehaviour in office, it is necessary that the act imputed as misbehaviour, be distinctly and substantially charged to have been done with corrupt, partial, malicious or improper motives, and above all with knowledge that it was wrong, though there are no technical words indispensably required, in which the charge of corruption, partiality &c. shall be made.

Same—Same—Same—Failure to Charge Scelerator—Effect.—"An indictment in such case, not charging the corruption, partiality &c. distinctly and substantially, and not charging the scelerator: HELD naught after verdict of conviction, its defects not being cured by the statute 1 Rev. Code, ch. 100, § 44.

Error to a judgment of the circuit court of Augusta, upon an indictment against John Jacobs, L. W. Harris and 710 *John Digges, justices of the peace for the county of Nelson, for misbehaviour in office.

The prosecution was commenced in the circuit court of Nelson, from which the venue was changed to the circuit court of Augusta, where the case was tried; the jury found the defendants guilty and assessed fines against them; and the court rendered judgment for the fines, and judgment also of a motion from office. Many objections were taken to the judgment and proceedings, in the argument here; but the main point, that on which alone the court decided the case, was, whether the acts imputed to the defendants, as laid in the indictment, amounted to any crime or misdemeanour or misbehaviour in office?

There were three counts in the indictment; but they were not materially different from each other, and in regard to the points of objection to the indictment, they were all alike. The indictment charged,

***Public Officers—Misbehavior in Office—Indictment—Allegations.**—"In an indictment against an officer for corrupt misbehavior in office. It is necessary that an act imputed as misbehavior be distinctly and substantially charged to have been done with corrupt * motives and, above all, with knowledge that it was wrong, though there are no technical words indispensably required in which the charge of corruption shall be made. It is otherwise, however, in neglects, and in cases where bare acts are made indictable irrespective of intent." Lewis, P., in delivering the opinion of the court in *Boyd v. Com.*, 77 Va. 56, quotes with approval this language from Wharton (3 Whart. Crim. Law, § 2518), and cites the principal case to sustain it.

See also, monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

***Indictments—Defects—Effect of Statute of Jeofails.**—See, citing the principal case on this subject. Old v. Com., 18 Gratt. 980; State v. Cain, 8 W. Va. 730.

In substance, That William B. Jacobs, having been appointed and commissioned sheriff of Nelson, qualified as such in the county court, on the first day of November term 1820; and he being about to nominate his deputies to the court for its approbation, public proclamation thereof was made, and sixteen justices assembled on the bench; and then the sheriff nominated one Burks to be one of his deputies; but upon a statement made to the court, that Burks had been guilty of highly improper and corrupt conduct, while acting as a deputy sheriff of Amherst, which statement was corroborated by the admission of Burks's counsel, that the fact charged had been proved in a trial at law, the court, after full deliberation, by a majority of twelve justices to four, rejected Burks as a deputy, and refused to enter of record, that he was a man of honesty, probity and good demeanour, the only justices 711 who voted for admitting Burks as deputy, being William Digges and the defendants John Jacobs, L. W. Harris and John Digges, of whom John Jacobs was the brother of the high sheriff, and the others were relations of Burks: nevertheless the defendants, well knowing the premises, but seeking and contriving, under the colour of their offices, to carry into effect their own private feelings and personal views, without any regard to the interests and welfare of the people of the county, or the administration of justice therein, and in despite of the fair, open and deliberate expression of sentiment, which had already been pronounced, in a full and numerous court, as aforesaid, did combine and associate to form another court for the purpose of admitting Burks to the office of deputy sheriff; and, on the following day, after he had been rejected as aforesaid, being the second day of the term, and without giving any notice to the justices who had been assembled on the preceding day, that a reconsideration of their decision was contemplated, and without receiving any new or farther evidence tending to exculpate Burks, formed a court at an early hour of the day, consisting of themselves the said defendants, and two other justices, John Mosby and R. J. Kincaid, and by the said court it was ordered to be entered of record (the defendants only voting in the affirmative) that Burks was a man of honesty, probity and good demeanour, and thereupon Burks was permitted to qualify as deputy sheriff, although the said justice Kincaid earnestly opposed the making of the said order, and two other justices who were present when the proposition was made, refused to countenance the proceeding even by their presence, and immediately withdrew. And so the indictment concluded, the defendants were guilty of misbehaviour in their office of justices of the peace.

The cause was argued here, by Leigh for the plaintiffs in error, and the attorney general for the commonwealth.

*See the statute, 1 Rev. Code, ch. 78, § 15, which provides, that no person appointed to the office of deputy sheriff, shall execute any of the duties of that office, unless the court of the county shall be of opinion, and enter of record, at the time of his appointment, that he is a man of honesty, probity and good demeanour &c.—Note in Original Edition.

712 *Leigh said, the indictment consisted of a detail of circumstances, which might afford an argument or inference of improper conduct, but it contained no direct charge of official misbehaviour: the indictment in truth, charged no offence whatever. The mere fact of these justices on one day, giving a decision different from that pronounced by a larger number of justices on a preceding day, was not of itself criminal in the least degree. It was a legal and valid act, and if honestly done and intended, not an improper one. And the indictment did not charge any dishonest or corrupt motive; for, certainly, the imputation to these justices, of seeking and contriving to carry into effect their own private feelings and personal views &c. did not amount to a charge of corruption; since a justice of the peace might, in appointing or admitting to office, gratify his private feelings and personal views, and, especially, a desire to promote the welfare of the person appointed or admitted to the office (which seems to be the very guilt imputed to these justices), without any corruption. It is no where stated in the indictment, that the justices knew that Burks was not a man of honesty, probity and good demeanour. The words "well knowing the premises," refer to what had transpired the preceding day; and they might have known all that, and yet have entertained the opinion that Burks was an honest man; nay, the indictment states, that they gave the same opinion the first day, which they gave on the next, and they might just as well have been prosecuted for their opinion given on the first day, as for that given on the second day. It ought to have been charged directly and positively, that they knew Burks was not an honest man. The omission to charge the scienter is a fatal defect.

The attorney general contended, that the indictment was substantially good and sufficient; but whether it would have been so or no, upon a demurrer taken to it, he insisted, that all defects in it were cured by the verdict of conviction; and he referred to the statute, 1 Rev. Code, ch. 169,

§ 44, p. 611, which provides, that
713 "after verdict of twelve men, *no judgment on any indictment or information for felony or any other offence whatever, shall be stayed or reversed for any supposed defect or imperfection in any such indictment or information, so as the felony or offence therein charged to have been committed, be plainly and in substance set forth with convenient certainty, so as to enable the court to give judgment thereupon according to the very right of the cause; any former law, custom or usage, to the contrary notwithstanding."

BROCKENBROUGH, J., delivered the opinion of the court. The first and most important objection to the proceedings and judgment in this case, is, that the indictment is incurably defective; that it does not set forth any offence at all; and that the judgment ought to have been arrested.

It is a general rule, in indictments, that the special matter of the whole fact ought to be set forth with such certainty, that it may judicially appear to the court, that the

indictors have proceeded upon sufficient premises. 1 Chitty's C. L. 227; Hawk. P. C. B. 2, ch. 25, § 57. But an indictment clogged with so much unnecessary matter, as to perplex and confuse the case, and to render it difficult to perceive the real charge intended to be exhibited, is highly objectionable. This indictment is obnoxious to the objections which the counsel for the plaintiffs in error has made to it. It consists of a long detail of circumstances from which the impropriety of conduct of the defendants may be inferred, rather than a direct charge of official misconduct. "The want of a direct allegation (says Hawkins, *Ibid.* § 60,) of any thing material in the description of the substance, nature or manner of the crime, cannot be supplied by any intendment or implication whatsoever."

What is the criminal fact with which it is intended to charge these justices? It is that, they formed a court (with the aid of two others alleged to be innocent) on the second day of the November term &c. at which they ordered it to be entered of record,

714 that Burks, who was nominated to *them by the high sheriff as his deputy, was a man of honesty, probity and good demeanour; and permitted him to qualify as deputy. This, of itself, so far from being a crime, was, as the law stood at that day, a legal and valid act; for the statute authorized the court of the county, whether consisting of four only, or of sixteen or any other number, to enter of record their opinion (if it be their opinion), that the person appointed a deputy sheriff is a man of honesty, probity and good demeanour; and then to permit him to qualify. But if they do not entertain that opinion; or if they know that he is not a man of honesty &c. and certify that he is; in that falsehood, in that corrupt conduct, consists their offence, their official misbehaviour. The scienter is a material part of the substance of this crime, of which there is no direct allegation in this indictment; and it cannot be supplied by any implication or intendment whatever. There is one part of the count, in which a scienter is laid; but the scienter of what? "The defendants well knowing the premises" &c. Let us ascertain what were those premises. They were, that on the preceding day, the high sheriff nominated Burks as one of his deputies; that a court of sixteen justices assembled; that a statement was made that Burks had been guilty of highly improper and corrupt conduct, while acting on a former occasion as deputy sheriff, which statement was corroborated by the admission of the said Burks's counsel, that the fact charged against him (without stating what that fact was) was proved in a trial at law; that twelve of that court refused to enter of record an opinion of his honesty &c. but that four voted in favor of Burks, three of whom were the defendants; and that they and the fourth were the relations of the high sheriff and deputy. These are the premises, which the defendants are charged with well knowing. They are not sufficient to ground a reasonable inference, that they knew that Burks was dishonest: they might not have believed the statement; they

might not have thought, that the corroborating admission was of any consequence; they might have *had a better knowledge of Burks's character, than the other twelve. But even if the inference was irresistible, that they did know his dishonesty, it would not be sufficient; it would not supply the want of a direct allegation to that effect.

It is a well established principle, that a judicial officer cannot be prosecuted criminally, for any judgment rendered by him, however illegal, unless rendered from some motive of malice, partiality or corruption. Much less can such a prosecution be carried on, where the act done is within the pale of his lawful authority, without such corrupt motive. In indictments of this character, it is usual to charge the judgment or thing done, to be done corruptly, wickedly or maliciously. We do not say, however, that the word corruptly is a term of art, or technical term, like the words feloniously, burglariously &c. which must necessarily be used. The motive which is here alleged, namely, to carry into effect their own private feelings, and personal views without any regard to the interest, and welfare of the people, or the administration of justice, may probably be considered as a sufficient assignment of a corrupt motive. And if the indictment had alleged, that, with that motive, the defendants had made the entry on the record, well knowing that the said Richard H. Burks was not a man of honesty, probity and good demeanour, it would have probably been sufficient without alleging, in terms, that it was done corruptly. But the omission of the scienter is just as fatal as the omission of the word *murdravit* would be in an indictment for murder.

If this substantial allegation had been made, then the circumstances so laboriously set out in the indictment, would have been evidence proper to be laid before the jury, to enable them to ascertain, whether the defendants sinned knowingly or not. But, however formidable the array of circumstances, it is not equivalent to a direct allegation.

The court is of opinion, that the indictment would have been bad on demurrer: and the majority of the court is of opinion, that the defect in the indictment is not cured by the statute of jeofails in criminal cases; the offence not being in substance set forth with convenient certainty.

716 *It is unnecessary to give an opinion on the other numerous objections made by the counsel for the plaintiffs in error, to the proceedings set forth in the record.

MAY, J. The record, in this case, is so replete with error, that it matters little on what point the judgment be reversed: but I cannot concur in the opinion that it ought to have been arrested, on account of the insufficiency of the indictment. It would clearly have been bad on general demurrer; and to me it seems, that the authorities cited against it prove nothing more. Every act necessary to be charged upon the defendants, as constituting official misbehaviour, is charged, clearly and distinctly. The defect is, that it is not alleged, that the defendants well knowing that Burks

was not a man of probity &c. did nevertheless certify that he was; and in violation of law, admitted him to qualify as deputy sheriff. But it is alleged, that he was charged with corruption in office; that this charge, and his conduct and character, were investigated before a court of sixteen magistrates including the three defendants; and that, by a vote of twelve justices to four, that court refused to make the certificate, and to allow him to qualify. The indictment then charges, that these defendants (two of them being relations of Burks, and the other a brother of the high sheriff) well knowing the premises, but seeking and contriving, under mere colour and pretence of their office &c. to carry into effect their own private feelings and personal views, without any regard to the interest and welfare of the people of the county, or the administration of justice therein, and in despite of the fair, open and deliberate expression of sentiment, which had been pronounced in a full court &c. did combine and associate together, to form another court, for the purpose of admitting Burks to qualify as deputy sheriff; and, the next day, without giving any notice of their intention, and without any new evidence, the defendants with two other justices, formed a court, at an early hour, in the morning, and caused it to be entered of record,

that Burks was a person of probity 717 *&c. and admitted him to qualify as deputy sheriff." I do not agree with the attorney general, that this is to be regarded as an indictment for a conspiracy; but I am of opinion, that (in the words of the statute) it does "plainly and in substance, set forth, with convenient certainty," though not with technical precision, a charge, that these defendants, with full knowledge of the unfitness and unworthiness of Burks, and of a decision to that effect by a large majority of a full court, did illegally and improperly certify, that he was a man of probity &c. and permit him to qualify as deputy sheriff, in a manner highly unbecoming their office and without regard to their duty and the public welfare; and that this charge is so stated "as to enable the court to give judgment thereupon, according to the very right of the case." This, after verdict, would be sufficient.

In the opinion of MAY, J., on this point, SAUNDERS and DANIEL, J., concurred. Judgment reversed.

The Commonwealth v. Edmund Perryman and Kiturah Perryman.

June, 1830.

Statute Prohibiting Certain Marriages—Construction.—It is provided by statute, that "If the brother hath married or shall marry his brother's wife," the marriage shall be dissolved, the parties fined &c. HELD, the marrying a brother's widow, is an offence within the statute.

This was a case adjourned to this court from the circuit court of King & Queen.

It was an information against the defendants, founded on the 17th section of the marriage act, 1 Rev. Code, ch. 106, p. 399, charging, that Edmund Perryman, unlawfully, willfully and incestuously, intermar-

ried with and took to wife Kiturah Perryman, the wife and widow of 718 Joseph Perryman *deceased, who was the brother of Edmund. The defendants pleaded not guilty. Upon the trial, the jury found specially, that the defendant Edmund did intermarry with the other defendant Kiturah; that the said Kiturah had been the wife, and was at the time of the marriage the widow of Joseph Perryman, then deceased; and that Joseph was the brother of Edmund: and the jury referred the question to the court, whether, upon this state of facts, the defendants were guilty of a violation of the marriage act? Which question the circuit court, at the instance of the defendants, adjourned to this court, together with the usual question, what judgment ought to be given in the case?

The marriage act (above referred to) provides, *inter alia*, that, "if the brother hath married or shall marry his brother's wife" — "every person or persons, so unlawfully married, shall be separated by the definitive sentence or judgment of any superior court of law" &c. The defendants contended, that, as Joseph Perryman, the brother, was dead, and the woman who had been his wife, was now no longer his wife, but his widow, and as this was a penal law, which ought to be strictly construed, therefore, the case was not within the statute.

PER CURIAM. The circuit court ought to give judgment upon the verdict rendered against the defendants, declare the nullity of the marriage, and cause them to give bond with surety, that they will not cohabit hereafter.

719 *Ex Parte Barker.

June, 1880.

Grant of Administration—Want of Jurisdiction—Effect.—Letters of administration granted by a court having no jurisdiction to grant them, are merely void; and the court having competent jurisdiction to grant the administration, may proceed to grant it, though the letters of administration before improperly granted, have not been revoked.

Barker, a citizen of Kentucky, applied for letters of administration of the estate of James Markham deceased. The county court of Henrico had heretofore granted administration of the decedent's estate to William Duval, taking jurisdiction to do so, upon the ground, that the decedent died out of the state of Virginia, and had estate in Henrico, namely, the claim on the treas-

ury, which was the subject of the case of *The Commonwealth v. Markham's adm'r*, 1 Leigh, 516. But Barker now exhibited proof, that he was a grandson of Markham, and that he lived and died in the county of Cabell in Virginia, and Duval, being present in court, admitted notice of this application of Barker for the administration.

The case was argued by John Scott in support of Barker's application, and by the attorney general, who opposed the grant of administration to him.

BROCKENBROUGH, J., delivered the opinion of the court. The court has reviewed its decision upon the same point, at November term 1828, in the case of the administration of Robert Robinson's estate. In that case, the hustings court of Richmond had granted administration to Scott, of the estate of Robinson, who lived and died in Canada: it was proved, that a debtor of Robinson lived in Middlesex, but that there was no estate in the city of Richmond, nor any debt due him there: and this court decided, that the grant of administration by the hustings court of Richmond was void, and proceeded to commit administration to the sheriff of Middlesex. In the case now before us, it was contended,

1. that the non-residence of Barker, 720 the applicant, was an *objection to the grant of administration to him; and 2. that the grant to Duval was not void, but voidable only, and that till it was revoked, administration could not be granted to another. As to the first, the court is of opinion, that the applicant being a citizen and resident of another state, furnishes no legal objection. It is a matter of sound discretion. If there were creditors of the deceased in this state, and if the distributees lived in this state, it might be indiscreet and improper to give administration to a non-resident; but where the facts are otherwise, as in this case, the objection does not lie. As to the second point, the jurisdiction to grant administrations, is conferred by the statute, 1 Rev. Code, ch. 104, § 12, 32, p. 377, 382. The circuit and county courts have jurisdiction to grant administrations within certain limits. If they transcend those limits, they have no jurisdiction. The place of residence of the intestate, gives jurisdiction to the local courts: if he had no known place of residence, then the place of his death gives jurisdiction, or the place where his estate lies. In this case, the intestate resided in Cabell county, and died there: the circuit or county court of Cabell had jurisdiction, but not the courts of Henrico, although he had estate there. It would have been different if the intestate had resided and died out of the state. The court of Henrico not having jurisdiction, the grant was a mere nullity. Toller's law of ex'ors, B. 2, ch. 3, § 8, p. 120; *Blackborough v. Davis*, 1 Salk. 38, 1 P. Wms. 44, S. C. *Griffith v. Frazier*, 8 Cranch, 1. See also *Piggot's case*, 5 Co. 29, b. The statute gives this court jurisdiction to grant administration in any case. Administration of the decedent's estate is granted to Barker.

SEMPLE and MAY, J., dissented.

***Grant of Administration—Wrong Exercise of Jurisdiction—Effect.**—The doctrine of the principal case—that a grant of administration by the court of a county or corporation not authorized by the facts of the case to make such grant (as where the decedent had neither a residence nor any estate, real or personal, in the county or corporation in which the administration was granted) is the act of a court without jurisdiction and is void—has been entirely repudiated by subsequent decisions in Virginia (see *Schultz v. Schultz*, 10 Gratt. 378; *Hutcherson v. Priddy*, 12 Gratt. 90); and it seems well settled that where a court has general jurisdiction to grant letters of administration, an order granting administration, in a case in which the state of facts is not such as to give the court jurisdiction in that particular case, is not a void, but only a voidable, act. See discussion of this subject in *foot-note* to *Andrews v. Avory*, 14 Gratt. 229; *foot-note* to *Fisher v. Bassett*, 9 Leigh 119; *foot-note* to *Burnley v. Duke*, 3 Rob. 102; monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

721 *Webb v. The Commonwealth.

June, 1830.

Mills—Rebuilding—Construction of Statute.—A mill which had been built, and had gone down, prior to the statute of 1819, 2 Rev. Code, ch. 235, § 10, and which was rebuilt after the passing of that statute, is not a mill thereafter built within the meaning of the statute.

Criminal Law—Presentment—Information.†—Upon a presentment in a circuit court, for an offence for which the penalty prescribed by law, exceeds not 20 dollars, the court cannot proceed by way of information, but only in a summary way, under the statute 1 Rev. Code, ch. 169, § 65.

Error to a judgment of the circuit court of Nottoway, against Webb, for a fine of five dollars, and the costs of prosecution. Webb, was presented, in the circuit court, at April term 1827, for grinding grain, and taking toll, at his mill in that county, the mill not being established by order of court, pursuant to provisions of law.‡ A rule was made upon Webb, to shew cause why an information should not be filed upon the presentment; and the rule having been duly served upon him, it was made absolute. An information was accordingly filed, which contained two counts. 1. The first charged, that Webb, being the owner and occupier of a grist mill in Nottoway, which was built without any lawful authority, and never established by order of court, pursuant to law, [without stating when the mill was built] did, within twelve months next preceding the April term 1827 of the circuit court, grind grain brought to the said mill, and did take toll for so grinding. 2. The second count charged, That Webb being the owner of a grist mill in Nottoway, which was built by him in the

722 year 1821, *without any lawful authority &c. did within the twelve months aforesaid, grind grain for L. W. and T. W. C. brought by them to the said mill, and did take toll for so grinding the same, against the statute &c. Webb pleaded not guilty. The jury found him guilty. He moved the court to set aside the verdict, and order a new trial. The court overruled the motion, and gave judgment against him for a fine of five dollars, and the costs. He filed a bill of exceptions to the opinion of the circuit court overruling his motion for a new trial; and applied to this court for writ of error to the judgment, which was allowed.

The bill of exceptions sets forth the facts proved at the trial: It was proved, that the defendant did grind grain at his mill for toll, as stated in the information. It was also proved, that those under whom the defendant claims, erected a mill and dam

at the same place, more than thirty years before the presentment was made, and used the same as a water grist mill, grinding for toll, until the defendant became owner thereof, and that the defendant used it in like manner. But it was farther proved, that the said old mill from decay of the timbers about the pier-head, and giving way of the dam at its foundation near to the pier-head, as early as the year 1810, became wholly unfit for public use; that by means of puncheons driven down, and clay thrown against them, the dam would hold water for short periods after heavy rains, during which times the defendant had his own grain ground, and at such times would and did grind some grain for a few of his near neighbours, who, from observation of the weather, or information received, could hit the right time; and for such grinding he took toll. These times of grinding were more frequent and lasted longer in the winter, but at no season could it grind with any regularity, and for several years the miller was not kept at the mill, but engaged about the plantation, though generally within hearing of a horn. The 4th July 1818, the dam was broke and the old mill house swept off by a fresh. In the fall of the same year, the defendant commenced getting timber for 723 *the mill house. In 1819, these timbers were framed. In the spring and summer of 1820, the foundation of the house was dug out; the mill race cut; and by christmas the whole work was nearly completed. In 1821 the mill, much improved, commenced grinding regularly for toll.

The case was argued at this term by Johnson for the plaintiff in error; and the attorney general for the commonwealth. Johnson shewed, that neither the presentment, nor the first count, charged any violation of law, or offence of any kind. And then, the question was, whether the facts proved at the trial, made good the charge contained in the second count? Whether this was a mill built since the 1st January 1820, within the meaning of the statute?

SEMPLE, J., delivered the opinion of the court. There is no offence, either at common law or under any statute, laid in the first count of the information. And the second count is not sustained by the facts proved at the trial; for they do not prove, that Webb built his mill since the 1st January 1820, but that he rebuilt an old previously existing mill. The judgment might have been reversed, and a new trial ordered, if the circuit court had been authorized by law to proceed by way of information. But the circuit court had no authority to proceed by way of information. The statute for regulating criminal proceedings, 1 Rev. Code, ch. 169, § 65, p. 614, provides, that if on a presentment to a circuit court, the penalty exceed not twenty dollars, no information thereupon shall be filed; but a summons shall be issued against the defendant to answer the presentment; and the court shall, in a summary way, without a jury, hear and determine the matter of the presentment, in the form in which it shall have been made, and give judgment thereupon, according to law and the very

*Mills.—See generally, monographic note on "Mills and Milldams" appended to Calhoun v. Palmer, 8 Gratt. 88.

†Presentment—Information.—See generally, monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

‡See 2 Rev. Code, ch. 235, § 10, p. 228, a provision introduced at the revival of 1819, which took effect the 1st January 1820.—That "no person shall take any toll or other compensation for grinding any grain, at any mill hereafter built, unless such mill be established by order of court, pursuant to the provisions of law; and if any person shall offend herein, he shall forfeit and pay, for every such offence, the sum of five dollars to the commonwealth" &c. This statute (§ 1, 2, 3, 4, 5,) provides for obtaining leave of court to build mills; and § 6 authorizes the rebuilding of mills destroyed, or rendered unfit for public use &c.

right of the case &c. Now, the penalty for the offence charged in this case is only five dollars. If the presentment itself charged the plaintiff in error with any offence, 724 so that the circuit *court could proceed to judgment upon it according to law and the very right of the case, without regarding form or want of form, the proceedings might be reversed to the presentment, and the cause remanded to be further proceeded in. But the presentment charges no offence against Webb, and is so defective that no judgment can be pronounced upon it. The judgment, therefore, by the unanimous opinion of the court, is to be wholly reversed, and judgment entered for the plaintiff in error.

The Commonwealth v. Fugate.

June, 1830.

Justice of Peace*—Conviction of Felony—Forfeiture of Office—Effect of Pardon.—A justice of the peace is convicted of the felony of malicious stabbing, sentenced to the penitentiary, confined there, and then pardoned: **HOLD**, the conviction and judgment for this felony, was a forfeiture of his office of justice, and incapacitated him from afterwards acting under his commission; and the pardon neither avoided the forfeiture, nor restored his capacity.

This was a case adjourned from the circuit court of Scott.

A rule was made by the circuit court upon Fugate, to shew cause why an information in the nature of a Quo warranto, should not be filed against him, for exercising the office of the justice of peace of Scott county, without any lawful authority. Fugate appeared to shew cause at April term 1830, when the following state of facts was agreed:

Fugate was duly commissioned a justice of the peace for the county of Scott, in April 1815, and qualified as such in June following; and thenceforth exercised the powers and duties of the office till September 1825; when he was convicted in the circuit court of Scott, of malicious stabbing, and was sentenced to be imprisoned in the penitentiary for two years according to the verdict of the jury. He was sent to the penitentiary accordingly; but before the

725 expiration of the term of his imprisonment, he was pardoned by *the executive. No proceeding of any kind was had between the time of his conviction and sentence, and the time of the pardon, for the purpose of ascertaining, whether he had forfeited his office of justice of the peace, or of removing him from the office. After his pardon and discharge from the penitentiary, he returned to Scott and resumed the exercise of the office of justice of the peace of the county, and continued in the exercise thereof till this rule was made.

The circuit court, with Fugate's assent, adjourned the following questions to this court: 1. Did he, by the conviction and judgment of the felony aforesaid, forfeit his office of justice of the peace of the county of Scott, or become thereby legally incapacitated from ever after acting therein under his said commission?

*Justice of Peace.—See generally, monographic note on "Justices of the Peace" appended to Wallace v. Com., 2 Va. Cas. 180.

2. If the conviction and judgment produced such forfeiture or incapacity, did the pardon avoid the forfeiture or restore his capacity? 3. Ought the court, on the state of the facts, to discharge the rule, or make it absolute?

BROCKENBROUGH, J. In considering the first question, the court has not thought it necessary to make a minute investigation of english authorities. In 1 Plowden's Com. 381, a case is stated, in which it was decided, that where a grant had been made to two persons for the term of their lives, and for the life of the survivor of them, of the sheriffwick of Cheshire, and one of them was attainted of treason, the whole office was forfeited, because the office was intire, and could not be severed. This decision is founded on the postulate, that an attainer of treason produces a forfeiture of a freehold office which concerns the administration of justice. In another case it was decided, that a cestui que trust of a grant for years of the license of wines, who had committed felony, had forfeited the said office. 13 Vin. Abr. Forfeiture, H. pl. 2, p. 445. But, in England, this question can seldom arise. Felonies are there, for the most part, punishable capitally; and if the holders of an office becomes convict of felony, he can no longer hold it, if 726 the sentence *is carried into effect.

As we have substituted penitentiary confinement and discipline for capital punishments, it would seem, that a similar incapacity for holding office should follow the conviction for felony. The court does not, however, mean to rely mainly on any english authorities or adjudged cases, in deciding the question now before it. When the people of Virginia established their constitution, they never intended that the bench of justice should be contaminated by the presence of a convicted and attainted felon. Neither did the legislature nor the executive ever intend, that a judicial officer appointed under their authority, should continue to hold the office, after he should be sentenced to confinement in the penitentiary for a felonious offence. The court is decidedly of opinion, that such judicial officer forfeits his office by conviction and attainer of a felony; that no pardon can restore him to his former office. The following is to be entered as the judgment of the court:

This court is unanimously of opinion and doth decide, 1. That the said William Fugate, by the conviction and judgment of the felony of which he was indicted, did forfeit his office of justice of the peace for the county of Scott, and became thereby legally incapacitated from ever after acting therein under his said commission. 2. That the pardon of the executive did not restore his capacity to act under his former commission, nor avoid the forfeiture. And 3. That the circuit court of Scott ought to make the rule absolute against him.

727 *Allen v. The Commonwealth.

June, 1830.

Statute Defining Larceny—Effect on Former Statute—Case at Bar.—By statute of 1819, grand larceny is defined stealing goods to value of \$4. and upwards, and punished by imprisonment &c. not less than

one nor more than three years: by statute of 1824, larceny committed after 1st May, 1824, to value of \$10, and upwards, is defined grand larceny, and punished as grand larceny therefore was; and larceny of goods of less value than \$10, is defined petit larceny, and punished as petit larceny therefore was; and the latter statute neither makes provision as to larcenies committed before 1st May 1824, nor contains any express repeal of the former statute. HELD, the latter statute does not repeal the former, as to larcenies committed before 1st May 1824.

Criminal Law—Erroneous Charge to Jury as to Minimum Punishment—Effect.—At the trial of an indictment for a crime, the punishment whereof, prescribed by law, is imprisonment &c. not less than one nor more than three years, the clerk charges the jury, that the term of imprisonment is to be not less than two nor more than three years: verdict finds prisoner guilty, and ascertains his imprisonment to be two years; the attorney for commonwealth remits one year of the term: whereupon, the court sentences prisoner to one year's imprisonment: HELD, 1. the attorney had no power to make such remission, which was therefore merely void; 2. the judgment was erroneous, not being according to verdict; 3. the verdict ought to be set aside, on account of the erroneous charge as to the minimum term of imprisonment.

Error to a judgment of the circuit court of Logan.

Allen was indicted of the larceny of a steer of the value of ten dollars: one count of the indictment charged, that the theft was committed on the 10th September 1823; another, that it was committed on the 1st January 1830. The prisoner pleaded not guilty. The jury being sworn, and the indictment read to them, the clerk charged them (inter alia) "That if they found the prisoner guilty, they were then to inquire of the value of the chattel stolen; if they found it to be of the value of ten dollars

and upwards, they were then to ascertain the term of his imprisonment in the penitentiary, so as such term should be not less than two nor more than three years; if they found it to be of less value than ten dollars, they were then to ascertain the time it was stolen, and the value thereof." The court corrected this charge by directing the jury, that if they found the defendant guilty of the larceny, they were to find, specifically, the time when the crime was committed, and the value of the steer stolen, and to ascertain the imprisonment: but the court did not apprise or charge the jury, that if they found the prisoner guilty of grand larceny committed in 1823, the term of imprisonment might be less than two years, the minimum stated in the charge given by the clerk. The jury found this verdict: "We of the jury find, that the prisoner John Allen did steal &c. the steer in the indictment mentioned on the 15th August 1823 in manner and form as therein charged; and that the said steer was of the value of nine dollars and seventy five cents: we further find, that the said steer is not forthcoming to be restored to the owner. If the facts found amount in law to grand larceny, we ascertain the term of his imprisonment in the penitentiary to be two years." Upon this verdict being returned, the prisoner moved the court to discharge him, upon the ground that, the statute prescribing the punishment for the offence, which was in force at the time it was committed, 1 Rev. Code, ch. 171, § 6, p. 617, had been repealed by the statute of the 9th March 1824, Sess. Acts of 1823-4, ch. 10, § 11, p. 17,† and there was now

***Criminal Law—Erroneous Charge to Jury as to Minimum Punishment—Effect.**—In *Mitchell v. Com.*, 75 Va. 856, the offense for which the prisoner was indicted was punishable by confinement in the penitentiary for not less than one nor more than five years though the clerk charged the jury that the minimum term of imprisonment was three years, and the maximum five years. The jury found a verdict of guilty and fixed the term of imprisonment in the penitentiary at five years. It was insisted that this charge by the clerk must be treated as an erroneous instruction of a court, and therefore the verdict must be set aside and a new trial awarded the prisoner; and the principal case was cited to sustain the contention. But it was held by the court of appeals, approving the principal case, but distinguishing it from the case at bar (p. 863, 864, 865), that, since the jury had fixed the maximum period of imprisonment, they could not have been misled by the erroneous charge of the clerk; that the prisoner was not in any way prejudiced by the mistake, nor could he have been benefited if the minimum period had been correctly stated in the charge; and therefore the error was not sufficient to set aside, or arrest the judgment.

See also, monographic note on "Instructions" (V. e.) appended to *Womack v. Circle*, 29 Gratt. 192.

Same—Charge by the Clerk—Effect.—The acts of the clerk done in the presence of the court and under its supervision, must be taken to be done by directions of court; and are the acts of the court. *Mesmer v. Com.*, 26 Gratt. 982, citing the principal case. So where a charge is given to the jury by the clerk in the presence and hearing of the court without any correction by the court, it is regarded as receiving the sanction of the court and thus becomes the act of the court; and if there is any error in it to the prejudice of the prisoner, it is an error for which the judgment ought to be reversed. To this effect, the principal case was cited with approval in *Thornton v. Com.*, 24 Gratt. 682; *Dull v. Com.*, 25 Gratt. 961; *State v. Cobbs*, 40 W. Va. 718, 22 S. E. Rep. 310; *Mitchell v. Com.*, 75 Va. 864.

The principal case is distinguished in *Mitchell v. Com.*, 80 Va. 830, 17 S. E. Rep. 480.

Same—Waiver of Second Jeopardy.—To the point by that certain acts, such as consenting to the discharge of the jury, or moving in arrest of judgment, the prisoner will be presumed to waive any objection to being put a second time in jeopardy, the principal case is cited in *Briggs v. Com.*, 82 Va. 563.

†The statute of 1796 and the revised statute of 1819, 1 Rev. Code, ch. 171, § 6, 7, enacted, that every person convicted of simple larceny to the value of four dollars and upwards—should undergo confinement in the penitentiary for a period not less than one nor more than three years; and that "if any person shall feloniously steal &c. any goods or chattels under the value of four dollars, he, she, or they, being thereof legally convicted, shall be deemed guilty of petit larceny, and shall be sentenced to be punished by stripes on his or her bare back, not less than ten nor more than forty for any one offence, or by confinement in the penitentiary for a term not less than six nor more than eighteen months, at the discretion of the jury by which such person shall be tried."

The statute of March 1824, Sess. Acts of 1823-4, enacted, that "if any free white person, after the 1st day of May next, shall be guilty of simple larceny of goods and chattels to the value of ten dollars or upwards, and shall be thereof duly convicted, he shall, in all respects, be subject to the same sentence and punishment as is now prescribed by law, for white persons guilty of larceny of goods of the value of four dollars and upwards; and if after the said 1st day of May, any person shall feloniously steal &c. any goods and chattels under the value of ten dollars, he or she shall be deemed guilty of petit larceny, and shall be, in all respects, subject to the same proceeding, trial, conviction, sentence and punishment, as are now prescribed by law for free white persons guilty of petit larceny." This statute contained no proviso as to the prosecution and punishment of larcenies committed before the 1st May 1824, and no general repealing clause.

A statute passed March 9, 1826, Sess. Acts of 1825-6, ch. 11, p. 10, enacted, "that if any person shall hereafter commit any offence, for which he or she may now be punished by confinement in the penitentiary for any term less than two years, every such person shall for every such offence, being thereof convicted, be confined in the penitentiary for a term not less than two years, and not more than the number of years now prescribed by law as the longest period for the commission of such offence: provided, that every person who shall have committed any such offence, heretofore, shall be tried and punished in the same manner as if this act had never passed."—Note in Original Edition.

729 no law in force prescribing a "punishment for the offence. The court overruled the motion. He then moved the court, to set aside the verdict, and order a new trial, on the ground, that the jury had been erroneously charged with the prisoner's case, as to the minimum of the term of imprisonment, not having been informed, that the term might be less than two years, and of the probable effect, injurious to the prisoner, which this erroneous charge might have produced upon the jury in ascertaining the term of imprisonment. Upon which the attorney for the commonwealth offered to wave and remit one year's imprisonment, and to take judgment for the residue of the term, namely, one year. The prisoner objected to any such waver and remission, and insisted that he ought to have a new trial. But the court, being of opinion, that as the evidence was full and satisfactory, and well warranted the finding of the jury, the only effect of the omission to charge them, that if they found him guilty of a larceny of goods over the value of four dollars committed in 1823, the term of imprisonment, according to the law then in force, was limited to a term of not less than one nor more than three years; was, to mislead the jury as to the minimum of the time; and that the commonwealth, by waving and remitting all of the term of imprisonment fixed by the jury, above the shortest time which could have been legally fixed by the jury consistently with the prisoner's guilt, gave him all the advantage that could

730 have resulted to him from the most specific and correct charge on this head; therefore, overruled the motion for a new trial. To these opinions of the court, the prisoner filed a bill of exceptions; from which the above state of the case has been collected.

The court then proceeded to give judgment upon the verdict. That the statute of March 1824, respecting the crime of grand larceny, did not affect offences committed before the passing thereof, or render punishable larcenies committed during the operation of the former law on the subject; and that the law upon the verdict, was for the commonwealth: and the attorney prosecuting for the commonwealth, with leave of the court, waving and remitting one year of the term of imprisonment in the penitentiary, ascertained by the jury, and praying judgment that the prisoner should be so there imprisoned for one year only; thereupon, the court passed sentence upon the prisoner that he should be imprisoned in the penitentiary for the term of one year.

The prisoner prayed a writ of error to the judgment; which was allowed.

C. R. Baldwin and Johnson, for the plaintiff in error; the attorney general, for the commonwealth.

FIELD, J., delivered the opinion of the court. This court concurs in opinion with the circuit court, that, as to the offence committed by the prisoner, the revised statute of 1819, 1 Rev. Code, ch. 171, § 6, defining grand larceny, and prescribing the punishment of the offence, was not repealed by the statute of March 1824, Sess. Acts of 1823-4, ch. 10, § 11. The latter statute en-

acts, that "if any free white person, after the 1st May 1824, shall be guilty of simple larceny of goods &c. to the value of ten dollars and upwards, and shall be thereof duly convicted, he shall, in all respects, be subject to the same sentence and punishment,

as is now prescribed by law for white persons guilty of larceny of goods of four dollars and upwards." There is

no repealing clause in this statute: so that, if it has the effect of repealing the former law, it is by implication. As to offences committed after the new statute went into operation, the old law was undoubtedly repealed: every affirmative statute is a repeal, by implication, of a precedent affirmative statute, so far as it is contrary thereto: *leges posteriores priores contrarias abrogant*. But subsequent statutes, which add accumulative penalties, and institute new methods of proceeding, do not repeal former penalties and methods of proceeding, ordained by preceding statutes, without negative words: neither hath a latter statute ever been construed to repeal a prior statute, unless there be a contrariety or repugnance in them, or at least some notice taken in the latter statute of the preceding one, so as to indicate an intention in the law makers to repeal it. 6 Bac. Abr. Statute D. p. 372, 3. The act of March 1824 applies exclusively to offences committed after the 1st day of May following: as to offences committed prior to that time, it leaves the revised statute of 1819 in full force. Allowing the two statutes to have this effect, is there any contrariety or repugnance between them? This court thinks not. The question is not new here. A similar one arose in Wyatt's case, 6 Rand. 694, and in Pegram's case, 1 Leigh, 569, which were prosecutions under the statutes to prevent unlawful gaming. In both cases, the court held, that the former laws had not been repealed by the latter, as to offences committed prior to the time when the latter went into operation. The question now before us does not differ materially from that decided in those cases. It is true, we are directed to construe the statutes against unlawful gaming remedially: but, if the question to be decided be not one of construction, but whether the law be in force or repealed, the rule is alike in all cases, whatever may be the degree or nature of the crime or offence punishable by such law, if in force.

But, we think, the circuit court ought to have set aside the verdict against the prisoner, and ordered a new trial. The charge given by the clerk to the jury was erroneous, and was well calculated to mislead them, as to the legal term of imprisonment. It was equivalent to an instruction from the court: it was given by an officer of the court, in the usual course of his duty, in the presence and hearing of the court; and, not having been corrected by the court, must be regarded as having been sanctioned by it. What effect it had, does not appear from any thing in the record. But it may have induced the jury to agree upon the term of two years for the prisoner's confinement in the penitentiary, believing that to be the minimum, when, if they had been correctly informed of the law, they might have ascertained his im-

prisonment to be one year only. This error was not corrected by what was done by the attorney for the commonwealth. The power of pardon was not in his hands. His waving and remitting one year of the term, was a void act, and ineffectual to any purpose. It left the verdict intire; and being intire, the judgment rendered by the court was not according to the verdict.

The judgment is, for this reason, reversed; and the cause remanded to the circuit court for a new trial to be had of the case.

733 *Howard v. Rawson and Pugh.

June, 1830.

Writ of Right—Affidavit of Demandant's Death before Suit Instituted—Effect.—A writ of right having been brought in name of H. against R. and P. and the mise regularly joined on the mere right, and the tenants shewing by affidavits that H. was dead before the writ purchased, and that they had come to knowledge of the fact after the mise was joined: **HELD,**

1. **Same—Same—Abatement.**—The pleadings ought not to be set aside, and tenants permitted to plead this matter in abatement: but,
2. **Same—Same—Same—Proceedings Stayed.**—The court ought to stay proceedings, till W. the person prosecuting the suit, shall shew by proof, that demandant was living at commencement thereof.
3. **Same—Same—Same—Right of Person Benefitted to Prosecute Suit.**—That W. who instituted suit for his own benefit, ought not to be allowed to prosecute it to judgment without shewing demandant was living at commencement thereof, though W. may shew evidence of title to land demanded, and deduce title from H. the demandant:
4. **Same—Same—Same—Contempt.**—That court ought to make a rule upon W. and his attorneys, and inquire into their conduct herein, as a contempt, and abuse of the process of the court: and
5. **Same—Same—Same—Liability for Costs.***—That unless W. within reasonable time after rule given for the purpose, produce proof, that demandant was living at commencement of suit, it ought to be dismissed, and payment of tenants' costs enforced, by attachment, against W. or his attorney.

This was a case adjourned to this court from the circuit court of Wood.

A writ of right was sued out in the name of Howard against Rawson and Pugh, in September 1826, and the mise was regularly joined upon the mere right, in September 1827. The cause was continued from term to term, till April term 1830, when the tenants filed affidavits to shew, that Howard, the demandant, died many years before the institution of the suit; that the tenants were ignorant of this fact, till after the mise had been joined; and that the suit was, in truth, prosecuted by one Willard, who was aware of Howard's death. And thereupon, the tenants moved for a rule upon the counsel, attorneys and agents, engaged in the prosecution of the suit, to shew cause, 1. Why the tenants should not be permitted to withdraw their plea, and to plead, in abatement, the death of Howard before the writ purchased: 2. Why the

734 proceedings in the suit should *not be

***Pleading and Practice—Suit in Name of Deceased Person—Liability for Costs.**—Where a suit has been brought in a fictitious name, or in the name of a person without his privity and consent, or of a deceased person, the court will interfere in a summary way, and will hold the party by whom the suit was prompted or even the attorney in the case, responsible for costs. Pates v. St. Clair, 11 Gratt. 24, 25, citing the principal case.

See principal case also cited in Richardson v. Justices, 11 Gratt. 196.

stayed, and the counsel, attorneys, agents, and all others concerned in the prosecution thereof, directed not to proceed further therein, until they should produce satisfactory proof to the court, that Howard was in life at the institution of the suit: and 3. Why the counsel, attorneys, agents, and others engaged or concerned in the institution and prosecution of the suit, should not be respectively attached as for a contempt of the court and for an abuse of the process thereof, in the institution and prosecution of the suit in the name and in the pretended right of Howard, as the demandant, well knowing that he was dead long before the præcipe was sued out. The motion for the rule was resisted by one Willard, who claimed title to the land in controversy under Howard, and who being present in court when the motion was made, filed an affidavit, in which he stated, that, before the mise was joined in this case, the death of the demandant Howard, had been put in issue in another cause tried in the circuit court, when it was a subject of general inquiry and conversation; and the counsel of the tenants in the present case, were counsel engaged in that other case in which Howard's death was so put in issue: and that he, Willard, believed he has a sufficient legal title to enable him to recover. But there was no suggestion in any part of Willard's affidavit, that he believed, that Howard was living at the time this suit was commenced.

The circuit court adjourned the case to this court, for its opinion on the several points presented by the motion of the tenants, for the rule. These points are stated in the following opinion of the court, delivered by.

SUMMERS, J. The first question is, Whether the pleadings in this cause ought to be set aside, and the defendants permitted to plead in abatement, under the circumstances disclosed?

Pleas in abatement are regarded with great strictness; and no example is found of the reception of such plea after a plea in bar (except for matter arising puis 735 darrein continuance) *although it must frequently happen, that matter in abatement arising before suit brought, is discovered after issue joined. In Garrard v. Henry, 6 Rand. 112, 113, it is said by judge Carr, that the death of the demandant pending the action, abates the writ, and the court will ex officio abate the suit, at whatever stage the fact may come to its knowledge; but that the death of a party before the commencement of the suit, is a fact which does not itself abate the writ, but only falsifies and renders it abateable by plea; and that, if the tenant passes by the fact of such death, and joins the mise on the mere right, he thereby acknowledges the demandant is in life, and forever precludes himself from taking advantage of his death, in any manner or form. This is conclusive upon the first point.

2. The second question adjourned, is, Whether, if the pleadings are not now to be set aside, the court ought to stay proceedings until the persons prosecuting this suit, shall shew, by proof, that Howard was in life at the commencement thereof?

The institution of suits in feigned names, fictitious suits, and the suing in the names of others, without their privity and consent, have ever been held to be perversions of the process of the courts; and to guard against such abuses, as well as to punish them, the courts have been constrained to exert their superintending and protecting powers, by putting the attorneys, and those who have prompted such suit, under rules to disclose the person of the plaintiff on the record, his place of residence, and whatever may be necessary to guard against frauds of this kind, whenever the proper occasions have arisen. In *Gynn v. Kirby*, 1 Stra. 402, the attorney was summoned before justice Fortescue to produce his client, and an order made, that unless he produced him within a month, the defendant should be at liberty to sign a non pros.: he failed to produce him: a non pros. was signed; and on affidavit, that no such man as the plaintiff could be found, a rule was made upon the attorney to pay the costs; and on demand and non-payment, an attachment

736 ment *was awarded. The generality of the expression used by the judges in *Garrard v. Henry*, is not regarded as applying to this form of relief, since the questions here considered, did not arise in that case, and were evidently not within the scope of the examination there made. In *Short v. King*, 1 Stra. 681, a motion was made to stay proceedings in an ejectment, until payment of the costs of a former suit, and for notice where the lessors of the plaintiff were to be found; and the court denied the first, and granted the latter part of the rule. The power to interpose in this form, is abundantly sustained by authority; *Shindler v. Roberts*, Barnes, 126; *Hooper v. Harcourt*, 1 H. Black. 534; *Butterworth v. Stagg*, 2 Johns. Ca. 291; *The People v. Bradt*, 6 Johns. Rep. 318; *Coxe v. Phillips*, Ca. Temp. Hardw. 237, 4 Black. Comm. 285, authorities, which remove all doubt of the propriety of exercising the power in the case before us.

3. The third question is, Whether Willard, who instituted the suit and for whose benefit a recovery is sought therein, ought to be permitted to prosecute the same to final judgment, without first shewing, that the demandant was living at the commencement thereof, though he may shew evidence of title to the land in controversy, and deduce his right from the demandant?

The discussion of this point is rendered unnecessary by the decision of the second. It will suffice to say, that a claimant cannot be permitted to assert his rights in the name of a party no longer in life, except in a few statutory cases.

4. The fourth question is, Ought the circuit court further to inquire into the alleged contempt and abuse of its process, on the evidence now before it? and if so, does the institution and prosecution of this suit in the name of a dead man, amount to a contempt and abuse of the process of the court, in Willard, and the attorneys engaged by him in the institution and prosecution thereof, provided it shall appear, that they had knowledge of the death of Howard, before the commencement thereof?

737 *It has been already stated, that suing in feigned names, or in the names of others without their privity and consent, is an abuse of the process of the court: and the cases before referred to, shew, that the attorney, or the party at whose request the suit is brought, may be attached for the costs; and that where fraudulent purposes are manifest, the parties will deserve more serious animadversion. Upon the facts, as they now appear in the record, it is not apparent, whether the parties acted under a misconception of the law, or in conscious violation of it. Therefore, the court is of opinion, that the rule ought to be awarded, and an inquiry had as to this feature of the case.

5. The fifth question adjourned, is, What proceedings ought to be had, and what judgment given upon the whole matter?

Much of the ground covered by this inquiry, has been already disposed of. The answer given to the second question, and the reasoning upon which that answer is founded, shew the course which the circuit court ought, in the first instance, to adopt, on that branch of the motion; and as this proceeding has for its object, the protection of the rights of the tenants, every reasonable facility and indulgence should be extended to the opposite party, for procuring and exhibiting the proof necessary to discharge the rule, and which ought not to become absolute (from analogy to our statute providing for the revival of causes) until the second term, unless by consent of the party interested as plaintiff. Should the party who instituted and is now prosecuting this suit, ultimately fail to produce evidence of the demandant's being in life at the commencement thereof, the circuit court ought to dismiss the cause, and enforce the payment of the tenants' costs by the attorney, or the person who has employed him, according to the circumstances of the case.

So, this court certified its opinion to the circuit court: 1. That the pleadings in the cause ought not to be set aside, and the tenants permitted to plead in abatement.

2. That the court ought to stay proceedings in the cause, till the persons

738 *prosecuting it, shall shew, by proof, that Howard was in life at the commencement thereof. 3. That Willard, who instituted the suit, and for whose benefit a recovery was sought therein, ought not to be permitted to prosecute the same to final judgment, without first shewing that Howard was living at the commencement thereof, although Willard may shew evidence of title to the land in controversy, and deduce his right from Howard. 4. That the circuit court ought to award the rule applied for by the tenants, and make further inquiry as to the alleged contempt, and abuse of the process of the court. And 5. that, unless the party, at whose instance the suit was commenced, shall, within a reasonable time after a rule given for that purpose, produce proof that Howard was living at the commencement of the suit, it ought to be dismissed, and the payment of the tenants' costs enforced, by attachment, against Willard, or the attorney.

JUDGES PRESENT.

*Stuart,
Brockenbrough,
Johnston,
Smith,
Allen,
Daniel,*

*Semple,
Parker,
Upshur,
Field,
May,
Lomax.*

The Commonwealth v. Willson.

November, 1830.

(Absent STUART, J.)

Grand Jury—Qualification—Keeper of Ordinary—Who is Not.—A. obtains a license to keep an ordinary; A. opens a tavern under this license, and B. is his partner in the business; but A. alone resides at the tavern, and acts as keeper thereof: **Held.** B. is not the keeper of an ordinary, disqualified to serve on grand juries, within the meaning of the statute, 1 Rev. Code, ch. 72, § 2.

This was a case adjourned from the circuit court of Fairfax.

Willson was presented in that court at May term 1830, for retailing spirituous liquors without license. A rule was made upon him, returnable to September term 1830, to shew cause why an information should not be filed against him upon the presentment; and upon the return of the rule he alleged for cause, that W. B. Butler, one of the grand jury which made the presentment, was, at the time of making the same, keeper of an ordinary, and therefore, not a good grand juror. Whereupon, the following state of facts, was agreed:

That in January 1830, the county court of Fairfax, granted to E. C. Butler, the brother of W. B. Butler, the

740 *grand juror objected to, license to keep an ordinary; which license expired at May term 1830; when the license was renewed, to expire at May term 1831. Both of these licenses were regularly perfected in the manner required by law; and by virtue thereof, a tavern was opened and kept from the 11th January 1830. On the 6th April 1830, a joint advertisement of the said E. C. Butler and of the said W. B. Butler was published, which stated that they had opened a house of entertainment, where they were prepared to accommodate travelers and others; the advertisers recommend their house and their accommodations; and they both signed the advertisement and gave it circulation. But W. B. Butler did not reside at the tavern, though he was there occasionally. E. C. Butler resided there constantly, and acted as the tavern keeper.

Upon this case agreed, sundry questions were adjourned to this court, and among others, the following: Whether the facts agreed were sufficient to prove or constitute the said W. B. Butler an ordinary keeper within the meaning of the statute which excludes ordinary keepers from serving on grand juries? See 1 Rev. Code, ch. 75, § 2, p. 264.

BROCKENBROUGH, J., delivered the resolution of the court, That the facts agreed

*See the principal case cited in foot-note to Com. v. Burcher, 2 Rob. 826.

See generally, monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

were not sufficient to constitute W. B. Butler an ordinary keeper, within the meaning of the statute.

741 *Thomas v. The Commonwealth.*

November, 1830.

(Absent DANIEL and LOMAX, J.)

Criminal Law—Carrying Slaves Out of State.—T. carries the slaves of D. out of the state, without the owner's consent, with intent to deprive him of the slaves, until T. should receive a reward for apprehending and restoring them: **Held.** this is felony in T. under the statute, 1 Rev. Code, ch. 111, § 30.

Same—Same—Variance between Indictment and Record of Examining Court as to Name of Slaves—Effect.—Indictment against T. for carrying out of the state, four slaves, named Sandy, Henry, Poll and Hyatt the property of D. without his consent, and with intent to defraud and deprive him of the property; but the record of the examining court, shews he was examined, and committed, for so carrying away the three first named slaves, and another named Harriet, not Hyatt: **Held.** the indictment ought not to be quashed for this cause: and, the court instructing the jury, that the prisoner was not, under this indictment, to be convicted for carrying away Harriet or Hyatt, and the jury, with this instruction, convicting him: **Held.** further, this conviction is right.

Thomas was indicted in the circuit court of Hampshire, under the statute, 1 Rev. Code, ch. 111, § 30, p. 428, whereby it is made felony for any person to carry any slave or slaves, not his own property, out of the commonwealth &c. without the consent of the owner, and with intention to defraud or deprive the owner of the property.

The indictment charged Thomas, with carrying out of the county of Hampshire, and out of the commonwealth, into Maryland, five slaves, Henry, Sandy, Poll and Hyatt, the property of E. Dunn, and George, the property of L. I. Dunn, without consent of the owners, and with intention to defraud and deprive them thereof. The prisoner upon being set to the bar, moved the court to quash the indictment; the court overruled the motion; and the prisoner filed a bill of exceptions to the opinion.

This bill of exceptions sets forth the record of the examining court, and stated the ground of the motion to be, that the examination was not for the same offence, that was charged in the indictment. Upon a comparison of the record of the examining court, with the indictment, it appeared that one of the slaves was called Harriet

742 in the record, and *Hyatt in the indictment. And there was a statement added by the judge, that the name of Hyatt was by mistake inserted in the indictment instead of Harriet, and that upon the trial which afterwards took place, the court instructed the jury, that as to that slave it was not competent for them to find the prisoner guilty.

Upon the trial, the prisoner moved the court to instruct the jury, that "if they believed from the evidence, that the prisoner carried the slaves out of the commonwealth with the intention of getting a reward, and not with the intention of depriving the owners thereof of said slaves, they must find the prisoner not guilty." The court gave the instruction, but added thereto these words: "unless they should also believe from the

*The principal case is cited in Com. v. Adcock, 8 Gratt. 671.

testimony, that the prisoner did carry them out of the commonwealth, with the intention of depriving the owners of their said slaves until he should receive a reward for their apprehension." And to this addition to the instruction the prisoner filed exceptions.

The jury found the prisoner guilty, assessed a fine upon him, and ascertained the term of his imprisonment in the penitentiary to be three years; and the court passed sentence upon him accordingly. And now he applied to this court, by petition, for a writ of error to the judgment.

PER CURIAM (unanimously) the writ of error was denied.

743 *Poulson v. The Justices of Accomack.

November, 1830.

(Absent DANIEL, J.)

Justice of Peace—Removal from State—Resumption of Office on Return.—A justice of the peace of the county of A. leaves this state, with intent to establish his residence in another state; he remains in another state nine months, but does not establish his permanent residence there; and then he returns to, and resumes his former residence in, the county of A. HELD, he has no right to resume the exercise of his office of justice of the peace of A.

This was a case adjourned to this court from the circuit court of Accomack.

Upon the motion of Poulson, a rule was made in October 1828, by the circuit court, upon the justices of the county court of Accomack, to shew cause why a writ of mandamus should not issue, to command them to restore Poulson to his rights and privileges as a justice of the county court of Accomack; which rights and privileges were withheld from him. And upon the return made by the justices of the county court, an issue of fact was made up between the parties; upon the trial of which, the jury found the following facts:

That Poulson left the commonwealth about October 1820, with intent to take up his permanent residence elsewhere; that he remained about nine months in the state of Kentucky, but did not establish any residence of a permanent character there or elsewhere, until his return to Accomack county about July or August 1821, where he has resided ever since.

Whereupon, the circuit court adjourned the following question to this court: Whether upon the case found by the jury a mandamus ought to be awarded to the justices of the county court?

UPSHUR, J., delivered the resolution of the court, that this case was not distinguishable, in principle, from the case of Chew v. The Justices of Spottsylvania, 2 Virg. Ca. 208, and upon the authority of that case, the court was unanimously of opinion that the mandamus ought not to be awarded.

*Justice of Peace.—See generally, monographic note on "Justices of the Peace" appended to Wallace v. Com. 2 Va. Cas. 130. The principal case was cited in Bunting v. Willis, 27 Gratt. 161.

744 *The Commonwealth v. Snider.

November, 1830.

Indictment—Sufficiency of.—Indictment against a surveyor of a public road describing the road, but not naming the surveyor: HELD, insufficient and bad, on general demurrer.

Same—Record of Finding—Defendants' Names Not Given—Effect.—Record states, that two indictments against surveyors of roads are found true bills by grand jury, not naming the surveyors: HELD, this is not a record of indictments found against any particular surveyors.

At the circuit court of Pendleton, March term 1830, the grand jury found and presented sundry indictments, against several persons by name, and it was recorded that those indictments were found true bills, "and (the record proceeded) two other indictments against surveyors of roads true bills." One of these indictments was against the surveyor of that part or precinct of the public road on the South Fork of the Potowmac which passes by G. P.'s saw mill on the South Fork in Pendleton county. The indictment did not name the surveyor. A summons was issued against Snider, describing him as the surveyor; who appeared, and 1. demurred generally to the indictment; and 2. pleaded, that there was no record of the supposed indictment against him, to which "there was a general replication." Whereupon, the circuit court adjourned the following questions to this court: 1. Whether there was a sufficient record of the indictment having been presented in court by the grand jury as a true bill? 2. Whether the indictment was good and sufficient in law?

SMITH, J., delivered the resolutions of the court. A majority of the court is of opinion, that the decision of this court in Cawood's case, 2 Virg. Ca. 527, is decisive on the first point, that there is not a sufficient finding of the indictment shewn by the record.

As to the 2d question adjourned: the general rule is, that the name of the party indicted ought to be inserted. There is an exception to this rule mentioned in 3 Bac. Abr. Indictment, G. 2, p. 557, and 2 Hawk. P. C. ch. 25, § 68, "that an indictment,

that the king's highway in such a place, *is in decay through the default of the inhabitants of such a town, is good without naming any person in certain." This exception is allowed, because of the difficulty, if not utter impracticability, of ascertaining and naming all the inhabitants of the town. But, in the case before the court, where the default is by a single individual, there is no reason why the general rule should not prevail. And we are unanimously of opinion, that the indictment is insufficient, and the demurrer ought to be sustained.

Martin v. The Commonwealth.

November, 1830.

(Absent STUART, J.)

Criminal Law—Passing Counterfeit Bank Notes—Evidence to Prove Sceler.—Upon the trial of an

*See monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com. 14 Gratt. 674.

*Criminal Law—Passing Counterfeit Bank Note.—See monographic note on "Forgery and Counterfeit-

indictment for passing counterfeit bank notes, proof that prisoner had, about same time, passed another note of same kind, which was thought to be a counterfeit and which he took back, though this note is not produced at the trial, is admissible evidence to prove the scienter.

Same-Same-Evidence-Notes Passed by Confederate.

—Upon the trial of an indictment against M. for passing counterfeit bank notes, the prisoner appears clearly to have been confederated with one L. in passing counterfeit notes, and present when L. passed such notes; the notes so passed by L. are produced in evidence against the prisoner: HELD, they are proper evidence.

Same-Same-Necessity for Testimony of Bank Officer.

—In a criminal prosecution for passing counterfeit bank notes, it is not necessary to prove the notes to be counterfeit, by an officer of the bank of which the notes are counterfeited.

Jury-Separation before Any Evidence Given-Effect.

—After a jury is empaneled and sworn, but before any evidence is given, three of the jurors separate from their fellows, for a brief space of time: HELD, such separation before any evidence given, is no cause for setting aside a verdict of conviction; especially, in the case at bar, where the separation was so momentary that any tampering with the jurors was hardly possible.

Martin was indicted, tried and convicted, of felony, in the circuit court of Botetourt, under the statute 1 Rev. Code, ch. 154, § 1, p. 578. He was convicted upon a count in the indictment, which charged, that he did, on the 17th December 1829, with intention to injure and defraud a certain

746 *W. Smith, pass and tender, and offer to pass and exchange, and cause and procure to be offered to be passed and exchanged, to the said W. Smith, a certain false, forged and counterfeited note, purporting to be a bank note of the bank of Virginia for twenty dollars, knowing the note to be false, forged and counterfeited. The jury ascertained the term of his imprisonment in the penitentiary, to be ten years, and sentence was passed upon him accordingly.

He filed four bills of exceptions to opinions of the circuit court given at the trial; and after the verdict was rendered, he moved the court to set it aside, and order a new trial; which motion the court overruled, and to this opinion also he filed a bill of exceptions, wherein all the evidence which had been adduced at the trial, was set out at large. And now he applied, by petition, to this court, for a writ of error to the judgment.

From the evidence set out in the last bill of exceptions, it appeared, that one Lewallen, in December 1829, informed an illiterate youth, named Millirous, that the prisoner wished to hire him, to aid in bringing

in some horses, which he was going to purchase over the mountains; and that Millirous went to the prisoner, and engaged with him accordingly, the prisoner stating to Millirous, that he would learn to trade &c. Soon afterwards, the prisoner having furnished Millirous with a small horse, they and Lewallen set out from Bedford, on their journey over the mountains. At their first stage, the prisoner gave Millirous a five dollar note, to pay the expenses of the three; which was done, and the surplus, in change, was paid to the prisoner. They staid the first night in Botetourt, where the prisoner gave Millirous two twenty dollar notes, and told him to swap the small horse for a large one. A swap was soon made with W. Smith, who required and received 50 dollars in exchange, the prisoner furnishing another ten dollar note. One of the notes paid Smith, was the note mentioned in the indictment. They all traveled together through Botetourt and Giles, and returned together to Bedford. During 747 this *journey, Lewallen bought several horses, and paid for them with counterfeit notes of the bank of Virginia; some of which were produced in court at the trial. The prisoner appeared to take no part in these purchases; but occasionally joined in conversation about them. The prisoner and Lewallen both concurred in stating that they were going to Kanawha; and were buying horses to move a family. After the swap with Smith, the prisoner rode the horse which had been obtained from him; and, subsequently, one purchased by Lewallen: and on their return, the horses were all shod at the expense of the prisoner. From these and other circumstances, that need not be particularized, the prisoner and Lewallen appeared, very plainly, to have been jointly interested in all these transactions.

1. The first bill of exceptions stated, that upon the cross examination of a witness for the prisoner, the counsel for the commonwealth asked the witness, whether the prisoner had passed to him a five dollar note of one of the Virginia banks, which was said to be counterfeit? to which the witness answered that he had, in the fall of the year 1829, passed a five dollar note to him, which was said to be a counterfeit of one of the banks of Virginia; but the witness did not remember which; and that the prisoner, afterwards, took that note back, and gave him another note in lieu of it. The prisoner's counsel objected to this evidence, because the note was not produced, and because the witness could not state, which of the banks it purported to be the note of. The court overruled the objection and admitted the evidence.

2. The second bill of exceptions, stated, that the attorney for the commonwealth, having adduced evidence of the facts (above stated) shewing the connexion between the prisoner and Lewallen, introduced a witness, who testified, that he had sold a horse to Lewallen then in company with the prisoner, during their same journey above-mentioned, for sixty-five dollars, which Lewallen paid him in notes purporting to be notes of the bank of Virginia. Upon 748 which *the counsel for the common-

ing" appended to Coleman v. Com., 25 Gratt. 865.

*Same-Separation of Jury-Effect.—As authority for the position that the separation of the jury does not *per se* vitiate a verdict in a criminal case, the principal case, McCarter's Case, 11 Leigh 633, and Thompson's Case, 8 Gratt. 637, are cited in Phillips v. Com., 19 Gratt. 540. To the same effect, the principal case was cited in Thompson v. Com., 8 Gratt. 643.

The separation or discharge of the jury after swearing and impanelling but before the examining of witnesses is no ground of objection to a verdict. Dilworth v. Com., 12 Gratt. 706, citing the principal case.

In Toole v. Com., 11 Leigh 714, 717. It was held that in impanelling a jury for trial of an indictment of felony, there is no necessity to keep jurymen who have been elected and sworn together and separate from other persons, under charge of the sheriff, until the whole number shall be elected and sworn. The principal case was cited as authority for the decision.

See further, monographic note on "Juries" appended to Chahoon v. Com., 30 Gratt. 733.

wealth offered these notes in evidence. The prisoner objected to the admission of them; but the court overrule the objection. It having been farther proved, by the same witness, that on the night of the same day on which he saw the prisoner and Lewallen, a young man, who passed by the name of Leftwich, was with them, and he understood was travelling with them, the attorney for the commonwealth introduced this man, who was Millirous, as a witness; and he testified, that he was employed by the prisoner to go with him to buy horses; that the prisoner, Lewallen and Millirous, were all together at Smith's, when Millirous made the swap of horses with Smith, and gave him fifty dollars to boot; that he Millirous, had no money; that he got the money he paid Smith, from the prisoner, and the horse was for the prisoner; that he, Millirous, could not read or write, and did not know but the money was good, nor did he now know that the prisoner knew it was counterfeit. The prisoner objected to the admission of all this evidence; but the court overruled the objection, and admitted it.

3. The third bill of exceptions stated that the attorney for the commonwealth introduced persons other than bank officers, to say whether the note charged to be counterfeit, was a counterfeit or genuine note; and the prisoner objected to the admissibility of such evidence. The court overruled the objection.

4. After the verdict was rendered, a motion was made to set it aside on two grounds, 1. that it was not warranted by the evidence; and 2. the improper separation of the jury. The court overruled the motion; and the prisoner filed a bill of exceptions, in which all the evidence adduced at the trial was set out at large; including contradictory testimony as to the credit of the witness Millirous; testimony as to the prisoner's character; and testimony as to the credit of a witness, who testified favourably to his character. As to the separation of the jury, it appeared, by affidavits,

that immediately after the jury was sworn (whether it had been charged with the case, did not appear, but certainly) before any evidence had been introduced, three of the jurors left their box: one was called back before he got out of the courthouse: the other two went out unattended by an officer; but the sheriff perceiving them, immediately pursued them, and brought them back to the jury box, within about a minute's time, without their being seen or heard to speak to or have communication with any body.

MAY, J., delivered the resolutions of the court. 1. As to the point presented by the first bill of exceptions: in a prosecution for uttering counterfeit money or notes, evidence that the accused had, about the same period, passed other counterfeit money or notes, of the like kind, is admissible as tending to prove the scienter. With this view, the evidence was properly admitted.

2. The prisoner moved to exclude all the evidence respecting the counterfeit notes paid away by Lewallen, for the purchase of horses. We think it may be fairly deduced from the whole evidence, that the prisoner

and Lewallen were jointly interested, and had confederated, in thus passing counterfeit notes, in the purchase of horses, during their expedition over the mountains. If so, there could be no stronger evidence to prove that the note mentioned in the indictment, which was of the same description, and was passed to Smith, upon the same journey, was known by the prisoner to be counterfeit.

3. The commonwealth proved by persons well acquainted with the notes of the bank of Virginia, that the note in the indictment mentioned, was counterfeit. The prisoner insisted that the proof should be made by an officer of the bank. We are of opinion, that the evidence was legal and competent, to be weighed by the jury; and, therefore, that the objection was properly overruled.

4. The motion made for a new trial, on the ground that the verdict was not warranted by the evidence, was properly overruled. Without admitting, in any manner, the propriety of spreading the evidence on the record, as was done here, and in effect asking this court to review the decision of mere questions of fact; we are all of opinion, that the verdict is fully sustained by the evidence.

Then, as to the separation of the jury. No case has been cited, and we have found none, in which a separation of the jury, before any evidence has been introduced, has been held to be a sufficient cause to set aside their verdict. Coke, Foster and Blackstone say, that after the jury are sworn and charged with the prisoner, and after evidence has been given, the jury cannot be discharged or separated. In Burr's trial, it being impracticable to empanel a jury on the first day, four were sworn; and the question being made, whether they should be confined, the court held that it was unnecessary. We are not disposed to increase the rigour which has prevailed upon this subject. See *The King v. Kinnear* and others, 2 Barn. & Ald. 462; 7 Howell's St. Tri. 499; 19 Id. 671. There has been no decision of this court, which would require us to set aside the verdict for such a separation of the jury as is here stated.

It is proper to mention, that a majority of the judges have decided this part of the case, on the distinction between a separation before and one after the evidence commenced, without expressing any opinion as to the character of the separation proved; whilst others, upon the authority of *Massey Thomas's case*, 2 Virg. Ca. 479, and under a belief, that the possibility of any tampering with the jury, under the circumstances of this case, was too remote, are disposed to place it on that ground, without affirming or denying the principle adopted by the court.

751 *Spencer v. The Commonwealth.

November, 1830.

Forgery—Evidence—Possession of Forged Notes and Implements for Forging.—Upon trial of an indictment for forging bank notes, the fact if proved, of the forged notes mentioned in the indictment, and other forged notes of like kind, and the plates, implements and materials for forging such notes, being found in the prisoner's possession, is prima facie or circumstantial, presumptive evidence,

that the prisoner was the forger, proper to be given to the jury.

Same—Same—Possession of Forged Notes in Certain County.—And such forged notes &c. being found in possession of the prisoner in the county of B. is like prima facie evidence, proper to be given to the jury, of the fact that he committed the forgery there.

Spencer was indicted, tried and convicted of felony, in the circuit court of Botetourt, at September term 1830, under the statute, 1 Rev. Code, ch. 154, § 1, p. 578. The indictment contained two counts: he was convicted on the second, which charged, That the prisoner, at the county of Botetourt and within the jurisdiction of the circuit court thereof, on &c. feloniously, made, forged and counterfeited, and caused and procured to be falsely made, forged and counterfeited, and aided and assisted in falsely making, forging and counterfeiting, a certain note, purporting to be a note of the farmers' bank of Virginia for ten dollars (which was regularly set forth and described) with intention to injure and defraud the president, directors and company of the said farmers' bank of Virginia. The jury ascertained the term of his imprisonment in the penitentiary to be ten years, and the court passed sentence on him accordingly. But he filed three bills of exceptions to opinions of the court given at the trial; and now applied to this court, by petition, for a writ of error to the judgment.

1. The first bill of exceptions stated, that at the trial, the attorney for the commonwealth proved, that the prisoner was seen in the county of Botetourt, in November 1829, in company with one Lewallen, at a public house, and representing himself as a Dr. Davis, a hog drover, from Kentucky, and offered to shave a hundred dollar U. States note, but did not shew it; paid thirty seven and a half cents for repairing his watch, in good money; and inquired
752 the way *to the Big Lick in Botetourt: that he was seen on the 2d day of March court 1830, at a public house, with one Eppes in Botetourt, when he represented himself as a Dr. Davis of Tennessee, and said he was going to Nashville: that a warrant was then issued against him, to apprehend him for forgery, and he was pursued until the witnesses supposed he had left the county: that about twelve or sixteen days after, as he was passing through the town of Fincastle in Botetourt, on horseback, he was arrested and taken from his horse; and his saddle bags being examined, there were found in them above 3500 dollars in counterfeit money, includ-

***Forgery—Evidence—Possession of Forged Notes in Certain Counties.**—Upon the trial of an indictment for forging bank notes, evidence that the prisoner had the forged notes in his possession in a certain county is proper evidence to go before the jury of the fact that he committed the forgery in that county. To this point, the principal case is cited with approval in *State v. Tinger*, 32 W. Va. 552, 9 S. E. Rep. 937; *State v. Poindexter*, 23 W. Va. 814.

"It is not necessary that witnesses should be produced to testify that the offence was committed in the place charged. It is enough if the proof be inferential." *State v. Hobbs*, 37 W. Va. 816, 17 S. E. Rep. 382, quoting from *Whart. Crim. Law* (8th Ed. § 108), and citing the principal case.

See further, monographic note on "Forgery and Counterfeiting" appended to *Coleman v. Com.*, 25 Gratt. 865.

The principal case is also cited in *Perkins v. Com.*, 7 Gratt. 666; *Wash v. Com.*, 16 Gratt. 541.

ing the ten dollar note for the forgery of which he was indicted; a number of plates, from one of which that note, and many others of the same denomination, were obviously struck; two canisters of ink, one not full; blank papers, about the size of a bank note, one of which had a slight impression of a bank note on it; part of the notes were imperfect, some of them unsigned, others completed, some erased; a five dollar U. States bank note with the engraving in part erased, and the signatures left; a twenty dollar U. States bank note plate; a plate with broker's marks engraved on it, and some notes with broker's marks on them, obviously made from the plate. He had some good money with him.

When the prisoner was examined, he represented, that he stopped at a house in Campbell county, and going to the stable to feed his horse, pulled down a bundle of fodder; that the notes fell out; that he took them to the master of the house, who said he knew nothing of them; that he carried them to Philadelphia, and brought them back with him; he represented the ink to be blacking. There was no evidence, that he had been out of the county of Botetourt, from the time he was seen in November, and no evidence that he resided in that county, or that he was ever in the county, except the times above stated. He proved, that a witness introduced by him, had, in October 1829, moved his mother from Franklin county, Virginia, to the state of

Kentucky; that he went with that
753 witness to *Kentucky, where they met with Lewallen: the witness returned in December 1829, but did not know when the prisoner returned. Another witness for the prisoner, testified that he had seen notes made in a bank in Ireland, and they used a press weighing about 500 pounds. And this being all the evidence in the case, the attorney for the commonwealth moved the court to instruct the jury, that the circumstances above set forth, were proper evidence for the jury, and were prima facie evidence, that the forgery was committed in the county of Botetourt, and proper for their consideration; which instruction the court gave; and the prisoner excepted to the opinion.

2. The second bill of exceptions stated, that, at the trial, the prisoner's counsel moved the court to instruct the jury, that if they were not satisfied from the evidence, that the forgery charged in the indictment, was committed in Botetourt, it was their duty to render a verdict of acquittal. The court instructed the jury, that they ought to be satisfied, that the making and forging, or assisting in making, forging and counterfeiting, was committed in Botetourt; but that the prisoner, being first found in possession of the other notes, plates, ink and paper, in the first bill of exceptions mentioned, in Botetourt, was prima facie evidence of the fact of his having counterfeited them in Botetourt. The prisoner excepted to the latter part of this instruction.

3. The third bill of exceptions stated, that, at the trial, the prisoner's counsel moved the court to instruct the jury, that, if they were not satisfied from the evidence, that the prisoner falsely made, forged and

counterfeited, or caused and procured to be falsely made, forged and counterfeited, or acted and assisted, being present, at the forging of the note in the indictment mentioned, they ought to find a verdict for the prisoner. The court instructed the jury, that, though they ought to be satisfied, that the prisoner either did forge and counterfeit the note, or act or assist in the making, forging and counterfeiting, or was present at the making, forging and counterfeiting thereof, yet that the prisoner being "in possession of this note, as well as the other notes, and plates and ink, found in his possession, was prima facie evidence of his having forged or assisted in forging the note in the indictment mentioned. To the latter part of this instruction, the prisoner excepted.

The prisoner, in his petition for the writ of error, assigned the following errors: That the court erred, 1. in instructing the jury, that the prisoner being found in possession of the note mentioned in the indictment, as well as other [forged] notes, plates and ink, amounted to prima facie evidence of his having forged or assisted in forging the note in the indictment mentioned; and 2. in instructing the jury, that the prisoner being first found in possession of the notes, plates, and ink, in Botetourt, was prima facie evidence of his having counterfeited them there.

F. W. Riasque for the petitioner; the attorney general for the commonwealth.

UPSHUR, J., delivered the opinion of the court. The most serious difficulty the court has had in this case, has grown out of the ambiguous phraseology of the bills of exceptions. Some of the judges think, that the expression "the prisoner being first found in possession of the other notes" &c. in the second bill of exceptions, and the expression "the prisoner being in possession of the note in the indictment mentioned" &c. in the third bill of exceptions, ought to be construed as an instruction by the court, that these facts were proved; and of course, that the court, in this respect, encroached upon the proper province of the jury. If this construction had been admitted by the other judges, there would have been no difference of opinion among us, in regard to the law. A majority of us, however, think, from an attentive examination of the record, that the judge meant to submit those facts hypothetically, and that the jury must have so understood him. The expressions above mentioned are not stronger than this, "it being proved,

that the prisoner was found in possession" &c. which, without any violence to language, may be interpreted, if it be proved &c. or, if the jury shall believe &c. or, when it is proved &c. to which form of instruction no objection could be urged. We feel warranted in believing, that this was the meaning of the judge, and that the jury so understood him, from the particular terms used in the first bill of exceptions; where, after stating all the facts proved on the trial, the court instructed the jury, that they were prima facie evidence &c. If the instruction contained only these words, they would be pre-

cisely equipollent with the expressions "being found in possession" &c. and would receive the same construction: but the court, in the first part of this instruction, explains its own meaning, by saying that "the circumstances above set forth, were proper evidence for the jury." It is to be remarked that the court did not tell the jury, that the facts above proved, were proper evidence for its consideration, nor is there any other word or expression, which warrants us in concluding, that the court meant to assume that the facts were proved. "The circumstances above set forth," that is, the circumstances in relation to which evidence had been offered, were proper for the consideration of the jury. And how were the jury to consider them? Not as facts proved or assumed as true; but they were first to consider, whether the facts were proved or not, and if the evidence in relation to those facts, which the court first declared to be proper for the jury, should satisfy the jury, that the facts themselves were proved, then that those facts amounted to prima facie evidence of guilt, and were proper for their consideration, though not conclusive upon them. This, we think, the fair construction of the language of the court in the first bill of exceptions, and the construction which must have been placed on it by the jury. We think it correct, as a general rule, that where more than one bill of exceptions, is taken in a cause, the court, in considering any one of them, may refer to others, in order to ascertain the precise point to which the mind of the

judge was directed, and the precise extent to which he *intended his instruction should apply. This rule is still more applicable to a case in which all the evidence or facts proved, appear in one bill of exceptions, and all the instructions given relate directly to those facts. In the case before us, the second bill of exceptions contains a direct reference to the facts or evidence stated in the first. The instructions in the two cases are in *pari materia*, and ought, as we believe, to receive the same interpretation. And though the third bill of exceptions contains no such direct reference, still we feel authorized, by the intimate connexion of its subject with that of the other two, to put upon that also, a similar construction.

Upon the whole, a majority of us consider the record in this case, as presenting only the following questions: 1. Is the possession of forged bank notes, together with the plates and other implements used in forging them, prima facie evidence, that the person so found in possession, did feloniously forge them? And 2. Is such possession prima facie evidence, that the forgery was committed in the place where such possession was first discovered?

1. By the terms "prima facie evidence," as used by the judge in the instructions before us, we understand only, such a state of facts, as upon first impression cannot be reasonably accounted for without supposing the guilt of the prisoner. In the absence of every thing to contradict or explain it, such a state of facts ought, in general, to be considered by the jury sufficient to warrant a verdict; but it would not

bind them with the force of conclusive proof. It is nothing more than a high degree of presumptive proof, or in other words, such a state of facts, as cannot, by natural and fair construction, consist with the innocence of the prisoner. In some cases of presumptive proof, the influences would be strong and irresistible; in others, weak and wholly inconclusive. In all cases, the jury are to weigh the circumstances, and to draw from them whatever inferences they may warrant. The instruction, therefore, that the facts, in the present case amounted to *prima facie* evidence of

757 *guilt, was only saying, in other words, that they were such that the jury might (not that they were bound to) infer from them the guilt of the prisoner, without any auxiliary evidence. We think this instruction strictly correct. We can see no reason, why the possession of forged notes, with the plates and other instruments used in forging them, should not create as strong a presumption, that the person so found in possession is the actual forger, as the possession of stolen goods creates, that the person found in possession of them, is the actual thief. In both cases, the presumption may be repelled by proof, explaining or accounting for the possession; but in the absence of all such proof, the inference of guilt, upon any fair view of human conduct, is as strong in the one case as in the other. In the case before us, the inference is still farther justified, by the fact, that the prisoner was found in possession, not only of the note described in the indictment and of the plate with which it was made, but also of a large amount of other forged notes and the plates used in forging them. Apart from all direct authority, therefore, we consider the principle reasonable in itself, and strictly within the analogies afforded by other well established cases of presumptive proof. It derives strength also, from the authorities applying to the second question, which we now proceed to consider.

2. In the case of the U. States v. Britton, 2 Mason's Rep. 470, judge Story, sitting in the federal circuit court, decided, that a check drawn in Philadelphia, in favor of a person then in Philadelphia, but presented in an altered and forged state in Massachusetts, should be presumed, in the absence of all proof to the contrary, to have been altered and forged in Massachusetts. His words are these: "If its existence in a forged state, is not proved in any other place, it must, from the necessity of the case, be presumed to have been forged where its existence in such state is first made known." This decision is not opposed, if it be not supported, by the authorities relied on by the prisoner's counsel, for the contrary position. In Crocker's 758 case, 2 *Leach, 987, (better reported in 5 Bos. & Pul. 87,) the prisoner was indicted for forgery committed in the parish of St. Edmund in Sarum, Wiltshire: the forged note bore date in Somersetshire, in which county it was proved that the prisoner resided at the time of the date of the note; and there were other circumstances tending to shew, that the forgery was not committed in Wilts but in Somerset. The

prisoner was pardoned, and the judges gave no opinion upon the point before us. We are informed, however, that it was understood that a majority of them thought the evidence not sufficient to prove the forgery in Wilts. In Thomas's case, 2 East's C. L. 605, the prisoner was indicted for stealing certain letters from the mail; and the venue was laid in Middlesex, where the letters were first found on him. Here also, there was conflicting evidence as to the place where the larceny was committed, and the jury expressly found that it was not committed in Middlesex. In Parke's case, 2 Leach, 775, the question before us did indeed, pass under the notice of the judges, but it was not the principal question, and was not solemnly decided either way. Parkes was indicted at the Old Bailey, for the forgery of a promissory note, which bore date at Righton, Salop. Some of the judges thought that the fact of his being founded in possession of the note in London, was *prima facie* evidence of his having forged it there; all agreed, that it was evidence proper for the consideration of the jury, but the majority without deciding, whether it was *prima facie* evidence or not, were of opinion that there was sufficient proof that the forgery was not committed in London; and therefore, that the presumption arising from the fact of his having been found in possession of the forged note there, was contradicted and removed. It is manifest that neither of these cases is in conflict with Britton's case. They no where disaffirm the principle, that the possession of a forged instrument is *prima facie* a presumptive proof, that the forgery was committed at the place where

such possession was first made known, 759 but they all go upon the *ground, that there was sufficient counter proof in the particular case, to remove the presumption.

For these reasons a majority of the court are of opinion, that the writ of error ought to be denied. But in this opinion judges Lomax, May, Semple and Johnston do not concur. All those judges, after much consideration, have placed a different construction upon the bills of exceptions from that which is herein assumed. Had this been otherwise, judge Johnston would have concurred with the majority of the court; and judge Lomax would have so far concurred, as to consider the possession &c. as *prima facie* evidence of aiding and assisting, at least.

Judges May and Semple are of opinion, that although the evidence would have been legal and proper for the consideration of the jury, and that they might well have deduced therefrom the inference of the prisoner's guilt, yet that it was error to instruct them that it was *prima facie* evidence thereof.

Writ of error denied.

Stephen v. The Commonwealth.

November, 1830.

(Absent STUART, J.)

Nuisance—Indictment—Sufficiency after Verdict.—Indictment for a nuisance, caused by a certain mill

*See monographic note on "Indictments, Informa-

and mill dam, the property of the defendant, situate near to a common highway, without particular specification or description of the mill, and without expressly alleging that it is in the county wherein the indictment is found: **Held**, good and sufficient after verdict.

Stephen was indicted in the circuit court of Berkeley for a nuisance. The indictment stated, That the grand jury empaneled for the body of the county of Berkeley, presented, that Stephen, "being possessed of a certain mill and mill dam with their appurtenances, situate near and adjacent to a certain common highway and public road, and the *dwelling houses of divers of the good citizens of this commonwealth," did on the 1st July 1828, and on divers days before and since, unlawfully and injuriously permit the water of the mill pond to overflow the adjacent lands, as well of others as his own, and also the public road or highway; by means whereof the land so overflowed, was rendered and kept marshy, and filled and covered with noxious weeds and putrid vegetation, whereby the air became corrupted and infected, to the great damage and common nuisance, not only of the neighbouring citizens, but of all the good citizens of the commonwealth &c. Stephen put in a general demurrer to the indictment, and pleaded not guilty. The court overruled the demurrer; and, upon trial of the issue, the jury convicted him, and assessed a nominal fine; for which the court gave judgment against him. And now he applied by petition, to this court for a writ of error.

Nicholas, for the petitioner, endeavoured to maintain that the indictment was not sufficiently certain. The highway is not described; nor is any locality given to the mill or mill dam. There is not even an averment, that the mill and mill dam are in the county. That they are in the county, is only to be inferred from the introductory part of the indictment. If, however, this inference is to be construed into an averment, that they are in the county, still the indictment will be insufficient. It should have given a further description of the mill, so as to identify the same. Suppose Stephen had two mills in the county (as is not an uncommon case) he might, upon this indictment (if it be a good one) have been tried for a nuisance in regard to either; so that the indictment gave him no such certain information of the offence charged, as to enable him to defend himself. The charge is not "plainly and in substance set forth with convenient certainty," even within the statute curing defects in criminal proceedings, 1 Rev. Code, ch. 169, § 44, p. 611. But here there was a demurrer to the indictment.

Sed per curiam, Writ of error denied.

761 *Ex Parte Lyons.

November, 1830.

(Absent STUART, J.)

Administration d. b. n.—Jurisdiction to Grant *—When administration of a decedent's estate has been duly granted by any court of competent jurisdiction

and Presentments appended to Boyle v. Com., 14 Gratt. 674.

*See monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

tion, that same court only, upon the death of the administrator, has the jurisdiction to grant administration de bonis non.

The attorney general, on behalf of Lyons, moved the court to commit to the sergeant of the city of Richmond, the estate of John Robinson deceased, remaining unadministered. The former administrations were not granted by this court: administration was first granted to Edmund Pendleton and Peter Lyons, by the county court of King & Queen; and after the death of the survivor of them, the same court granted administration de bonis non to Dr. James Lyons, who had since died. And the attorney general said, that if administration had never been granted by the county court, there could be no doubt of the jurisdiction of this court. He insisted, that after the death of the person to whom the county court had granted administration, the jurisdiction of this court was reinstated. He likened it to the case of the grant of administration by an inferior court whose judgment was reversed. After such reversal, there was no subsisting administration; and it might be granted by any court which originally possessed jurisdiction over the subject.

BROCKENBROUGH, J., said, that after full consideration, the judges were unanimously of opinion, that the general court had no jurisdiction in the case: that, there having been a valid administration formerly granted by the county court of King & Queen, the administration de bonis non must necessarily be granted by the same court.

762 *Mann and Others v. Givens and Others.

November, 1830.

(Absent STUART, SMITH and FIELD, J.)

Instrument of Emancipation—Refusal of Court to Admit to Probate—Remedy.—A county court refuses to admit an instrument of emancipation of slaves to probate and record: **Held**, the circuit court cannot review this judgment, by way of appeal, writ of error or supersedeas.

Same—Admission to Record.—Quære, whether an instrument of emancipation of slaves, ought to be admitted to record, on the deposition of a witness non-resident of the state, and on proof of the handwriting of such absent witness, and of another subscribing witness, who is dead?

This was a case adjourned to this court, from the circuit court of Botetourt.

Upon a motion made in the county court of Botetourt on behalf of Mann and others, to admit to record an instrument of emancipation executed by Thomas Reynolds to his slaves therein named, which was opposed by Givens and others, it appeared, that the instrument bore date the 18th October 1797, and that Samuel Mitchell and Mitchell Porter were the subscribing witnesses to it; that Reynolds at the time he executed the instrument, resided in Botetourt; that the subscribing witness Mitchell was now a resident of the state of Illinois; and that Porter, the other subscribing witness, was dead: whereupon, the plaintiffs offered in evidence, 1. a deposition of the witness Mitchell, regularly taken under a commission issued by the court, upon due notice to the defendants, proving the execution of the instrument of emancipation by Reynolds, and Mitchell's attestation thereof: 2. proof of the handwriting of both the

subscribing witnesses: 3. a copy of an order of the district court held at The Sweet Springs,* at October term 1797, shewing, that this instrument of emancipation, was then acknowledged by Reynolds before that court, and ordered to be recorded; and 4. an order of the county court of Monroe,* at February term 1821, shewing, that the instrument *of emancipation was then presented to that court, and that that court, upon proof of the handwriting of the subscribing witnesses, and of the death of one of them, and the non-residence of the other, admitted the instrument to record. And this being all the evidence, the county court of Botetourt refused to admit the instrument to record. An appeal was taken for Mann and others to the circuit court; which adjourned to this court, the following question, Whether this instrument of emancipation ought to be admitted to record, upon proof of the handwriting of the subscribing witnesses, one of whom was dead and the other a non-resident, and the deposition of the non-resident witness? And (as usual in adjourned cases) any other questions of law arising on the record.

BROCKENBROUGH, J., delivered the opinion of the court. That the circuit court had no jurisdiction of the case by way of appeal, and the appeal ought to be dismissed by that court; and that it was, therefore, deemed improper to give any opinion on the specific question adjourned from the circuit court.

764 *Harrison v. Emmerson and Others,
Justices of Norfolk.

November, 1830.

Oath of Insolvency—Justices Bound to Administer.—A country court, or justices of the peace in the country, to whom a debtor in execution applies to have the oath of insolvency administered to him, and to be thereupon discharged, have no discretion to administer or refuse to administer the oath, but are bound to administer it, though they may be of opinion, that the debtor has effects not put into his schedule to be surrendered, which he fraudulently conceals.

Same—Refusal of Justice to Administer—Mandamus.†
—And if the justices being asked to administer

*The district court had no jurisdiction of the probat and registry of instruments of emancipation, and the circuit courts only succeed to the jurisdiction of the district courts. The county or corporation court of the county or corporation wherein the emancipator resides, has the exclusive jurisdiction to admit such instruments to probat and record. See the statute. 1 Rev. Code. ch. 111, § 53, p. 433; *Givens v. Manns*, 6 Munf. 191; *Thrift v. Hannah*, ante, 300.—Note in Original Edition.

†**Mandamus—When it Will Lie.**—In *Morris Ex parte*, 11 Gratt. 292, it is said: "That a mandamus will lie from the circuit court to the justices of the county court, both as members of the court and individually *in pais*, is shown by numerous cases. *Commonwealth v. Justices of Fairfax*, 3 Va. Cas. 9; *Dawson v. Thurston*, 2 Hen. & Munf. 132; *Brander v. Chesterfield Justices*, 5 Call 548; *Brown v. Crippin*, 4 Hen. & Munf. 173; *Harrison v. Justices of Norfolk*, 2 Leigh 764; *Manns v. Givens*, 7 Leigh 689."

For further information as to when a mandamus will lie, see Page v. Clopton, 30 Gratt. 419 (citing principal case); *foot-note* to *Morris Ex parte*, 11 Gratt. 292; *foot-note* to *Cowan v. Fulton*, 23 Gratt. 579; *foot-note* to *Commonwealth v. Justices*, 2 Va. Cas. 9; *foot-note* to *Justices v. Munday*, 2 Leigh 165.

Same—Proceedings in.—In *Fisher v. City of Charleston*, 17 W. Va. 610, it is said: "The practice in mandamus cases differs much in England and in the different states in this country, it being largely regulated by local rules, usages and statutes. * * * Without undertaking to point out or comment on these diversities of practice I will simply state,

the oath, and order a discharge of the prisoner accordingly, refuse to do so, a mandamus lies from the circuit court to compel them.

This was a case adjourned to this court from the circuit court of Norfolk.

Harrison presented a petition to the circuit court at September term 1830, representing that he was confined in the jail of Norfolk county, for a debt which he was unable to pay; that he had appeared before Emmerson and Nash, two justices of the county, and prayed that the oath of insolvency might be administered to him, which they refused, notwithstanding he had complied with the requisites of the act, in relation to the notice and schedule; and that he afterwards appeared before Webb and Thompson, two other justices, who refused in like manner. He, therefore, prayed for a writ of mandamus, to compel the justices to administer the oath. A rule was accordingly made upon the justices, to shew cause why the mandamus should not issue. Emmerson and Nash made a return stating, that their reason for not discharging Harrison, was, that they were of opinion, from his confession in answer to interrogatories put to him, that he was in possession of personal property, which ought to have been included in his schedule, but was not mentioned; his schedule stating that he had "no property." And they proceeded to state the facts as they appeared before them, touching this matter. The other two justices made a similar return, referring to that of Emmerson and Nash. Whereupon, the circuit court adjourned to the general court the following questions:

765 *If a prisoner is brought before two magistrates, in order to take the oath of insolvency, and offers to take such oath, and to convey and deliver the property, real and personal, contained in his schedule, and to comply with the other requisites of the law; have the magistrates a discretion to administer the oath or not, on the ground that they have reason to believe, from his own admission, not under oath, or from the testimony of witnesses, that the prisoner has not included all his

that the usual practice in this state, and the most usual practice in this country, is to begin the proceedings by presenting to the court an application in the form of a petition setting forth in detail the grounds, upon which the petitioner asks a writ of mandamus. This petition in this state is usually *ex parte*, no notice that it will be filed being given to the defendants, and it is always supported by affidavit, when presented by a private person. *Goshorn et al. v. Supervisors of Ohio County*, 1 W. Va. 312; *Board of Supervisors of Mason County v. Minturn*, 4 W. Va. 302; *Shields & Preston v. Bennett*, Auditor, 8 W. Va. 76; *Barnett v. Meredith*, Judge, 10 Gratt. 651; *Sights v. Yarnalls*, 12 Gratt. 293. If a *prima facie* case is presented by this petition warranting the relief sought, the court frequently issues a rule, which is served on the opposite party, requiring him to shew cause why a mandamus should not issue. *Smith v. Dyer*, 1 Call 563; *Dew v. Judges of Sweet Springs*, 3 H. & M. 1; *Barnett v. Meredith*, Judge, 10 Gratt. 652; *Harrison v. Emmerson and Others*, *Justices of Norfolk*, 2 Leigh 764; *Board of Supervisors of Mason County v. Minturn*, 4 W. Va. 302; *The Ohio Valley Iron Works v. The Town of Moundsville*, 11 W. Va. 8. But in this state the issuing of this rule is frequently dispensed with; and the most usual practice is to issue the alternative writ immediately on the filing of a proper petition supported by affidavit. See *Bridges v. Shallcross*, 6 W. Va. 553; *Shields & Preston v. Bennett*, 8 W. Va. 74; *Fisher v. The Mayor of Charleston, in tra.*"

property in said schedule? 2. Does the return of the justices shew such a case as liberates them from further proceedings on the mandamus? 3. Will a mandamus lie from the circuit court to county justices, to compel them to administer the oath of insolvency, and discharge the prisoner; the circuit court having no power itself to administer the oath? And all other questions arising on the record.

PARKER, J., delivered the resolutions of the court. The first question propounded to this court, involves an important point of practice as well as of principle, which seems to have been differently understood in various parts of the state. We have carefully considered the statute for the relief of insolvent debtors, under which the question arises, 1 Rev. Code, ch. 134, § 31, 2, 3, 4, pp. 536, 7, 8. And a large majority of us are of opinion, that the magistrates, under the circumstances stated in the question, have no discretion to administer or not to administer the oath of insolvency, but are bound to do so, and to discharge the prisoner. The provision in the statute was made "for the relief of insolvent debtors," and "to prevent the long imprisonment of unfortunate people, which can be of no benefit, but rather a disadvantage, to their creditors." The conditions imposed are, that the debtor shall deliver in a schedule of his estate, take an oath of a very solemn and comprehensive character, which is prescribed in terms, and under the directions of the court, or persons before whom such oath of insolvency shall

766 be taken, transfer and deliver all the personal *estate contained in such schedule, and convey all the real estate therein to the sheriff. On complying with these conditions, he is entitled to his warrant of discharge. If the schedule does not contain all the debtor's property, but he fraudulently conceals any part of it, he is liable to the penalties of perjury; and all the estate contained in it, and any other estate which may be discovered to belong to him, is absolutely vested in the sheriff, and means are provided, in certain cases, for his recovering it. These are the sanctions of the law, and seem to be the only ones intended to be provided, to ensure a due compliance with that clause of it, which directs that the schedule shall contain the whole of the property of the debtor. No discretion is reserved to the court or justices, to refuse to administer the oath in consequence of their believing he is about to commit a perjury; nor are any means provided, by which they can inquire into the truth or falsehood of the schedule. They cannot summon witnesses to ascertain the fact; nor have they the power to propound any question to the prisoner himself; or to administer any other oath than the one prescribed in the statute. They act, indeed, merely as ministerial officers, designated by law to perform a prescribed duty. It is not probable, that the legislature would ever have confided to two justices of the peace, the power to decide, without appeal, and without the intervention of a jury, the delicate and often intricate questions, which might arise under a different construction of this law. If

the justices can inquire into the fraud, and on that ground refuse to administer the oath, as they have done in the case at bar, their decision is final, and the prisoner must remain in jail, until their scruples are satisfied; and thus, the question of liberty or perpetual imprisonment, is made to depend upon the opinion of two individuals, who have not even the means of inquiring fully into the facts. We cannot believe, that such was the intention of the legislature, or that the words it has used are fairly susceptible of such a construction.

In confirmation of this idea, it may 767 be proper to mention, that *during the session of 1826-7, a bill was introduced into the house of delegates, founded on the admission, that a prisoner complying with the other requisites of the law, had a right to take the oath of an insolvent debtor, and to be discharged; the fourth section of which provided "that previously to the administering of any oath of insolvency to any debtor, it shall be lawful for any creditor by judgment, who may be affected thereby, his attorney or agent, to propound to such debtor any question or questions, touching his estate, rights, or credits; and if from his answers, or refusal to answer or any legal evidence, the court or justices, before whom the proceeding may be, shall believe that the debtor has fraudulently concealed, or disposed of any part of his estate to the injury of such creditor, or that the schedule offered is not a schedule of his whole estate, he shall not be allowed to take the oath of insolvency; and every such debtor may require a jury to be empaneled, to try the question, whether he hath been guilty of any fraud or concealment as aforesaid or not, or whether such schedule be a schedule of his whole estate," &c. It further provided, that if the application was made in court, a jury should be empaneled forthwith; but if before justices in the country, upon his finding bail to abide the result of the trial, he was to be discharged from custody; the trial to be had at the next court, either county or circuit, at the election of the debtor; and, if the jury found him guilty, he should not be allowed to take the oath, until all the estate which he might have fraudulently concealed or disposed of, should be surrendered in the mode prescribed by law. The movers and supporters of this bill, obviously, took it for granted, that the powers thereby proposed to be conferred, had not before been given to the justices or the court. It was advocated and opposed upon that assumption: and, notwithstanding the safeguards it provided against the abuse of the power, it was rejected by the legislature, in consequence, it is believed, of the impression, that the sanctions of the law were already sufficient.

768 *We, therefore answer to the 1st question propounded to us by the circuit court, that the magistrates, under the circumstances stated, had no discretion upon the subject, but ought to have administered the oath, and discharged the prisoner: To the 2d, that the return of the justices is insufficient to liberate them from further proceedings on the mandamus: To

the 3d, that a mandamus does lie from the circuit court to county justices, to compel them to administer the oath of insolvency and discharge the prisoner; for which we refer to the decision and reasoning of the court, in the case of *The Commonwealth v. Justices of Fairfax*, 2 Virg. Ca. 9. And, lastly, that the circuit court ought to award a peremptory mandamus, unless (as has been intimated) the applicant has been already discharged from custody.

STUART, JOHNSTON and UPSHUR, J., dissented.

769 *Brown v. The Commonwealth.

November, 1839.

Criminal Law—Counterfeit Bank Note*—Indictment—Sufficiency.—An indictment for causing and procuring a counterfeited bank note to be offered to be passed, without stating by whom or how the accused caused and procured it to be done, is sufficiently certain, and good.

Same—Same—Same—Same.—An indictment for passing a counterfeited bank note to a slave, with intent to defraud the bank, is good.

Same—Witness—Accomplice.—An accomplice is a competent witness, in a criminal prosecution; and, though the accomplice, on a former occasion, denied on oath all knowledge of the facts to which he testifies at the trial, yet this goes only to his credit; and if the jury find a verdict of conviction on his testimony, and the court before which the trial is had, be satisfied with the verdict, the appellate court will not set it aside.

Jurors—Competency—Preconceived Opinion.—A person, being called as a juror in a case of felony, says, on voir dire, "that he had expressed an opinion on the circumstances as he had heard them narrated in the country; but he had not heard any of the evidence given on the examination of the prisoner, or conversed with any of the witnesses or parties; and he did not think the opinion so formed would have any influence on his mind in trying the case;" and this juror is challenged for cause: HELD, he is an indifferent juror, and the challenge for cause rightly disallowed.

Brown was indicted of felony, in the circuit court of Kanawha, under the statute, 1 Rev. Code, ch. 154, § 1, p. 578. There were two counts in the indictment. 1. The first charged, that the prisoner feloniously caused and procured to be offered to be passed to a certain E. Perryman, three certain false, forged and counterfeited bank notes of the bank of the U. States, payable at its office of discount and deposit at New Orleans [setting out the tenor of the notes]

***Criminal Law—Counterfeiting.**—See generally, monographic note on "Forgery and Counterfeiting" appended to Coleman v. Com., 25 Gratt. 865.

+**Same—Witness—Accomplice.**—In *Dove v. Com.*, 82 Va. 307, it is said: "An accomplice is unquestionably a competent witness against a prisoner charged with a crime unless he has been previously convicted of an infamous offence, and he is competent *alone*—that is, an accused may be convicted on the testimony of an accomplice uncorroborated by that of any other witness; it being the duty of the jury in all cases to consider the evidence and judge of the credit of the witnesses. *Byrd's Case*, 2 Va. Cases, 490; *Broten's Case*, 2 Leigh 769; *Oliver's Case*, 77 Va. 590; Code 1873, ch. 195, sec. 21." This quotation from *Dove v. Com.*, 82 Va. 307, is approved in *Woods v. Com.*, 86 Va. 932, 11 S. E. Rep. 799.

To the point that a conviction may be had upon the uncorroborated testimony of an accomplice, the principal case is also cited in *State v. Betsall*, 11 W. Va. 742, 743.

±**Same—Jurors—Competency—Preconceived Opinion.**—In *State v. Baker*, 33 W. Va. 324, 10 S. E. Rep. 641, the principal case is cited as one of the many cases in Virginia upon the incompetency of jurors in criminal cases, on account of preconceived opinions.

For further information on the subject, see *foot-note* to *Com. v. Hallstock*, 2 Gratt. 564; *foot-note* to *Jackson's Case*, 23 Gratt. 920; *foot-note* to *Shinn v. Com.*, 32 Gratt. 901; *foot-note* to *Lithgow v. Com.*, 2 Va. Cas. 297, and other notes in this series of reports there cited; monographic note on "Juries" appended to *Chaboon v. Com.*, 30 Gratt. 733.

with intent to injure and defraud the said E. Perryman; he, the prisoner, at the time, well knowing the notes to be false, forged and counterfeited. 2. The second count charged, that the prisoner feloniously passed to a certain negro man slave named Milus, the property of J. D. Lewis, three false, forged and counterfeited notes of the bank of the U. States payable at its office at New Orleans [setting out the tenor of the notes] with intent to injure and defraud the president, directors and company of the bank of the U. States; he, the prisoner, well knowing &c.

770 *The prisoner being set to the bar, moved the court to quash both counts of the indictment. The motion was overruled. He then pleaded not guilty, and was put upon his trial. In empaneling the jury, one was called, who being examined on oath, said, "that he had expressed an opinion on the circumstances, as he had heard them narrated in the country, but he had not heard any of the evidence given on the examination, or conversed with any of the witnesses or parties, and that he did not think the opinion so formed, would have any influence on his mind in trying the case." Upon this the prisoner challenged him for cause: the court overruled the challenge; and the prisoner filed a bill of exceptions to the opinion. And, then, he made a peremptory challenge.

The jury which was empaneled, found the prisoner guilty, and ascertained the term of his imprisonment in the penitentiary to be ten years. The prisoner moved the court to set aside the verdict, and order a new trial, on the ground that the evidence did not warrant the finding. This motion was overruled. But the judge made a statement of the facts, as they appeared in evidence at the trial, and ordered it to be made part of the record; from which it appeared, That the commonwealth introduced a witness named Ross, whose evidence fully warranted the conviction, if he was to be believed; but, on the cross-examination of this witness, it appeared, that he had been apprehended with the prisoner, and charged jointly with him before the examining magistrate, with the felony of which the prisoner was now indicted; but after some examination by the magistrate, he was discharged, and sworn as a witness against the prisoner; and, on that examination, he denied most, perhaps all, of the material facts to which he now testified. The witness was a young man between eighteen and twenty years of age; and he gave as a reason for this variance in his testimony, that the prisoner had informed him, that if he was examined, he could not be bound to disclose any knowledge he possessed, as in doing so he would implicate himself. It was also disclosed by the witness, in

771 the course *of the cross-examination, that he was to receive part of the profits of the counterfeit notes, which he (and he only) proved to have been given by the prisoner to the negro Milus, to be passed to E. Perryman. The manner of the witness, during his examination, was frequently hesitating; and, in some instances, as to collateral facts implicating himself, he prevaricated; but in his narrative

of the main facts, which went to establish the prisoner's guilt, he was unembarrassed and consistent. The other evidence, if Ross's testimony was disregarded, was clearly insufficient to warrant the conviction of the prisoner. And the motion for the new trial was made on the ground, that Ross was an incompetent witness, or if competent, unworthy of credit.

The court passed sentence upon the prisoner according to the verdict. And now he applied, by petition, to this court, for a writ of error to the judgment.

The cause was argued by Johnson for the petitioner, and the attorney general for the commonwealth.

The objection to the first count in the indictment, was, that it did not state whom the prisoner caused or procured to offer the notes, or in what manner or by what means, he caused or procured them to be offered to be passed. And it was objected to the second count, that the intent was laid to defraud the bank of the U. States: that the intent must be laid to defraud the person to whom the notes were offered; or, when offered to a servant or agent, to defraud the master or principal. *Sprouce's case*, 2 Virg. Ca. 375, was chiefly relied on, to shew that there was good cause of challenge to the juror. And it was insisted, that the new trial ought to have been granted, since it appeared, that the verdict of conviction was founded on the testimony of a witness, who was not only an accomplice, but by his own account, had committed perjury in an earlier stage of this very prosecution.

BROCKENBROUGH, J., delivered the opinion of the court. Objections to indictments under the statute concerning forgery *and counterfeiting, have several times been made before this court. In *Rasmick's case*, 2 Virg. Ca. 356, the indictment charged, that the defendants "did falsely make, forge and counterfeit, and did cause and procure to be falsely made, forged and counterfeited, and did willingly act and assist in the said false making, forging and counterfeiting" &c. The court decided, that the indictment was sufficient on the ground, that it pursues the words of the statute, and that it is a transcript from certain approved forms to be found in the second and third volumes of *Chitty's treatise on criminal law*, founded on statutes similar to our own. In *Huffman's case*, 6 Rand. 685, this subject again came before the court. That was a motion to quash the indictment, before the jury were empaneled. An objection was made to the first count, that it did not set forth "the person, or persons whom the prisoner caused or procured to forge the instrument, and those with whom he willingly acted and assisted in the forgery." The objection did not prevail; and the court said, that where an indictment charges an offence in the words of a statute creating the offence, the indictment, as to the description of the fact, is good; and relied upon the authority of certain forms to be found in *Archbold and Chitty*, in which are found indictments upon the english statute of forgery of 52 Geo. 3, ch. 138, which our statute very much resembles. It has been

urged by the counsel for the present petitioner, that these forms ought not to be relied on, since they do not appear to have undergone the adjudication of any court in England. It might be a sufficient answer to this remark, that they are published to the world as forms which have been used in the english courts without objection, for a long series of years; that they have been adopted after much deliberation; that, in the numerous prosecutions for forgery, and passing and uttering base coin, and counterfeited notes and other instruments, which have occurred in that country, these are the forms which have been uniformly used; and that under them many individuals have suffered the penalty of death. There is, however, at least one case, in which the subject was brought before the

773 *twelve judges of England; *The King v. Holden and others*, 2 Taunt. 334.

In that case, the count charged, that the prisoner feloniously "did dispose of and put away a certain false, forged and counterfeited bank note [setting out the tenor] with intent to defraud the governor and company of the bank of England, he the prisoner at the time &c. well knowing" &c. The objection made to the indictment was, that it was insufficient as being too general, neither stating in what manner nor to whom the notes were disposed and put away. The same case is reported in 2 Leach, 1019, and in *Russell & Ryan's Crown cases*, 154. Taunton says, the court did not pronounce any opinion, but the prisoners were executed; which would not have been, unless the court had decided that the indictment was right; and the other reporters of the case, say, that the twelve judges unanimously decided that the conviction was right. It has also been decided, that it is not necessary to set forth the particular manner by which the fraud was effected, which is a mere matter of evidence, although in all these cases of forgery, or passing or uttering base coin, or counterfeited notes, the intent to defraud some person or persons, or body politic or corporate, must be set out. 3 Chitty, 1043, citing 1 Leach, 77. Taking these approved precedents of indictments as evidences of the law, supported as they are by the decision of the twelve judges in the case of *Holden and others*, we think there can be no doubt, that, in all cases of tendering, offering, passing or uttering counterfeit notes, the indictment is sufficiently certain, if it pursue the words of the statute; if it sets forth the tenor of the instrument, thereby giving it a precise certainty; if it sets forth the scienter, and the intent to defraud some person, or corporate body by name. If the indictment moreover sets forth the person to whom it is tendered or passed, the degree of certainty and precision is greater than (it would seem) is absolutely essential. Nor can we see any real difference between such cases, and those of "causing and procuring to be offered to be passed," which is the charge in the first count under consideration. The statute is closely followed, *the tenor of the notes fully set out, the person to whom they were offered to be passed stated, and the intent to defraud and injure a particular individ-

ual distinctly charged. It was urged, that indictments for this offence, ought to pursue the form of indictments charging defendants with obtaining money by false pretences, which are not sufficient without stating what were the particular false pretences. The only statute that we have on the subject of cheats, is the statute 1 Rev. Code, ch. 153, p. 577, against those who counterfeit letters or privy tokens in other men's names, and which is taken from the statute 33 Hen. 8, ch. 1. In prosecutions under that statute, it is readily admitted, that the counterfeit letter by which the cheat is effected, must be set out according to its tenor; and that is required under the statute now under consideration; so that the precision which we require is just as great as that required in that instance. So the privy token should be stated, that the court may judge whether it is such false token as the statute requires should be used, to bring the party within its terms. The english statute of 30 Geo. 2, concerning cheats by false pretences, uses those general words alone; the courts have required, that the particular pretences should be set out in the indictment, because there may be some false pretences not within the statute, and the court should see what they were. 2 East's C. L. p. 837. The false pretences interdicted by that statute may be mere verbal representations, than which nothing is more evanescent; and unless the indictment fixes the character of those representations, there is nothing which the accused can be required to answer with any degree of certainty. But where a man is charged, that "he procured to be offered to be passed" a certain counterfeit bank note the tenor of which is set out, his attention is drawn to that particular thing which is offered, and the court cannot help seeing, that the procuring of the offering to be passed of that identical thing, is within the statute. But, however it may be as to the statute against false pretences, there is no doubt, that indictments against persons for forgery, and causing and procuring the forgery to be effected, *are in daily use in England, under a great variety of statutes, and that, in no instance, does the indictment charge the accused with having caused or procured any particular person to commit the forgery. Convictions and condemnations have repeatedly taken place under such indictments. See 3 Chitty, 1049, 1052, 7, 1060; 2 Leach, 732, 827. We think the objection to the first count cannot be sustained.

The objection to the second count is, that it alleges the notes to have been passed to the negro Milus, not to defraud or injure either him or his master, but to defraud or injure a corporate body, the bank of the U. States. It is not contended by the counsel, that a note cannot be passed to a slave: although a slave is not capable in law of holding property, except for his master, yet we know, in point of fact, that he may hold it, and that he is a person who may be dealt or traded with; and the law admits such fact, because we have a variety of laws, prohibiting free persons from dealing or trafficking with slaves without the consent

of their masters. The objection seems to be, that the count charges the passing to the slave, with intent to defraud the bank of the U. States; which is thought to be impossible. The objection would be equally good, if it was passed to a free person: there is no more impossibility in the one case, than in the other. If Milus had been a free man, the count could not be bad, if charged that the note was passed to him, with intent to injure and defraud the president, directors and company of the bank, because it is within the express words of the statute. The evidence might not have supported the charge, but the charge itself could not be objected to. Neither can the objection be sustained where the passing is to the slave. But is it impossible, that there should be, in any act of passing a counterfeit note, an intent to injure or defraud the corporate body whose notes are counterfeited? The primary intent of every man who forges notes, or passes them knowing them to be forged, is to benefit himself: he intends to increase his own fortune by getting something for nothing. When he passes a counterfeit note of a hundred dollars to another person, he defrauds and injures that person, by obtaining from him, for a worthless piece of paper, property or money to the amount of a hundred dollars. The effect of the passing, is to injure the person with whom he deals; but his intent is to benefit himself. He knows, that the direct consequence of this act of felony, is to injure and defraud his neighbour; he is reckless of the consequence. Then the law steps in, declares, that every man shall be presumed to intend that which is the necessary consequence of his own acts. In this way only, can the law be understood which makes it felony to pass a counterfeit bank note to another, with intent to defraud that other. It is the same thing when the law speaks of the intent to injure or defraud the corporate body. The natural and inevitable consequence of counterfeiting bank notes, or of passing bad notes, is to injure the institution whose notes are so counterfeited or passed. It affects the interest, it impairs the credit of the bank. The man who passes them, knowing them to be counterfeit, is presumed to intend this which is the necessary consequence of his so passing them, and he therefore comes within the provision of the statute. In support of this view of the law, we have the authority of the english judges. *Rex v. Mary Mazagora, Russell & Ryan*, 291. That was an indictment for disposing of a forged bank note, with intent to defraud the governor and company of the bank of England. It appeared in evidence, that the prisoner disposed of this note and eight others, with a full knowledge that they were all forged. An inspector of the bank proved, that they might readily impose on others, but not on the bank inspectors, who always examined the notes offered at bank; and that it was not a probable consequence of the prisoner's act, that the bank would be defrauded by means of these notes. Bayly, J., directed the jury to say, what their opinion was as to the prisoner's intent to defraud the bank: the

jury said, the prisoner intended to defraud whoever might take the notes, but that the intention to defraud the bank, did not enter into her contemplation. The judge referred this question for *consideration: Whether an intention to defraud the bank ought to be inferred, when that intention was not likely to exist in the prisoner's mind, and where the caution ordinarily used would naturally protect the bank from being defrauded? The judges decided, that the prisoner must be taken to have intended to defraud the bank, and, consequently, that the conviction was right. We are all of opinion, that this count, as well as the first, is good. And in these opinions, we are unanimous.

The next question presented to us, is, Whether a new trial ought to have been granted to the prisoner, on account of the incompetency, or want of credibility of the principal witness, whose evidence, mainly, produced the conviction? In Byrd's case, 2 Virg. Ca. 490, this court gave a very decided opinion on the competency of an accomplice as a witness, at any time before his conviction. The question of his credibility may surely be left to the determination of the jury, under the superintendence of the judge who tries the cause. The credit of this witness has been affirmed by the jury, and sanctioned by the judge, who heard and saw him. This court sitting as an appellate court, and knowing nothing of the evidence or of the witness, except as it appears on the paper, feels itself very incompetent to decide on the credibility of the testimony. Unless it was irresistibly clear, that the conviction was wrong, this court would not disturb it. We are unanimously of opinion, that no new trial should be granted in this case on that ground, and we give this opinion, without deciding on the propriety of the judge below stating the proofs which had been given on the trial, as has been done here.

The last objection arises from the bill of exceptions to the opinion of the court disallowing the prisoner's challenge to the juror for cause. It was argued, that Spruce's case, 2 Virg. Ca. 375, is decisive of this; and that Wiant, who was there called as a juror, had not formed and ex-

pressed a more decided opinion than did the juror here. But this *court is of opinion, that there is a difference between the cases. There the juror had heard the subject of the trial frequently in the country; had formed a pretty substantial opinion, and expressed it more than once; and this court understood the remark as meaning, that "he had made up, and expressed, a decided opinion." Here the juror says, that he had expressed "an opinion;" he does not say, he had expressed "a decided opinion." It may have been but little more than a vague impression. If it was an opinion formed without much deliberation, without much attention to the facts reported to him, or without reflecting on the various rumours he may have heard, it might be called an opinion, but surely it was one which was slight, which would readily yield to evidence, and which could not be said to be fixed, deliberate, decided. If the opinion was formed, upon the hypothesis that certain facts were true, without knowing whether they were true or not, then the opinion was merely hypothetical, and cannot be said to have been a "decided" opinion. In this case, the juror gives his own account of the strength or weakness of his opinion. He is called on (most probably by the prisoner) to give an account of the state of his mind: his own conscience is referred to; and as that is the only evidence we have on the subject, we must be guided by it. In Lithgow's case, Id. 297, the juror Irvine said, that although he believed he would be guided by the evidence, yet he would be "unwilling to trust himself." But here the juror says, he does not think "that the opinion so formed would have any influence on his mind in trying the case." It must then have been a slight opinion: it could not have the character of fixedness, deliberation, decision. It could not with propriety be denominated "a decided opinion." This case is more like Pollard's case, 5 Rand. 658, than like Spruce's. The court is of opinion, that the bill of exceptions shews no error; but two of our brethren, judges Semple and Upshur, dissent from this opinion.

Writ of error denies.

INDEX.

ABANDONMENT.

1. See Payment by mistake, and Lee and wife v. Stuart &c., 76
2. A. applies to B. for a loan of money, upon the security of a mortgage of slaves then held by A., and B. being doubtful as to A.'s title to the slaves, and apprehensive that C. has some claim to them, applies to C. to know whether he has such claim, explaining his reason for the inquiry: upon which C. informs him he has no right to the slaves, being at the time apprised of all the facts, on which his right, if any he has, depends: B. lends the money, and takes the mortgage of the slaves: HELD, that C. cannot be allowed, in equity, to assert the right he had disclaimed against the mortgagee B. 401

Dickenson v. Davis and others.

ABATEMENT.

I. In actions at Law.

1. Writ of right abates by death of tenant in 1812, and the abatement is entered of record; sci. fa. sued out by demandant in 1820, to revive the suit against heirs of tenant: HELD, the abatement was absolute, and suit could not be revived under provision of statute of 1819, 1 Rev. Code, ch. 128, § 37, that provision being prospective.

Lovell v. Arnold, 16

2. A writ of right having been brought in name of H. against R. and P. and the mise regularly joined on the mere right, and the tenants shewing by affidavits, that H. was dead before the writ purchased, and that they had come to knowledge of the fact after the mise was joined: HELD, the pleadings should not be set aside, and tenants permitted to plead this matter in abatement: but the court ought to stay proceedings, till W. the person prosecuting the suit, shall shew by proof, that demandant was living at commencement thereof.

Howard v. Rawson & Pugh, Gen. Court, 738

II. Suits in Equity.

3. Where bill in chancery states matter proper for relief in equity, and defendant without pleading to jurisdiction in abatement, answers the bill, he is precluded from taking exception to jurisdiction afterwards, by stat. 1 Rev. Code, ch. 66, § 86. Aliter, if bill on its face, shew case not properly relievable in equity.

Hickman v. Stout, 6

ABEYANCE.

- See Estates Tail, No. 1, and Orndoff v. Turman and others, 200

ABSENT DEBTORS.

1. In a foreign attachment in chancery against an absent debtor, laid on personality in hands of garnishees, and on lands claimed by persons under conveyance of absent debtor, the question being, whether conveyance gave vendees priority over rights of attaching creditors, or attachment gave these priority over vendees, the absent debtor was, upon motion of attaching creditors themselves, who waived demand of security from him, allowed to appear and file his answer, without giving security to abide and perform the decree: HELD, the attachment was thereby discharged, and the attaching creditors could, thenceforth, only prosecute their claim against their debtor, personally.

Tiernans v. Schley & Schroeder, 25

2. Upon a foreign attachment in chancery, against absent debtor and home defendant as garnishee, decree against absent defendant for debt, and against home defendant for a debt due by him to absentee to be paid plaintiff in part of debt due him by absentee, the absentee, being in default: the home defendant appeals: HELD, the home defendant cannot, in the appellate court, contest the justice of the decree as against the absentee but only so much of it as affects himself.

Hefferman's adm'or &c. v. Grymes' adm'or &c., 512

780

*ACCOUNT.

1. Bill in chancery stating running accounts for many years between plaintiff and defendant, consisting of numerous items of debit and credit or claims for them on both sides, and praying an account and decree for balance: HELD, this is a bill

for an account which equity will entertain, though assumpsit might have lain at law.

Hickman v. Stout, 6

2. Bill in chancery, praying an account, and a decree for the balance which should be found due, upon a claim, on which an action at law would have lain, without shewing any obstacle which would defeat or embarrass the legal remedy: HELD, the court of chancery has no jurisdiction.

Poage v. Wilson, 490

3. See Equitable Assets, No. 1, and Kinney's ex'ors &c. v. Harvey &c., 70

ACTION.

- A. having been guardian of B. and C. and B. being out of country, and C. the younger of the wards having attained to full age, A. delivers to C. six slaves, the property of both wards in equal shares, and takes bond and surety from C. with condition, that, if B. returns to the country, or in any other manner claims his proportion of said slaves and their hires, and receives satisfaction from C. then obligation to be void, &c. One of distributees of B. sues D. as executor of A. his former guardian, for her share of B.'s moiety of the slaves, and recovers decree in chancery for value of share, which is satisfied out of A.'s estate: HELD, the administrator de bonis non of A. is entitled to an action on the indemnifying bond given by C. to A. to recover the amount so paid, from C.'s surety therein bound.

Lamb v. Harrison's adm'or &c., 525

ACTS OF ASSEMBLY.

- See Construction of Statutes; and Statutes cited and construed.

ADMINISTRATION.

- See Executors and Administrators.

AGENT AND ATTORNEY.

1. An attorney at law is employed to collect debts, and some of them are lost to his client through his negligence: HELD, the attorney is chargeable for the principal of the debts so lost, but not with interest thereon.

Rootes v. Stone, 650

2. See Principal and Agent, No. 1, and Hefferman's adm'or &c. v. Grymes' adm'or &c., 512

AGREEMENT.

- See Specific Execution, and Reed's heirs v. Vannorsdale and wife, 569

ALIENAGE.

- See Descents, and Jacksons v. Sanders &c., 109

ANNUITY.

- See Lien, No. 3, and Coutts v. Walker, 268

ANSWER IN CHANCERY.

- See Practice in suits in equity, No. 2, and Kinney's ex'ors v. Harvey &c., 70

APPELLATE JURISDICTION.

I. In cases before Courts of Law.

1. Judgment of a justice of the peace, affirmed by the county court, for debt, principal, interest, damages and costs, not amounting to \$3 dollars 33 cents: HELD, circuit court has no appellate jurisdiction to review such judgment by certiorari or otherwise.

Hay's adm'x v. Pistor, Gen. Court, 707

2. A county court refuses to admit an instrument of emancipation of slaves to probat and record: HELD, the circuit court cannot review this judgment, by way of appeal, writ of error or superseas.

Mann and others v. Givens and others, Gen. Court, 762

3. A mandamus lies from circuit court, to compel justices of the peace to administer the oath of insolvency to a debtor in execution, and order his discharge, if upon being applied to, they improperly refuse to do so.

Harrison v. Norfolk Justices, Gen. Court, 764

4. See Mandamus, No. 1, 2, and King William Justices v. Munday, 165

II. In suits in Equity.

5. Upon appeals from interlocutory decrees in chancery, only so much of the cause is before the appellate court, as the court of chancery has acted upon.

Madden v. Madden's ex'ors. 377

6. Suit in chancery against A. and B. Decree against A. for debt, and against B. declaring a conveyance by A. to him fraudulent as against plaintiffs; ca. sa. issued on decree against A. for the debt, and executed; then B. appealed from the decree so far as it affected him; and "the court reverses the decree so far as it affected B. but HELD, that it could not reverse the decree against A. who had not appealed, though the court of chancery had no jurisdiction to make the decree against him.

Tate v. Liggit &c., and Liggit &c. v. Morgan &c.. 84

7. A. and B. are co-defendants in a suit in chancery for recovery of a parcel of slaves and an account of their profits; B. claims the slaves under a mortgage thereof to him by his co-defendant A.; there is a decree for the slaves and profits, against both defendants; B. alone appeals from the decree; the court, holding that the plaintiffs had no right, considered the whole cause before it, upon B.'s appeal, and dismissed the bill as to A. as well as B.

Dickenson v. Davis and others. 401

8. Upon a foreign attachment in chancery, against absent debtor and home defendant as garnishee, decree against absent defendant for debt, and against home defendant for a debt due by him to absentee, to be paid plaintiff in part of debt due him by absentee, the absentee being in default; the home defendant appeals: HELD, the home defendant cannot, in the appellate court, contest the justice of the decree as against the absentee, but only so much of it as affects himself.

Heffernan's adm'or &c. v. Grymes' adm'or &c.. 513

APPOINTMENT.

See Legacy, No. 1, and

Frazier &c. v. Frazier's ex'ors &c.. 642

ASSETS.

1. See Executors and Administrators, No. 9, and Lamb v. Harrison's adm'or &c.. 525

2. See Real Assets.

ASSIGNMENT.

1. A holding a bond of B. places it in C.'s hands, to collect the money for him when due, and if not paid, to put it in an attorney's hands, to collect by suit; the money was not paid when due, and C. put the bond in attorney's hands for collection; then A. addressed a letter to C. telling him he owed D. about \$200 out of the money B. owed him; and desiring C. when he collected the money from B. if A. himself should not happen to be present, to pay the whole to D.; and this letter being presented by D. to C. without accepting the order therein contained, only told him that B.'s bond was in the attorney's hands; the amount of B.'s bond to A. exceeded the amount due from A. to D.: HELD, the letter of A. to C. was neither an equitable assignment by A. to D. of so much of B.'s debt to A., nor a security given by A. to D. for the debt he owed him.

Clayton v. Fawcett's adm'ors. 19

2. Concerning assignment by creditor to surety of demand against principal, see Principal and Surety, No. 1, and

Blow v. Maynard. 39

ASSIGNMENT OF BREACHES.

See Bond, No. 4, and

Lamb v. Harrison's adm'or &c.. 525

ASSUMPSIT.

1. See Account, No. 1, and

Hickman v. Stout. 6

2. A is prosecuting debt against B. the surety of C. and C.'s father agrees in writing to pay the debt with interest, if A. will dismiss his suit against B. at A.'s own costs; A. dismisses his suit, generally; in assumpsit by A. against the father, upon his conditional promise to pay the debt: HELD, A. was bound to perform the condition strictly, in order to entitle himself to enforce the promise, and having dismissed his suit generally instead of at his own costs, he cannot recover upon the promise.

Couch v. Hooper. 557

3. And though the father subsequently approved A.'s dismissal of his suit against the son's surety, generally, yet A. not having averred such subsequent ratification in his declaration on the father's promise, that fact cannot avail him. Ibid., 557

4. A constable levies sundry executions sued out by A. on property of the debtors; the removal and sale of the property is forbidden by the landlords

of the debtors, claiming that it liable for the rents; and A. the creditor and B. enter into a written agreement, to indemnify the constable "agreeably to law;" which agreement is signed by A. and B. and by C. also, though C.'s name is not in the body of the instrument; and this agreement is delivered to the officer, on the day and at the place of sale; A. B. and C. all acknowledging it as their act, and B. and C. declaring verbally, that they are A.'s sureties: HELD, this is the joint assumpsit of A., B. and C. to indemnify the constable, for removing and selling the property under A.'s executions *and paying the proceeds to him, and the sale of it by the constable is a consideration to support the assumpsit as to them all.

Crawford and others v. Jarrett's adm'or. 630

ATTACHMENT.

See Absent Debtors.

ATTORNEY.

See Agent and Attorney, and Rootes v. Stone. 650

BANK NOTES.

1. In an indictment for larceny of bank notes, it is not indispensably necessary to produce the stolen notes upon the trial.

Moore v. The Commonwealth. 701

2. See Felony, No. 3, 4, 5, and

Martin v. Commonwealth. 745

3. See Felony, No. 1, 2, and

Spencer v. Commonwealth. 751

BEQUEST.

See Wills, and Legacy.

BILL OF EXCEPTIONS.

1. Where a bill of exceptions to an instruction of a court to a jury, states the instruction so vaguely and imperfectly, that its import and bearing on the case cannot be ascertained with precision, the appellate court will reverse the judgment, and remand the cause for a new trial.

Thompson v. Cumming. 821

2. A bill of exceptions to an opinion of a court, overruling a motion for a new trial, sets forth all the evidence adduced by both parties; but the evidence thus set forth, shews that there was no conflicting evidence, and that excluding all the evidence of the party against whom the verdict was found, and admitting the truth of all the evidence adduced for the party for whom the verdict was found, the verdict was contrary to the evidence, and to justice: HELD, such exceptions, in such a case, are well taken, to enable an appellate court to review and reverse the judgment overruling the motion for a new trial.

Ewing v. Ewing. 337

3. The principle of Bennett v. Hardaway, 6 Munf. 125, and Carrington v. Bennett, 1 Leigh. 340, explained and approved. Ibid., 337

BILL OF EXCHANGE.

In an action, by holder against indorser, on a bill of exchange, whereof the drawee has refused acceptance when it was presented, and afterwards refused payment when demanded at maturity: HELD, not enough, to charge the indorser, to prove protest for non-payment and due notice thereof to the indorser: It is necessary to prove due notice to him of the dishonour of the bill by the non-acceptance.

Thompson v. Cumming. 821

BOND.

I. Sealing and Delivery.

1. P. agrees to join H. W. as his surety in a forthcoming bond, and executes and delivers the bond, as an escrow, upon condition that K. shall also join in and execute the bond as co-security; and K. agrees to join as surety in the bond, and executes and delivers the same, as an escrow, upon condition that O. W. shall also join in and execute the bond as co-security; but O. W. never unites in the bond: HELD, that upon this state of facts, neither P. nor K. is liable for any part of the debt in equity, any more than they would be liable for any part of it at law, where the facts would amount to proof of non est factum.

King v. Smith and others, and Porterfield v. Same. 157

II. Misrepresentation at the time of execution.

2. A. fi. fa. being sued out by J. against M. and being in the hands of the sheriff, M. the debtor, applies to G. to join him in a forthcoming bond thereon, and represents to him, in the sheriff's presence, that the amount of the debt is about one seventh of the real amount, which representation the sheriff does not contradict; whereupon G. con-

sents to become the surety, and M. and G. sign and seal a forthcoming bond, blank as to the amount of the execution and as to other material particulars, and deliver it to the sheriff, who afterwards fills up the blanks; and execution is awarded upon this forthcoming bond: **HELD**, G. is not entitled to relief in equity against the obligation of the bond, upon the ground of the deception which induced him to execute it as the creditor to whom it was taken was no party to the fraud, and the sheriff, who was party to it, was not the creditor's agent in taking the bond.

Gordon v. Jeffery, 410

III. Construction of the Instrument; and what will amount to a breach.

3. A. having been guardian of B. and C. and B. being out of country, and C. the younger of the 783 wards having attained to full age, A. delivers to C. six slaves, the property of both wards in equal shares, and takes bond and surety from C. with condition, that, if B. returns to the country, or in any other manner claims his proportion of said slaves and their hires, and receives satisfaction from C. then obligation to be void &c.: **HELD**, C. and his surety are bound by this bond, though B. die without ever returning to country, to indemnify A. against the claims of B.'s representatives.

Lamb v. Harrison's adm'or, 525

4. One of distributees of B. sues D. as executor of A. his former guardian, for her share of B.'s moiety of the slaves, and recovers decree in chancery for value of share, but no legal representative of B. is party to that suit; and this recovery, and payment of amount recovered, are alleged as breach of condition of C.'s indemnifying bond, in an action thereon against C.'s surety: **HELD**, it is a breach thereof; and defendant cannot in this action, contest the regularity of the decree in chancery, or take advantage of any error in it; neither can he plead, that D. was never the executor of A.

Ibid., 553

IV. Of Statutory Bonds.

5. Bond with surety taken from an administrator with will annexed, with condition, not in form prescribed by law for official bond of administrator with will annexed, but in form prescribed for an administrator, and not exactly conforming even to that: **HELD**, this is not a good statutory bond, and no suit, either at law or in equity, can be maintained against the surety for the benefit or at the relation of a legatee.

Frazier & c. v. Frazier's ex'ors &c., 642
6. Quære, whether such a bond be good as a common law bond, for the indemnity of the justices to whom it was given? Ibid., 642

BREACHES.

See Bond, No. 4, and
Lamb v. Harrison's adm'or, &c., 525

CAPIAS AD SATISFACIENDUM.

See Execution.

CERTIORARI.

See Appellate Jurisdiction, No. 1, and
Hay's adm'x v. Pistor, 707

CIRCUI TY OF ACTION.

See Jurisdiction.

COLLATERAL UNDERTAKING.

See Assumpsit, No. 4, and
Crawford and others v. Jarrett's adm'or, 630

COMMISSION.

See Practice in Suits in Equity, No. 5, 6, 7, and
401, 426

COMMONWEALTH.

In what way the commonwealth may ratify a contract made for the purchase of the fee and freehold, though the authority of her agents originally, extended only to the acquisition of an easement. See Easement, and
Young v. Gooch and Brown, 506

COMPETENCY OF WITNESS.

See Evidence.

CONDITIONAL SALE.

Question, whether a transfer of bank stock was, under all circumstances of transaction, a security or indemnity provided for the transferee, and therefore redeemable; or, a conditional sale, which became absolute by non-performance of the condition? **Leavell v. Robinson**, 161

CONDITION PRECEDENT.

See Assumpsit, No. 2, 3, and

Couch v. Hooper, 557

CONFESSION.

See Evidence, No. 9, and

Moore v. The Commonwealth, 701

CONSIDERATION.

1. See Declaration, No. 5, and

Peasley v. Boatright, 195

2. See Specific Execution, and

Reed's heirs v. Vannorsdale and wife, 560

CONSTRUCTION OF STATUTES.

I. General Rules governing Construction.

1. When the words of a statute are doubtful, general usage may serve to explain them: but the maxim communis error facti jus, has no application to the usages of particular corporate towns or other places.

Currie and others v. Page and others, 617

II. Construction of Penal Statutes.

2. It is provided by statute, that "if the brother hath married or shall marry his brother's wife," the marriage shall be dissolved, the party fined &c.: **HELD**, the marrying a brother's widow, is an offence within the statute.

Commonwealth v. Perryman &c., 717

3. T. carries the slaves of D. out of the state, without the owner's consent, with intent to deprive him of the slaves, until T. should receive a reward for apprehending and restoring them: **HELD**, this is felony in T. under the statute, 1 Rev. Code, ch. 111, § 30.

Thomas v. The Commonwealth, 741

4. A mill which had been built, and had gone down, prior to the statute of 1819, 1 Rev. Code, ch. 235, § 10, and which was rebuilt after the passing of that statute, is not a mill thereafter built, within the meaning of the statute.

Webb v. The Commonwealth, 721

III. When a new Statute repeals an old one.

5. By statute of 1819, grand larceny is defined stealing goods to value of \$4 and upwards, and punished by imprisonment &c. not less than one nor more than three years; by statute of 1824, larceny committed after 1st May 1824, to value of \$10 and upwards, is defined grand larceny, and punished as grand larceny theretofore was; and larceny of goods of less value than \$10, is defined petit larceny, and punished as petit larceny theretofore was; and the latter statute neither makes provision as to larcenies committed before 1st May 1824, nor contains any express repeal of the former statute. **HELD**, the latter statute does not repeal the former, as to larcenies committed before 1st May 1824.

Allen v. The Commonwealth, 727

CONTEMPT.

See Practice in Actions at Law, No. 4, and

Howard v. Rawson and Pugh, 733

CONTINUANCE.

Upon a motion for a continuance, upon the ground of the absence of a material witness, the court, if it sees cause to suspect that the party is mistaken, or that his object is delay, may examine him as to what he expects to prove by the absent witness.

Harris v. Harris, 564

CONTRACT.

I. Where against the Policy of the Law.

1. Deeds of gift, or of release and acquittance, made by ward to guardian, or person who has borne part of guardian, shortly after ward's attainment to full age, but before delivering of ward's estate, and without any settlement of account, are void on a principle of public policy, without proof of actual fraud; much more, if circumstances of transaction evince actual fraud.

Waller v. Armistead's adm'ors, 11

2. No just distinction, in this respect, between deeds of gift, and deeds of release and acquittance, by ward to guardian: both equally condemned by equity. Ibid., 11

II. Where made for an Expectant Interest, or Price is inadequate.

3. Inadequacy of price, whether it be so gross as to be per se proof of fraud or not, if attended by circumstances evincing unconscientious advantage taken by vendee of improvidence and distress of vendor, will avoid the contract in equity, though it be a contract executed.

McKinney v. Pinckard's ex'or, 149

4. Quære, whether every vendor of an expectant interest is not to be regarded in equity as a young heir dealing for his expectancies? Ibid., 149

5. But clear, that very anxious protection is extended by equity to all persons selling expectant interests, whether they stand in relation of expectant heirs or not, and trivial circumstances, added to inadequacy of price, sufficient to set aside such sales. *Ibid.*, 149

III. Where no Consideration.

6. See Specific Execution, and
Reed's heirs v. Vannorsdale and wife, 569

IV. Construction of Contract.

7. See Assumpsit, No. 2, 3, and
Couch v. Hooper, 557
8. See Partnership, and
Bowyer v. Anderson, 550
9. See Principal and Agent, No. 1, and
Heffernan's adm'r v. Grymes' adm'r &c., 512
10. See Motion, No. 5, and
Jacobs v. Hill and others, 398

CONVERSION.

See Executors and Administrators, No. 9, and
Heffernan's adm'r v. Grymes' adm'r &c., 512

785

*CONVEYANCE.

See Deeds.

COVENANT.

1. Upon a sale of land by T. to B. the vendors covenants for himself, his heirs, executors and administrators, to warrant the land to B., his heirs and assigns; B. is evicted, and brings covenant for breach of this warranty: *Held*, the proper measure of damages is the purchase money with interest from the date of the actual eviction, the costs incurred in defending the title, and such damages as the vendee may have paid, or may be shewn to be clearly liable to pay, to the person who evicted him. *Threlkeld's adm'r v. Fitzhugh's ex'x*, 451

2. But, though the purchase money with interest &c. was held to give the proper measure of damages in the particular case, the opinions of the judges leave it still questionable, whether the actual value of the land at the time of sale, if proved to be greater than the purchase money, with interest &c., may not be justly demanded. *Ibid.*, 451

3. See Landlord and Tenant, No. 1, and
Boiling v. Stokes, 178

COVENANT TO STAND SEIZED TO USE.

See Estates Tail, No. 2, and
Watts v. Cole &c., 653

COVERTURE.

See Feme Covert.

CRIMINAL PROCEEDINGS.

See Indictments, Informations and Presentments.

DEBT.

1. See Lamb v. Harrison's adm'r &c., 525
2. See Declaration, No. 4, 5, and
Peasley v. Boatwright, 195

DECLARATION.

I. In Assumpsit.

1. It seems, that in assumpsit against an administrator de bonis non, counts upon promises made by executor or a former administrator of the deceased debtor, as such, may be joined with counts on promises by the deceased debtor himself, to save the statute of limitations; *debitante GREEN, J.*
Bishop v. Harrison's adm'r &c., 532

2. But, in such case the counts upon promises of the executor or former administrator, must distinctly aver the promises to have been made as executor or administrator; otherwise, they are bad upon general demurrer; *per tot. cur.* *Ibid.*, 532

3. See Assumpsit, No. 2, 3, and
Couch v. Hooper, 557

II. In Debt.

4. Debt on an instrument, which is in its form a promissory note for money, concluding "witness the hands" of the parties: but scrolls by way of seals are set to their signatures; this instrument is rightly described in the declaration as a promissory note. *Peasley v. Boatwright*, 195

5. In debt on promissory note: *Held*, plaintiff need not aver in declaration, or prove, consideration; though defendant may go into evidence touching consideration. *Ibid.*, 195

6. See Action, and
Lamb v. Harrison's adm'r &c., 525

III. In Trespass.

7. In an action upon the statute. 1 Rev. Code, ch. 112, § 5, for wrongful distress for rent when no rent

in arrear, the declaration must set forth the relation of landlord and tenant existing between the plaintiff and defendant; and if it does not, the declaration is bad on general demurrer.

Jones v. Murdaugh, 447

IV. Operation of Statute of Jeofails.

8. Quære, if plaintiff omits to aver in his declaration, matter necessary to shew good cause of action, and defendant, instead of demurring, pleads the general issue, whether, upon the construction of the new statute of jeofails, 1 Rev. Code, ch. 128, § 103, p. 512, the plaintiff is bound to prove the matter at the trial of the issue, which he has not averred in his declaration.

Thompson v. Cumming, 821

DECREES IN CHANCERY.

See Appellate Jurisdiction in suits in equity.

DEEDS.

I. Privy examination of feme covert.

1. Under the statute of conveyances of 1785, ch. 62, the aldermen of the city of Richmond, not being justices of the peace of Henrico, had no authority to take privy examinations and acknowledgments of femes covert residing in Richmond, to conveyances of land.

Currie and others v. Page and others, 617

II. How proved or acknowledged by other than feme covert.

2. The provision of the statute of conveyances of 1792, Rev. Code of 1794, ch. 90, § 5, was repealed by the 5th and 7th sections of the revised statute of 1819, 1 Rev. Code, ch. 99, so that, now, a deed of lands in Virginia made by a party residing in another state of the union, cannot be recorded here, upon acknowledgment thereof by the party before a court of such state where he resides, but only on such acknowledgment before two justices of the peace of such state.

Lockridge v. Carlisle, 186

III. Mode of proving instruments of Emancipation.

3. See Emancipation.

IV. Remedy where court of probat will not admit to record.

4. See Appellate Jurisdiction, No. 2, and
Mann and others v. Givens and others, 762

DEMURRER.

See Scire Facias, No. 3, and
Garland v. Ellis, 555

DEPOSITIONS.

1. See Practice in Suits in Equity, No. 6, 7, and
Beverly v. Brooke and others, 426
2. See Evidence, No. 8, and
Pleasants v. Clements, 474
3. See Practice in Suits in Equity, No. 5, and
Dickenson v. Davis and others, 401

DEPUTY SHERIFF.

See Sheriff.

DESCENTS.

A citizen dies seized of lands in Virginia, leaving a brother who is a citizen, a sister who is an alien yet living, children of the alien sister, who are citizens, and grand-children of the alien sister, who are citizens, though their fathers as well as their grand-mother are aliens: *Held*, under the statute of descents, 1 Rev. Code, ch. 98, § 18, the descendants of the alien sister take by descent, one moiety to be divided among them *per stirpes*, and the citizen brother the other moiety.

Jacksons v. Sanders &c., 109

DEVASTAVIT.

See Executors and Administrators, No. 9, and
Heffernan's adm'r &c. v. Grymes' adm'r &c., 512

DEVISE.

See Wills.

DEVISEES.

1. Under the statute giving summary remedy to all sureties against their principals, 1 Rev. Code, ch. 116, § 1, no motion lies for sureties against devisees of their principals.

Bacchus v. Gee, 68

2. The 37th section of the statute concerning sheriffs, 1 Rev. Code, ch. 78, which binds the lands of a sheriff to his sureties, does not authorize a surety, upon summary motion against a sheriff, his heirs or devisees, to obtain a judgment for the money paid by such surety; but where a judgment has been previously obtained, authorizes the court to award an execution against the lands. *Ibid.*, 68

DISSOLUTION OF INJUNCTION.

See Injunction.

DOWER.

1. A husband dies entitled to reversion of lands: his widow is not entitled to dower thereof.

Blow v. Maynard.

30

2. A husband makes a fraudulent conveyance of real estate to the use of himself and children, and contingently to the use of his wife, who does not execute the conveyance: the husband dies: a creditor exhibits his bill against the children and the widow, to avoid the conveyance as voluntarily and fraudulently: the widow claims under the conveyance: it is declared fraudulent and void: **Held**, the widow is entitled to dower of the estate.

Ibid., 30

3. See Deeds, No. 1. and Currie and others v. Page and others,

617

4. See Payment by mistake, and Lee and wife v. Stuart &c.,

76

EASEMENT.

How Commonwealth may ratify a contract for purchase of the fee.

A county court, empowered by act of assembly in 1784, to select a place on which to establish an inspection of hemp and hemp warehouses, and if the proprietor of the ground will not erect the warehouses, to cause them to be erected at public expense, but not empowered by the law to purchase the ground itself for the commonwealth, contracts with the proprietor to purchase the ground itself, and orders payment of the purchase money thereof out of the treasury, and the same is paid to the proprietor accordingly: the commonwealth holds the ground till 1797, when the inspection is discontinued, and thenceforth till 1816, when an act of assembly is passed, claiming this ground as the property of the state, putting it under care of the executive, and directing it to be sold: **Held**, that the actual holding possession under the contract of the county court, and the assertion of the right of property by the act of 1816, are a ratification of the contract made for the purchase of the ground by the county court, and a sanction of the contract.

Young v. Gooch and Brown.

596

EJECTMENT.

Ejectment by M. against S. It appeared, that M. claimed under F. and that M. and S. had stood in relation of landlord and tenant for many years, but S. the tenant before the suit brought had disclaimed to hold under M. Tenant offers evidence, that F. by deed recorded in 1776, let the premises to L. for three lives, that L. in writing, but not by deed, had assigned term to H. and H. had in like manner assigned term to S. the tenant, with proof that S. had paid rent to M. but without any proof that any of the three lives on which the term depended were yet in existence: **Held**, such evidence is admissible and proper evidence in defence to the action.

Smoot v. Marshall,

134

ELECTION.

B. makes a deed of settlement of property upon his wife, and then by will makes a disposition of the property, different from that made by the deed of settlement, and far less beneficial to the wife, and dies: the wife takes administration with the will annexed: **Held**, the widow taking administration with the will annexed, is not an election by her to take under the will, and not to claim under the deed of settlement.

Taylor and wife v. Brygwe and others,

419

ELEGIT.

See Lien by judgment or decree.

EMANCIPATION.

I. How Instruments of Emancipation must be proved or acknowledged.

1. Semble, an instrument of emancipation, being partly proved in the court of the county where the emancipator resides at the time, may be fully proved in the same county, though before full proof made, the emancipator removes to another county.

Thriff v. Hannah &c.,

300

2. Quære, whether an instrument of emancipation of slaves, ought to be admitted to record, on the deposition of a witness non-resident of the state, and on proof of the handwriting of such absent witness, and of another subscribing witness, who is dead?

Mann and others v. Givens and others,

762

3. See Appellate Jurisdiction, No. 2. and Mann and others v. Givens and others,

762

II. When instrument takes effect.

4. A feme sole, owner of slaves, makes a written

instrument of emancipation of them, in November 1798, to take effect in futuro; this instrument is attested by two witnesses; it is partly proved by one of them, and continued for further proof, in April 1799, in the county court of Fluvanna, where the emancipator then resided: in November 1799, the emancipator holding the persons named in her instrument of emancipation, in her possession, marries T. who is ignorant of the execution of the instrument; then, T. removes with his wife to Albemarle, carrying the persons named in the instrument of emancipation, with him as slaves: the wife dies in 1811: the husband continues to hold the persons in question, as his slaves: in 1819, the instrument of emancipation is fully proved by the other attesting witness, in the county court of Fluvanna; and, afterwards, the persons therein named, bring a suit against the husband, to recover their freedom:

Held, under the statute of Virginia, an instrument of emancipation is ineffectual to confer freedom, till full probat thereof be made according to law, and takes effect only from the date of the complete probat; and as the rights of the husband, in this case, attached to the property long before full probat was made, the subsequent full probat did not divest or affect those rights, or give any right to freedom.

Thriff v. Hannah &c.,

300

III. Construction of instrument.

5. Testator, by will, in 1819, bequeaths "and provides" "if it be agreeable to the laws of this state, Virginia, that after death of my wife, it is my will, that the following slaves owned by me, viz. Joan &c. shall, as soon as they attain the age of 31 years, be freed; and I appoint my friends J. M. and E. H. trustees for the liberation of said slaves, and for them to make the necessary application to court, on said slaves' behalf, both as to their freedom and their remaining in the state. If the laws of the state be against such procedure, then my will is, that said slaves be equally divided among my children &c." **Held**, upon construction of this will, that it was not testator's intention to emancipate these slaves, unless by change of law they might be permitted to remain as free persons in Virginia; and as by the law at date of will and of testator's death, and at death of his widow, these slaves, if emancipated, could not be allowed to remain in Virginia, they are not entitled to their freedom, but pass to testator's children.

Walthall's ex'or v. Robertson and others,

189

IV. Suits for freedom.

6. See Freedom.

ENTRY.

See Petition of Right, and Young v. Gooch and Brown,

596

EQUITABLE ASSETS.

1. Upon a bill by certain creditors of a decedent, to charge the debts due them, on the debtor's real estate in the hands of his devisees, the court ought always to make an order to call in all creditors, to receive their dividends of the real assets.

Kinney's ex'ors &c. v. Harvey &c.,

70

2. See Substitution, and

S. C., 70

EQUITY.

The maxim of courts of equity, that a plaintiff asking equity, must do equity to the party against whom he asks it, applies only to cases where the plaintiff is wholly without remedy at law, and is entirely dependent on the court of equity for relief.

By GREEN and CABELL J., in

Gilliat v. Lynch,

493

ESCAPE.

If a debtor in custody under a ca. sa. be permitted to escape, the creditor is entitled to another execution against the debtor, as well as to an action against the sheriff for the escape. By GREEN, J., in Windrum v. Parker and Goodwyn,

361

ESCROW.

See Bond No. 1. and King v. Smith and others,

157

ESTATES TAIL.

1. Tenant in fee tail general aliens in fee, by deed of lease and release with general warranty, 1769; and tenant in tail lives till 1816, and then dies leaving issue: **Held**, that the statutes of 1776 and 1785, abolishing entails, barred the issue, and converted the estate tail, even though it were in abeyance, into a pure and absolute fee, and confirmed the fee simple to the tenant in tail's alienee in fee.

Orndoff v. Turman & others,

300

2. S. W. tenant in tail, in 1783, covenants to stand seized to use of L. W. his then eldest son and heir

apparent, and his heirs, in fee simple; and then subjoins a covenant, that L. W. may immediately after his S. W.'s death enter upon and enjoy the land; L. W. died before S. W. who always continued in possession; **Held**, this conveyance worked no change in S. W.'s estate, but he continued seized of an estate tail as before it was made, and therefore, the limitation of the estate to L. W. after S. W.'s death, was void; neither did L. W. acquire any seizin in fact or in law, upon which a writ of right could be sustained.

Watts v. Cole and wife and others. 653

3. See Executory Limitations, No. 1, and Burfoot v. Burfoots, 119

ESTOPPEL.

1. A suit in chancery and decree therein, can neither be pleaded in bar, nor given in evidence, in an action at law, between the same parties, unless the very same matter of controversy was involved in both suits, and unless the court of chancery had competent jurisdiction to decide the matter. Therefore, where P. filed bill in chancery against C. charging fraud practised by defendant in sale of a slave, and praying that the contract might be rescinded, and that C. might be enjoined from taking measures to recover the purchase money of P. and the bill was dismissed on a hearing; and then P. brought an action at law against C. to recover damages for breach of warranty of the soundness of the slave: **Held**, the proceedings and decree 789 in the "suit in chancery could neither be pleaded by C. in bar of the action at law, nor was the record thereof admissible evidence on the trial of the action at law.

Pleasants v. Clements, 474

2. See Evidence, No. 1, and

Frazier & c. v. Frazier's ex'ors & c., 642

3. See Bond, No. 4, and

Lamb v. Harrison's adm'or, 525

EVICITION.

See Covenant, No. 1, 2, and

Threlkeld's adm'or v. Fitzhugh's ex'x, 451

EVIDENCE.

I. Matter of record and proceedings of Courts.

1. In a suit in chancery, though the defendants are in default; yet the record or proceedings in another suit inter alios, is not competent evidence against them.

Frazier & c. v. Frazier's ex'ors & c., 642

2. A suit in chancery and decree therein can neither be pleaded in bar, nor given in evidence to prove the matter which is the ground of the decree, in an action afterwards between the same parties, unless the very same matter of controversy was involved in both suits, and unless the court of chancery had competent jurisdiction to decide the matter. See Estoppel, No. 1, and

Pleasants v. Clements, 474

3. A motion is made against a sheriff for default of his deputy, upon which the sheriff, with assent of the deputy, but without the knowledge of his sureties, confesses judgment: **Held**, the record of this judgment, is admissible evidence against the deputy's sureties, upon a motion by the sheriff against the deputy and his sureties.

Jacobs v. Hill and others, 393

4. See Motion, No. 9, and

Fletcher v. Chapman, 560

II. Written documents and parol evidence in relation thereto.

5. Parol evidence is not admissible to vary, contradict, add to, or explain, a written agreement; but, in cases of equivocal written agreements, the circumstances under which they were made, may be given in evidence to explain their meaning.

Crawford and others v. Jarrett's adm'or, 630

6. In ejectment for land in Wood county, lessor of plaintiff claims under grant of land described in the patent as lying in Monongalia; defendant shews by the statute of 1784, dividing Monongalia and establishing Harrison county, and other evidence, that the land described in the patent, at the date of the patent, lay not in the then county of Monongalia, but in that of Harrison, and that no part of the present county of Wood was then part of Monongalia: **Held**, competent to plaintiff to prove, that the land in Wood was the same land granted by the patent, notwithstanding the error of the patent as to the county it lay in.

Chapman v. Bennett, 329

7. See Ejectment, and

Smoot v. Marshall, 184

III. Depositions.

8. On the trial of an action at law, depositions taken in a suit in chancery between the same parties, are not proper evidence, unless the witnesses

be dead, or otherwise not capable of attending the trial.

Pleasants v. Clements, 474

IV. Confessions and Declarations.

9. If a threat be made, or promise held out, to a person in custody on a charge of felony, to induce him to make confession, and he denies his guilt at the time, but afterwards makes a confession, which appears, from the time and circumstances, not to have been induced by such previous threat or promise, this confession, so afterwards made, is a voluntary one, and proper evidence against him on his trial.

Moore v. Commonwealth, 701

10. Effect of acknowledgment contained in the recital of a deed. See Postnuptial Settlements, No. 2, and

Blow v. Maynard, 29

V. Competency of witness.

11. In suit by persons held in slavery against their master to recover their freedom, defendant claimed plaintiffs as slaves by purchase of them as slaves from W. K. deceased; and plaintiffs offered K. K. widow of W. K. to prove that W. K. in his lifetime, before sale to defendant, repeatedly declared, in presence of his family, and without injunction of secrecy, that mother of plaintiffs then held by him in slavery, was an Indian woman: **Held**, widow not competent witness to prove such declarations of her deceased husband.

Robin & c. v. King, 140

12. A. mortgages land to B. to secure debt due him, and then mortgages same land to C. to secure debts, first to C. then to other favoured creditors, and then to all creditors; and, in a suit in chancery, between B. the first mortgagee, and A. 790 "the mortgagor, C. the second mortgagee and the creditors claiming under the second mortgage, B. claims priority under the first mortgage, and his claim is contested by C. and those claiming under the second mortgage, on the ground that the first mortgage is usurious: **Held**, that A. the mortgagor, is interested in the event of the suit, and not a competent witness for his co-partners against B. to prove the usury.

Beverly v. Brooke and others, 425

13. And though A. the mortgagor, after executing the second mortgage, having been arrested under a ca. sa. had been discharged as an insolvent debtor, upon surrendering all his effects, which had been sold for a sum less than the debt for which he had been taken in execution; and though A. therefore, in his answer to the bill of B. the first mortgagee, disclaimed all interest in this controversy between his creditors; yet though B. put in no replication to this answer; yet **Held**, that, this disclaimer of interest did not restore A.'s competency as a witness for his co-parties to prove the usury against B. since he could not by such disclaimer exempt himself from liability to any personal decree to which B. might be entitled against him either for debt or costs. •

Ibid., 425

14. An accomplice is a competent witness, in a criminal prosecution; and, though the accomplice, on a former occasion, denied on oath all knowledge of the facts to which he testifies at the trial, yet this goes only to his credit; and if the jury find a verdict of conviction on his testimony, and the court before which the trial is had, be satisfied with the verdict, the appellate court will not set it aside.

Brown v. The Commonwealth, 769

15. See Practice in Suits in Equity, No. 6, 7, and

Beverly v. Brooke and others, 426

VI. Evidence in particular cases.

16. Evidence to prove handwriting. See Hand-writing, and

Sharpe v. Sharp and others, 249

17. Evidence to prove pedigree. See Freedom, suits for, and

Gregory v. Baugh, 665

18. Evidence to prove larceny of bank notes. See

Felony, No. 6, and

Moore v. Commonwealth, 701

19. Evidence to prove forgery of bank notes. See

Felony, No. 1, 2, and

Spencer v. Commonwealth, 751

20. Evidence, to sustain indictment for passing counterfeit bank notes. See Felony, No. 3, 4, 5, and

Martin v. Commonwealth, 745

EXAMINING COURTS.

See Indictments, Informations and Presentments, No. 9, and

Thomas v. Commonwealth, 741

EXCEPTIONS.

1. See Bill of Exceptions, and

Thompson v. Cumming, 218

- Also.
 Ewing v. Ewing. 387
 2. See Practice in Suits in Equity, No. 6, 7, and
 Beverley v. Brooke and others. 426
 3. See same title, No. 5, and
 Dickenson v. Davis and others. 401

EXECUTIONS.

I. What may be taken under a Fieri Facias.

1. H. makes a bill of sale of slaves to C. without any consideration, and notwithstanding the deed, remains in uninterrupted possession for 25 years, and dies in possession; after his death, his widow claims these slaves as her own property, and holds adversary possession of them for more than five years; then administration of H.'s estate is committed to the sheriff, who gets possession of the slaves, and a creditor of H. who had recovered judgment against the sheriff administrator, levies an execution on one of them, which is sold to satisfy the same; in detinue by the widow against the purchaser: HELD, that though H.'s bill of sale to C. was good as between the parties, yet being fraudulent as to H.'s creditors, and the subject having come to the hands of H.'s administrator, it was liable to execution at the suit of a creditor of H. and the levy of such execution and the sale under it may be pleaded in bar of any claim set up by C. the fraudulent grantee under the fraudulent bill of sale.

Clark v. Hardiman. 347

II. Under an Elegit.

2. Real estate is vested in a trustee by deed of marriage settlement, in trust to pay the wife an annuity out of the profits, and, subject to the annuity, in trust for a son of the grantor; while the annuitant is yet living, a creditor of the son recovers a judgment against him: HELD, that the son's equitable interest in the estate cannot be taken in execution at law.

Coutts v. Walker. 368

III. Lien of a Capias ad Satisfaciendum.

3. The question in Jackson v. Heiskell, 1 Leigh, 257, reconsidered in a full court, and decided contrary to the decision in that case.

Foreman v. Loyd and others. 284

*4. Several creditors recover judgment against N., and sue out writs of ca. sa., upon which he is taken and charged in execution; then F. recovers judgment against the same debtor, and sues out an elegit, on which his lands are extended, and a moiety delivered to F.; and then the debtor is regularly discharged from custody under the writs of ca. sa. as an insolvent debtor, putting into his schedule the whole of the lands which had been extended under F.'s elegit: HELD, the lien of the writs of ca. sa. executed, given by the statute, 1 Rev. Code, ch. 134, § 10, does not overreach and avoid the extent under F.'s elegit. Ibid., 284

IV. When a second Execution may issue.

5. Construction of the 3d section of the statute of executions, 1 Rev. Code, ch. 134: It authorizes a party who has sued out one execution, to sue out other executions, if the first be not returned and be not executed; if the first be executed, though not returned, the party is not entitled to sue out any other execution.

Windrum v. Parker and Goodwyn. 361

6. If a debtor be arrested on a ca. sa. and discharged by order of the creditor or his agent, no other execution can be had on the same judgment or decree. Ibid., 361

7. If a debtor in custody under a ca. sa. be permitted to escape, the creditor is entitled to another execution against the debtor as well as to an action against the sheriff for the escape. By GREEN, J., in S. C., 361

V. Remedy against Sheriff for not returning Execution.

8. A fi. fa. sued out by C. against P. is delivered to the sheriff, and P. the debtor pays the amount of the execution to C. the creditor; the sheriff fails to make due return of the execution: HELD, P. the debtor cannot maintain a motion in the name of C. the creditor against the sheriff for a fine for failing to return the execution, even though the debtor were a party injured thereby.

Fletcher v. Chapman. 560

9. Neither the statute which gives a motion against a sheriff for a fine for failing to return an execution, nor the statute which gives a motion to the sheriff against his deputy, to recover the amount of fines imposed upon the sheriff for the alleged defaults of the deputy, is imperative on the court to give such judgments; but the court, in its sound discretion, may give or deny judgment in such cases.

Ibid., 560

VI. Remedy where Execution Issues Irregularly.

10. A fi. fa. is directed to the sheriff of Campbell, but is delivered to and levied by the serjeant of Lynchburg, who takes a forthcoming bond upon it, reciting that the writ had been directed to the serjeant: HELD, the writ gave no authority to the serjeant, and no warrant to him to take the forthcoming bond, and that the bond is variant from the execution, and therefore the bond ought to be quashed.

Couch v. Miller. 545

11. See Forthcoming Bond, No. 3, and

S. C., 545

VII. Executions on Decrees in Equity.

12. The statute giving common law executions on decrees in chancery, gives the courts of chancery the superintendence and control of all such process, and power to correct irregularities and abuses in it.

Windrum v. Parker and Goodwyn. 361

13. The courts of chancery may quash executions irregularly sued out on their decrees, and forthcoming bonds taken under them, on motion made on notice, in a summary way. Ibid., 361

VIII. Other matters relating to Executions.

15. See Injunction, No. 2, and

Miller v. Crews. 576

16. See Indemnifying Bond, No. 1, 2, and 630. 651

17. See Insolvents, and

Harrison v. Norfolk Justices. 764

EXECUTORS AND ADMINISTRATORS.

I. What Court may grant Probate or Administration.

A resident of Kentucky dies intestate there, having no estate in Virginia, but a claim on this commonwealth for money: HELD, the circuit court of Henrico county, wherein is the seat of government, has jurisdiction to grant administration of such decedent's estate.

Commonwealth v. Hudgin. 248

2. Letters of administration granted by a court having no jurisdiction to grant them, are merely void; and the court having competent jurisdiction to grant the administration, may proceed to grant it, though the letters of administration before improperly granted, have not been revoked.

Ex parte Barker, Gen. Court. 719

3. When administration of a decedent's estate has been duly granted by any court of competent jurisdiction, that same court only, upon the death of the administrator, has the jurisdiction to grant administration de bonis non.

Ex parte Lyons, Gen. Court. 761

II. Who should be preferred in granting Administration.

4. A person dies intestate in 1825; and in 1830, a distributee and a creditor come, at the same time, to ask administration: HELD, the court has no discretion to choose between them, but must prefer the distributee.

Haxall v. Lee. 267

III. Bond required of Executor or Administrator.

5. Bond with surety taken from an administrator with will annexed, with condition, not in form prescribed by law for official bond of administrator with will annexed, but in form prescribed for an administrator, and not exactly conforming even to that: HELD, this is not a good statutory bond, and no suit either at law or in equity, can be maintained against the surety, for the benefit or at the relation of a legatee.

Frazier & c. v. Frazier's ex'ors & c., 642

6. Quære, whether such a bond be good as a common law bond, for the indemnity of the justices to whom it was given? Ibid., 642

IV. Remedies of Executor or Administrator.

7. Testator bequeaths slaves to his son G. for life, remainder to G.'s children; the executor, being apprehensive that G. will sell the slaves to persons who will carry them out of the state, applies to court of chancery to restrain G. from so doing, and to compel him to give security that the property shall be forthcoming at his death for the legatees in remainder; the executor alleging that he had never assented to the legacy, and the legatee for life alleging that he had assented thereto: HELD, if the executor had not assented to the legacy, he had plain remedy at law to recover the subject; if he had assented to it to the legatee for life, that assent enured to benefit of legatees in remainder, and though they might, the executor could not, ask the aid of the court to secure the subject to the legatees in remainder.

Bishop's ex'or v. Bishop and others. 484

8. See Executions, No. 1, and

Clark v. Hardiman. 347

V. Remedies of Administrator de bonis non.

9. An administrator makes sale of personal property of decedent, partly for cash, partly on credit, and says on oath, in answer in chancery, that he did not mean to convert proceeds to his own use; before credit payment due, his administration is revoked, and administration de bonis non granted to another: **Held**, administrator de bonis non entitled to sue for and recover the deferred payment of the vendee.

Heffernan's adm'or &c. v. Grymes' adm'or &c., 512

10. A. having been guardian of B. & C., and B. being out of country, and C. the younger of the wards, having attained to full age, A. delivers to C. six slaves, the property of both wards in equal shares, and takes bond and security from C., with condition that if B. returns to the country, or in any other manner claims his proportion of said slaves, and their hires, and receive satisfaction from C., then obligation to be void &c. One of distributees of B. sues D. as executor of A., his former guardian, for his share of B.'s moiety of the slaves, and recovers decree in chancery for value of share, which is satisfied out of A.'s estate: **Held**, the administrator de bonis non of A. is entitled to an action on the indemnifying bond given by C. to A. to recover the amount so paid from C.'s surety therein bound.

Lamb v. Harrison's adm'or &c., 525

VI. Remedies against Administrator de bonis non.

11. See Declaration, No. 1, 2, and Bishop v. Harrison's adm'or &c., 532

VII. Right of Executor or Administrator to be substituted for creditors of Decedent.

12. Bill by creditors against executors and devisees, to charge their demands on decedent's real estate, the same being charged with debts by his will; on the settlement of the executor's accounts, it is found he is largely in advance to the estate, for payments made by him to creditors, beyond the available assets by him received; though there is a much greater amount, due the testator's estate, of debts not desperate: **Held**, the executor shall rank as a creditor on the real, by substitution in place of the creditors, whose demands he has satisfied out of his own pocket.

Kinney's ex'ors &c. v. Harvey &c., 70

EXECUTORY LIMITATIONS.

1. Testator devises and bequeaths to his two grandsons D. and T. B. children of his deceased daughter M. B. sundry real and personal estate, and adds "all the estate given to my grandsons and to *be equally divided between them, each holding his part in fee simple, upon condition that each shall have issue of his body; but if either should die leaving no such issue, then his share shall pass to the surviving grandson; and such survivor shall hold and enjoy in fee simple the whole estate given to both, upon condition that such surviving grandson shall, at the time of his death, leave issue of his body; but if both my grandsons shall die, neither of them leaving such issue as aforesaid, and any of the children or grandchildren of my daughter E. M.T. should be then living, the whole estate given to my two grandsons shall be considered as given for life only, and the same shall, after their death without such issue as aforesaid, be equally divided in fee simple among the issue of my daughter E. M.T. then living, and the children of such of them as may then be dead." **Held**, each of the grandsons took a fee simple in the moiety devised to him, with an executory devise limited and well limited thereon to the other, on the contingency of either dying without leaving issue living at his death.

Burfoot v. Burfoots, 119

2. See Estates Tail, No. 2, and Watts v. Cole and wife and others, 653

FELONY.

I. In Forging Bank Notes.

1. Upon trial of an indictment for forging bank notes, the fact, if proved, of the forged notes mentioned in the indictment, and other forged notes of like kind, and the plates, implements and materials, for forging such notes, being found in the prisoner's possession is prima facie or circumstantial, presumptive evidence, that the prisoner was the forger, proper to be given to the jury.

Spencer v. Commonwealth, 751

2. And such forged notes &c. being found in possession of the prisoner in the county of B. is like prima facie evidence, proper to be given to the jury, of the fact that he committed the forgery there. **Ibid.**, 751

II. In passing Counterfeit Bank Notes.

3. Upon the trial of an indictment for passing counterfeit bank notes, proof that prisoner had, about same time, passed another note of same kind,

which was thought to be a counterfeit, and which he took back, though this note is not produced at the trial, is admissible evidence to prove the scienter.

Martin v. Commonwealth, 745

4. Upon the trial of an indictment against M. for passing counterfeit bank notes, the prisoner appears clearly to have been confederated with one L. in passing counterfeit notes, and present when L. passed such notes; the notes so passed by L. are produced in evidence against the prisoner: **Held**, they are proper evidence. **Ibid.**, 745

5. In a criminal prosecution for passing counterfeit bank notes, it is not necessary to prove the notes to be counterfeit, by an officer of the bank, of which the notes are counterfeited. **Ibid.**, 745

III. In Stealing Bank Notes.

6. In an indictment for larceny of bank notes, it is not indispensably necessary to produce the stolen notes upon the trial.

Moore v. Commonwealth, 701

IV. Larceny.

7. If goods be stolen in one county, and carried into another, the thief may be indicted in either, the offence being complete in both.

Commonwealth v. Cousins, 708

V. In carrying Slaves out of State.

8. T. carries the slaves of D. out of the state, without the owner's consent, with intent to deprive him of the slaves, until T. should receive a reward for apprehending and restoring them: **Held**, this is felony in T. under the statute, 1 Rev. Code, ch. 111, § 30.

Thomas v. Commonwealth, 741

9. Indictment against T. for carrying out of the state, four slaves named Sandy, Henry, Poll and Hyatt, the property of D. without his consent, and with intent to defraud and deprive him of the property; but the record of the examining court, shews he was examined, and committed, for so carrying away the three first named slaves, and another named Harriet, not Hyatt: **Held**, the indictment ought not to be quashed for this cause; and the court instructing the jury, that the prisoner was not, under this indictment, to be convicted for carrying away Harriet or Hyatt, and the jury, with this instruction, convicting him: **Held**, further, this conviction is right. **Ibid.**, 741

VI. Legal Consequences of Conviction of Felony.

10. A justice of the peace is convicted of the felony of malicious stabbing, sentenced to the penitentiary, confined there, and then pardoned: **Held**, the conviction and judgment for this felony, was a forfeiture of his office of justice, and incapacitated him from afterwards acting under his commission; and the pardon neither avoided the forfeiture, nor restored his capacity. **Commonwealth v. Fugate**, 724

VII. Other matters relating to Indictment for Felony.

11. See Indictments, Informations and Presentments.

FEME COVERT.

1. Female ward makes deed of general release and acquittance to guardian, without any settlement of accounts, and deed of gift to guardian's infant son, without having its contents and effect explained to her; and marries the same day; husband lives for more than 20 years, and then dies: **Held**, the lapse of time during the coverture does not affect the right of the wife to impeach the deeds in equity.

Waller v. Armistead's adm'ors, 11

2. To debt on bond, defendant pleaded, that she was feme covert at time the bond was executed; plaintiff replied, that defendant's husband had abjured the commonwealth, and was not then or now a citizen thereof; on general demurrer to this replication, it was held nought.

Branch v. Bowman, 170

3. A feme covert, quoad property settled to her separate use, is a feme sole, and has a right to dispose of all her separate personal estate, and the profits of her separate real, in same manner as if she were feme sole, unless her power of alienation be restrained by the instrument creating the separate estate.

Vizonneau v. Pegram and others, 183

4. See Deeds, No. 1, and Currie and others v. Page and others, 617

FOREIGN ATTACHMENT.

See Absent Debtors.

FOREIGN JUDGMENT.

Under the provision of Const. U. S. art. 4, § 1, judgments of another state of the union are not to be re-

garded here as foreign judgments, but have the same effect as judgments of our own courts.

Clarke's adm'or v. Day, 172

FORFEITURE.

See Felony, No. 10, and

Commonwealth v. Fugate, 724

FORGERY.

1. See Felony, No. 1, 2, and

Spencer v. Commonwealth, 751

2. See Felony, No. 3, 4, 5, and

Martin v. Commonwealth, 745

3. See Indictments, Informations and Present-

ments, No. 1, 2, and

Brown v. Commonwealth, 760

FORTHCOMING BOND.

1. It is competent to the obligors in a forthcoming bond to move to quash it for irregularity.

Couch v. Miller, 545

2. A fl. fa. is directed to the sheriff of Campbell, but is delivered to and levied by the sergeant of Lynchburg, who takes a forthcoming bond upon it, reciting that the writ had been directed to the sergeant: HELD, the writ gave no authority to the sergeant, and no warrant to him to take the forthcoming bond, and that the bond is variant from the execution, and therefore the bond ought to be quashed. Ibid., 545

3. Upon a motion to quash a forthcoming bond, for defects apparent on the face of the execution on which it was taken, an appellate court will regard the execution as part of the record, though not made so by any express order to that effect. Ibid., 545

FRAUD, MISTAKE AND SURPRISE.

1. A fl. fa. being sued out by J. against M., and being in the hands of the sheriff, M. the debtor, applies to G. to join him in a forthcoming bond thereon, and represents to him, in the sheriff's presence, that the amount of the debt is about one seventh of the real amount, which representation the sheriff does not contradict; whereupon, G. consents to become the surety, and M. and G. sign and seal a forthcoming bond, blank as to the amount of the execution, and as to other material particulars, and deliver it to the sheriff, who afterwards fills up the blanks; and execution is awarded upon this forthcoming bond: HELD, G. is not entitled to relief in equity against the obligation of the bond, upon the ground of the deception which induced him to execute it, as the creditor to whom it was taken, was no party to the fraud, and the sheriff, who was party to it, was not the creditor's agent in taking the bond. Gordon v. Jeffery, 410

2. But the award of execution on the forthcoming bond, was founded on proof by the sheriff, of notice given by him to G., "when in fact no such notice had been given, and the sheriff had induced G.'s attorney to believe that no notice would be given; whereby G. was deprived of the opportunity of defending himself at law, upon the plea of non est factum: HELD, that in giving notice on a forthcoming bond, the sheriff acts as agent of the creditor, who is not entitled to benefit by any fraud he commits in relation thereto; and that, in the present case, the surety was entitled to relief in equity, upon the ground of surprise, but only on terms that he himself shall do equity; that is, that he shall pay the amount for which he really intended to bind himself as surety. Ibid., 410

FRAUDULENT DEEDS.

I. As between Grantor and Grantee.

1. See Contract, No. 1, 2, and

Waller v. Armistead's adm'ors, 11

II. As between Feme Grantor, her Grantee, and her Intended Husband.

2. Deeds executed by a woman immediately before her marriage, giving away her property, without knowledge of intended husband, are fraudulent as to the husband.

Waller v. Armistead's adm'ors, 11

III. As between Purchaser with notice of Fraudulent Deed, and Creditors of Grantor.

3. If A. make a fraudulent conveyance of personal property to B., and then make a conveyance for valuable consideration to C., who has full notice of the previous fraudulent conveyance, the statute of frauds and perjuries does not apply to protect such a subsequent purchaser against the previous fraudulent conveyance, nor upon the principles of the common law can he claim against the previous fraudulent conveyance whereof he had notice when he purchased. By GREEN, J., in Tate v. Liggett and Matthews, 84

4. Delson mortgages property to secure a fair debt due The Farmers' Bank, and a pretended debt to Tate: L. and M. bring a suit in chancery impeaching the security provided by the mortgage for pretended debt to T. as fraudulent: pending this suit, D. mortgages not the property, but his equity of redemption in it, to S. & Co., fair creditors, to secure a just debt due them; and then L. and M. obtain a decree for their claim against D.: HELD, that S. & Co. purchased only what D. could rightfully convey, that is, his equity of redemption, and took, subject not only to the fair debt due The Farmers' Bank, but the pretended debt secured to T., and L. and M. being creditors by decree, and thus having a right to satisfaction in preference to the pretended creditor T., acquired a preference also over the second mortgagees S. & Co., who were postponed by contract to the pretended creditor T. Tate v. Liggett &c., 84

IV. Remedy of Creditors, at law, to subject property fraudulently conveyed.

5. See Executions, No. 1, and

Clark v. Hardiman, 347

V. When Creditors may come into Equity.

6. A creditor at large, not having obtained judgment or decree against his debtor, cannot resort to equity to set aside a fraudulent conveyance of his debtor, though interference of the court be also prayed to prevent a sale or removal of the subject, and though the subject be equitable estate not liable to execution. Tate v. Liggett &c., 84

VI. When Equity will decree a Sale of the Subject fraudulently conveyed.

7. A father makes a voluntary and fraudulent conveyance of real estate to his children, and dies, leaving other real estate which descends; upon a bill by a creditor against the donees and heirs at law, to subject the land conveyed and land descended, to debt of the donor and ancestor, chancellor may decree a sale of both, out and out, to satisfy the creditor's demand. Blow v. Maynard, 30

VII. Responsibility of Fraudulent Donees for Rents and Profits.

8. A man makes a conveyance of real estate to the use of his children, and contingently to the use of his wife, and dies; upon a bill by a creditor after grantor's death, against grantees, who claim under the deed, conveyance declared not only voluntary, but fraudulent in fact on the part of the grantor: yet HELD, that the grantees are not accountable for rents and profits prior to the decree. Blow v. Maynard, 30

VIII. Widow's Right of Dower in Property fraudulently conveyed by Husband.

9. See Dower, No. 2, and

Blow v. Maynard, 30

FREEDOM—Suits for.

I. How Emancipation may be effected.

1. See Emancipation.

706 *II. Evidence in Suits for Freedom.

2. Quære, whether, in the case of a person claiming freedom on the ground of descent from a female Indian ancestor, hearsay be admissible, not only to prove the plaintiff's pedigree, but also to prove that the female ancestor, from whom he derives his descent, was an Indian? The court, four judges sitting, being divided on the point. Gregory v. Baugh, 665

3. Quære, also, whether, if a person claiming freedom on the ground of Indian descent in the maternal line, prove his descent from a native American Indian female ancestor, the onus probandi lies on the defendant to prove that such female ancestor was brought into the country, at a time and under such circumstances that such Indians might lawfully be enslaved, or on the plaintiff to prove that such his ancestor was brought into the country, at a time and under such circumstances that she could not lawfully be enslaved? The court being divided on the point. Ibid., 665

4. A woman named S. brought a suit for her freedom in 1772, and dying soon after, that proceeding was abated: some twenty-five or thirty years after, one W., an old person, informed her son, that S. was free, and her family, in consequence of their Indian descent from the mother; in a suit brought by S.'s grandson to recover his freedom, W.'s son testifies to those declarations of his mother, as to the plaintiff's ancestor S.: HELD, that this hearsay evidence is not objectionable on the ground, that the declarations of W. were made post litem motam. Ibid. Dissentiente, BROOKE, P. 665

GIFT.

A verbal gift of a chattel, without any actual delivery, does not pass the property to the donee.
Ewing v. Ewing, 387

GRAND JURORS.

See Jurors.

GUARDIAN AD LITEM.

See Infancy, No. 1, and
Watts v. Cole and wife and others, 653

GUARDIAN AND WARD.

1. Deeds of gift, or of release and acquittance, made by ward to guardian, or person who has borne part of guardian, shortly after ward's attainment to full age, but before delivering of ward's estate, and without any settlement of accounts, are void on a principle of public policy, without proof of actual fraud; much more, if circumstances of transaction evince actual fraud.

Waller v. Armistead's adm'ors, 11
2. No just distinction in this respect, between deeds of gift, and deeds of release and acquittance, by ward to guardian: both equally condemned by equity. Ibid., 11

3. See Lapse of time, No. 2, and S. C., 11

4. See Payment by Mistake, and Lee and wife v. Stuart &c., 76

HANDWRITING.

B. is appointed adm'r of S. at a time when S. was supposed to have died without a will; a will is afterwards found; B. had never seen S. write; but acquired a knowledge of his handwriting from examination of his papers after his death, and testifies from his knowledge of the handwriting thus acquired, that the will is wholly in S.'s hand: HELD, this is competent evidence of the handwriting in the court of probat.

Sharp v. Sharp and others, 249

HEIR.

I. Summary remedy against Heir.

1. The 37th section of the statute concerning sheriffs, 1 Rev. Code, ch. 78, which binds the lands of a sheriff to his sureties, does not authorize a surety, upon summary motion against a sheriff, his heirs or devisees, to obtain a judgment for the money paid by such surety; but where a judgment has been previously obtained, authorizes the court to award an execution against the lands.

Bacchus v. Gee, 68

II. Power of Equity to decree Sale of lands descended.

2. A father makes a voluntary and fraudulent conveyance of real estate to his children, and dies, leaving other real estate which descends; upon a bill by a creditor against the donees and heirs at law, to subject the land conveyed and land descended, to debt of the donor and ancestor, chancellor may decree a sale of both, out and out, to satisfy the creditor's demand.

Blow v. Maynard, 80

797 *III. Responsibility of Heir for Rents and Profits.

3. Upon a bill against an heir at law, to subject real estate descended, to a debt of the ancestor, the heir at law is not accountable for rents and profits accrued before decree.

Blow v. Maynard, 80

HUSBAND AND WIFE.

I. Marital Rights of Husband.

1. To property of wife conveyed immediately before marriage, without knowledge of husband. See Fraudulent Deeds, No. 2, and

Waller v. Armistead's adm'ors, 11

2. To slaves for which wife had executed instrument of emancipation; but the instrument was not fully proved before the marriage. See Emancipation, No. 4, and

Thrift v. Hannah &c., 300

II. Rights of wife in Separate Estate.

3. A feme covert, quoad property settled to her separate use, is a feme sole, and has a right to dispose of all her separate personal estate, and the profits of her separate real, in same manner as if she were feme sole, unless her power of alienation be restrained by the instrument creating the separate estate.

Vizonneau v. Pegram and others, 183

III. Rights of the Issue of the marriage.

4. See Marriage Settlement, No. 1, and

Lee and wife v. Stuart and others, 76

IV. Incompetency of wife to testify against husband.

5. See Evidence, No. 11, and Robin &c. v. King, 140

ILLEGAL CONTRACT.

See Contract.

INADEQUACY OF PRICE.

See Contract.

INCESTUOUS MARRIAGES.

See Construction of Statutes, No. 2, and Commonwealth v. Perryman &c., 717

INDEMNIFYING BOND.

1. An indemnifying bond given to a sheriff, under statute, 1 Rev. Code, ch. 134, § 25, 26, can only be put in suit at the relation of the person having the legal title, to the property taken in execution and sold by the sheriff, not at the relation of any person having an equitable right therein.

Garlands v. Jacobs &c., 651

2. An officer is indemnified for selling property taken under execution, the sale whereof is forbidden by landlords of the debtor, claiming payment of rents in arrear; the officer sells; the landlords bring action against him and recover judgment for damages: Quære, under what circumstances, in an action brought by the officer upon the contract for the indemnity, it may be competent to the defendants to prove the real value of the property to be less than the damages assessed in the action against the officer, or what is the effect of the judgment against the officer, as against the persons bound to indemnify him?

Crawford and others v. Jarrett's adm'or, 630

3. See Assumpsit, No. 4, and S. C., 630

INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

I. Sufficiency of indictment.

1. An indictment for causing and procuring a counterfeit bank note to be offered to be passed, without stating by whom or how the accused caused and procured it to be done, is sufficiently certain, and good.

Brown v. Commonwealth, 760

2. An indictment for passing a counterfeit bank note to a slave, with intent to defraud the bank, is good. Ibid., 760

3. In an indictment against justices of the county court, for misbehaviour in office, it is necessary that the act imputed as misbehaviour, be distinctly and substantially charged to have been done with corrupt, partial, malicious or improper motives, and above all, with knowledge that it was wrong, though there are no technical words indispensably required, in which the charge of corruption, partiality &c. shall be made.

Jacobs and others v. Commonwealth, 709

4. An indictment, in such case, not charging the corruption, partiality &c. distinctly and substantially, and not charging the scienter: HELD, naught after verdict of conviction, its defects not being cured by the statute 1 Rev. Code, ch. 100, § 44.

5. Indictment for a nuisance, caused by a certain mill and mill dam, the property of the defendant, situate near to a common highway, without particular specification or description of the mill and

798 without expressly alleging that it is in "the county wherein the indictment is found: HELD, good and sufficient upon general demurrer.

Stephen v. Commonwealth, 759

6. Indictment against a surveyor of a public road, describing the road, but not naming the surveyor: HELD, insufficient and bad, on general demurrer.

Commonwealth v. Snider, 744

II. Record of Indictment found.

7. Record states, that two indictments against surveyors of roads, are found true bills by grand jury, not naming the surveyors: HELD, this is not a record of indictments found against any particular surveyors.

Commonwealth v. Snider, 744

III. Process upon Presentment.

8. Upon a presentment in a circuit court, for an offence for which the penalty prescribed by law, exceeds not 20 dollars, the court cannot proceed by way of information, but only in a summary way, under the statute, 1 Rev. Code, ch. 100, § 65.

Webb v. Commonwealth, 721

IV. Motion to quash Indictment.

9. Indictment against T for carrying out of the state, four slaves named Sandy, Henry, Poll and Hyatt, the property of D. without his consent, and with intent to defraud and deprive him of the property; but the record of the examining court, shews he was examined, and committed, for so carrying away the three first named slaves, and another named Harriet, not Hyatt: HELD, the

indictment; ought not to be quashed for this cause; and, the court instructing the jury, that the prisoner was not, under this indictment, to be convicted for carrying away Harriet or Hyatt, and the jury, with this instruction, convicting him: **Held**, further, this conviction is right.

Thomas v. Commonwealth.

741

V. Impanelling Jury.

10. See Jurors.

VI. Evidence at the Trial.

11. See Evidence.

VII. New Trial.

12. See New Trial.

VIII. Legal consequences of Conviction.

13. See Felony, No. 10, and Commonwealth v. Fugate.

724

INFANCY.

1. In a writ of right, the præcipe and count describe tenant as an infant: tenant appears, pleads and defends himself by attorney, no guardian ad litem being assigned him; nor does it appear he came to full age pending the writ: verdict and judgment for demandants: tenant in person appeals to this court: Quære, whether he can object to the proceedings on account of his infancy here, or ought to have resorted to writ of error, coram nobis?

Watts v. Cole and wife and others.

658

2. See Marriage Settlement, No. 1, and

Lee and wife v. Stuart and others.

76

INFORMATION.

See Indictments, Informations and Presentments.

INJUNCTION.

I. To Judgment at Law.

1. In an action of debt, defendant pleads, a special plea in bar, and the issue joined thereon is found against him, and judgment rendered for plaintiff; then defendant exhibits bill in chancery, stating that though he was unable to prove the matter of his plea on the trial at law, he is now able to prove it, without suggesting fraud, accident, mistake or other circumstance which prevented him from establishing his defence at law, and praying relief against the judgment: **Held**, the court of chancery has no jurisdiction to grant relief in such a case.

Norris v. Hume.

384

II. To Injoin Sale under Execution.

2. M, a non-resident of the state, causes a f. fa. to be levied on tobacco, corn &c. in possession of L, the debtor; and C, who claims a legal right to the goods, joins L, in a forthcoming bond for the delivery thereof at the time and place of sale: **Held**, that C, if he has the legal right he claims, has a plain remedy at law, by action against the sheriff; and therefore cannot ask the interference of a court of equity to injoin M's proceeding under his execution and upon the forthcoming bond.

Miller v. Crews.

576

II. To restrain Tenant for life from carrying Slaves out of State.

3. Testator bequeaths slaves to his son G, for life, remainder to G's children: the executor, being apprehensive that G, will sell the slaves to persons who will carry them out of the state, applies to court of chancery, to restrain G, from so doing, and to compel him to give security, that 799 the property shall be forthcoming at his death for the legatees in remainder: the executor, alleging that he had never assented to the legacy, and the legatee for life alleging that he had assented thereto: **Held**, if the executor had not assented to the legacy he had plain remedy at law to recover the subject; if he had assented to it to the legatee for life, that assent enured to benefit of legatees in remainder, and though they might, the executor could not, ask the aid of the court to secure the subject to the legatees in remainder.

Bishop's ex'or v. Bishop and others.

484

IV. Order dissolving Injunction.

4. Four plaintiffs in equity unite in same bill, praying injunction to stay proceedings on four several judgments at law against them, respectively, on grounds of equity common to all: the bill is exhibited against five parties defendants: the injunction awarded: pending suit, two of plaintiffs and three of defendants die: and chancellor makes an order that unless living plaintiffs and representatives of deceased plaintiffs, revive the injunction, in name of representatives of deceased plaintiffs, against representatives of deceased defendants, on or be-

fore a given day, the injunction shall stand and be dissolved: this order is irregular and erroneous.

M'Kays v. Hite and others.

146

INSOLVENTS.

1. A county court, or justices of the peace in the country, to whom a debtor in execution applies to have the oath of insolvency administered to him, and to be thereupon discharged, have no discretion to administer or refuse the oath, but are bound to administer it, though they may be of opinion, that the debtor has effects not put into his schedule to be surrendered, which he fraudulently conceals.

Harrison v. Norfolk Justices, Gen. Court.

764

2. And if the justices being asked to administer the oath, and order a discharge of the prisoner accordingly, refuse to do so, a mandamus lies from the circuit court to compel them.

Ibid.,

764

INTEREST.

An attorney at law is employed to collect debts, and some of them are lost to his client through his negligence: **Held**, the attorney is chargeable for the principal of the debts so lost, but not with interest thereon.

Rootes v. Stone.

650

INTERLOCUTORY DECREES.

See Appellate Jurisdiction, No. 5, and

Madden v. Madden's ex'ors.

377

JEOFAILS.

1. See Declaration, No. 8, and

Thompson v. Cumming.

321

2. See Writ of Right, No. 9, 10, and

3. See Indictments, &c., No. 4, and

Jacobs &c. v. Commonwealth.

709

JOINT ACTION.

See Practice in Actions at Law, No. 8, and

Peasley v. Boatwright.

196

JUDGMENTS.

I. Mode of entering Judgment.

1. In joint action of debt against two, there is judgment by default against one: the other pleads to the action, and there is trial, and verdict against him: **Held**, there should be one and the same joint judgment against both.

Peasley v. Boatwright.

196

II. Lien created by the Judgment.

2. See Lien.

III. Effect here of Judgments rendered in other States.

3. Under the provision of Const. U. S. art. 4. § 1, judgments of another state of the Union, are not to be regarded here as foreign judgments, but have the same conclusive effect as judgments of our own courts.

Clarke's adm'or v. Day.

172

4. To debt on judgment of a court of Kentucky, the plea of nil debet is not a good plea.

Ibid.,

172

JURISDICTION.

I. Cases in which Equity will not take Jurisdiction.

1. Bill in chancery, stating that plaintiff is entitled to fee simple and absolute estate in certain real and personal property held by her; but that defendants insist she has only a life estate, remainder to them; and praying a decree declaring and settling her rights: **Held**, the court has no jurisdiction to entertain such a bill.

Randolph v. Randolph &c.

540

2. Bill in chancery, by plaintiff against the executors of his deceased father and a purchaser under them, claiming slaves "under parol gift of the father in his lifetime, accompanied by delivery of possession, and praying discovery of the increase of the slaves, of which, bill shews plaintiff was not ignorant, and a decree for the slaves and their increase before suit brought as well as pendent lite, and an account of profits: **Held**, the court of chancery has no jurisdiction to entertain such a bill.

Hardin's ex'ors v. Hardin.

572

3. M. and D. merchants and partners, contract debts to L, for which M. in the name of the firm of M. and D. with R. as surety, executes bonds to L, in 1799 and 1801: D. dies: M. lives till 1818, and then dies insolvent, the principal of the debts due L, with interest from 1816 remaining unpaid: R. the surety is perfectly solvent: in 1821, L., without bringing suit on the bonds against R. the surety, exhibits bill in chancery against the representatives of D., the administrator of M., the surviving partner, and R. the surety, to charge D.'s estate with the debts, or to have payment of them from the parties, according to their respective liabilities: **Held**, that L. had a clear and complete remedy at law, by action

on the bonds against R. the surety; and therefore the court of chancery has no jurisdiction to entertain such a bill.

- Linney's adm'r v. Dare's adm'r and others, 588
 4. See Account. No. 2, and Poage v. Wilson, 490
 5. See Fraud, Mistake and Surprise, and Gordon v. Jeffery, 410
 6. See Fraudulent Deeds, No. 6, and Tate v. Ligat &c., 84
 7. See Injunction, No. 1, 2, 3, and 334, 484, 576
 8. See Replevin, No. 1, and Mayo v. Winfree, 370

II. When exception should be taken to jurisdiction of Equity.

9. Where bill in chancery states matter proper for relief in equity, and defendant, without pleading to jurisdiction, in abatement, answers the bill, he is precluded from taking exception to jurisdiction afterwards, by stat. 1 Rev. Code, ch. 66, § 86, alter. if bill on its face, shew a case not properly relievable in equity.

Hickman v. Stout, 6

III. Jurisdiction of Courts of Probat.

10. See Executors and Administrators, No. 1, 2, 3, and 248, 719, 761

IV. Jurisdiction of Appellate Courts.

11. See Appellate Jurisdiction.

V. Jurisdiction of Criminal Tribunals.

12. See Felony.

JURORS.

1. A. obtains a license to keep an ordinary: A. opens a tavern under this license, and B. is his partner in the business; but A. alone resides at the tavern, and acts as keeper thereof: HELD, B. is not the keeper of an ordinary, disqualified to serve on grand juries, within the meaning of the statute, 1 Rev. Code, ch. 72, § 2.

Commonwealth v. Willson, 739

2. A person, being called as a juror in a case of felony, says, on voir dire, "that he had expressed an opinion on the circumstances as he had heard them narrated in the country; but he had not heard any of the evidence given on the examination of the prisoner, or conversed with any of the witnesses or parties; and he did not think the opinion so formed would have any influence on his mind in trying the case;" and this juror is challenged for cause: HELD, he is an indifferent juror, and the challenge for cause rightly disallowed.

Brown v. Commonwealth, 769

3. Separation of jurors. See New Trial, No. 7, and Martin v. Commonwealth, 745

JUSTICES OF THE PEACE.

1. What act will amount to an abandonment, or forfeiture of office.

1. A justice of the peace of the county of A. leaves this state, with intent to establish his residence in another state; he remains in another state nine months, but does not establish his permanent residence there; and then, he returns to, and resumes his former residence in the county of A.: HELD, he has no right to resume the exercise of his office of justice of the peace of A.

Poulson v. Accomack Justices, Gen. Court, 743

2. Conviction and sentence for felony adjudged to forfeit office. See Felony, No. 10, and Commonwealth v. Fugate, 724

II. How Justice may be removed for misbehaviour in office.

3. See Indictments &c., No. 3, 4, and Jacobs and others v. Commonwealth, 709

LANDLORD AND TENANT.

I. Liability of Landlord for Taxes.

1. Private act of assembly in 1813, authorizes *the paving of streets of Petersburg, and ascertains manner of levying expense on proprietors and tenants of lots in town: in 1815 B. lets a lot to S. for term of five years, S. yielding and paying therefor an annual ground rent of \$50 besides all taxes and other public dues in any manner accruing, and besides taxes and public dues of every kind: in 1817, the street on which the lot lies, is paved according to act of assembly, and the expense of paving apportioned and charged to and paid by S. the tenant. In the first instance: HELD, this expense of paving, is not a tax or public due of any kind, within the meaning of the covenants in the lease, which the tenant is bound to bear, and therefore he has a right to demand and recover the same of the landlord.

Bolling v. Stokes, 178

II. Ejectment by Landlord against Tenant.

2. See Ejectment, and Smoot v. Marshall, 184

III. Remedy by Tenant for wrongful Distress.

3. See Declaration, No. 7, and Jones v. Murdaugh, 447
 4. See Replevin, and 370, 372

LAND TITLES.

I. Where Commonwealth obtains Title.

1. See Easement, and Young v. Gooch and Brown, 596

II. Where Title is claimed under grant from Commonwealth.

2. See Evidence, No. 6, and Chapman v. Bennett, 329

III. Where Land is sold by Sheriff for Taxes.

3. Defendant in ejectment claims under a sale made by a sheriff in 1815, under the statute of 1814, for taxes in arrear, and shews the return of the land as delinquent, and the sale made by the sheriff, without shewing that the sheriff had strictly pursued the statute in the steps preparatory to the sale: HELD, this is not enough to divest the title of the original owner.

Chapman v. Bennett, 329

4. Under the statute of 1818-14 for sale of lands forfeited for non-payment of taxes, the deputy sheriff as well as the high sheriff is competent to make such sales. Ibid., 329

LAPSE OF TIME.

1. T. sheriff of B. for the years 1808 and 1804, collects the poor rates; and in November 1823, the overseers of the poor commence proceedings against him, by motions for balances unaccounted for: HELD, after such a lapse of time, the motions ought not to be entertained.

Overseers of the Poor v. Tucker, 580

2. Female ward makes deed of general release and acquittance to guardian, without any settlement of accounts, and deed of gift to guardian's infant son, without having its contents and effect explained to her, and marries the same day: husband lives for more than 20 years, and then dies: HELD, the lapse of time during the coverture does not affect the right of the wife to impeach the deeds in equity.

Waller v. Armistead's adm'rs, 11

LARCENY.

- See Felony, No. 6, 7, and 701, 708

LEASE.

- See Landlord and Tenant, No. 1, and Bolling v. Stokes, 178

LEGACY.

1. Testator bequeaths his personal estate to his brother J. to be sold, and the proceeds to be distributed by the brother among testator's next of kin, according to their deserts, as he should see at a future time what may turn up; the brother dies without making any appointment: HELD, the testator is to be regarded as intestate quoad this subject, and the same is distributable among his next of kin according to law.

Frazier &c. v. Frazier's ex'ors &c., 642

2. Testator bequeaths residuum of his estate to the four children of a deceased brother: two of the legatees die before testator, whereby the intended legacy of the moiety of the residuum to those two lapses: HELD, this moiety does not go to the two residuary legatees that survived testator, but as to it he was intestate and it is distributable among his next of kin according to law. Ibid., 642

3. The rule, that all legacies which fail by lapse or otherwise fall into the residuum and go to the residuary legatees, applies to specific or pecuniary legacies, but not to the subject of the residuary legacy itself. Ibid., 642

4. See Wills.

LIEN.

I. By Judgment or Decree.

1. A judgment has relation to the first day of the term at which it is rendered, *and this relation is allowed in equity as well as at law.

Counts v. Walker, 268

2. A judgment creditor has a lien in equity on the equitable estate of the debtor, in like manner as he has a lien at law on his legal estate. Ibid., 268

3. Real estate is vested in a trustee by deed of marriage settlement, in trust to pay the wife an annuity out of the profits, and, subject to the annuity, in trust for a son of the grantor; while the annuitant is yet living, a creditor of the son recovers a judgment against him, and exhibits his bill in

chancery, to subject the son's equitable interest in the estate, to the debt: **HELD**, 1. that such an equitable interest cannot be taken in execution at law; 2. that it is bound by the judgment in equity, which will apply it to the satisfaction of the debt; but 3. as the annuitant is yet living and is not compellable to take a gross sum in satisfaction of the annuity, and as the trustee is to hold the subject and pay the annuity out of the profits, the court of chancery ought not to direct the sale out and out of the debtor's equitable interest, subject to the annuity, but ought only to direct the application of the surplus of profits as they accrue, after paying the annuity, to the debt. **Ibid.**, 208

4. A judgment is obtained against a debtor; and then the debtor alien his lands to divers alienees by divers conveyances: **HELD**, all the debtor's lands in the hands of his several alienees, are alike liable to the judgment creditor, and the lands in the hands of the several alienees must contribute pro rata to satisfy the judgment.

Beverly v. Brooke and others, 426

5. Lien of ca. sa. executed, given by statute, 1 Rev. Code, ch. 184, § 10. See Execution, No. 3, 4, and Foreman v. Loyd and others, 284

II. By Deed.

6. See Mortgages and Trusts.

III. Implied Lien.

7. A vendor, taking a mortgage of the subject sold to secure the purchase money, can only claim under the mortgage, and according to its terms: the mortgage supersedes the implied equitable lien for the purchase money, which but for the mortgage would have been attached to the subject.

Little & Telford v. Brown, 353

8. The implied equitable lien of a vendor upon the subject sold, for the purchase money, does not give the vendor asserting the lien, any claim for the profits of the subject. **Ibid.**, 353

9. If goods be pawned for the security of a particular specified debt, the pawnee has no lien on the goods pawned, for any other or subsequent debt contracted by the pawnor to him, without an agreement to that effect, either express or implied from the nature or circumstances of the transaction.

Gilliat v. Lynch, 408

LIMITATION OF ACTIONS.

I. When the Statute begins to run.

1. H. makes a bill of sale of slaves to C. without any consideration, and notwithstanding the deed, remains in uninterrupted possession for 25 years, and dies in possession; after his death, his widow claims these slaves as her own property, and holds adversary possession of them for more than five years; then administration of H.'s estate is committed to the sheriff who gets possession of the slaves, and a creditor of H. who had recovered judgment against the sheriff administrator, levies an execution on one of them, which is sold to satisfy the same: in detinue by the widow against the purchaser: **HELD**, that the statute of limitations did not enure to give the widow a title to the slaves since it did not begin to run till an administrator of her husband's estate was appointed.

Clark v. Hardiman, 347

II. How Defendant must rely upon the Statute.

2. The statute of limitations cannot be insisted on in equity, without being pleaded, or in some form, relied on as a defence, in the pleadings.

Hickman v. Stout, 6

III. How Plaintiff may avoid the Statute.

3. See Declaration, No. 1, 2, and

Bishop v. Harrison's adm'r &c., 582

See also Lapse of Time.

IV. Limitation of Estates.

See Executory Limitations.

MANDAMUS.

1. Mandamus never lies if there is another specific legal remedy for the party complaining.

King William Justices v. Munday, 165

2. Mandamus does not lie for the undertaker of a public bridge, to compel the county court to levy the stipulated reward *in the county levy, because a specific remedy is given him by statute, to recover the same by action of debt against the justices refusing to levy it. **Ibid.**, 165

3. Mandamus lies from circuit court to compel justices of the peace to administer the oath of insolvency to a debtor in execution, and order his discharge, if upon being applied to, they improperly refuse to do so.

Harrison v. Norfolk Justices, Gen. Court, 764

4. See Appellate Jurisdiction, No. 2, and Mann and others v. Givens and others, 762

MARITAL RIGHTS.

See Husband and Wife.

MARRIAGE SETTLEMENT.

1. A deed of marriage settlement is made before marriage, between infant female and her guardian, the intended husband, and trustees; whereby her real estate is settled on her and her children &c. and husband covenants that he will, when after required, execute any and every further conveyance proper for more effectually settling and assuring the subject to the uses declared by the deed: husband and wife exhibit bill in chancery praying that this settlement be set aside, on the ground of the infancy of the wife at the time it was executed; and the wife on a privy examination directed by the chancellor, declares that she had freely and voluntarily joined in the bill: **HELD**, whether the infant feme were bound by the deed or not, the husband was bound by his covenant, and equity will not aid him to avoid it; and bill dismissed.

Lee and wife v. Stuart and others, 76

2. See Post-nuptial Settlements, and

Blow v. Maynard, 29

3. See Lien, No. 3, and

Coutts v. Walker, 208

MASTER AND SLAVE.

See Emancipation and Freedom.

MILLS.

1. A mill which had been built, and had gone down prior to the statute of 1819, 1 Rev. Code, ch. 235, § 10, and which was rebuilt after the passing of that statute, is not a mill thereafter built within the meaning of the statute.

Webb v. Commonwealth, 721

2. Indictment for a nuisance, caused by a certain mill and mill dam, the property of the defendant, situate near to a common highway, without particular specification or description of the mill, and without expressly alleging that it is in the county wherein the indictment is found: **HELD**, good and sufficient upon general demurrer.

Spencer v. Commonwealth, 759

MISBEHAVIOUR IN OFFICE.

See Indictments &c., No. 3, 4, and Jacobs and others v. Commonwealth, 709

MISE.

See Writ of Right, No. 9, 10, and 1, 652

MISTAKE.

1. See Fraud, Mistake and Surprise, and

Gordon v. Jeffery, 410

2. See Payment by Mistake, and

Lee and wife v. Stuart &c., 76

MONEY HAD AND RECEIVED.

See Principal and Agent, No. 1, and Hefferuan's adm'r &c. v. Grymes' adm'r &c., 512

MORTGAGES AND TRUSTS.

1. What will be construed a Mortgage, as distinguished from a Conditional Sale.

1. See Leavell v. Robinson, 161

II. Mortgagee claims only as Purchaser.

2. A creditor at large, procuring a mortgage of his debtor's property, cannot claim as a creditor, or in the double character of creditor and purchaser, but only as purchaser.

Tate v. Liggett &c., 84

III. Like other Purchasers affected with notice of Prior Mortgage.

3. C. takes a mortgage from A. to secure just debts and is informed immediately before the mortgage is executed, that A. has mortgaged the same subject to B. to secure a debt due him, but that the debt to B. is usurious; which mortgage to B. is not duly recorded: **HELD**, that C. and all claiming under the mortgage to him, are purchasers with notice of the prior unrecorded mortgage to B. and that the contemporary information that the prior mortgage was usurious, does not affect the question of notice of the prior mortgage.

Beverly v. Brooke and others, 426

IV. When a Prior Mortgage shall be postponed to a Subsequent Mortgage.

4. A. applies to B. for a loan of money, upon the security of a mortgage of *slaves then held by A., and B. being doubtful as to A.'s title to the slaves, and apprehensive that C. has some claim to them, applies to C. to know whether he has such claim, explaining his reason for the enquiry; upon which C. informs him he has no right to the slaves, being at the time apprised of

all the facts, on which his right, if any he has, depends: B. lends the money, and takes the mortgage of the slaves: HELD, that C. cannot be allowed, in equity, to assert the right he had disclaimed against the mortgagee B.

Dickenson v. Davis and others, 401

V. When a Prior Mortgage shall be postponed to a Subsequent Judgment.

5. Deison mortgages property to secure a fair debt due The Farmers' Bank, and a pretended debt to Tate: L. and M. bring a suit in chancery impeaching the security provided by the mortgage for pretended debt to T. as fraudulent: pending this suit, D. mortgages not the property, but his equity of redemption in it, to S. & Co. fair creditors, to secure a just debt due them; and then L. and M. obtain a decree for their claim against D.: HELD, that S. & Co. purchased only what D. could rightfully convey, that is, his equity of redemption, and took, subject not only to the fair debt due The Farmers' Bank, but the pretended debt secured to T. And L. and M. being creditors by decree, and thus having a right to satisfaction in preference to the pretended creditor T. acquired a preference also over the second mortgagees S. and Co. who were postponed by contract to the pretended creditor T.

Tate v. Liggit &c., 84

VI. Construction of the meaning and import of Mortgage.

6 J. and D. W. purchase lands of B., and to secure the purchase money, payable in instalments, convey same lands to a trustee, upon trust to permit J. and D. W. to take the profits thereof, to their order, use and benefit, till the time appointed for payment of the last instalment, and then, in default of payment, to sell the subject, and apply proceeds to satisfaction of the debt: afterwards, and before the last instalment of the debt to B. falls due, J. and D. W. mortgage same lands, and all yearly rents, issues and profits thereof, and all their right and interest therein, to L. and T. to secure a debt due them: HELD, that L. and T. are entitled, in preference to B., to all profits accruing prior to the time when the last instalment of debt to B. falls due

Little and Telford v. Brown, 353

7. A. mortgages lands to B. to secure a debt due to him: and then, by a general deed of trust, conveys the equity of redemption of the same lands, together with sundry personal property, to a trustee, to raise a fund to pay all his debts, including debts due B. other than that specifically secured by the mortgage: HELD, B. is entitled to receive the whole of the debt specifically secured to him by the mortgage, out of the proceeds of the mortgaged lands, and then to come in for distribution of the fund in the hands of the trustee under the general deed of trust, for satisfaction of the other debts due him, pro rata with the other creditors.

Bell v. Hammond and others, 416

VII. Right of taking Securities.

8. See Pawns and Pledges, and

Gilliat v. Lynch, 493

9. See ante, No. 7, and

Bell v. Hammond and others, 416

MOTION.

I. By Surety against Principal.

1. Under the statute giving summary remedy to all sureties against their principals, 1 Rev. Code, ch. 116, § 1, no motion lies for sureties against devisees of their principals.

Bacchus v. Gee, 68

II. By Creditor against Sheriff for not returning Execution.

2. A fl. fa. sued out by C. against P. is delivered to the sheriff, and P. the debtor pays the amount of the execution to C. the creditor: the sheriff fails to make due return of the execution: HELD, P. the debtor cannot maintain a motion in the name of C. the creditor, against the sheriff for a fine for failing to return the execution, even though the debtor were a party injured thereby.

Fletcher v. Chapman, 560

III. By surety of sheriff against his heirs or devisees.

3. The 37th section of the statute concerning sheriffs, 1 Rev. Code, ch. 78, which binds the lands of a sheriff to his surety, does not authorize a surety, upon summary motion, against a sheriff, his heirs or devisees, to obtain a judgment for the money paid by such surety: but where a judgment has been previously obtained, authorizes the court to award an execution against the lands.

Bacchus v. Gee, 68

806 *IV. By sheriff against deputy and his securities.

4. A deputy sheriff gives bond with eight sureties to the sheriff: one of the sureties dies: HELD, a motion lies on the bond against the deputy and the surviving sureties.

Jacobs v. Hill and others, 393

5. A bond is executed to a sheriff, during the first year of his shrievalty, by a deputy sheriff and his sureties, the condition whereof recites that the sheriff has been commissioned sheriff of N. and that the deputy has undertaken the duties of the said office for and during the time the sheriff may continue in office &c.: HELD, that the contract here recited is a deputation of the office not only for the first but for the second year also of the shrievalty, and the sureties are bound for the conduct of the deputy during both years.

6. What evidence is admissible against sureties of deputy. See Evidence, No. 3, and S. C. 393

7. The statute 1 Rev. Code, ch. 78, § 33, giving a summary remedy by motion for a sheriff against his deputy and his sureties, does not authorize the court to allow interest.

8. Neither the statute which gives a motion against a sheriff for a fine for failing to return an execution, nor the statute which gives a motion to a sheriff against his deputy to recover the amount of fines imposed upon the sheriff for the alleged defaults of the deputy, is imperative on the court to give such judgments, but the court, in its sound discretion, may give or deny judgment in such cases.

Fletcher v. Chapman, 560

9. Judgment is rendered against a sheriff for a fine for the alleged default of his deputy, the sheriff making no defence, nor giving any notice to the deputy of the proceeding: this judgment is erroneous in point of law, and unjust upon the merits: HELD, in such case, the sheriff is not entitled to recover the amount of the fine from the deputy.

Ibid., 560

NEGLIGENCE.

See Agent and Attorney, and

Rootes v. Stone, 660

NEW TRIAL.

I. In Civil Suits.

1. A circuit court, in a charge or instruction to the jury, states matter as being in a written deposition, and instructs the jury that that matter is legal evidence, but in point of fact no such matter is in the deposition: HELD, this was calculated to mislead the jury, and is error, for which the verdict should be set aside and the judgment upon it reversed.

Gregory v. Baugh, 645

2. When new trial will be granted because of the vagueness with which instruction is stated in bill of exceptions. See Bill of Exceptions, No. 1, and

Tompson v. Cumming, 821

3. When bill of exceptions to opinion overruling motion for a new trial will be sufficient to enable appellate court to review and reverse the judgment. See Bill of exceptions, No. 2, 3, and

Ewing v. Ewing, 337

4. As an appellate court will review an order of an inferior court, overruling a motion for a new trial and reverse the proceedings of new trial improperly refused, so it will review an order granting a new trial, and reverse proceedings, if improperly granted.

Pleasants v. Clements, 474

5. An affidavit of a party, that he failed to summon material witnesses at the trial, owing to advice of counsel that their testimony was not necessary, no ground to set aside verdict and grant a new trial.

Ibid., 474

6. If appellate court, reverses judgment, on ground that new trial has been previously improperly granted, it will examine the proceedings of the trial set aside, and if it find error in them reverse and correct them, otherwise affirm them.

Ibid., 474

II. In Criminal Causes.

7. After a jury is impanelled and sworn, but before any evidence is given, three of the jurors separate from their fellows, for a brief space of time: HELD, such separation before any evidence given, is no cause for setting aside a verdict of conviction; especially, in the case at bar, where the separation was so momentary, that any tampering with the jurors was hardly possible.

Martin v. Commonwealth, 745

8. See Evidence, No. 14, and

Brown v. Commonwealth, 769

9. At the trial of an indictment for a crime, the punishment whereof, prescribed by law, is imprisonment &c. not less than one nor more than three years the clerk charges the jury, that the

term of imprisonment is to be not less than two nor more than three years; verdict finds prisoner guilty, and ascertains his imprisonment to be 806 two years; the attorney for "commonwealth remits one year of the term; whereupon, the court sentences prisoner to one year's imprisonment: **Held**, 1. the attorney had no power to make such remission, which was therefore merely void; 2. the judgment was erroneous, not being according to verdict; 3. the verdict ought to be set aside, on account of the erroneous charge as to the minimum term of imprisonment.

Allen v. Commonwealth, 727

NIL DEBET.

To debt on judgments of courts of Kentucky, the plea of nil debet is not a good plea.

Clarke's adm'r v. Day, 172

NON EST FACTUM.

1. See Bond, No. 1. and

King v. Smith &c., 157

2. See Fraud, Mistake and Surprise, and Gordon v. Jeffery, 410

NOTICE.

1. See Bill of Exchange, and

Thompson v. Cumming, 321

2. See Fraudulent Deeds, No. 3, 4, and Tate v. Ligkat &c., 84

3. See Mortgage, No. 3, and Beverley v. Brooke and others, 426

NUISANCE.

See Mills.

ORDINARY KEEPER.

See Jurors, No. 1. and

Commonwealth v. Wilson, 739

OUSTER.

See Petition of Right, and

Young v. Gooch and Brown, 506

PAROL AGREEMENT.

See Specific Execution, and

Reed's heirs v. Vannorsdale and wife, 569

PARTIES IN CHANCERY.

See Practice in Suits in Equity, No. 1, 2, and 70, 401

PARTNERSHIP.

B., owner of a public ferry, leases it to F. for two years, in consideration of \$1000 paid him by F. in cash; and it is agreed between the parties, that if the net profits of the ferry do not yield F. \$2000 within the two years, F. shall hold over the term, until the profits yield the \$2000, and if the profits give more than \$2000 within the two years, the surplus shall be equally divided between them: **Held**, this contract does not constitute a partnership between B. and F. in the ferry, and B. is not liable for losses by negligence at the ferry during the term of F.'s tenancy thereof.

Bowyer v. Anderson, 560

PATENT.

See Evidence, No. 6. and

Chapman v. Bennett, 329

PAWNS AND PLEDGES.

If goods be pawned for the security of a particular specified debt, the pawnee has no lien on the goods pawned for any other or subsequent debt contracted by the pawnor to him, without an agreement to that effect, either express or implied from the nature or circumstances of the transaction.

Gilliat v. Lynch, 493

2. See Conditional Sale, and

Leavell v. Robinson, 161

PAYMENT BY MISTAKE.

S. being second husband of M. and guardian of her infant daughters by first husband; and M. having claim to dower of lands of first husband, descended her infant daughters, over and above provision made for her by first husband's will; S. continually during his wife's life and after her death, carries the whole profits of the lands descended, to the credit of his wards, and finally settles his accounts, allows them credit for the whole profits, and pays them the balance: one of the wards being married, a bill is filed by her husband and her, praying to open, surcharge and falsify the accounts previously settled; and then S. claims, as against them, credit for one third of the profits, accrued during his wife's life, as belonging to her in right of dower: **Held**, that as S. accounted for and paid these profits, with full knowledge of his

right, or at least of the facts, out of which his right arose, he cannot now recover them back.

Lee and wife v. Stuart &c., 76

PEDIGREE.

See Freedom, No. 2, 3, 4, and

Gregory v. Baugh, 665

807

*PENAL STATUTES.

See Construction of Statutes.

PETITION OF RIGHT.

If the commonwealth is in actual possession of land, an individual claiming the same, cannot enter upon that possession, but must resort to his petition of right; and, if he enters, and is ousted by actual force, by the officers or agents of the commonwealth, having lawful orders to do the act, he cannot maintain trespass against them.

Young v. Gooch and Brown, 506

PLEADING.

I. In Abatement.

1. See Abatement.

II. In Bar.

2. When nil debet is not a good plea. See Nil

Debet, and

Clarke's adm'r v. Day, 172

3. Concerning coverture. See Feme Covert, No. 1, 2, and 11, 170

4. Statute of Limitations. See Limitation of Actions, and 6, 347, 532

III. Pleadings in Particular Actions.

5. Respecting pleadings in replevin. See Replevin, No. 2, and

Southall v. Garner, 372

6. Pleadings in writ of right. See Writ of Right No. 8, 9, 10, and 1, 653

PLEDGE.

See Pawns and Pledges.

POST NUPTIAL SETTLEMENTS.

1. The doctrine of post nuptial settlements discussed.

Blow v. Maynard, 29

2. The recital in a post nuptial settlement, of an agreement as the consideration of the deed, is evidence against persons claiming under the settler, but not against a creditor of the settler, contesting the fairness and validity of the deed.

Ibid., 29

POWER.

1. Where power is given to distribute a legacy. See Legacy, No. 1, and

Frazier &c. v. Frazier's ex'ors &c., 642

2. Where power is given sheriff to sell land for taxes. See Land Titles, No. 3, 4, and Chapman v. Bennett, 329

PRACTICE IN ACTIONS AT LAW.

I. Where writ issues in name of one not in existence.

1. A writ of right having been brought in name of H. against R. and P. and the mise regularly joined on the mere right, and the tenants shewing by affidavits, that H. was dead before the writ purchased, and that they had come to knowledge of the fact, after the mise was joined: **Held**,

1. The pleadings ought not to be set aside, and tenants permitted to plead this matter in abatement; but,

2. The court ought to stay proceedings, till W. the person prosecuting the suit, shall shew, by proof, that demandant was living at commencement thereof;

3. That W. who instituted suit for his own benefit, ought not to be allowed to prosecute it to judgment, without shewing demandant was living at commencement thereof, though W. may shew evidence of title to land demanded, and deduce title from H. the demandant;

4. That court ought to make a rule upon W. and his attorneys, and enquire into their conduct herein, as a contempt, and abuse of the process of the court; and

5. That unless W. within reasonable time after rule given for the purpose, produce proof, that demandant was living at commencement of suit, it ought to be dismissed, and payment of tenant's costs enforced, by attachment, against W. or his attorney.

Howard v. Rawson and Pugh, Gen. Court, 733

II. Where Writ abates by death of Plaintiff after action brought.

2. See Abatement, No. 1, and

Lovell v. Arnold, 16

III. Upon motion for continuance.

3. See Continuance, and
Harris v. Harris.

584

IV. Mode of entering Judgment.

4. In joint action of debt against two, there is judgment by default against one; the other pleads to the action, and there is trial and verdict against him: *HELD*, there should be one and the same joint judgment against both.

Peasley v. Boatwright. 195

V. Scire Facias after Judgment.

5. See Scire Facias, No. 2, and
Garland v. Ellis.

555

6. A demurrer to a sci. fa. upon a recognizance of special bail, is regular practice. *Ibid.*

555

808 *PRACTICE IN CRIMINAL CAUSES.

See Indictments, Informations and Presentments.

PRACTICE IN SUITS IN EQUITY.

I. Parties and Process.

1. If one person to whom alone the right asserted in a bill in chancery appertains, and other persons who have no right, join in the bill, and the cause be proceeded in to a decree in the court of chancery, without any objection there to the joining of improper parties plaintiff in the bill: upon appeal from the decree to the court of appeals, the objection will have only this effect in the appellate court, that the court will consider the right as vested in the plaintiff entitled thereto, and affected by his acts or omissions.

Dickenson v. Davis and others.

401

2. A defendant in equity is charged as executrix, and as devisee of a decedent: in the caption of her answer, she professes to answer only as executrix; but, in the body of her answer, she in fact answers as devisee: *HELD*, such answer places her before the court, in her character of devisee.

Kinney's ex'ors v. Harvey &c..

70

3. Decree by default against defendants, who were not in contempt upon any proper process, reversed for this irregularity.

Frazier &c. v. Frazier's ex'ors &c..

643

II. Exceptions to Jurisdiction.

4. See Abatement, No. 3, and
Hickman v. Stout.

6

III. Exceptions to Depositions.

5. If irregularities occur in awarding a commission to take a deposition in chancery, and in taking the deposition, and the deposition be read at the hearing in the court of chancery without any exception taken there: upon appeal to the court of appeals, objections taken in that court to the deposition, for such irregularities, cannot avail to exclude the evidence.

Dickenson v. Davis and others.

401

6. When the deposition of a party in a suit in chancery is taken under a special commission, subject to all just exceptions, whether the deposition be excepted against on the ground of incompetency or not, it behooves the court to examine and decide the question of competency; and though the deposition be read at the hearing in the court of chancery without exception, yet if, on an appeal from the decree, the appellate court finds the deposition incompetent evidence by reason of the deponent's interest in the event, it will pay no regard to the deposition.

Beverley v. Brooke and others.

426

7. The deposition of a defendant was taken by his co-defendant, under a special commission awarded by the chancellor to take the deposition, subject to all just exceptions; and the plaintiff prayed and obtained a like special commission to take the deposition of the same party, but did not act under his commission: *HELD*, that the plaintiff, by obtaining this special commission himself, was not precluded from objecting to the competency of the deposition taken on the other side.

Ibid., 426

IV. Decree.

8. See Appellate Jurisdiction, in Suits in Equity

PRESENTMENTS.

See Indictments, Informations and Presentments.

PRESUMPTION OF PAYMENT.

- See Lapse of Time, No. 1, and
Overseers of the Poor v. Tucker.

580

PRINCIPAL AND AGENT.

1. An administrator contracts to sell slaves of testator's estate, partly for cash, partly on credit: contract made by an agent of administrator, who receives cash payment; the administrator's powers

are revoked, so that the slaves sold cannot be delivered according to contract; and then administrator authorizes agent to retain the cash payment received by him on the executory contract for sale of the slaves, as compensation to agent for services to decedent's estate: *HELD*, this is not money had and received by agent to use of the persons from whom, but to use of administrator for whom, he received it, and administrator had a right so to dispose thereof.

Heffernan's adm'or &c. v. Grymes' adm'or &c..

513

2. An attorney at law is employed to collect debts, and some of them are lost to his client through his negligence: *HELD*, the attorney is chargeable for the principal of the debts so lost, but not with interest thereon.

Rootes v. Stone.

650

PRINCIPAL AND SURETY.

1. B. is bound as surety for D. in a guardian's bond: the guardian dies indebted *to his ward; the ward sues surety for the debt: the surety compromises the suit with the ward, and pays her a less sum than on a settlement of the guardian's accounts was justly due her; and the ward by deed assigns to the surety all her claims upon the guardian's estate, and by the same instrument releases the surety from all demands on the guardian's bond: *HELD*, 1. that the deed releasing the obligation as to the surety, released it also as to his co-obligor, the principal, and thus left nothing for the assignment to operate upon; and 2. that the surety, notwithstanding the assignment, was only entitled, in equity, to demand indemnity from his principal's estate, for the money actually paid by him to the ward in satisfaction of her claim.

Blow v. Maynard.

29

2. Concerning surety's summary remedy. See Motion, No. 1, 3, and
Bacchus v. Gee.

68

PRIORITY OF LIEN.

See Lien.

PRIVY EXAMINATION.

See Deeds, No. 1, and

Currie and others v. Page and others.

617

PROCESS.

1. In actions at law. See Practice in Actions at Law.

2. In suits in equity. See Practice in Suits in Equity.

3. In criminal causes. See Indictments, Informations and Presentments.

PROMISE.

See Assumpsit.

PROMISSORY NOTE.

1. What may be declared on as a promissory note. See Declaration, No. 4, and

Peasley v. Boatwright.

195

2. In debt on promissory note: *HELD*, plaintiff need not aver in declaration, or prove, consideration; though defendant may go into evidence touching consideration. *Ibid.*

195

PURCHASER WITH NOTICE.

See Mortgages and Trusts, No. 3, and

Beverley v. Brooke and others.

426

REAL ASSETS.

I. Where Estate descends, and constitutes Legal Assets.

1. See Heir, and

30, 68

II. Where assets are equitable.

2. See Equitable Assets, and

Kinney's ex'ors &c. v. Harvey &c..

70

3. Right of an executor who satisfies creditors out of his own pocket, to be substituted for them, and share the equitable assets. See Substitution, and S. C., 70

RECITAL IN A DEED.

See Post Nuptial Settlements, No. 2, and

Blow v. Maynard.

29

RECOGNIZANCE.

See Scire Facias, No. 2, 3, and

Garland v. Ellis.

555

RECORD.

What will constitute part of the record. See Forthcoming Bond, No. 3, and

Couch v. Miller.

545

RECORDING OF DEEDS.

See Deeds.

RELEASE.		
See Principal and Surety, No. 1, and Blow v. Maynard.	29	
RELIEF IN EQUITY.		
See Jurisdiction.		
RELINQUISHMENT OF DOWER.		
See Deeds, No. 1, and Currie and others v. Page and others.	617	
RENT.		
1. Measure of damages against sheriff who takes goods of lessee in execution, without paying landlord his rent. See Sheriff, No. 2, and Crawford and others v. Jarrett's adm'or.	690	
2. Respecting controversies between Landlord and Tenant, see that Title.		
RENTS AND PROFITS.		
I. Responsibility of Heir to Creditors of Ancestor.		
1. Upon a bill against an heir at law, to subject real estate descended, to a debt of the ancestor, the heir at law is not accountable for rents and profits accrued before decree. Blow v. Maynard.	80	
III. Responsibility of Fraudulent Grantee to Creditors of Fraudulent Grantor.		
2. A man makes a conveyance of real estate to the use of his children, and contingently to the use of his wife, and dies: upon a bill by a creditor after grantor's death, against grantees, who claim under the deed, conveyance declared not only voluntary, but fraudulent in fact on the part of the grantor: yet HELD, that the grantees are not accountable for rents and profits prior to the decree. Blow v. Maynard.	80	
III. Claim of Vendor asserting Lien against Vendee.		
3. The implied equitable lien of a vendor upon the subject sold, for the purchase money, does not give the vendor asserting the lien, any claim for the profits of the subject. Little and Telford v. Brown.	353	
RENUNCIATION BY WIDOW.		
See Widow, and Taylor and wife v. Browne and others.	419	
REPEAL.		
See Construction of Statutes, No. 5, and Allen v. Commonwealth.	727	
REPLEVIN.		
1. A tenant complaining of distress made for more rent than was in arrear and due, not having resorted to an action of replevin for redress, nor shewing any reason for failing to resort to his remedy at law, is not entitled to relief in equity. Mayo v. Winfree.	370	
2. The common law rules respecting the pleadings in replevin, and particularly in regard to the nicety and precision required in the avowry, are in force in Virginia, unaffected by any statutory provision; therefore, an avowry, faulty according to the common law rules applicable to that pleading, was held bad on general demurrer. Southall v. Garner.	372	
REVERSAL OF DECREE.		
See Appellate Jurisdiction, in suits in Equity.		
REVIVAL OF SUITS.		
1. At law. See Scire Facias, No. 1, and Lovell v. Arnold.	16	
2. In equity. See Injunction, No. 4, and McKays v. Hites and others.	145	
RIGHT OF ENTRY.		
See Petition of Right, and Young v. Gooch and Brown.	506	
SALES FOR TAXES.		
See Land Titles, No. 3, 4, and Chapman v. Bennett.	329	
SCIRE FACIAS.		
I. To revive Pending Action.		
1. Writ of right abates by death of tenant in 1812, and the abatement is entered of record: sci. fa. sued out by defendant in 1820, to revive the suit against heirs of tenant: HELD, the abatement was absolute, and suit could not be revived under provisions of statute of 1819, 1 Rev. Code, ch. 128, § 37; that provision being prospective. Lovell v. Arnold.	16	
II. Upon Recognizance of Special Bail.		
2. In a joint action of debt against three obligors,		
three persons severally undertake, by several recognizances, as special bail for each of the three defendants: after judgment, creditor sues out one sci. fa. against the three bail, upon their several recognizances: HELD, they cannot be joined in one sci. fa. and that the sci. fa. is naught, and ought to be quashed. Garland v. Ellis.	555	
3. A demurrer to a sci. fa. upon a recognizance of special bail, is regular practice. Ibid.	555	
SEAL.		
1. To a printed form of a bond, there are put printed stamps or scrolls by way of seals; the blanks are filled up; and the instrument executed by the obligors, by signing their names to the printed stamps or scrolls, which are recognized as their seals in the body of the instrument: this is a sealed instrument within the statute, 1 Rev. Code, ch. 128, § 94. Buckner v. Mackay.	498	
2. See Declaration, No. 4, and Peasley v. Boatwright.	195	
SECURITY.		
1. See Assignment, and Clayton v. Fawcett's adm'or.	19	
811 *2. See Conditional Sale, and Leavell v. Robinson.	161	
SEIZIN.		
See Estates Tail, No. 2, and Watts v. Cole &c.	653	
SET-OFF.		
Against a debt due by A. and B. jointly to C., a debt due by C. to B. alone, cannot be set-off in equity any more than at law. Per GREEN, J., in Gilliat v. Lynch.	493	
SHERIFF.		
1. Concerning motions against sheriff by his sureties or by creditors: and concerning motions by sheriff against a deputy and his sureties. See Motion.		
2. An officer takes under execution, and removes, goods of a lessee, without paying the rent in arrear due to the landlord: HELD, in an action by the landlord against the officer for so doing, not the amount of the rent in arrear, but the value of the goods, is the just measure of damages. Crawford and others v. Jarrett's adm'or.	630	
3. Measure of damages in action brought by the officer upon contract for his indemnity. See Indemnifying Bond, No. 2, and S. C.	630	
4. What will be a sufficient contract of indemnity. See Assumpsit, No. 4, and S. C.	630	
SPECIAL BAIL.		
See Scire Facias, No. 2, 3, and Garland v. Ellis.	555	
SPECIFIC EXECUTION.		
J. being wealthy and childless, verbally agrees with his brother C., who is poor and has a large family of children, that if C. will forego his intention to move to the west, and move to and settle on a tract of land of J. near his residence, J. will convey the land to him in fee; C. induced by this promise, executes the agreement on his part; but without incurring any expense or loss in so doing: HELD, there was neither a meritorious nor a valuable consideration to support the agreement, and equity cannot decree specific execution against J.'s heirs. Reed's heirs v. Vannorsdale and wife.	509	
STATUTE OF LIMITATIONS.		
See Limitation of Actions.		
STATUTES OF VIRGINIA, OF A GENERAL NATURE, CITED AND CONSTRUED.		
1. Statutes declaring those which are in force.		
1. Ch. 40, p. 136, of 1 R. C. repealing British statutes, commented on. Orndoff v. Turman &c.	208, 219, 247	
2. Ch. 1, § 9, p. 16, of 1 R. C. repealing Virginia statutes of general nature, not published in Code, construed. Lockridge v. Carlisle.	188	
Gregory v. Baugh.	686	
II. Relating to Courts, Jurors and Sheriffs.		
3. Ch. 66, § 86, p. 214, of 1 R. C. regulating objections to jurisdiction of court of chancery, construed. Hickman v. Stout.	6	
4. Ch. 67, § 10, p. 222, of 1 R. C. and ch. 104, § 13, 16, 22, pp. 377, 378, 382, regulating jurisdiction of courts of probat, construed. Commonwealth v. Hudgin.	248	
Ex parte Barker.	719	

5. Ch. 69, § 9, p. 280, of 1 R. C. prescribing jurisdiction of circuit courts, construed.
 Hay's adm'r v. Pistor, 707
 6. Ch. 75, § 1, 2, p. 264, of 1 R. C. excluding ordinary keepers as grand-jurors, construed.
 Commonwealth v. Willson, 739
 7. Ch. 78, § 6, p. 277, of 1 R. C. prescribing term of sheriff's continuance in office, cited.
 Jacobs v. Hill and others, 895
 8. Same chapter, § 11, 12, p. 278, prescribing bonds to be given by sheriffs, cited.
 Overseers of Poor v. Tucker, 580
 9. Same chapter, § 15, p. 279, concerning appointment of deputy sheriffs, cited.
 Jacobs and others v. Commonwealth, 710
 10. Same chapter, § 38, p. 288, giving sheriff summary remedy against deputy, construed.
 Jacobs v. Hill and others, 898
 Fletcher v. Chapman, 560
 11. Same chapter, § 87, p. 285, binding lands of sheriffs to their sureties, construed.
 Bacchus v. Gee, 68

III. Rights.

12. Ch. 23, § 5, p. 66, of 1 R. C. regulating right of expatriation, cited.
 Branch v. Bowman, 171
 13. Ch. 96, p. 355, of 1 R. C. directing course of descents, cited.
 Orndoff v. Turman &c., 302, 218
 14. Same chapter, § 18, p. 357, removing bar by reason of alienage of ancestor, construed.
 Jackson v. Sanders &c., 109
 15. Ch. 99, § 1, p. 361 of 1 R. C. requiring writing to be sealed and delivered, *where lands are passed for more than five years, cited.
 Smoot v. Marshall, 187
 Thrift v. Hannah &c., 316
 16. Statute of 1748 on same subject, cited.
 Smoot v. Marshall, 187
 17. Ch. 99, § 5, 7, pp. 362, 3, of 1 R. C. concerning acknowledgments of deeds, construed.
 Lockridge v. Carlisle, 187
 18. Statute of 1792 on same subject, cited.
 Ibid., 187
 19. Ch. 99, § 4, p. 362, of 1 R. C. as to recording and notice of deeds, cited.
 Beverley v. Brooke and others, 485
 20. Statutes prior to revival of 1819, concerning privy examinations of femes covert, construed.
 Currie and others v. Page and others, 617, 619, 620
 21. Statutes of 1776 and 1785, converting estates tail into fees simple, (9 Hen. stat. at large, p. 228; 12 Ibid. p. 156; and 1 R. C. ch. 99, § 22, p. 368,) construed.
 Burfoot v. Burfoots, 119
 Orndoff v. Turman &c., 200
 Watts v. Cole &c., 664
 22. Statutes of 1705, 1710 and 1748, concerning docking entails, cited.
 Orndoff v. Turman &c., 228
 23. Ch. 99, § 29, p. 370, of 1 R. C. transferring possession to the use, construed.
 Bass &c. v. Scott &c., 359
 24. Same chapter, § 30, p. 370, subjecting estates in trust to execution, construed.
 Coutts v. Walker, 280
 25. Ch. 101, p. 372, of 1 R. C. against frauds and perjuries, cited; and § 9 commented on.
 Tate v. Ligat &c., 92, 104
 Clark v. Hardman, 850
 26. Ch. 104, § 1, p. 375, of 1 R. C. prescribing mode of executing wills, cited.
 Sharp v. Sharp &c., 254
 27. Same chapter, § 32, 33, 34, pp. 382, 3, declaring to whom administration shall be granted, construed.
 Haxall v. Lee, 267
 28. Same chapter, § 35, p. 383, prescribing form of administrator's bond, cited.
 Frazier &c. v. Frazier's ex'ors, 647
 29. Statutes of 1711 and 1786, on same subject, cited.
 Ibid., 646, 647
 30. Ch. 104, § 26, p. 381, of 1 R. C. concerning widow's renunciation of provision in husband's will, construed.
 Taylor &c. v. Browne and others, 419
 31. Same chapter, § 49, p. 387, of 1 R. C. concerning sale of slaves by executors and administrators, cited.
 Heffernan's adm'r &c. v. Grymes' adm'r &c., 519
 32. Ch. 106, § 17, p. 399, of 1 R. C. prohibiting marriages within certain degrees, construed.
 Commonwealth v. Perryman &c., 717
 33. Ch. 111, § 58 61, 62, pp. 488, 6, 7, regulating emancipation, cited; and § 58 construed.
 Walthall's ex'or v. Roberston &c., 191
 Thrift v. Hannah &c., 200
 Mann and others v. Givens and others, 768
 34. Ancient statutes concerning Indians, slaves and servants, cited.
 Gregory v. Baugh, 681, 684, 685

IV. Remedies.

35. Ch. 118, § 1, 2, 15, 20, 23, pp. 446, 447, 450 and 451, of 1 R. C. concerning rents, cited.
 Mayo v. Winfree, 370, 371, 373
 36. Same chapter, § 5 and 81, pp. 447 and 453, cited.
 Jones v. Murdaugh, 449
 37. Same chapter, § 7, p. 448, construed.
 Crawford &c. v. Jarrett's adm'r, 684
 38. Same chapter, § 15, p. 450, cited.
 Southall v. Garner, 372
 39. Ch. 116, § 1, p. 460, of 1 R. C. giving summary remedy to sureties, construed.
 Bacchus v. Gee, 68
 40. Ch. 118, p. 463, of 1 R. C. reforming proceedings in writs of right, construed.
 Snapp v. Spengler and wife, 1
 Watts v. Cole &c., 654
 41. Statute of 1734 on same subject, cited.
 Snapp v. Spengler and wife, 1
 42. Ch. 121, p. 471, of 1 R. C. concerning writs of mandamus, cited.
 King William Justices v. Munday, 169
 43. Ch. 123, p. 474, 475, 476, of 1 R. C. giving remedy against absent debtors, remarked on; and § 2 construed.
 Tate v. Ligat &c., 100
 Heffernan's adm'r v. Grymes' adm'r &c., 522
 Tiernans v. Schley &c., 28
 44. Statutes of 1744 and 1777, on same subject, cited.
 Tiernans v. Schley &c., 28, 39
 45. Ch. 123, p. 476, of 1 R. C. giving remedy against absconding debtors, remarked on.
 Tate v. Ligat &c., 100
 46. Ch. 125, § 4, 5, p. 484, of 1 R. C. giving debt on promissory note, and allowing suit in name of assignee, construed.
 Peasley v. Boatwright, 198
 47. Statute of 1780, on same subject, cited.
 Ibid., 198
 48. Ch. 126, § 2, p. 485, of 1 R. C. giving debt on foreign bill of exchange, cited.
 Thompson v. Cumming, 321
 49. Statute of 1748, on same subject, cited.
 Ibid., 322
 50. Ch. 128, § 1, p. 487, of 1 R. C. prescribing limitation of writs of formodon, commented on.
 Orndoff v. Turman &c., 303, 219, 248, 248
 51. Same chapter, § 37, p. 496, giving scire facias to revive real actions, construed.
 Dovell v. Arnold, 16
 52. Same chapter, § 38, p. 497, giving scire facias to revive suits in equity, cited.
 M'Kays v. Hite &c., 147
 53. Same chapter, § 94, p. 510, declaring scrolls valid as seals, construed.
 Buckner v. Mackay, 488
 54. Same chapter, § 108, pp. 511, 512, (statute of Jeofails) cited.
 Lovell v. Arnold, 17
 Thompson v. Cumming, 326, 323
 55. Same chapter, § 107, p. 513, concerning the direction of process, construed.
 Couch v. Miller, 547, 549
 56. Ch. 133, p. 523, of 1 R. C. allowing bill of exceptions, cited.
 Threlkeld's adm'r v. Fitzhugh's ex'x, 471
 57. Ch. 134, § 3, p. 527, of 1 R. C. allowing a second execution, though the first be not returned, construed.
 Windrum v. Parker &c., 361
 58. Statute of 1726, on same subject, cited.
 Ibid., 366
 59. Ch. 134, § 10, p. 528, of 1 R. C. creating lien on real estate from time of levying ca. sa., construed.
 Foreman v. Loyd &c., 284
 60. Same chapter, § 9, 10, p. 528, giving new execution against property of person dying in execution, cited.
 Ibid., 288
 61. Same chapter, § 25, 26, pp. 532, 533, concerning indemnifying bond, construed.
 Garlands v. Jacobs &c., 651
 62. Same chapter, § 31, 2, 3, 4, pp. 536, 7, 8, providing for relief of insolvent debtors, construed.
 Harrison v. Norfolk Justices, 764
 63. Same chapter, § 34, p. 538, vesting in sheriff, estate of an insolvent, cited.
 Beverley v. Brooke and others, 429
 64. Same chapter, § 47, p. 541, authorizing fine on sheriff for failing to return execution, construed.
 Fletcher v. Chapman, 560
 65. Same chapter, § 55, p. 545, giving same execution on decrees as upon judgments, construed.
 Tate v. Ligat &c., 101
 Windrum v. Parker &c., 361
 V. Crimes, Prosecutions and Punishments.
 66. Ch. 111, § 30, p. 428, of 1 R. C. declaring it felony to carry slaves out of state, without consent of owners, construed.
 Thomas v. Commonwealth, 741

67. Ch. 153, p. 577, of 1 R. C. against obtaining money by false tokens, cited.
Brown v. Commonwealth, 774
68. Ch. 154, § 1, p. 578, of 1 R. C. declaring it felony to forge a bank note or knowingly pass a forged bank note, cited.
Spencer v. Commonwealth, 751
Martin v. Same, 745
Brown v. Same, 769
69. Ch. 171, § 6, p. 617, of 1 R. C. prescribing punishment for larceny, cited.
Allen v. Commonwealth, 737
70. Statute of 1824, on same subject, (sess. acts of 1823-24, ch. 10, § 11, p. 17.) construed. Ibid., 737
71. Statute of 1826, on same subject, (sess. acts of 1825-26, ch. 11, p. 10.) cited. Ibid., 739
72. Ch. 160, § 66, p. 614, of 1 R. C. declaring mode of proceeding for small penalties, construed.
Webb v. Commonwealth, 721
73. Same chapter, § 44, p. 611, causing defects in criminal proceedings after verdict, (Jeoffails) construed.
Jacobs and others v. Commonwealth, 709
- VI. Revenue.
74. Ch. 191, § 6, p. 63, of 2 R. C. concerning county levy, cited.
King William Justices v. Munday, 167
75. Statutes of 1781, 1787, 1790, 1807 and 1814, forfeiting lands for taxes, cited; and last mentioned statute construed.
Chapman v. Bennett, 332
- VII. Mills and Roads.
76. Ch. 235, § 10, p. 238, of 2 R. C. concerning mills, construed.
Webb v. Commonwealth, 721
77. Same chapter, § 1, 2, 3, 4, 5, & cited. Ibid., 721
78. Ch. 236, § 9, 10, pp. 236, 237, of 2 R. C. concerning bridges, cited.
King William Justices v. Munday, 166, 170
- SUBSEQUENT PURCHASER.
1. See Fraudulent Deeds, No. 3, 4, and Tate v. Liggett &c., 84
2. See Mortgages and Trusts, No. 3, and Beverley v. Brooke and others, 426
- SUBSTITUTION.
- Bill by creditors against executors and devisees, to charge their demands on decedent's real estate, the same being charged with debts by his will; on the settlement of the executor's accounts, it is found he is largely in advance to the estate, for payments made by him to creditors, beyond the available assets by him received; though there is a much greater amount, due the testator's estate, of debts not desperate: HELD, the executor shall rank as a creditor on the real, by substitution in place of the creditors, whose demands he has satisfied out of his own pocket.
Kinney's ex'ors &c. v. Harvey &c., 70
- 814 *SUMMARY REMEDY.
See Motion.
- SURETY.
See Principal and Surety.
- SURPRISE.
See Fraud, Mistake, and Surprise, and Gordon v. Jeffery, 410
- TAXES.
See Land Titles, No. 3, 4, and Chapman v. Bennett, 329
- TRESPASS.
1. If the commonwealth is in actual possession of land, an individual claiming the same, cannot enter upon that possession, but must resort to his petition of right; and, if he enters, and is ousted, by actual force, by the officers or agents of the commonwealth, having lawful orders to do the act, he cannot maintain trespass against them.
Young v. Gooch and Brown, 596
2. How to declare in trespass for wrongful distress. See Declaration, No. 7, and Jones v. Murdaugh, 447
- TRUSTS AND TRUSTEES.
1. It seems that the statute of uses of Virginia, does not apply to uses created by devise, and transfer such uses into possession of the cestui que use.
Bass and wife and others v. Scott and others, 356
2. Testator devises and bequeaths real and personal estate to trustees, in trust for the equal use and benefit of testator's four sisters (naming them) and their heirs forever, to be managed as the trustees should think most conducive to the interest of each of the parties; two of the sisters, being females covert: HELD, 1. that each of the sisters took a fee simple as to the real, and the absolute property as to the personal subject, in her share of the trust estate; and, 2. that the legal title remains in the trustees in order that they may manage the part of the subject intended for the use and benefit of each sister, in such manner as the trustees shall think most conducive to the interests of each respectively. Ibid., 356
3. See Mortgages and Trusts.
- USAGE.
See Construction of Statutes, No. 1, and Currie &c. v. Page &c., 617
- USES.
See Trusts and Trustees.
- USURY.
1. The principle of Marks v. Morris, 2 Munf. 407, and Martin v. Lindsay's adm'ors, 1 Leigh 499, again brought under review; and the court, four judges sitting, divided on the point.
Fitzhugh v. Gordon, 626
2. F. contracts usurious debt to G. and gives him a deed of trust of land to secure it; F. exhibits bill in chancery, against G. and the trustee, charging the usury, disclaiming any demand of discovery from the creditor, insisting that deed of trust is null and void, and praying that plaintiff's testimony may be perpetuated, and defendants enjoined from selling trust subject till the validity of the deed can be tried at law; G. denies the usury; but it is proved: Quære, whether, in such case, the court of chancery ought to enjoin the trustee from selling under the deed of trust, till the creditor claiming under it shall establish its legal validity in some proper forum where the debtor may have an opportunity to contest it? Ibid., 636
- VENDOR AND VENDEE.
- I. What will avoid Contract of Sale.
1. See Contract, No. 3, 4, 5, and McKinney v. Pinckard's ex'or, 149
- II. Lien of Vendor for the Purchase Money.
2. A vendor, taking a mortgage of the subject sold, to secure the purchase money, can only claim under the mortgage, and according to its terms: the mortgage supersedes the implied equitable lien for the purchase money, which but for the mortgage would have attached to the subject.
Little & Telford v. Brown, 353
3. The implied equitable lien of a vendor upon the subject sold, for the purchase money, does not give the vendor asserting the lien, any claim for the profits of the subject. Ibid., 353
- 815 *III. Claim of Vendee in case of Eviction.
4. For measure of damages, see Covenant, No. 1, 2, and Threlkeld's adm'or v. Fitzhugh's ex'x, 451
- WARRANTY.
For measure of damages recoverable on warranty, where vendee is evicted, see Covenant, No. 1, 2, and Threlkeld's adm'or. v. Fitzhugh's ex'x., 451
- WASTE.
See Executors and Administrators, No. 9, and Heffernan's adm'or &c. v. Grymes' adm'or &c., 513
- WIDOW.
- B. makes a deed of settlement of property upon his wife, and then by will makes a disposition of the property, different from that made by the deed of settlement, and far less beneficial to the wife, and dies; the wife takes administration with the will annexed:
HELD, 1. the widow may claim under the deed of settlement, without having renounced the provision made for her by the will according to the statute, 1 Rev. Code, ch. 104, § 26. And, 2. the widow taking administration with the will annexed, is not an election by her to take under the will, and not to claim under the deed of settlement.
Taylor &c. v. Browne and others, 419
- WILLS.
- I. Attestation and Probat.
1. B. is appointed adm'or of S. at a time when S. was supposed to have died without a will; a will is afterwards found: B. had never seen S. write; but acquired a knowledge of his handwriting from examination of his papers after his death, and testifies from his knowledge of the handwriting thus acquired, that the will is wholly in S.'s hand: HELD, this is competent evidence of the handwriting in the court of probat.
Sharp v. Sharp and others, 349

2. Question, whether an instrument is a complete will, or only a note, memorandum, or plan of a will to be afterwards made? *Ibid.*, 349

II. Construction of Will.

3. Testator bequeaths that "all his moveable property, after the death of his wife, shall be sold, and the proceeds divided among his five daughters: after all his debts paid, all his moveable property should be at the intire disposal of his wife: on her decease, the same to be disposed of as above mentioned:" *Held*, that the wife took only a life estate in such of the moveables as were capable of being used and returned in kind; and, therefore, the wife's gift of a slave to one of the daughters, passed only the wife's life estate therein to the donee.

Madden v. Madden's ex'ors, 377

4. Quære, whether the wife, or her estate after her death, was accountable to the legatees in remainder, for such of the moveables as were consumable in the use, such as grain, or for the proceeds of crops left on hand by the testator, or for money or debts collected? *Ibid.*, 377

5. See *Executory Limitations*, No. 1, and *Burfoot v. Burfoots*, 119

6. See *Trusts and Trustees*, No. 1, 2, and *Bas v. Scott &c.*, 356

7. See also *Legacy*, No. 1, 2, 3, and *Frazier &c. v. Frazier's ex'ors &c.*, 643

WITNESS.

See *Evidence*.

WRIT OF RIGHT.

I. Upon what seizin writ may be sustained.

1. See *Estates Tail*, No. 2, and *Watts v. Cole &c.*, 653

II. Where demandant is dead before writ issues, what course will be taken.

2. A writ of right having been brought in name of H. against R. and P. and the mise regularly joined on the mere right, and the tenants shewing by affidavits, that H. was dead before the writ purchased, and that they had come to knowledge of the fact after the mise was joined: *Held*,

1. The pleadings ought not to be set aside, and tenants permitted to plead this matter in abatement: but,

2. The court ought to stay proceedings, till W. the person prosecuting the suit, shall shew, by proof, that demandant was living at commencement thereof:

3. That W. who instituted suit for his own benefit, ought not to be allowed to prosecute it to judgment, without shewing demandant was living at commencement thereof, though W. may shew evidence of title to land demanded, and deduce title from H. the demandant:

4. That court ought to make a rule upon W. 816 and his attorneys, and inquire into *their conduct herein, as a contempt, and abuse of the process of the court: and

5. That unless W. within reasonable time after rule given for the purpose, produce proof, that demandant was living at commencement of suit, it ought to be dismissed, and payment of tenant's costs enforced, by attachment, against W. or his attorney.

Howard v. Rawson and Pugh, Gen. Court, 733

III. Where either Party dies after writ issues.

3. Writ of right abates by death of tenant in 1812, and the abatement is entered of record: *scl. fa.* sued out by demandant in 1820, to revive the suit against heirs of tenant: *Held*, the abatement was absolute; and suit could not be revived under provision of statute of 1819, 1 Rev. Code, ch. 128, § 37, that provision being prospective.

Lovell v. Arnold, 16

IV. Where Tenant is an Infant.

4. In a writ of right, the præcipe and count describe tenant as an infant; tenant appears, pleads and defends himself by attorney, no guardian ad litem being assigned him; nor does it appear he came to full age pending the writ; verdict and judgment for demandants; tenant in person appeals to this court: Quære, whether he can object to the proceedings on account of his infancy here, or ought to have resorted to writ of error coram nobis?

Watts v. Cole &c., 653

V. See *Count, Plea and Replication*; and effect of statute of Jeofails upon misjoining of mise.

5. The count in writ of right demands a certain tenement consisting of the one stone house with the appurtenances &c.: *Held*, this is a demand of the land on which the house stands, and is certain enough.

Snapp v. Spengler and wife, 1

6. To count in writ of right by husband and wife in right of wife, tenant files a plea in blank throughout, and tenders the mise to the demandant in the singular; replication filed by both demandants join the mise as for male demandant only; assize is charged to inquire whether demandants have right as they demand: *Held*, after verdict for demandants, the blanks, informalities and bad grammar of plea and replication, immaterial. *Ibid.*, 1

7. In a writ of right, there is count and plea, in the statutory forms, but no replication; the assize is regularly charged to make recognition; verdict and judgment for demandants: Quære, whether the mise was joined by the count and plea, without a replication? and whether the irregularity was not cured by the verdict?

Watts v. Cole &c., 658

WRONGFUL DISTRESS.

1. See *Declaration, in trespass*, No. 7, and

Jones v. Murdaugh, 447

2. See *Replevin*, and 370, 372



REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS,
AND IN THE
GENERAL COURT,
OF
VIRGINIA.

By BENJAMIN WATKINS LEIGH.

VOLUME III.

Eastern District of Virginia, to wit:

BE IT REMEMBERED, That on the sixth day of June, Anno Domini one
{ L. S. } thousand eight hundred and thirty-three, BENJAMIN WATKINS LEIGH,
of the said district, for and on behalf of the commonwealth of Virginia, hath
deposited in this office, the title of a book, (for the benefit of the said common-
wealth,) the title of which is in the words following, to wit:

“Reports of Cases argued and determined in the Court of Appeals, and in the General
Court, of Virginia. By Benjamin Watkins Leigh. Volume III.”

the right whereof he claims as author, in conformity with an act of congress, entitled,
“an act to amend the several acts respecting copy rights.”

R'D JEFFRIES,
Clerk of the District.

P R E F A C E .

The amended constitution of Virginia, adopted in convention on the 15th January 1830, provided, that the judges of the court of appeals, of the general court, and of the superiour courts of chancery should remain in office, until the termination of the first legislature elected under that constitution, and no longer, art. 5, § 3. and that all the courts of justice should continue with the jurisdiction they then had, until and except so far as the judicial system might or should be otherwise organized by the legislature, art. 7.

The legislature, at the session of 1830-31, passed three acts for re-organizing, or rather new modeling, the judicial system of the commonwealth.

By one of those acts it was provided, that the court of appeals, from and after the termination of that session of assembly, should consist of a president and four other judges, and the office of president should be so far distinct from that of the other judges, that vacancies occurring in the office of president should be filled by particular election or appointment and commission thereto : and that the court should hold a session annually at Lewisburg in the county of Greenbrier, to commence on the first Monday in July, and to continue ninety days unless the business should be sooner dispatched, and to be divided into such terms as the court should from time to time direct and appoint, for the hearing and determining all causes brought to the court by appeal &c. from the courts of the counties lying on the western side of the blue ridge of mountains, with the exception of certain counties particularly mentioned; and another session at Richmond, to continue one hundred and sixty days unless the business should be sooner dispatched, and to commence at such times, and be divided into such terms, as the court should from time to time direct and appoint, for the hearing and determining all causes brought to the court by appeal &c. from the courts of the counties and corporations on the eastern side of the mountains, and from those counties on the other side excepted out of the western district : provided, that the parties to causes arising in either district, might by consent carry the same to the court at its session in the other. Sess. acts 1830-31, ch. 4, p. 37.

It was provided by another act, that the general court should consist of twenty judges, and should hold its terms in July and December, with the same jurisdiction it before had, except such as had been

taken away by the amended constitution (the jurisdiction, namely, to try impeachments, now vested in the senate, amend. const. art. 3, § 13.) and except also the jurisdiction to hear and determine questions of law in civil causes thereto adjourned, which, it was provided, it should no longer have and exercise. Id. ch. 7, p. 39.

The third act abolished the former superiour courts of chancery, and circuit courts of law, and established a circuit superiour court of law and chancery in each and every county of the commonwealth, and in certain corporations therein mentioned, with very general jurisdiction, civil and criminal, at common law and in equity; combining, indeed, the jurisdiction of the former superiour courts of chancery, and that of the former circuit courts of law, and vesting both in these new tribunals, though the equitable and common law jurisdictions were still to be exercised each separately and distinctly from the other. The counties and corporations were divided into ten districts, and each district into two circuits : two of the judges of the general court were assigned to each of the ten districts, and of the two judges so assigned to each district, one was assigned to each circuit of the district : and thus the twenty judges of the general court were assigned, respectively, to twenty circuits : and the judge assigned to each of the twenty circuits, was required to hold the circuit superiour courts of law and chancery, two terms every year, in each of the counties and corporations of his circuit. Id. ch. 11, p. 42.

All the twenty judges were required to attend the session of the general court at July term 1831—but it was provided, that, thenceforth, they should attend the sessions of the general court alternately, so that but one of the judges assigned to each of the ten districts should attend at the same term : and that five judges should constitute a quorum. Id. ch. 7, § 1. In consequence of this provision, ten of the judges (that is, one from each of the ten districts) were, by an arrangement of the court at July term 1831, assigned to attend the summer term, and the other ten (one from each district) to attend the winter term, of the general court.

The judges of the court of appeals, and of the general court, under the new organization, were elected and appointed by joint vote of the two houses of assembly during the session of 1830-31.

JUDGES OF THE COURT OF APPEALS, DURING THE TIME OF THESE REPORTS, ELECTED AT THE SESSION OF ASSEMBLY OF 1830-31.

HENRY SAINT GEORGE TUCKER, PRESIDENT.

FRANCIS T. BROOKE.
DABNEY CARR.

WILLIAM H. CABELL.
JOHN W. GREEN.

Attorney General : JOHN ROBERTSON.

JUDGES OF THE GENERAL COURT, DURING THE TIME OF THESE REPORTS, ELECTED AT THE SESSION OF ASSEMBLY OF 1830-31.

WILLIAM BROCKENBROUGH.
DANIEL SMITH.
FLEMING SAUNDERS.
WILLIAM DANIEL.
RICHARD E. PARKER.
LEWIS SUMMERS.
WILLIAM BROWNE.
ALLEN TAYLOR.
ABEL P. UPSHUR.
RICHARD H. FIELD.

JOHN F. MAY.
JOHN T. LOMAX.
ROBERT B. TAYLOR.
JOHN SCOTT.
WILLIAM LEIGH.
LUCAS P. THOMPSON.
BENJAMIN ESTILL.
JAMES E. BROWN.
EDWIN S. DUNCAN.
JOSEPH L. FRY.

TABLE OF CASES REPORTED.

Allen and others &c. v. Cunningham and others.	385	Dold's ex'rs and others, Wallace and wife v.,	258	Morgan, Selby v.,	577
Allen's ex'r v. Carr and wife and another.	407	Doswell v. Buchanan's ex'rs.	385	Mowry v. Miller,	561
Anderson, adm'r &c., Burwell's ex'rs v.,	348	Dryden and another, The Auditor v.,	708	Mutual Assurance Society v.	218
Anderson, adm'r of Byrd &c., Shields, adm'r &c. of Waller, and others, v.,	729	Dryden and others, The Auditor v.,	708	Stone and another,	250
Attorney General, Gallego's ex'rs v.,	450	Dudleys v. Dudleys.	436	Newell v. Mayberry,	714
Auditor v. Dugger and Foley.	241	Duff v. Duff's ex'rs,	523	Newton, adm'r &c., Maitland and another v.,	714
Auditor v. Dryden and another.	703	Dugger and Foley, The Auditor v.,	523	Oslander v. Commonwealth,	780
Auditor v. Dryden and others,	703	Faulkner v. Faulkner's ex'rs.	241	Overseers of Poor of Henrico v. Hart,	1
Ayres v. Lewellin,	609	Fauquier Justices, Rixey and others v.,	255	Peachy, Henderson's ex'rs and devisees v.,	64
Beeson, Commonwealth v.,	821	Footo, Tallafarro v.,	811	Pope, Callava e. d. Bryant and wife and others v.,	108
Blackburn, Kelso v.,	299	Ford's adm'r v. Thornton,	695	Povall ex parte,	816
Blythe's ex'rs and others, Brockenbrough and Taylor v.	619	Gallego's ex'rs v. Attorney General,	450	Powell v. Watson,	4
Bob and others, paupers, Winn v.	140	Gallego's ex'rs v. Lambert and wife and others,	450	Pratt v. Tallafarro,	419
Boyd and another v. Cook, ex'r of Vass,	32	Garrett, ex'r of Allen, v. Carr and wife and another,	407	Richardson ex parte,	848
Broadus and others v. Rosson and wife and others,	12	Garth, Commonwealth v.,	701	Rixey and others v. Justices of Fauquier,	811
Brockenbrough and Taylor v. Blythe's ex'rs and others,	619	Gilbert, Rucker's adm'r &c. v.,	461	Robertson v. Hogsheads,	667
Brown, Carthrae v.,	98	Gilliam v. Clay and others,	407	Rosson and wife and others,	12
Bryant and wife and others v. Pope,	103	Goodwin, Hubbard v.,	580	Rosson and wife and others,	12
Buchanan's ex'rs, Doswell v.,	385	Goodwin, Kennedy &c. v.,	492	Rucker's adm'r &c. v. Gilbert,	8
Burnett and others v. Harwell and others &c.,	89	Hansbrough's ex'rs v. Thom. Harper, Walnwright and others v.,	147	Sale v. Dishman's ex'rs,	548
Burwell's ex'rs v. Anderson, adm'r &c.,	348	Harrison and others, Conrad v.	582	Samuel v. Marshall and wife and others,	567
Byrd's adm'r, Shields, adm'r &c. of Waller, and others, v.,	729	Hart, Overseers of Poor of Henrico v.,	582	Selby v. Morgan,	577
Callava e. d. Bryant and wife and others v. Pope,	103	Harwell and others &c., Burnett and others v.,	348	Shields, adm'r &c. of Waller, and others v. Anderson,	729
Carpenter and others v. Sims, Carr and wife and another,	675	Henderson's ex'rs and devisees v. Peachy,	89	adm'r of Byrd &c.,	729
Garrett, ex'r of Allen, v.,	407	Henderson &c., Jackson's adm'r v.,	64	Sims, Carpenter and others v.,	675
Carthrae v. Brown,	98	Henrico Overseers v. Hart,	196	Stanard v. Timberlake,	681
Chowning, Taylor's adm'r and devisees v.,	654	Hogsheads, Robertson v.,	667	Stokes and Smith v. Upper Appomatox Company,	818
Christian and wife and another v. Coleman's adm'r and others,	30	Holcombe and others, Moore and another v.,	507	Stone and another, Mutual Assurance Society v.,	218
Christian and wife and another v. Miller, assignee &c.,	78	Hubbard v. Goodwin,	492	Tallaferro v. Footo,	58
Claibornes, Turnbull, ex'r &c. v.,	892	Jackson v. Ligon,	161	Tallaferro, Pratt v.,	419
Clay and others, Gilliam v.,	590	Jackson's adm'r v. Henderson &c.,	196	Tankersley v. Lipscomb,	813
Coleman's adm'r and others, Christian and wife and another v.,	30	Janey and another, Collins's adm'r &c. v.,	389	Tate, Commonwealth v.,	802
Collins's adm'r &c. v. Janey and another,	389	Justices of Fauquier, Rixey and others v.,	811	Taylor's adm'r and devisees v. Chowning,	654
Commonwealth v. Beeson,	821	Kelso v. Blackburn,	299	Thom, Hansbrough's ex'rs v.,	147
Commonwealth v. Garth,	761	Kennedy &c. v. Goodwin,	492	Thomas, Glassell v.,	118
Commonwealth v. Maclin,	809	Kinney and wife, Watts and others v.,	719	Thomas, Lynch v.,	682
Commonwealth v. Maclin, v.,	786	Kyles & Co. v. Connelly,	532	Thornton, Ford's adm'r v.,	695
Commonwealth v. Tate,	802	Lambert and wife and others,	389	Thurmond and others, Crawford v.,	85
Commonwealth, Vass v.,	786	Gallego's ex'rs v.,	450	Timberlake, Stanard v.,	681
Commonwealth, Word v.,	743	Lewellen, Ayres v.,	609	Todd ex parte,	819
Connelly, Kyles & Co. v.,	719	Ligon, Jackson v.,	161	Turnbull, ex'r &c. v. Claibornes,	392
Conrad v. Harrison and others,	532	Lipscomb, Tankersley v.,	813	Upper Appomatox Company,	818
Cook, ex'r of Vass, Boyd and another v.,	32	Lynch v. Thomas,	682	Stokes and Smith v.,	318
Crawford v. Thurmond and others,	85	Maitland and another v. New-ton, adm'r &c.,	714	Vass's ex'r, Boyd and another v.,	82
Cunningham and others, Allen and others &c. v.,	385	Marshall and wife and others, Samuel v.,	567	Vass v. Commonwealth,	786
Dishman's ex'rs, Sale v.,	548	Mayberry, Newell v.,	250	Walnwright and others v.	270
		Miller, assignee &c., Christian and wife and another v.,	561	Harper,	270
		Miller, Mowry v.,	578	Wallace and wife v. Dold's ex'rs and others,	258
		Moore and another v. Holcombe and others,	597	Waller's adm'r and others v. Anderson, adm'r of Byrd &c.,	729
				Watson, Powell v.,	4
				Watts and others v. Kinney and wife,	272
				Winn v. Bob and others, paupers,	140
				Winston v. Rosson and wife and others,	12
				Word v. Commonwealth,	748

TABLE OF CASES CITED.

Abbot, Cary v., 7 Ves. 490	460	Boyd v. M'Lean, 1 Johns. Ch. Rep. 482	507, 8
Abel v. Heathcote, 2 Ves. Jun. 98, 4 Bro. C. C. 278	177	Braxton v. Winslow, 1 Wash. 31	91
Adams, Pryor v., 1 Call 382	571	Braxton v. Spotsylvania Justices, 1 Wash. 31	397
Adams v. Price, 3 P. Wms. 11	688	Brazier v. Gratz, 6 Wheat 528	174
Aldrich v. Cooper, 8 Ves. 381	544	Bridgman v. Green, 2 Ves. sen. 627	576
Alexander, Parkist v., 1 Johns. Ch. Rep. 398	374	Brisbane v. Dacres, 5 Taunt. 144	461, 490, 662
Allens, Henderson v., 1 Hen. & Munf. 235	206	Britton, Payne v., 6 Rand. 102	271
Ambler v. Warwick, 1 Leigh 195	88	Bronaugh v. Freeman's ex'r, 2 Munf. 266	614
Amey, Dunn v., 1 Leigh 467	10	Brooke, Beverley v., 2 Leigh 426	532, 6, 7, 540, 1, 6
Amory v. Justices of Gloucester, 2 Virg. Cas. 523	804	Brown, Gliman v., 1 Mason 212, 4 Wheat. 255	600
Anderson v. Martindale, 1 East 407	101	Brown, Burnell v., 1 Jac. & Walk. 168	635
Anderson, Tinsley v., 3 Call 285	281, 296	Brown's case, 2 Leigh 769	782, 4
Angell v. Haddon, 1 Madd. C. R. 529	280	Brudenel's case, 5 Co. 9	404
Anthony, Clayton v., 6 Rand. 285	737, 794	Brune, Enders v., 4 Rand. 438	281, 700
Archer, Robertson v., 5 Rand. 319	489	Bull v. Douglass, 4 Munf. 303	83
Asberry v. Calloway, 1 Wash. 74	723	Bull v. Vardy, 1 Ves. Jun. 370	857
Ashburner, Fletcher v., 1 Bro. C. C. 497	421, 427	Bull, Jackson v., 1 Johns. Ca. 90	370
Ashby v. Palmer, 1 Meriv. 296	423, 424	Burgess v. Wheate, 1 W. Blac. 123, 1 Eden 177	502, 7, 9, 518, 9
Ashby v. Kiger, 3 Rand. 165	617	Burke, adm'r v. Levy's ex'rs, 1 Rand. 1	614
Ashdown, Suleman v., 2 Atk. 608	317	Burnell v. Brown, 1 Jac. & Walk. 168	635
Atbol (duke of), Lanoy v., 2 Atk. 444	544	Burnley v. Lambert, 1 Wash. 308	489, 694
Atkinson, Grayson v., 2 Ves. sen. 454	442, 444	Burton v. Scott, 3 Rand. 399	41
Atkinson v. Elliott, 7 T. R. 378	699	Burwell v. Corbin, 1 Rand. 181	42, 5, 7, 54, 436, 9, 440, 1, 2, 4, 6, 7, 8, 9
Attorney general v. Matthews, 2 Lev. 167	460	Bushell v. Bushell, 1 Sch. & Lef. 90	370, 378
Attorney general v. Syderfen, Vern. 224	490	Bussard, Marshall v., Glim. 9	564
Attorney general v. Fowler, 15 Ves. 85	490	Buster's ex'rs v. Wallace, 4 Hen. & Munf. 68	789
Attorney general v. Price, 17 Ves. 371	490	Butts v. Blunt, 1 Rand. 255	685
Attorney general v. Robins, 2 P. Wms. 23	461	Bynner v. Russell, 7 Moore 366, 1 Bingh. 23	210, 217
Attorney general v. Baxter, 1 Vern. 248	473	Calender's case, 1 Chase's Trial 188	775
Attorney general v. Sands, Hardr. 488, 502, 507, 510, 517	517	Calland, Rose v., 5 Ves. Jun. 186	177, 181, 194, 5
Attorney general v. Duplessis, 2 Ves. sen. 286, 506, 519	519	Calloway, Asberry v., 1 Wash. 74	723
Attorney general v. Tyndall, Amb. 614	544	Calverley v. Williams, 1 Ves. Jun. 210	129
Auld, Hepburn v., 5 Cranch 262	174	Campbell v. M'Combs, 4 Johns. Ch. Rep. 534	280, 293
Backhouse, Bedford v., 2 Eq. Ca. Abr. 615, pl. 12	370, 372, 377	Carlisle, Lockridge v., 2 Leigh 183	281
Bagwell v. Elliott, 2 Rand. 300	528	Carrington v. Bennett, 1 Leigh 340	206, 214, 5
Bailey v. Greenleaf, 7 Wheat. 46	600	Carroll, Gainsford v., 2 Barn. & Cress. 694	83, 4
Baird v. Bland, 5 Munf. 492	739, 740	Carroll's ex'rs, King William Justices v., 2 Munf. 24	397
Banert's lessee v. Day, 3 Wash. C. C. R. 243	691	Cary v. Abbot, 7 Ves. 490	460
Bank of Columbia, Renner v., 9 Wheat. 581, 236, 210, 213	213	Castleman, Graff v., 5 Rand. 195	21
Bank of U. States, Mills v., 11 Wheat. 431, 205, 211, 213	213	Chamberlaine v. Marsh's adm'r, 6 Munf. 283	125, 129
Bank of Washington v. Triplett & Co., 1 Peters 25	205, 211, 213	Chamberlayne v. Temple, 2 Rand. 384	536, 737
Bank of the Valley, Stribling v., 5 Rand. 132, 332, 586	586	Chaney v. Saunders, 3 Munf. 51	794
Baptist association v. Hart's ex'rs, 4 Wheat. 1, 3	460, 462, 8	Chapman, Smith v., 1 Hen. & Munf. 240	111
Peters, append. 481	357	Chase, Orr v., 1 Meriv. 729	556
Barford v. Street, 16 Ves. 135	507	Cheesborough v. Millard, 1 Johns. Ch. Rep. 409	536
Barkeley, Willson v., Plowd. 229	507	Cherry, Ferrars v., 2 Vern. 384	385
Barrett & Co. v. Tazewell, 1 Call 215	144	Cheval v. Nichols, 2 Eq. Ca. Abr. 63, pl. 7, 1 Stra. 664	377
Bartlett & al., Weeden v., 6 Munf. 123	737	Chowning v. Cox, 1 Rand. 306	654, 663
Bartlett v. Williams, 1 Pickering 288	228, 232, 3, 6	Christian, Whittington v., 2 Rand. 357	152, 3, 7, 8
Barton, Greenhow & Co. v., 4 Munf. 590	461	Church, Bishop v., 2 Ves. sen. 107	553, 4, 5, 560
Barton, Newman v., 2 Vern. 205	406	Claibornes, Turnbull ex'r v., reported 392, cited	397
Barzizas v. Hopkins, 2 Rand. 276	576	Clarke v. Conn, 1 Munf. 160	616
Basein, Huguenin v., 14 Ves. 273	473	Clayton v. Anthony, 6 Rand. 285	737, 794
Baxter, Attorney general v., 1 Vern. 248	588	Clerk v. Withers, 2 Id. Raym. 1072, 1 Salk. 822, 6	293
Baylors, Pollard v., 6 Munf. 433	614	Mod. 290	100
Beale v. Wilson, 4 Munf. 380	377	Cliphsham, Eccleston v., 1 Wms. Saund. 153-5, notes	1 and 2
Beatniff v. Smith, 1 Eq. Ca. Abr. 357, pl. 11	690	Clowes v. Dickenson, 5 Johns. Ch. Rep. 235	537, 540, 5
Beattie v. Tabb's adm'r, 2 Munf. 254	460	Coalter, Stuart's heirs v., 4 Rand. 74	3
Beatty & al. v. Kurtz & al., 2 Peters 506	592, 5	Coalter v. Hunter, 4 Rand. 58	333, 4
Beck, Taylor v., 3 Rand. 316	370, 372, 377	Cocke, Tucker v., 3 Rand. 66	125
Bedford v. Backhouse, 2 Eq. Ca. Abr. 615, pl. 12	375	Cocker, Fludyer v., 12 Ves. 25	635
Beekman, Frost v., 1 Johns. Ch. Rep. 288	417	Cocksedge v. Fanshaw, Doug. 119	158
Bennet v. Whitehead, 2 P. Wms. 644	206, 214, 5	Coffin v. Cooper, 14 Ves. 205	174
Bennett v. Hardaway's adm'r, 6 Munf. 125	206, 214, 5	Cogbill v. Cogbill, 2 H. & M. 477	79
Bennett, Carrington v., 1 Leigh 340	400	Cole v. Mordaunt, referred to in 4 Ves. 196, note	145
Bertie, lord Falkland v., 2 Vern. 342	178, 196	Colgin, Lightfoot v., 5 Munf. 42	338
Beverley v. Lawson, 3 Munf. 317	532, 6, 7, 540, 1, 6	Collett, Lloyd v., 4 Bro. C. C. 469, 4 Ves. 689, note	173, 189
Beverley v. Brooke, 2 Leigh 426	623	Collins v. Lowry, 2 Wash. 75	685, 9
Biddulph v. Biddulph, 12 Ves. 161	693	Columbia Bank, Renner v., 9 Wheat. 581	205, 210, 213
Bilbie v. Lumley, 2 East 471	716	Comegys v. Vasse v., 4 Wash. C. C. R. 570	716
Bishop v. Church, 2 Ves. sen. 107	716, 7	Comegys v. Vasse, 1 Peters 193	716, 7
Bishop's ex'r v. Bishop, 2 Leigh 487	507, 517, 8	Commonwealth v. Martin, 5 Munf. 117	507, 517, 8
Blagden's case, 19 Ves. 466	755	Commonwealth, Word v., reported 743, cited	755
Blair v. Owles, 1 Munf. 38	616	Conn, Clarke v., 1 Munf. 160	616
Bland, Baird v., 5 Munf. 492	181, 6	Cook, Stockton v., 3 Munf. 68	181, 6
Blanks's adm'r v. Foushee, 4 Munf. 61	174	Cooper, Coffin v., 14 Ves. 205	174
Blannerhassett, Miller v., 5 Munf. 197	177	Cooper v. Denne, 1 Ves. Jun. 565	177
Blount, Foone v., 2 Cowp. 467	266, 9	Cooper v. Thornton, 3 Bro. C. C. 96	266, 9
Blow v. Maynard, 2 Leigh 29	544	Cooper, Aldrich v., 8 Ves. 381	544
Blower v. Morret, 2 Ves. sen. 420	685	Coppin v. Coppin, 2 P. Wms. 292	685
Blunt, Butts v., 1 Rand. 255	63	Corbin, Burwell v., 1 Rand. 181	42, 5, 7, 54, 436, 9, 440, 1, 2, 4, 6, 7, 8, 9
Boddam, East India Company v., 9 Ves. 466	174	Couch v. Miller, 2 Leigh 545	614
Boehm v. Wood, 1 Jac. & Walk. 419	530	Couch, Webster v., 6 Rand. 519	673
Bond v. Seawell, 3 Burr. 1773	335	Courtown (lord), Underwood v., 2 Scho. & Lef. 64	879
Boughan, Wood v., 1 Call 329	283	Cox, Sheldon v., Amb. 624	877
Bowie, Williamson v., 6 Munf. 176	440		
Boyd v. Vass, reported 32, cited			

Cox, Chowning v., 1 Rand. 306.....	654, 663	Foster, Pope v., 4 T. R. 590.....	564, 5, 6
Craig v. Leslie, 3 Wheat. 563.....	424, 513	Foushee, Blanks' adm'r v., 4 Munf. 61.....	206
Crenshaws v. Slate River Company, 6 Rand. 24.....	331, 2, 4, 7	Fowler, Attorney general v., 15 Ves. 85.....	460
Cridde, Merryman v., 4 Munf. 542.....	83	Franklin, Osgood v., 2 Johns. Ch. Rep. 20, 14 Johns. Rep. 553.....	175
Crofts v. Lindsey, 11 Vin. Abr. Executors, B. c. pl. 11, p. 430.....	461	Frederick Justices, Gordon's adm'r v., 1 Munf. 1 Freeland & al. Vaughan & al. v., 2 Hen. & Munf. 477, 8, note.....	397 79
Cross, Daniel v., 3 Ves. 277.....	568	Freeman's ex'r, Bronaugh's v., 2 Munf. 266.....	614
Croughton v. Duval, 3 Call 60.....	554	Fries's case, 2 Chase's Trial, append.....	772
Currie's adm'r v. Mutual Assurance Society, 4 Hen. & Munf. 315.....	228, 232	Frost v. Beekman, 1 Johns. Ch. Rep. 288.....	375
Currie v. Donald, 2 Wash. 50.....	378	Gainsford v. Carroll, 2 Barn. & Cress. 624.....	83, 4
Curtis, Plincke v., 4 Bro. C. C. 329.....	175	Gardner's adm'r v. Vidal, 6 Rand. 106.....	93, 6
Cuzzen, M'Connico & c. v., 2 Call 368.....	244	Garland v. Jacobs, 2 Leigh 651.....	91
Dacres, Brisbane v., 5 Taunt. 144.....	461, 490, 662	Garnett v. Macon, U. S. Circuit Court, district of Va.....	173
Dandridge, Spotswood v., 4 Munf. 289.....	316, 397	Gee, Todd v., 17 Ves. 273.....	290, 674
Daniel v. Cross, 3 Ves. 277.....	558	George, Howell v., 1 Madd. Ch. Rep. 1.....	290
Dare's adm'r, Linney's adm'r v., 2 Leigh 588, 550, 1, 6	575	Gibson v. Hunter, 3 H. Blac. 207.....	157, 8, 9
Darwin, Ridgeway v., 8 Ves. 66.....	461	Gibson v. Patterson, 1 Atk. 12.....	187
Davenport, Lawrason v., 2 Call 95.....	556	Gibson, Hawkins v., 1 Leigh 478.....	725
David v. Ellice, 5 Barn. & Cress. 196.....	106	Gill v. Lyon, 1 Johns. Ch. Rep. 447.....	537, 545
Davis, Jiggetts v., 1 Leigh 368.....	614	Gilman v. Hoare, 1 Salk. 275.....	871
Dawson, Glascock's adm'r v., 1 Munf. 605.....	691	Gilman v. Brown, 1 Mason 212, 4 Wheat. 255.....	600
Day, Banert's lessee v., 3 Wash. C. C. R. 243.....	602, 7	Glascock's adm'r v. Dawson, 1 Munf. 606.....	614
Dean, Livingston v., 2 Johns. Ch. Rep. 479.....	777	Glennie, Mafr v., 4 Man. & Selw. 248.....	738
Dean of St. Asaph's case, 21 Howell's St. Tr. 971.....	564	Gloucester Justices, Amory v., 2 Virg. Cas. 523.....	804
Deck, Kirtley v., 2 Munf. 10.....	377	Glyn, Hardidg v., 1 Atk. 470.....	10
Deniston, lord Forbes v., 4 Bro. P. C. 189.....	177	Goodrich, Tom v., 2 Johns. Rep. 213.....	555
Denne, Cooper v., 1 Ves. Jun. 565.....	423, 9	Goodtitle v. Otway, 2 Wils. 67.....	357
Denne, Walker v., 2 Ves. Jun. 170.....	674	Gordon's ex'rs, Williamson v., 5 Munf. 257.....	226, 236
Denton v. Stewart, 17 Ves. 276, note.....	584, 9	Gordon's adm'r v. Frederick Justices, 1 Munf. 1	397
Dey, Dunham v., 13 Johns. Rep. 40.....	545	Gordon, Fitzhugh v., 2 Leigh 626.....	568
Dickinson, Clowes v., 5 Johns. Ch. Rep. 235, 577, 540, 545	370, 2, 7, 9, 382	Gould, Dunham v., 16 Johns. Rep. 367.....	584
Dickins, Morecock v., Amb. 678.....	796	Graft v. Castleman, 5 Rand. 195.....	21
Dingler's case, 2 Leach C. C. 638.....	254	Graham v. Hendren, 5 Munf. 185.....	125, 9
Divett, Powell v., 15 East 29.....	372, 7	Granberry's ex'r v. Granberry, 1 Wash. 246	348, 353, 4, 8, 9, 360, 361, 2, 3, 4, 416
Dodd, Hine v., 2 Atk. 275.....	69	Gratz, Brazier v., 6 Wheat. 528.....	174
Doe v. Perryn, 3 T. R. 484.....	69	Graves, Stanard v., 2 Call 369.....	571
Doe v. Martin, 4 T. R. 39.....	556	Grayson v. Atkinson, 2 Ves. sen. 454.....	442, 4
Donaghe's ex'r, Williams v., 1 Rand. 300.....	378	Green, v. Judith 5 Rand.	158, 4, 7, 8
Donald, Currie v., 2 Wash. 50.....	226	Green, Vaughan v., 1 Leigh 292.....	216
Donally, Hoover v., 1 Hen. & Munf. 316.....	417	Green, Bridgman v., 2 Ves. sen. 627.....	576
Dormer v. Fortescue, 2 Atk. 288, 3 id. 124.....	83	Green, Edmonds v., 1 Rand. 44.....	681
Douglass, Bull v., 4 Munf. 308.....	83	Greenhow & c. v. Barton, 4 Munf. 560.....	228, 232, 3, 6
Douglass & al. v. M'Allister, 3 Cranch 298.....	110	Greenhow's adm'r v. Harris, 6 Munf. 472.....	584, 6
Drew, Walter v., cited 1 Leigh 401; reported, Com. 372.....	516	Greenleaf, Bailey v., 7 Wheat. 46.....	600
Duke of York v. sir John Marsham, Hardr. 482.....	544	Greenwood, Skyring v., 4 Barn. & Cress. 281.....	461, 490
Duke of Athol, Lanoy v., 2 Atk. 444.....	673	Gregorie, Young v., 3 Call 446.....	564
Duncan v. Lyon, 3 Johns. C. R. 351.....	584, 9	Griffith v. Thompson, 1 Leigh 321.....	106
Dunham v. Dey, 13 Johns. Rep. 40.....	584	Guest v. Homfray, 5 Ves. 818.....	173
Dunham v. Gould, 16 Johns. Rep. 367.....	151, 160	Gwatkin, Ming & al. v., 6 Rand. 551.....	271
Dunkly, Durham v., 6 Rand. 135.....	174	Gwillm v. Stone, 14 Ves. 123.....	290, 674
Dunlop, Hepburn v., 1 Wheat. 179.....	144	Haddon, Angell v., 1 Madd. C. R. 529.....	280
Dunman, Mason v., 1 Munf. 456.....	10	Hairston v. Hughes & c. Justices of Henry, 3 Munf. 568.....	397
Dunn v. Amey, 1 Leigh 467.....	378	Hall, Walcott v., 2 Bro. C. C. 305.....	461
Dunsany (lord), Latouche v., 1 Sch. & Lef. 156, 280, 378	554	Hammersley v. Lambert, 2 Johns. Ch. Rep. 508.....	558
Duplessis, Attorney general v., 2 Ves. sen. 286, 506, 519	554	Hamilton, Stuart v., 2 Hen. & Munf. 48.....	723
Durham v. Dunkly, 6 Rand. 135.....	151, 160	Hampton v. Hampson, 3 Ves. & Beam. 41.....	571
Duval, Croughton v., 3 Call 60.....	507	Harben, Edwards v., 2 T. R. 567.....	737
Dykes v. Woodhouse, 3 Rand. 287.....	397, 400, 403, 4, 5	Harbert's case, 3 Co. 11.....	535, 540
Earl of Somerset's case, Hob. 214.....	601	Hardaway's adm'r, Bennett v., 6 Munf. 125, 206, 214, 5	10
Earl Verney, Stanhope v., Harg. Co. Litt. 290, b. note 1, § 13.....	63	Harding v. Glyn, 1 Atk. 470.....	382
East India Company v. Boddam, 9 Ves. 465.....	100	Hardingham v. Nicholls, 3 Atk. 304.....	177, 181, 194, 5
Eccleston v. Cliphsham, 1 Wms. Saund. 153-5, notes 1 and 2.....	685	Hardman, Onmed v., 5 Ves. 122.....	41
Echols, Minnis v., 3 Hen. & Munf. 31.....	681	Hardwick, The King v., 11 East 578.....	173
Edmonds v. Green, 1 Rand. 44.....	370	Harrington v. Wheeler, 4 Ves. 686.....	584, 6
Edwards, Vick v., 3 P. Wms. 372.....	737	Harris, Greenhow's adm'r v., 6 Munf. 472.....	584, 6
Edwards v. Harben, 2 T. R. 587.....	369	Hart's ex'rs, Baptist Association v., 4 Wheat. 1, 3 Peters, append. 481.....	460, 462
Ekins, Palmer v., 2 Id. Raym. 1550.....	528	Harwood, Jacob v., 3 Ves. sen. 265.....	556
Elliot, Bagwell v., 2 Rand. 200.....	699	Hawkins, Lechmere v., 2 Esp. Rep. 626.....	700
Elliot, Atkinson v., 7 T. R. 378.....	442	Hawkins v. Gibson, 1 Leigh 476.....	725
Ellis v. Smith, 1 Ves. Jun. 11.....	564	Hawley, Thornton v., 10 Ves. 129.....	423
Ellis v. Thelma, 3 Call 3.....	91, 2	Hayes v. Ward, 4 Johns. Ch. Rep. 123.....	281
Elwes, Tolson v., 1 Leigh 436.....	290	Hayes, Ranelagh v., 1 Vern. 190.....	293
Emery v. Wase, 8 Ves. 605.....	281, 700	Heath v. Percival, 1 P. Wms. 682.....	556
Enders v. Brune, 4 Rand. 438.....	281, 296	Heathcote, Abel v., 2 Ves. Jun. 98, 4 Bro. C. C. 378.....	177
Eppes v. Randolph, 3 Call 125.....	102	Henderson v. Allens, 1 Hen. & Munf. 235.....	206
Errington, Northumberland v., 5 T. R. 522.....	617	Hendley, Mantz v., 2 Hen. & Munf. 308.....	723
Evans, Thomson v., 6 Munf. 397.....	204, 206, 214	Hendren, Graham v., 5 Munf. 185.....	125, 9
Ewing v. Ewing, 2 Leigh 337.....	797	Henry, Sarah v., 2 Hen. & Munf. 19.....	813
Eyre, Longford v., 1 P. Wms. 741.....	48	Hepburn v. Auld, 5 Cranch 262.....	174
Eyre v. Shaftsbury, 2 P. Wms. 119.....	460	Hepburn v. Dunlop, 1 Wheat. 179.....	174
Falkland (lord) v. Bertie, 2 Vern. 342.....	460	Hepburn v. Lewis, 2 Call 497.....	616
Fanshaw, Cocksedg v., Doug. 119.....	158	Hickman v. Stout, 2 Leigh 6.....	308
Farrer, Irwin v., 19 Ves. 86.....	357	Hiern v. Mtll, 13 Ves. 120.....	385
Farrars v. Cherry, 2 Vern. 384.....	385	Hiles, Jenkins v., 6 Ves. 646.....	177, 195
Findlay v. Smith, 6 Munf. 184.....	338	Hill v. Simpson, 7 Ves. 152.....	385
Finn's case, 6 Rand. 701.....	797	Hine v. Dodd, 2 Atk. 275.....	372, 377
Fish, Longchamp v., 3 New Rep. 415.....	42, 8, 50	Hines, Whitehorn v., 1 Munf. 567.....	576
Fish v. Klein, 1 Meriv. 431.....	502	Hoare, Gilman v., 1 Salk. 275.....	371
Fitzhugh v. Gordon, 2 Leigh 628.....	593	Hodson, Jones v., 2 Rand. 483.....	91, 2, 7
Fletcher v. Ashburner, 1 Bro. C. C. 497.....	421, 7	Hodgkinson's case, Coop. Ch. Ca. 99.....	725
Flint's case, 1 Swans. 80.....	698	Hogg, Lashley v., 11 Ves. 602.....	280
Fludger v. Cocker, 13 Ves. 25.....	635	Holland's case, 1 Roll's Abr. 194, 584, Alleyn 14	502, 7, 510, 516, 7
Flutt, Plumb v., 2 Anstr. 438.....	513	Holliday, Rootes v., 4 Munf. 323.....	617
Foone v. Blount, 3 Cowp. 467.....	377		
Forbes (lord) v. Deniston, 4 Bro. P. C. 189.....	417		
Fortescue, Dormer v., 2 Atk. 283, 3 id. 124.....			

Holt v. Holt, 11 Vin. Abr. Executors, B. c. pl. 1, 1 Chan. Ca. 190.....	461	Lightfoot v. Colgin, 5 Munf. 42.....	338
Homfray, Guest v., 5 Ves. 818.....	173	Lilley's case, 1 Leigh 525.....	244, 8
Hoover v. Donally, 1 Hen. & Munf. 816.....	226	Lindo, Levy v., 3 Meriv. 80.....	174
Hopkins, Barzizas v., 2 Rand. 276.....	406	Lindsay's adm'r's, Martin v., 1 Leigh 499.....	593
Howell v. George, 1 Madd. Ch. Rep. 1.....	290	Lindsey, Crofts v., 11 Vin. Abr. Executors, B. c. pl. 11, p. 430.....	461
Howlet v. Strickland, 1 Cowp. 56.....	83	Linney's adm'r v. Dares's adm'r, 3 Leigh 588.....	550, 1, 6
Howver, Meze v., 1 Leigh 442.....	91, 2	Livingston v. Dean, 2 Johns. Ch. Rep. 479.....	602, 7
Hoyle v. Young, 1 Wash. 150.....	156	Livingston v. Livingston, 4 Johns. C. R. 287.....	673
Hucks, The King v., 1 Starkie N. P. Cas. 521.....	790	Lloyd v. Collett, 4 Bro. C. C. 469, 4 Ves. 669, note.....	173, 189
Hudson, Wrightson v., 2 Eq. Ca. Abr. 609, pl. 7, 377, 8		Lloyd v. Spillet, 2 Atk. 150.....	150
Hughes & C. Justices of Henry, Hairston v., 8 Munf. 568.....	397	Lockridge v. Carlisle, 2 Leigh 186.....	281
Hughes v. Kearney, 1 Scho. & Lef. 182.....	635	Long, Lewis v., 3 Munf. 134.....	616
Huguenin v. Baseley, 14 Ves. 273.....	576	Longchamp v. Fish, 2 New Rep. 415.....	42, 8, 50
Hunter, Gibson v., 2 H. Blac. 207.....	157, 8, 9	Longford v. Eyre, 1 P. Wms. 741.....	48
Hunter, Coalter v., 4 Rand. 58.....	333, 4	Love, Kerr v., 1 Wash. 172.....	244
Hutchison v. Kellam, 3 Munf. 202.....	616	Low, Smith v., 1 Atk. 490.....	370
Inglis v. Trustees of Sailor's Snug Harbour, 3 Peters 90.....	460	Lowe v. Waller, 2 Doug. 736.....	584, 7, 8
Ingraham, Penn's lessee v., 2 Wash. C. C. R. 487.....	691	Lowen, Kent v., 1 Camp. 177.....	584, 8, 9
Irwin v. Farrer, 19 Ves. 86.....	357	Lowry, Collins v., 2 Wash. 75.....	666, 9
Isham v. Morris, Cro. Car. 109.....	371	Lucas, Jones v., 1 Rand. 268.....	789
Jackson, Oates v., 2 Stra. 1172.....	69	Lumley, Bible v., 2 East 471.....	666
Jackson, Thompson v., 8 Rand. 504.....	125, 178	Lyburn, Murray v., 2 Johns. Ch. Rep. 443.....	602, 7
Jackson v. Veeder, 11 Johns. Rep. 169.....	175	Lymbriek v. Seldon, 3 Munf. 202.....	616
Jackson v. Wright, 14 Johns. Rep. 193.....	369, 370	Lyon, Gill v., 1 Johns. Ch. Rep. 447.....	537, 545
Jackson v. Bull, 1 Johns. Ca. 90.....	370	Lyon, Duncan v., 3 Johns. C. R. 351.....	673
Jackson v. Murray, 12 Johns. Rep. 201.....	370	Macnamara, Purcell v., 9 East 157.....	566
Jacobs, Garland v., 2 Leigh 561.....	91	Macon, Garnett v., U. S. Circuit Court, district of Va.....	173
Jacob v. Harwood, 2 Ves. sen. 265.....	556	Mair v. Glennie, 4 Mau. & Selw. 248.....	738
James, Selden v., 6 Rand. 465.....	635	Mantz v. Hendley, 2 Hen. & Munf. 308.....	723
Jenkins v. Hiles, 6 Ves. 646.....	177, 195	Marks v. Morris, 2 Munf. 407.....	593, 5
Jerrard v. Saunders, 2 Ves. jun. 454.....	382	Marlow v. Smith, 2 P. Wms. 198.....	177
Jiggetts v. Davis, 1 Leigh 368.....	106	Marsh's adm'r, Chamberlaine v., 6 Munf. 233.....	125, 9
Johns's case, 1 East's P. C. 387.....	790, 6	Marshall v. Bussard, Gilm. 9.....	564
Johnson v. Stagg, 2 Johns. Rep. 510.....	375	Marshall, Duke of York v., Hardr. 432.....	516
Johnson, Proctor v., 11d. Raym. 669, 2 Salk. 600.....	401	Martin, Doe v., 4 T. R. 39.....	69
Johnston, Syme v., 3 Call 523.....	175, 199	Martin, Commonwealth v., 5 Munf. 117.....	507, 513, 7
Jones, Smith v., 6 Rand. 33.....	47, 440, 1, 2, 7, 8, 529	Martin v. Lindsay's adm'r's, 1 Leigh 499.....	593
Jones v. Hobson, 2 Rand. 483.....	91, 2, 7	Martindale, Anderson v., 1 East 497.....	101
Jones v. Stanley, 3 Eq. Ca. Abr. 686, pl. 9.....	381	Martyr, Powell v., 8 Ves. 146.....	635
Jones v. Lucas, 1 Rand. 268.....	789	Mason v. Dunman, 1 Munf. 456.....	144
Judith, Green v., 5 Rand. 1.....	153, 4, 7, 8	Mason's devisees v. Peter's adm'r, 1 Munf. 437.....	736
Justices of Gloucester, Amory v., 2 Virg. Cas. 523, 804		Massey, Twiss v., 1 Atk. 67.....	725
Justices of King William v. Carter's ex'rs, 2 Munf. 24.....	397	Master v. Miller, 4 T. R. 320, 1 Anst. 226, 2 H. Blac. 141.....	254
Justices of Spotsylvania, Braxton v., 1 Wash. 81.....	397	Matthews v. Temple, Comb. 467.....	69
Kalmes, Orr v., 2 Ves. sen. 194.....	461	Matthews v. Warner, 4 Ves. 196.....	145
Kearney, Hughes v., 1 Scho. & Lef. 182.....	635	Matthews, Attorney general v., 2 Lev. 167.....	400
Kellam, Hutchison v., 3 Munf. 202.....	616	Maybow, Moore v., 2 Freem. 175.....	281
Kempshall v. Stone, 5 Johns. C. R. 193.....	674	Maynard, Blow v., 2 Leigh 29.....	728
Kendal's case, 17 Ves. 525.....	552	Mayo, Wilkinson v., 3 Hen. & Munf. 555.....	335
Kennedy, Westbeech v., 1 Ves. & Beam. 362, 442, 4, 5, 6		Mayo v. Tomkies, 6 Munf. 520.....	536, 8
Kent v. Lowen, 1 Camp. 177.....	584, 8, 9	M'Allister, Douglass & al. v., 3 Cranch 298.....	83
Kerr v. Love, 1 Wash. 173.....	244	M'Comb, Campbell v., 4 Johns. Ch. Rep. 534.....	290, 238
Keyling's case, 1 Eq. Ca. Abr. 239, pl. 25.....	461	M'Connico & v. Curzen, 2 Call 358.....	344
Kidd, Roake v., 5 Ves. 647.....	177	M'Donnell & c. Robinson & c. v., 2 Barn. & Ald. 134.....	737, 8
Kiger, Ashby v., 3 Rand. 165.....	617	M'Kinney, Salling v., 1 Leigh 58.....	806, 808
The King v. Woburn, 10 East 395.....	41	M'Lean, Boyd v., 1 Johns. Ch. Rep. 482.....	507, 8
The King v. Hardwick, 11 East 578.....	41	M'Murdo, Wernick's adm'r v., 5 Rand. 51.....	397, 409
The King v. Portington, 1 Salk. 162.....	460	Meng & al. Pleasants v., 1 Dall. 381.....	725
The King v. Holland, 1 Roll's Abr. Allen. A. pl. 8, p. 194, 534, Allyn 14.....	507, 510, 516, 7	Merryman v. Criddle, 4 Munf. 542.....	68
The King v. Hucks, 1 Starkie N. P. Cas. 521.....	790	Meze v. Howver, 1 Leigh 442.....	91, 2
King William Justices v. Carter's ex'rs, 2 Munf. 24.....	397	Miles, Kirkman v., 13 Ves. 338.....	424
Kinney, Watts v., reported 272, cited.....	630, 700	Mill, Hiern v., 18 Ves. 120.....	365
Kirkman v. Miles, 18 Ves. 338.....	424	Millard, Cheesborough v., 1 Johns. Ch. Rep. 409.....	536
Kirley v. Deck, 2 Munf. 10.....	564	Miller, Master v., 4 T. R. 320, 1 Anst. 226, 2 H. Blac. 141.....	254
Klein, Fish v., 1 Meriv. 431.....	502	Miller's ex'r v. Rice, 1 Rand. 438.....	461, 486
Koontz, Wilson v., 7 Cranch 302.....	315	Miller, Couch v., 2 Leigh 545.....	614
Korn & c. v. Mutual Assurance Society, 6 Cranch 192.....	228	Miller v. Blannerhassett, 5 Munf. 197.....	617
Kurtz & al., Beatty & al. v., 2 Peters 566.....	460	Mills v. Bank of U. States, 11 Wheat. 431.....	206, 211, 213
Lamb v. Smith, 6 Rand. 552.....	125	Ming & al. v. Gwatkin, 6 Rand. 551.....	371
Lambert, Burnley v., 1 Wash. 306.....	489, 694	Minnis v. Echols, 3 Hen. & Munf. 81.....	665
Lambert, Hamersley v., 2 Johns. Ch. Rep. 508.....	558	Mitchell, Tompkins v., 2 Rand. 428.....	700
Lampet's case, 10 Co. 47, b.....	688	Mitford v. Mitford, 9 Ves. 100.....	262
Land v. Otley, 4 Rand. 221.....	266	Moggridge v. Thackwell, 7 Ves. 35.....	460
Lane, Nadenbush v., 4 Rand. 413.....	271	Moore, Ritchie & Wales v., 5 Munf. 388.....	381
Lane v. Williams, 2 Vern. 277.....	563	Moore v. Maybow, 2 Freem. 175.....	145
Lane v. Tidball, Gilm. 133.....	640	Mordaunt, Cole v., referred to in 4 Ves. 196, note.....	370, 2, 7, 9, 336
Langford v. Pitt, 2 P. Wms. 630.....	174	Morecock v. Dickens, Amb. 678.....	109
Laoy v. Duke of Athol, 2 Atk. 444.....	544	Morgan, Selby & wife v., 6 Munf. 156.....	174
Lashley v. Hogg, 11 Ves. 602.....	280	Morgan, Wynn v., 7 Ves. 202.....	281
Latouche v. Id. Dunsany, 1 Scho. & Lef. 156.....	280, 370	Morley, Wright v., 11 Ves. 22.....	461, 484
Lawson v. Davenport, 2 Call 95.....	461	Morret, Blower v., 2 Ves. sen. 420.....	371
Lawrence, Trevivan v., 1 Salk. 276.....	178, 195	Morris, Insham v., Cro. Car. 109.....	371
Lawson, Beverley v., 3 Munf. 317.....	700	Morris, Marks v., 2 Munf. 407.....	370
Lechmere v. Hawkins, 2 Esp. Rep. 626.....	444	Murray, Jackson v., 12 Johns. Rep. 201.....	602, 7
Lemayne v. Stanley, 3 Lev. 1.....	370, 377	Murray v. Lyburn, 3 Johns. Ch. Rep. 443.....	507, 513
Le Neve v. Le Neve, 3 Atk. 646.....	424, 513	Mutual Assurance Society, Currie's adm'r's v. 4 Hen. & Munf. 315.....	236, 233
Leslie, Craig v., 3 Wheat. 563.....	174	Mutual Assurance Society, Korn & c. v., 6 Cranch 192.....	228
Levy v. Ludo, 3 Meriv. 80.....	614	Mutual Assurance Society v. Watts's ex'r, 1 Wheat. 279.....	228, 236
Levy's ex'rs, Burke, adm'r v., 1 Rand. 1.....	461, 484	Mutual Assurance Society, Stratton v., 6 Rand. 52.....	236
Lewin v. Lewin, 2 Ves. sen. 415.....	616	Myers v. Wade, 6 Rand. 444.....	23, 5
Lewis v. Lewis, 6 Serg. & Rawle 489.....	50	Nadenbush v. Lane, 4 Rand. 413.....	271
Lewis, Hepburn v., 2 Call 497.....	616	Nalsh, Tourville v., 3 P. Wms. 307.....	226, 261
Lewis v. Long, 3 Munf. 136.....	616		
Lidderdale v. Robinson, 12 Wheat. 564.....	281		
Liggat, Tate v., 2 Leigh 84.....	272, 284, 292, 7, 302, 5, 418		

Nekervis, Porter v., 4 Rand. 459	88	Schley & Co., Tiernans v., 2 Leigh 25	311
Newman v. Barton, 2 Vern. 205	461	Scott, Burton v., 3 Rand. 399	41
Nichols, Cheval v., 2 Eq. Ca. Abr. 68, pl. 7, 1	577	Seawell, Bond v., 3 Burr. 1773	530
Stra. 664	382	Sealy and wife v. Morgan, 6 Munf. 156	109
Nicholls, Hardingham v., 3 Atk. 304	382	Seiden v. James, 6 Rand. 465	635
Noel v. Robinson, 1 Vern. 92	640, 461	Seldon, Lymbrick v., 3 Munf. 202	616
Northmore, Sutherland v., 1 Dick. 56	176	Seton v. Slade, 7 Ves. 265	175, 187
Northumberland v. Errington, 5 T. R. 522	102	Shaftsbury, Eyre v., 2 P. Wms. 119	460
Oats v. Jackson, 2 Stra. 1173	69	Shaw, Phillips v., 4 Barn. & Ald. 435, 5 Id. 964	566
Okey, Taylor v., 13 Ves. 180	700	Sheldon v. Cox, Amb. 624	377
Omerod v. Hardman, 5 Ves. 722	177, 181, 194, 5	Shergold, Poole v., 2 Bro. C. C. 118	178
Orr v. Kalmes, 2 Ves. sen. 194	461	Shermer v. Shermer's ex'rs, 1 Wash. 266	357
Orr v. Chase, 1 Meriv. 729	556	Simpson, Hill v., 7 Ves. 152	385
Osgood v. Franklin, 2 Johns. Ch. Rep. 20, 14 Johns. Rep. 558	175	Skipwith v. Young, 5 Munf. 276	617
Land v., 4 Rand. 221	286	Skryring v. Greenwood, 4 Barn. & Cres. 281	461, 480
Otway, Goodtitle v., 2 Wils. 67	367	Slade, Seton v., 7 Ves. 265	175, 187
Owens, Ruth & al. v., 2 Rand. 507	461	Slate River Company, Creushaws v., 6 Rand. 245	331, 3, 4, 7
Owles, Blair v., 1 Munf. 38	236	Sleech's case, 1 Meriv. 563	554, 8, 9, 560
Palmer v. Ekins, 2 Id. Raym. 1550	369	Slingsby's case, 5 Co. 19, a	102
Palmer v. Stangane, 1 Lev. 43, T. Raym. 21	369	Smith v. Jones, 6 Rand. 33	47, 440, 1, 2, 7, 8, 529
Palmer, Ashby v., 1 Meriv. 296	422, 4	Smith v. Chapman, 1 Hen. & Munf. 240	111
Palmer, Mills v., 1 Meriv. 54	460	Smith, Lamb v., 6 Rand. 552	125
Parkist v. Alexander, 1 Johns. Ch. Rep. 398	374	Smith, Marlow v., 2 P. Wms. 198	338
Partridge, Wheldale v., 8 Ves. 235	423, 7	Smith, Findlay v., 6 Munf. 134	177
Patterson, Gibson v., 1 Atk. 12	187	Smith v. Low, 1 Atk. 490	370
Patterson, Pollard v., 3 Hen. & Munf. 67	203	Smith, Beattiff v., 1 Eq. Ca. Abr. 357, pl. 11	377
Payne v. Britton, 6 Rand. 102	271	Smith, Ellis v., 1 Ves. Jun. 1	442, 5
Peggy, Redford's adm'r v., 6 Rand. 316	45, 439	Somerset's (earl of) case, Hob. 214	507
Pendleton, Pleasants v., 6 Rand. 473	154	Sorrel, Williams v., 4 Ves. 389	570
Penn's lessee v. Ingraham, 2 Wash. C. C. R. 487	691	Spiller, Lloyd v., 2 Atk. 150	604
Percival, Heath v., 3 T. R. 484	556	Spotsylvania, Dandridge, 4 Munf. 298	316, 387
Perrin, Do v., 3 T. R. 484	69	Spotsylvania, Justices, Braxton v., 1 Wash. 31	387
Peter's adm'r, Mason's devisees v., 1 Munf. 437	736	Sprouse's case, 2 Virg. Cas. 375	782, 4
Phillips v. Shaw, 4 Barn. & Ald. 435, 5 Id. 964	566	Stagg, Johnson v., 2 Johns. Rep. 510	375
Pigo's case, 11 Co. 17	254	Stange, Palmer v., 1 Lev. 43, T. Raym. 21	369
Pim's case, Mo. 196	502	Stanard v. Graves, 2 Call 369	571
Pimcke v. Curtels, 4 Bro. C. C. 329	175	Stanhope v. Earl Verney, Harg. Co. Litt. 290, b. note 1, § 13	601
Pitt, Langford v., 2 P. Wms. 630	174	Stanley, Jones v., 2 Eq. Ca. Abr. 686, pl. 9	381
Pleasants v. Pendleton, 6 Rand. 473	154	Stanley, Lemayne v., 3 Lev. 1	444
Pleasants & Co., Ross v., Wythe's Rep. 162	359	Stanton, Roberts v., 2 Munf. 129	175
Pleasants v. Meng & al., 1 Dall. 381	725	Stephens v. White, 2 Wash. 210	152, 5
Plumb v. Fluit, 2 Anst. 438	894	Stephens's case, 11 Ves. 24	698
Pollard v. Patterson, 3 Hen. & Munf. 67	303	Stevens v. Stevens, 13 Johns. Rep. 316	370
Pollard v. Baylors, 6 Munf. 433	588	Stewart, Denton v., 17 Ves. 276, note	674
Pollard's case, 5 Rand. 659	782, 4	Stibbert, Taylor v., 2 Ves. Jun. 437	385
Poole v. Shergold, 2 Bro. C. C. 118	178	Stileman v. Ashdown, 2 Atk. 608	317
Pope v. Foster, 4 T. R. 590	564, 5, 6	Stith, Turner v., 1 Wash. 319	378
Porter v. Nekervis, 4 Rand. 459	88	Stout, Hickman v., 3 Leigh 6	308
Porter's case, 1 Co. 23	474, 5	Stratton v. Mutual Assurance Society, 6 Rand. 22	228
Portington, Rex v., 1 Salk. 163	460	Street, Barford v., 16 Ves. 135	357
Powell v. Divett, 15 East 29	254	Stribling v. Bank of the Valley, 5 Rand. 132	332, 586
Powell v. Martyr, 8 Ves. 146	635	Strickland, Howlet v., 1 Cowp. 56	83
Prescot's case, 1 Atk. 230	698, 700	Stuart's heirs v. Coalter, 4 Rand. 74	3
Price, Attorney general v., 17 Ves. 371	460	Stuart v. Hamilton, 2 Hen. & Munf. 48	733
Price, Adams v., 3 P. Wms. 11	688	Sturdivant v. Raines, 1 Leigh 481	96
Proctor v. Johnson, 1 Id. Raym. 639, 2 Salk. 600	401	Sutherland v. Northmore, 1 Dick. 56	176
Pryor v. Adams, 1 Call 382	571	Syderfen, Attorney general v., 1 Vern. 224	460
Purcell v. Macnamara, 9 East 157	566	Syme v. Johnston, 3 Call 523, 558	175, 199
The Queen v. Tanner & others, 2 Id. Raym. 1284	749	Tabb's adm'r, Beattie v., 2 Munf. 254	690
Raines, Sturdivant v., 1 Leigh 481	96	Tanner and others, The Queen v., 2 Id. Raym. 1284	749
Randolph, Eppes v., 2 Call 125	281, 296	Tate v. Liggit, 2 Leigh 84	272, 284, 292, 7, 302, 5, 418
Ranelagh v. Hayes, 1 Vern. 190	293	Taylor v. Stibbert, 2 Ves. Jun. 437	385
Rawlins's case, 4 Co. 53	369	Taylor v. Beck, 3 Rand. 316	562, 5
Reason & Tranter's case, 1 Stra. 499	791	Taylor v. Okey, 13 Ves. 180	700
Redford's adm'r v. Peggy, 6 Rand. 316	45, 439	Taylor v. Whitehead, Doug. 744	828
Redington v. Redington, 3 Ridg. P. C. 106	513	Tazewell, Barrett & Co. v., 1 Call 215	689
Regina v. Tanner & others, 2 Id. Raym. 1284	749	Temple, Matthews v., Comb. 467	69
Renner v. Bank of Columbia, 9 Wheat. 581, 206, 210, 218	423	Temple, Chamberlayne v., 2 Rand. 384	536, 737
Rex v. Portington, 1 Salk. 162	460	Thackwell, Moggridge v., 7 Ves. 35	460
Rex v. Holland, 1 Roll's Abr. Allen, A. pl. 8, p. 194, 534, Alleyne 14	507, 510, 516, 7	Thelman, Ellis v., 3 Call 3	564
Rex v. Woburn, 10 East 395	41	Thompson, Griffith v., 1 Leigh 321	106
Rex v. Hardwick, 11 East 578	41	Thompson v. Jackson, 3 Rand. 504	125, 178
Rex v. Hucks, 1 Starkie N. P. Cas. 521	790	Thomson v. Evans, 6 Munf. 397	617
Rice, Miller's ex'r v., 1 Rand. 438	461, 486	Thornton, Cooper v., 3 Bro. C. C. 96	266, 9
Ridgeway v. Darwin, 8 Ves. 66	575	Thornton v. Hawley, 10 Ves. 129	423
Ritchie & Wales v. Moore, 5 Munf. 388	82	Throckmorton, Tilley v., 2 Ch. Ca. 132	461
Roake v. Kidd, 5 Ves. 647	177	Tickell, Robinson v., 8 Ves. 142	266, 7, 9
Roberts v. Stanton, 2 Munf. 129	175	Tidball, Lane v., Gilm. 133	640
Roberts's case, Coop. Ch. Ca. 102	725	Tiernans v. Schley & Co., 2 Leigh 25	311
Robertson & others, Walthall's ex'r v., 2 Leigh 189	9	Tilley v. Throckmorton, 2 Ch. Ca. 132	461
Robertson v. Archer, 5 Rand. 319	489	Tinsley v. Anderson, 3 Call 285	281, 296
Robins, Attorney general v., 3 P. Wms. 23	461	Todd v. Gee, 17 Ves. 273	290, 674
Robinson v. Tickell, 8 Ves. 142	266, 7, 9	Tolson v. Elwes, 1 Leigh 436	91, 2
Robinson, Lidderdale v., 12 Wheat. 594	281	Tom v. Goodrich, 2 Johns. Rep. 213	565
Robinson, Noel v., 1 Vern. 92	460, 461	Tomkies, Mayo v., 6 Munf. 520	536, 8
Robinson & Co. v. McDonnell & Co., 2 Barn. & Ald. 134, 737, 8	617	Tomkins v. Mitchell, 2 Rand. 428	700
Rootes, Wilcox v., 1 Wash. 140	529	Tourville v. Naish, 3 P. Wms. 307	226, 381
Rootes v. Holliday, 4 Munf. 323	617	Trevivan v. Lawrence, 1 Salk. 276	369, 370
Rose v. Calland, 5 Ves. 186	177, 181, 194, 5	Triplett & Co., Bank of Washington v., 1 Peters 25	205, 211, 3
Ross v. Pleasants & Co., Wythe's Rep. 162	359	Trustees of Sailor's snug harbour, Inglis v., 3 Peters 99	460
Rowton v. Rowton, 1 Hen. & Munf. 91	571	Tucker v. Cocke, 2 Rand. 66	125
Russell, Bynner v., 7 Moore 266, 1 Bligh. 23	210, 217	Turnbull, ex'r v. Claibornes, reported 392, cited	397
Ruth & al. v. Owens, 2 Rand. 507	461	Turner v. Stith, 1 Wash. 319	378
Salling v. M'Kinney, 1 Leigh 58	806, 8		
Sands, Attorney general v. Hardr. 488	502, 7, 510, 517		
Sarah v. Henry, 2 Hen. & Munf. 19	813		
Saunders, Jerrard v., 2 Ves. Jun. 454	382		
Saunders, Chaney v., 3 Munf. 51	794		

Turpin, Wilson & Co. v. Henrico circuit court, Tate's Dig. Attachment, p. 35, note b.....	725
Twiss v. Massey, 1 Atk. 67.....	725
Tyndall, Attorney general v. Amb. 614.....	544
Underwood v. Id. Courtown, 2 Sch. & Lef. 64.....	379
United States Bank, Mills v., 11 Wheat. 481.....	205, 211, 3
Uvedale v. Uvedale, 3 Atk. 117.....	176, 182
Valley bank, Stribling v., 5 Rand. 132.....	332, 586
Vardy, Bull v., 1 Ves. Jun. 370.....	357
Vass, Boyd v., reported 32, cited.....	440
Vasse v. Comegys, 4 Wash. C. C. R. 570.....	716
Vasse, Comegys v., 1 Peters 193.....	716, 7
Vaughan & al. v. Freeland & al., 2 Hen. & Munf. 477, note.....	79
Vaughan v. Green, 1 Leigh 202.....	216
Veeder, Jackson v., 11 Johns. Rep. 169.....	175
Verney (earl), Stanhope v., Harg. Co. Litt. 290, b. note 1, § 13.....	601
Vick v. Edwards, 3 P. Wms. 372.....	370
Vidal, Gardner's adm'r v., 6 Rand. 106.....	96
Wade, Myers v., 6 Rand. 444.....	23, 5
Walcott v. Hall, 2 Bro. C. C. 305.....	461
Walker v. Denne, 2 Ves. Jun. 170.....	423, 9
Wallace, Buster's ex'rs v., 4 Hen. & Munf. 88.....	789
Waller, Lowe v., 2 Doug. 736.....	584, 7, 8
Walter v. Drew, cited 1 Leigh 401, reported, Com. 372.....	110
Walthall's ex'r v. Robertson & others, 2 Leigh 189.....	9
Ward, Hayes v., 4 Johns. Ch. Rep. 123.....	281
Warner, Matthews v., 4 Ves. 195.....	145
Warwick, Ambler v., 1 Leigh 195.....	88
Wase, Emery v., 8 Ves. 505.....	290
Washington Bank v. Triplett & c., 1 Peters 25 205, 211, 3	
Waters, Weigall v., 6 T. R. 488.....	83
Watts's ex'r, Mutual Assurance Society v., 1 Wheat. 279.....	228, 226
Watts v. Kinney, reported 272, cited.....	630, 700
Webster v. Couch, 6 Rand. 519.....	673
Weeden v. Bartlett & al., 6 Munf. 123.....	144
Weigall v. Waters, 6 T. R. 488.....	83
Welborne's case, 1 East's P. C. 359.....	790
Wernick's adm'r v. M'Murdo, 5 Rand. 51.....	397, 400
Westbeech v. Kennedy, 1 Ves. & Beam. 362, 442, 4, 5, 6	
Wheate, Burgess v., 1 W. Blac. 123, 1 Eden 177.....	502, 7, 9, 518, 9
Wheeler, Harrington v., 4 Ves. 686.....	173
Wheldale v. Partridge, 8 Ves. 235.....	423, 7
White, Stephens v., 2 Wash. 210.....	152, 5
White v. White, 1 Bro. C. C. 12.....	460
Whitehead, Bennet v., 2 P. Wms. 644.....	417
Whitehead, Taylor v., Doug. 744.....	828
Whitehorn v. Hines, 1 Munf. 557.....	576
Whittaker v. Whittaker, 4 Bro. C. C. 31.....	177
Whittington v. Christian, 2 Rand. 357.....	152, 3, 7, 8
Wigg v. Wigg, 1 Atk. 382.....	226, 382
Wilcox v. Rootes, 1 Wash. 140.....	529
Wilkinson v. Mayo, 3 Hen. & Munf. 565.....	335
Williams, Calverley v., 1 Ves. Jun. 210.....	129
Williams v. Sorrell, 4 Ves. 389.....	370
Williams v. Donaghe's ex'r, 1 Rand. 300.....	576
Williams, Lane v., 2 Vern. 277.....	568
Williams, Bartlett v., 1 Pickering 286.....	737
Williamson v. Gordon's ex'rs, 5 Munf. 257.....	226, 236
Williamson v. Bowle, 6 Munf. 176.....	283
Willson v. Barkeley, Plowd. 229.....	507
Willson, Beale v., 4 Munf. 380.....	614
Wilson v. Koontz, 7 Cranch 202.....	315
Wilson & Co. v. Turpin, Henrico Circuit Court, Tate's Dig. Attachment, p. 35, note b.....	725
Windsor (lord), Story v., 3 Atk. 630.....	381
Winslow, Braxton v., 1 Wash. 81.....	91
Withers, Clerk v., 2 Id. Raym. 1072, 1 Salk. 522, 6 Mod. 290.....	393
Woburn, The King v., 10 East 306.....	41
Wood, Boehm v., 1 Jac. & Walk. 419.....	174
Wood v. Boughan, 1 Call 829.....	336
Woodcock's case, 3 Leach C. C. 563.....	796
Woodhouse, Dykes v., 3 Rand. 287.....	397, 400, 403, 4, 5
Word v. Commonwealth, reported 743, cited.....	765
Wright v. Morley, 11 Ves. 22.....	281
Wright, Jackson v., 14 Johns. Rep. 193.....	369, 370
Wrightson v. Hudson, 2 Eq. Ca. Abr. 609, pl. 7.....	377, 8
Wynn v. Morgan, 7 Ves. 202.....	174
York (duke of) v. Sir John Marsham, Hardr. 433.....	516
Young, Hoyle v., 1 Wash. 150.....	156
Young v. Gregorie, 3 Call 446.....	564
Young, Skipwith v., 5 Munf. 276.....	617

CASES.

AMONG THOSE CITED.

WHICH WERE DISAPPROVED, DOUBTED OR EXPLAINED.

Beverley v. Brooke, 2 Leigh 425, doubted in Conrad v. Harrison and others.....	582
Brisbane v. Dacres, 5 Taunt. 114, distinguished from Gallego's ex'rs v. Lambert and others.....	490
Burgess v. Wheate, 1 W. Black. 123, doubted in Hubbard v. Goodwin.....	518
Burwell v. Corbin, 1 Rand. 131, doubted in Dudleys v. Dudleys.....	436
Granberry's ex'r v. Granberrys, 1 Wash. 249, explained in Burwell's ex'r v. Anderson, adm'r & c.....	348
Hamersley v. Lambert, 2 Johns. Ch. Rep. 508, doubted in Sale v. Dishman's ex'rs.....	558-60
Orr v. Kaines, 2 Ves. sen. 194, explained in Gallego's ex'rs v. Lambert and others.....	488
Pope v. Foster, 4 T. R. 590, disapproved in Mowry v. Miller.....	566
Skyring v. Greenwood, 4 Barn. & Cres. 281, distinguished from Gallego's ex'rs v. Attorney General.....	490
Tate v. Liggit & c., 2 Leigh 84, doubted in Watts and others v. Kinney and wife.....	272
Vasse v. Comegys, 4 Wash. C. C. R. 570, disapproved in Maitland and others v. Newton, adm'r & c.....	716
Walker v. Denne, 2 Ves. Jun. 170, disapproved in Pratt v. Taliaferro.....	423, 9

CASES

ARGUED AND DETERMINED IN THE

Supreme Court of Appeals of Virginia.

Overseers of Poor of Henrico v. Hart.

May, 1831.

Chancery—Jurisdiction to Injoin Overseer of Poor from Selling Glebe Lands of Church.*—The rector of the protestant episcopal church of the parish of H. insisting that the glebe land of that parish was a private donation to the church made before the revolution, and so reserved to the church within the exception of the statute of 1802 for the resumption of glebe lands, 1 Rev. Code, ch. 82, b. and therefore claiming the legal estate of this glebe land, files a bill in chancery, praying an injunction to inhibit the overseers of the poor of the county from selling the same, under the general provisions of the statute: *Held*, the court of chancery has no jurisdiction of such a case.

This was an appeal from a decree of the superior court of chancery of Richmond, upon a bill exhibited by the reverend William H. Hart, against William Montague and others, Overseers of the poor of the county of Henrico, wherein he alleged, That the glebe land of the parish of Henrico in that county, was a private donation for the use and benefit of the rector of that parish, made more than a hundred years ago, and therefore exempted from sale, *and preserved to the church, by the exception contained in the statute of January 1802, providing for the resumption and sale of glebe lands of the protestant episcopal church, 1 Rev. Code, ch. 32, b. p. 79, 81. That, at the time that statute was enacted, the reverend John Buchanan, now deceased, was rector of the parish, and incumbent of the glebe; and the plaintiff having been, some years before his death, appointed his assistant, was by him put into possession of the glebe, and permitted to enjoy the rents and profits thereof. That, upon the death of Mr. Buchanan, the plaintiff was regularly chosen his successor, and solemnly instituted rector of the church and parish of Henrico, and thus became entitled to the possession and enjoyment of the glebe belonging to the parish. But that the Overseers of the poor, proceeding under the general provisions of the statute, had advertised the glebe for sale. Therefore, the bill made them defendants; called upon them to shew their authority for so proceeding; and prayed that they should be enjoined from selling or otherwise disposing of the glebe. The injunction was awarded.

The Overseers of the poor answered, That the glebe in question having become vacant by the death of the reverend John Buchanan, the late incumbent, they had advertised the same for sale, as was their duty, under the general provisions of the statute of January 1802. That the glebe lands in Virginia, generally, were purchased by public contributions of, or assessments in the form of parish levies upon, the people of the respective

parishes, in pursuance of statutes of the colonial legislature; they referred to the acts of March 1655, act 9, 1 Hen. Stat. at large, p. 400, and of October 1748, ch. 34, 6 Id. p. 88. That if this glebe was, as the bill alleged, a private donation for the use and benefit of the rector of the parish, it formed an exception to the general mode by which such lands were acquired for the church; an exception which it was incumbent on the plaintiff to establish by proper proof; and, unless he should be able to prove that the glebe was a private *donation, and therefore excepted from the general disposition, which the statute of January 1802 required to be made of vacant glebe lands, it became the right and the duty of the Overseers of the poor, upon the death of the late incumbent, to make sale of it.

The depositions of two aged witnesses were taken and filed, to prove the declarations of many old inhabitants of the parish, now dead, that the glebe in question was given to the episcopal church by one Farrar; and that such was the ancient and general report and understanding, among the inhabitants of the parish, as to the manner in which the glebe was acquired. And to account for not producing the deed of the donor Farrar to the church, it was proved, that many of the records of the county court of Henrico, and papers deposited in the clerk's office, were destroyed by the british army in 1781.

The chancellor, upon the hearing, perpetuated the injunction; and the Overseers of the poor appealed to this court.

The cause was argued here by Williams and Daniel for the appellants, and Stanard for the appellee. But the only point considered and determined by this court, was the question of jurisdiction, Whether the case stated in the bill, was proper for relief in equity?

CARR, J. It has been decided by this court (so often and so recently that I need not cite the cases) that where a party has a complete remedy at law, equity will not interfere. We have also decided upon solemn argument, that a court of equity is not the proper tribunal to try legal titles, and that a bill bringing before this court, the dry legal title to lands, is demurrable: *Stuart's heirs v. Coalter*, 4 Rand. 74, is one of the cases in which this point was decided, after the most careful examination. Upon the case stated in the bill, did the plaintiff want the aid of equity? He had, as he says, the legal title and the possession; and the *glebe was a private donation, protected by the exceptions contained in the statute of January 1802. What had he,

*See monographic note on "Injunctions" appended to *Clayton v. Anthony*. 15 Gratt. 518.

then, to fear from the defendants' sale of the property? That sale could not divest his possession, nor affect his title in the least: he had only to hold on, and let the defendants' vendee bring his action: and then the legal title would have been discussed, and passed upon, in that forum to which such questions properly belong. But he has come into equity, whose aid he does not need, according to his own shewing; and brought up for its decision a title to real estate purely legal. Such a bill should never have been entertained.

The other judges concurring, the decree was reversed, and bill dismissed.

Powell v. Watson.

May, 1831.

Practice—Common Order—Entry upon Office Judgment List*—Case at Bar.—Capias ad respondendum, in debt on bond, returnable to August rules, being returned executed, and defendant not appearing, clerk enters the common order; at September rules, defendant appears, and puts in special bail, but does not plead; plaintiff insists that clerk shall enter a confirmation of the common order, so as to put the case on the office judgment list of the next term, which clerk refuses to do; at next term, court orders case to be put on office judgment list, and then defendant puts in a plea to the action; and, at the ensuing term, there is a trial, verdict and judgment, for plaintiff.

Same—Same—Same—Same—Quære.—Whether regular to order the case to be put on office judgment list?

Same—Same—Same—Waiver of Objection.—But HELD, if not regular, defendant's pleading to the action, was a waiver of objection to the regularity of the order.

This was an action of debt on a bond for \$14 dollars, brought by Watson against Powell in the circuit court of Amherst. The capias ad respondendum, upon which bail was required, was sued out in July, and made returnable to the rules to be held in the clerk's office in August. The writ being

5 taken as *his appearance bail, was returned to the August rules; at which Watson filed his declaration; and thereupon, the clerk entered the common order, that unless the defendant should appear at the next rule day, and plead to issue, judgment should be entered for the debt &c. against him and Coleman his appearance bail. At the September rules, Powell appeared, filed a recognizance of special bail entered into by Coleman, and cravedoyer of the writ and the bond, of which an entry was made; but he put in no plea to the action; and, therefore, Watson's attorney insisted, that the clerk should enter a rule confirming the common order, so as to put the cause upon the list of office judgments at the next term of the court; which the clerk refused to do. At the next term, Watson, insisting that the clerk ought to have entered an office judgment at the September rules, upon the failure of Powell to plead according to the rule given him at the August rules, moved the court to order the cause to be put upon the list of office judgments of that term: Powell objected, that if the clerk had erred, the court could only remand the cause to the rules, with directions to the clerk to correct the error there: but

the court disregarded the objection, and ordered the cause to be put on the list of office judgments of that term. Powell filed exceptions to this proceeding. And then, (special bail having been filed in the office as above mentioned) he pleaded payment; upon which the office judgment was set aside, and the cause continued for the trial of the issue made up upon the plea, until the next term; at which there was a trial, verdict and judgment for Watson. Powell applied to this court for a supersedeas to the proceedings and judgment, which was awarded.

Taylor, for the plaintiff in error. Supposing the clerk erred in not entering an office judgment at the September rules, upon the failure of Powell to plead according to the rule given him at the August rules, 1 Rev. Code, ch. 128, § 72, 73, p. 507, yet that error of the clerk was nowise 6 *imputable as a fault to Powell, nor ought he to be at all prejudiced thereby.

The statute, Id. § 77, p. 508, provides, that "the court shall have control over all proceedings in the office during the preceding vacation, may correct any mistakes or errors which may have happened therein, and may, for good cause shewn, set aside any of the rules or proceedings, and make such order concerning the same as may be just and right." Here, there was no rule or proceeding to be set aside; the error complained of, was an omission of the clerk to enter an office judgment at the September rules in the office, which could only be entered there; the effect of that omission was, that the cause remained at the rules; and the court in term could correct this error of omission, only by directing the clerk to enter the office judgment at the rules. The court could not enter an office judgment; it could not order a cause in which no office judgment had been entered, to stand upon the list of office judgments.

Johnson, for the defendant in error. Watson being clearly entitled to demand an office judgment at the September rules, it was a palpable mistake or error in the clerk not to enter it. The court at the ensuing term, was certainly authorized to correct this mistake or error, and to make such order as was just and right; and the only effectual mode of correcting the error, the order which justice required, was to enter the office judgment nunc pro tunc; or, which is the same thing, to consider the office judgment as having been entered at the rules, as it ought to have been, and to put the cause on the list of office judgments of the term. The effect of the clerk's error was, that Powell gained the delay of a term; the error could only be corrected by taking away that advantage from him. The method of correction adopted by the court, placed Watson in the situation in which he would have stood, if the clerk had not committed the error, and took from Powell, the advantage which

7 that error gave him: the mode of correction which *Powell proposed, would have left him all the advantage arising from the error, and left all the injustice done to Watson unredressed. But this point is now wholly immaterial: for, supposing the court erred in the method by which it intended to correct the proceedings at the rules, Powell himself cured that error, by pleading

*See monographic note on "Judgments" appended to Smith v. Charlton, 7 Gratt. 428.

to the action in open court; the effect of which was to set aside all the proceedings at the rules, and to put an end to all enquiry as to the regularity of those proceedings, and as to the proper method of correcting them if irregular. His defence was admitted, and fairly tried; he does not complain of any injustice in the trial and judgment.

Taylor. The court, by ordering the cause to be put upon the list of office judgments, imposed upon him the alternative of pleading to the action, or of suffering judgment by default. He was compelled to plead; and if it was irregular to compel him to plead, his pleading ought not to preclude him from complaining of this irregular compulsion.

GREEN, J. The substance of the opinion and direction of the court, excepted to by Powell, was, that Watson was entitled to a confirmation of the common order at the rule day preceding the then term of the court, and that what had been done in the office should be corrected accordingly, so as to put the cause on the list of office judgments of that term. If this had been done; if the office judgment had been entered on the docket, and not set aside during the term, it would have been final: and if the court erred in correcting the rules so as to produce that result, it might have been reversed for that error, which in that case would have been the foundation of the judgment. But the judgment appealed from, was not the consequence of, or in any degree affected by, that opinion and direction of the court: they were not in fact carried into effect. But if they had been, the voluntary plea of the defendant upon the merits, would have authorized and bound the court to set
8 *aside the office judgment, and no question could afterwards be entertained as to the validity of the judgment so set aside. But no office judgment having in fact been entered on the docket, there was none to set aside. The interposition of the defendant's plea obviated the necessity of entering any office judgment, and was a waiver of all objections on his part to the former proceedings and order. The judgment appealed from, being clearly right in itself, must be affirmed, whether the opinion and direction of the court below in respect to the proceedings at rules, were right or wrong; a question of which the court, therefore, waives the discussion.

Judgment affirmed.

Rucker's Adm'r &c. v. Gilbert.

May, 1881.

WILLS.—Direction That Slave Shall Enjoy Benefit of His Own Labor, but Shall Be under Control of Executor.—Effect.—Testator expresses his will and desire, that his slave J. Gilbert should be free, but finding it would be difficult for it to be so, and for him to remain in Virginia, he directs his ex'ors to lay off three acres of land for him, and to let him settle on it and have the use of it during his life and good behaviour, and that he wished Gilbert to enjoy the benefit of his own labour, but to be always under control and direction of his ex'ors; and Gilbert is carefully excepted out of every

***Slaves.—Emancipation.**—For the proposition that emancipation of slaves, to be effective, must be absolute, the principal case is cited in the following: *foot-note* to Wynn v. Carrell, 2 Gratt. 227; *Forward v. Thamer*, 9 Gratt. 589, and *note*; *Smith v. Betty*, 11 Gratt. 705; *Bailey v. Poindexter*, 14 Gratt. 193; *Williamson v. Coalter*, 14 Gratt. 397; *Adams v. Gilliam*, 1 Pat. & H. 161.

disposition of testator's slave property in the will: **Held**, this slave is not hereby emancipated.

The appellee Gilbert brought suit, in forma pauperis, against the appellant Rucker administrator with the will annexed of Rucker, to recover his freedom. in the county court of Amherst. The proceedings and pleadings were in the usual form, putting in issue the plaintiff's right to freedom. Upon the trial, the jury found a special verdict, stating—

That the plaintiff Gilbert was the slave of the defendant's testator Rucker, at the
9 time of his death. That *Rucker by his last will and testament, duly proved and recorded in the county court of Amherst, after making certain dispositions of slave property, directed, devised and bequeathed, as follows: "My said executors and trustees are hereby authorized to act in hiring out the balance of my negroes, except my mulatto man James Gilbert, from year to year, and rent land &c. during the lifetime of my wife, and apply the money arising therefrom to the best advantage for the benefit of my estate. Item, it is my will and desire that my mulatto man James Gilbert should be free; but finding there would be some difficulty for it to be so, and for him to remain here, I therefore request my executors to lay off three acres of land for said James Gilbert, at any corner of my land, and let him settle on it, that they may think proper; and he is to have it during his natural life on good behaviour, and then to return to my estate. I wish the said James Gilbert to enjoy the benefit of his labour, but always to be under the control and direction of my executors and trustees." That, in a subsequent part of the will, the testator directed all his personal estate and lands to be divided among his children, excepting said James Gilbert, and all his slaves to be valued, excepting said James Gilbert, of whom he made no other or further disposition than as above mentioned. And that the plaintiff was the same person mentioned in the will by the name of James Gilbert. And the jury referred the question to the court, Whether, upon this state of the case, Gilbert was entitled to his freedom?

The county court gave judgment that he was. Rucker's administrator appealed to the circuit court, which affirmed the judgment; and then he appealed to this court.

Johnson, for the appellant, cited *Walthall's ex'or v. Robertson and others*, 2 Leigh, 189.

Nicholas, assigned counsel for the pauper, said, that the judgment, in a doubtful case ought to be in favorem libertatis;
10 *and he endeavored to maintain, that the main intent of the testator in regard to this mar, to be collected from the whole will was to emancipate him, and that the other provisions respecting him, ought to be held subservient or subordinate to the main intent. He insisted, that the court ought to look to the main intent, and give it effect if consistent with the law. He said, the words willing and desiring, in a will, have always been held to create a trust for the person in whose favour the will and desire are expressed. *Harding v. Glyn*, 1 Atk. 470; *Sanders' Edi. note 1*; *Dunn v. Amey*, 1

Leigh, 467. This testator expressed "his will and desire that his man Gilbert should be free;" and throughout the will, there was no disposition made of Gilbert, as property. The emancipation of the man was the testator's main object, as well as his wish: but finding that there was a difficulty in his remaining in Virginia, he proceeded to make a provision for his subsistence and comfort, supposing he should remain here; and, as this provision was perfectly consistent with, and indeed auxiliary to, the main object, the court ought not to allow it such an effect as to defeat the main intent. That provision was a devise of land to the man he had before willed and desired should be free; a devise of land, which he could not hold unless he was made free: therefore, this very provision of itself implied an emancipation, instead of operating to defeat the will and desire to emancipate before expressed.

BROOKE, J. The question of freedom or slavery in this case, depends on the construction of the two clauses in Rucker's will, set out in the special verdict. No doubt the intention of testators must always be carried into effect, if consistent with the rules of law. But the question is, Whether this testator did intend, that at his death Gilbert should be a free man? If he did, the provisions in the will are very inconsistent. He says, "it is my will and desire that my mulatto man James Gilbert should be free: if he had

stopped here, there would have been no doubt, that James *Gilbert would have been free;" and here he would have stopped, if he had simply intended to emancipate him: "but finding" (as he says) "there would be some difficulty for it to be so, and for him to remain here," that is, as a freeman, he does not desire his executors to remove that difficulty, by sending him out of the state, but desires them to lay off three acres of land, which he is to have on good behaviour; certainly not as a freeman, because as such he could impose no such condition upon him; nor could he, as he has done in the last member of the clause, subject him to the control and direction of his executors, in the character of a freeman. However much the testator desired that Gilbert should be free, it was very clear, that he was deterred by the difficulties which the law presented with respect to residence here; and, under the circumstances, determined to do what he considered next best for him; to settle him for life on a piece of land, there to enjoy the fruits of his own labour.

Both judgments are to be reversed, and judgment entered for the appellant.

12 *Broadus and Others v. Rosson and Wife and Others.

Winston v. Same.

May, 1881.

Wills—Direction to Sell Realty—Authority of Administrator c. t. a. to Sell.—Testator, being about to leave the county, makes his will, and devises, that in case of his death, or if he should not be heard of for ten years, his land should be sold for the best price that could be got, as was directed by letter of attorney to J. H. of game date with the will, and proceeds divided among his four sisters: HELD, the adm'r with the will annexed has power to sell the land, under the statute 1 Rev. Code, ch. 104, § 52.

Administrators c. t. a.—Sale of Realty under Will—Bond Taken as Guardian.—The adm'r with the will annexed is guardian of testator's four sisters: he sells the land under power given by testator's will; and takes bonds for the proceeds payable to himself as guardian: HELD he is chargeable in his character of guardian, and his sureties for the guardianship are responsible.

Same—Same—Breach of Trust—Collusion—Liability.—The purchaser of the land, executes bonds for the purchase money in such proportions as the guardian requires, with a view to enable him to transfer bonds to others, for his own purposes: the guardian assigns one bond to T. and another to N. (who are both apprised of the right in which he held them, and that he is in failing circumstances) partly for his own individual debts and for cash advanced him; the guardian dies insolvent: HELD, the sureties of the guardian are primarily responsible to the wards, for so much of these bonds as the guardian misapplied to his own use; the assignees are bound to reimburse the sureties, the debt and costs recovered of them by the wards; each assignee is severally liable for what he received; if assignees prove unable to pay, the purchaser is bound to reimburse the sureties; and if sureties fail, the wards may have recourse against the assignees first, and then the purchaser, they being apprised of, and aiding in, the guardian's breach of his trust.

Guardians—Expenditure of Principal of Ward's Estate for Goods—Duty of One Who Furnishes Supplies.—Though a guardian has no right to expend the principal of his ward's estate, yet if he take up goods for his ward, the merchant who furnishes them, is not bound to see that the profits of ward's estate are sufficient to pay for them, and that the principal is not applied to pay for them.

Thomas Gaines, late of Culpeper county deceased, by his last will, dated the 4th December, reciting that he was about to leave Virginia, and that he was entitled under his father's will to a parcel of land in that county, devised and bequeathed, that, in case of his

***Fiduciaries—Dual Character—Election—Sureties.**—In the case of a person acting in the two characters of guardian and administrator, this court seems evidently to have contemplated the necessity of some act on the part of the administrator, manifesting his election to hold the funds (which he received as administrator) in the character as guardian, in order to charge his sureties in his guardian's bond. *Morrow v. Peyton*, 8 Leigh 75, citing *Myers v. Wade*, 6 Rand. 444; *Broadus v. Rosson*, 3 Leigh 12. See the principal case cited in *foot-note* to same case: also in *foot-note* to *Swope v. Chambers*, 2 Gratt. 319; *Boyd v. Cain*, 28 W. Va. 770. And in *Hill v. Umberger*, 77 Va. 660, it is said: "Aside from the sale of said two slaves, there is no account, no evidence of the dealings of said McGavock with said trust property, either as trustee or guardian. There is not the least evidence that said McGavock ever charged himself, or was chargeable as guardian, for the value of the negroes sold. It was incumbent on the complainants to produce such evidence to support their claim. *Smith v. Gregory*, 26 Gratt. 263, and cases there cited: *Broadus v. Rosson*, etc., 3 Leigh 25."

***Same—Breach of Trust—Liability of Participants.**—On this question the principal case is cited in *foot-note* to *Barksdale v. Finney*, 14 Gratt. 338; *foot-note* to *Asberry v. Asberry*, 83 Gratt. 463; *Hunter v. Lawrence*, 11 Gratt. 133; *Bolsseau v. Bolsseau*, 79 Va. 78; *Brockenbrough v. Turner*, 78 Va. 454. See monographic note on "Executors and Administrators" appended to *Rosser v. Deprest*, 5 Gratt. 135.
***Bonds—Assignment—Equities of Third Parties Not Parties.**—In *Thomas v. Linn*, 40 W. Va. 127, 20 S. E. Rep. 880, it is said: "The legal title (of nonnegotiable paper) cannot pass by assignment, death alone can pass the legal title, but the equitable owner by assignment may sue in his own name at law, under our statute (see section 14, ch. 90, Code); and, whether overdue or not, the assignee steps into the shoes of the assignor, taking it subject to all prior equities between previous parties (see 1 Daniel, Neg. Inst. §§ 1-31), being in no better situation than the assignor: for the holder can only sell and transfer such interest as he has (*Stockton v. Cook*, 8 Munf. 68), but it seems not subject to any equity of a third person not a party to the bond, of which he had no notice (*Broadus v. Rosson*, 3 Leigh 12)." See also, citing the principal case, note in 5 Va. Law Reg. 114. See monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801; also, monographic note on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 409.

death or his not being heard of for ten years, "the land aforementioned should be sold for the best price that could be got, which was directed by a power of attorney to John Hilton of the same date." and that the proceeds should be divided among his four sisters,

13 ters, *Clarissa, Susan, Mary and Lucy Gaines. The will was duly proved and recorded in the county court of Culpeper at March term 1812; and, the executors therein named, renouncing the executorship, the court granted administration with the will annexed to William Gaines, taking from him an administration bond, wherein William Broadus the younger was bound as his surety.

On or about the 1st January 1814, William Gaines as administrator with the will annexed of Thomas, sold the land in the will mentioned, to William Broadus the elder, for 1058 dollars, on a credit of twelve months; but he did not immediately make a conveyance to the vendee or take his bonds for the purchase money.

At the time this sale was made, Clarissa Gaines was married to Boswell Yates, but William Gaines, the administrator of Thomas, had been her guardian: he was still the guardian of Mary and Lucy Gaines, having been appointed in 1805, and Thomas Freeman, Archibald Tutt, Isaac Winston and Anthony Hughes being the sureties bound in the bond he gave as their guardian: and he was the guardian also of Susan Gaines, appointed in 1813, and the same Archibald Tutt with Philip Jones were the sureties in the bond he gave as her guardian. Before the sale was made, Gaines had contracted a small debt to Richard Norris, a retail dealer, to the amount of about 82 dollars, for articles of cloathing furnished by his directions, to his three wards, Clarissa, Susan and Mary, in different proportions; and he had contracted another debt to William Thompson, for like articles furnished by his directions, to his four wards, Clarissa, Susan, Mary and Lucy, in different proportions, and Thompson held a bond of his testator Thomas Gaines, for a small debt; these claims of Thompson amounted to about 300 dollars; and Gaines owed Thompson, on other accounts, 300 dollars more. The accounts of both Norris and Thompson appeared to have been settled by Gaines. Gaines himself was in failing circumstances, if not quite insolvent; and

14 this was well *known to Broadus the purchaser of the land, and to Norris and Thompson.

Very shortly after the sale of the land to Broadus the elder, Gaines drew an order on him in favour of Norris, for some £ 30. or £ 40. on account of the purchase money; but his son, Broadus the younger, who was Gaines's surety in his administration bond, apprehensive that he might be held responsible for the proceeds of the sale of the land, if the same should be misapplied by Gaines, interposed; and, at his instance, Broadus the elder refused to accept the draft. Upon this, Gaines, in order to enable himself to command the fund, agreed to give Broadus the younger counter security; and, accordingly, at the county court of Culpeper, on the 17th January 1814, he gave a new administration bond, wherein Boswell Yates and Larkin Nalle were his sureties. There was little doubt, that Yates, when he became Gaines's

surety in the new bond, was aware of his object in giving it; namely, to obviate the objection of his original surety, Broadus the younger, and to enable him to command the fund arising from the sale of the land to Broadus the elder.

On the 18th January 1814, Broadus the elder, with Broadus the younger as his surety, executed three bonds for the purchase money of the land, though these bonds were ante-dated the 1st of that month; one to Yates for his wife Clarissa's share of the purchase money; and two to Gaines, as the guardian of Susan, Mary and Lucy Gaines, one for 600 dollars, the other for 183 dollars 50 cents; Gaines apprising him, that he wanted the bond executed for 600 dollars, in order that he might transfer it to Thompson, and the other bond executed for 183 dollars 50 cents, in order that he might transfer it to Norris. Yates was present, understood the whole arrangement, and made no objection. Gaines, at the same time, executed a conveyance of the land to Broadus, (which he afterwards sold to other persons). And Gaines then transferred the

bond for 600 dollars to Thompson, in satisfaction of the amount *due him on the various accounts above mentioned: and he transferred the other bond to Norris, the debt due Norris for the goods furnished by him to the wards Clarissa, Susan and Mary Gaines, being discounted from the amount, and the balance paid by Norris to Gaines in cash. At the time these bonds were assigned to Thompson and Norris, they each knew the consideration for which they had been executed.

Very shortly after these transactions, Gaines went off to Tennessee, where he died insolvent.

In March 1814, Boswell Yates was appointed the guardian of Susau, Mary and Lucy Gaines, and James Yates was his surety in his guardian's bond. And upon the 24th of that month, he gave a written notice to Thompson, Norris and Broadus, warning Broadus that, as the money for which the two bonds for 600 dollars and for 183 dollars 50 cents were executed to Gaines, belonging to his wards, he must not pay the amount thereof to Thompson and Norris the assignees, and warning Thompson and Norris not to assign them away. Nevertheless, Broadus paid Thompson the whole amount of the larger bond which had been transferred to him by Gaines, with the avowed purpose of securing the money to him; and he paid Norris 150 dollars in part of the other bond that had been assigned to him.

Afterwards, Susan Gaines intermarried with Nimrod Rosson: and then a bill was exhibited in the superiour court of chancery of Fredericksburg by Boswell Yates and Clarissa his wife, Nimrod Rosson and Susan his wife, and Mary and Lucy Gaines, infants by Boswell Yates their next friend, against Broadus the elder, Thompson and Norris, setting forth the facts of the transactions; insisting, that the money for which the bonds executed by Broadus to Gaines, and by him assigned to Thompson and Norris, were given, belonged to Susan, Mary and Lucy Gaines, that Broadus was bound to look to the application of the purchase money of the land sold to him by Gaines

under his testator's will, and that
16 Thompson and Norris, having *taken the assignments of those bonds from Gaines, with full notice of the plaintiffs' rights, were not entitled to hold them; and praying, that Broadus should be decreed to pay the money due by those bonds to the three plaintiffs thereto entitled, and that Thompson and Norris should be compelled, respectively, to deliver the bonds, if they yet held them, or if they had received the contents, to account for and pay the amount they had respectively received, to the three plaintiffs entitled.

Broadus, in his answer to this bill, insisted that he was not bound to see to the application of the purchase money, and that his only duty was to pay the same to Gaines or to his assignees. And Thompson and Norris, in their answers, respectively, insisted that they were entitled to hold the bonds under Gaines's assignment, and that the plaintiffs could only look for redress to the sureties bound for Gaines in his guardian's bonds.

Pending this bill, Mary Gaines intermarried with Willis Carr, and the suit was thenceforth prosecuted in the name of Carr and wife. And the cause being heard on this bill, the answers thereto, exhibits and proofs, the court dismissed the bill as to the plaintiffs Boswell Yates and wife with costs; and gave the other plaintiffs leave to amend and make new parties, and substituted Nimrod Rosson in place of Yates, as the next friend of the infant plaintiff Lucy Gaines, to prosecute the suit on her behalf. Whereupon, Nimrod Rosson and Susan his wife, Willis Carr and Mary his wife, and Lucy Gaines by Rosson her next friend, exhibited an amended bill, wherein, referring to the former bill and proceedings thereupon, they made the following parties defendants, in addition to those made by the former bill; namely, William Broadus the younger, the surety of William Gaines in his first bond for the due administration of Thomas Gaines's estate; Boswell Yates and Larkin Nalle, the sureties in Gaines's second administration bond; Arch. Tutt and Philip Jones, the sureties of Gaines in the bond he gave as guardian of Susan
17 Gaines; *Arch. Tutt, Isaac Winston and Elizabeth Hughes executrix of Anthony Hughes, three of the sureties of Gaines in the bond he gave as guardian of Mary and Lucy Gaines, Thomas Freeman the other surety therein bound, having removed from the commonwealth, and died insolvent; and Boswell Yates as the successor guardian of Susan, Mary and Lucy Gaines, and James Yates the surety bound in his guardian's bond: and the bill prayed relief generally, against such of the parties defendants made by the original and amended bills, as the court should hold liable to the plaintiffs; and that Boswell Yates, the last guardian, should render accounts of his guardianship.

Most of these new parties filed their answers, insisting, respectively, that they were exempt from liability to the plaintiffs; and as to the others, the bill was regularly taken pro confesso.

The facts of the case as above stated, appeared, clearly enough, upon the pleadings and proofs in the cause. It also appeared,

that Jones the co-surety with Tutt for William Gaines as guardian of Susan Gaines, was not a resident of Virginia: That the three wards Susan, Mary and Lucy Gaines, had other property besides their shares of the proceeds of the land bequeathed to them by Thomas Gaines's will: And that in another suit prosecuted by the plaintiffs against the sureties of Gaines as their guardian, accounts of the guardianship had been taken, in which the proceeds of this land had not been accounted for, and yet on those accounts there was a balance found in favor of the wards.

The chancellor held, that the sureties of Gaines as guardian for Susan Gaines, were responsible to her for her share of the proceeds of the land, subject to a deduction for the goods furnished her by Thompson and by Norris respectively; and deducing, accordingly, the amount of their bills respectively, from her share, he decreed that Tutt (Jones being a non resident) should pay the balance with interest, to the plaintiffs Rosson
18 and wife. He held, *likewise, that

Tutt, Winston, and the executrix of Hughes, the sureties of Gaines as guardian for Mary and Lucy Gaines (the other surety, Freeman, being dead insolvent) were responsible to them respectively for their shares of the proceeds of the land, subject to deductions for the goods furnished them respectively, by Thompson and Norris; and deducting the amount of Thompson's and Norris's bills for goods furnished to each of them, he decreed that Tutt, Winston and Hughes's executrix should pay to Carr and wife, and to Lucy Gaines, the balances due to each respectively, with interest. And he decreed the plaintiffs their costs against the defendants Tutt, Winston and Hughes's executrix. But the decree required the plaintiffs to release, by proper deeds, all their right, title and interest in the land, directed to be sold by Thomas Gaines's will, to the purchaser thereof from William Gaines his administrator, as a condition upon which they should be entitled to payment of the balances decreed to them. And the chancellor, declaring that the liabilities which he had thus imposed on the sureties of Gaines as guardian of the plaintiffs, were caused by a fraudulent combination of the defendants Thompson, Norris, Broadus the elder, and Boswell Yates, with Gaines the guardian; that each and all of those defendants participated in procuring Gaines's breach of trust, in regard to the fraud; and that, therefore, he would not undertake to discriminate among them, or to inquire how far the transaction enured to the benefit of either, but would hold each and all bound to reimburse the sureties, to the full extent of the injury sustained by them in consequence of this fraudulent combination; therefore, decreed against the defendants Thompson, Norris, Broadus the elder, and Boswell Yates, jointly, that they should pay to the sureties the sums which they were respectively decreed to pay the plaintiff, and their own costs expended in their defence.

From this decree. Broadus, Thompson and Norris, first, appealed; and afterwards. Winston also, one of Gaines's sureties, prayed an appeal, which was allowed.

19 *Stanard, for the appellants Thompson and Norris, 1. endeavoured to

maintain, that they were entitled to hold the bonds assigned to them respectively by Gaines, or the money they had received from Broadus upon them: that they acquired by the assignment, the legal right to the bonds, and were not chargeable with any fraud, or participation in fraud, which could impair that right in equity. Norris had a just claim against Gaines as guardian of Susan, Mary and Lucy Gaines: he took an assignment from Gaines of a bond executed to him as guardian of the same persons, for a greater amount, and paid him the difference in cash. Thompson, having claims against Gaines, as the representative of Thomas Gaines, upon that testator's bond, and as the guardian of Clarissa, Susan, Mary and Lucy Gaines, the cestuis que trust to whom he was accountable for the proceeds of the land he had sold to Broadus, amounting to 300 dollars, took from Gaines, the assignment of Broadus's bond for 600 dollars, in discharge of those claims, and of a debt of 300 dollars due him from Gaines on other accounts. To the amount of 300 dollars, then, this part of the fund was justly applied. And as to the residue of the bond assigned to Thompson, Gaines got no other advantage, and his wards, or the sureties for his guardianship, sustained no other loss, than he would have got, or they sustained, if he had sold the bond in the market. The assignees, in effect, did no more than cash the bonds; they paid Gaines the money, instead of Broadus. If Broadus had paid it to him, and he had then paid it to Thompson and Norris, for exactly the same consideration for which he assigned them Broadus's bonds; in that case, he asked, could they have ever been held bound to refund the money? and would not Gaines's sureties have been held liable for his alleged misapplication of the fund, without recourse against them? He said, the actual case, in substance and in principle, was not materially different. And he argued, that if cestuis que trust may pursue the trust subject in the hands of assignees of the trustee, in a case where the trustee has given no security

20 *for the due discharge of the trust, it was because the trustee has given no security, and the rights of the cestuis que trust can no otherwise be preserved; and it by no means followed, nor had it ever been held, that where the trustee has given ample security, his sureties, who have expressly undertaken to stand sponsors for his fidelity, may, for their own indemnity, pursue the subject in the hands of assignees who have acquired the legal title from the trustee. But, 2. supposing Thompson and Norris bound to refund to Gaines's wards, or to his sureties, he said they could not be held jointly liable, each with the other and with Broadus and Yates: each of them should be held severally liable for what he had received of the money due on the bond assigned to him, over and above the amount of the debt due him by Gaines in his character of trustee. Now, Norris had received of Broadus, only 150 dollars, in part of the bond for 183 dollars 50 cents assigned to him; he was entitled to 82 dollars for goods furnished Gaines's wards Clarissa, Susan and Mary, and was, therefore, bound to refund only 68

dollars with interest: the balance still due from Broadus upon this bond, ought to be decreed against him. And Thompson was also entitled to retain, out of the bond for 600 dollars assigned to him, the amount of the debts which were due to him from Gaines in his character of trustee, and which were fairly chargeable upon this fund, and ought only to refund the residue with interest.

Williams and Briggs, for Tutt, Winston and Hughes, contended, 1. that there ought to have been no decree against these parties, the sureties bound for Gaines in his guardian's bond. For the fund consisted wholly of the proceeds of land, sold by him as administrator with the will annexed of Thomas Gaines: the purchase money was due to him only in that character: he was accountable for it, as administrator, to the legatees, of his testator, not as guardian of the legatees, to them as his wards: he could not vary the character of his responsibility, and charge his sureties as guardian,

21 *by taking the bonds as guardian, for money due him as administrator. But 2. supposing these sureties were responsible at all, they insisted, that they ought not to be held primarily liable. Broadus, after he had been warned, that Gaines would probably misapply the fund, with full knowledge that he was in failing circumstances, with express notice that he intended to transfer the bonds to Thompson and Norris, and for the purpose of enabling him so to transfer them, executed the bonds, at Gaines's request, for different sums: he was, therefore, a party to Gaines's breach of trust. He paid the money to the assignees, after he was warned of the just claims of the legatees: he thus wilfully aided the assignees in appropriating the funds to themselves. As to Thompson and Norris, they too knew that Gaines was in failing circumstances; and the bonds bore evidence on the face of them, that they were the property of Gaines's wards, Susan, Mary and Lucy Gaines; yet they took the assignment of them from Gaines, and enabled him to appropriate the money, in part at least, to his own use: they also were parties to his breach of trust. It was immaterial, whether they were seeking advantage to themselves, at the expense of his wards, or at the expense of his sureties. The parties entitled to the fund, have a right to pursue it in their hands. *Graff v. Castleman*, 5 Rand. 195. Then, 3. Broadus, having participated and aided in Gaines's breach of trust; Thompson and Norris, having received the fund from him, with notice of the trust and of the breach of it; and these parties being bound to make good the loss ultimately, either to Gaines's wards, or to his sureties, whichever shall sustain it; and they, as well as the sureties being before the court, they ought to be held directly and primarily liable, instead of subjecting the sureties in the first instance, and giving them a decree over against the others. And 4. the chancellor ought to have given the sureties a decree against the same parties, for the costs of the plaintiffs which were decreed against them, as well as for their own costs incurred in their defence.

22 *Johnson, for the appellees who were plaintiffs below, and for Boswell Yates, maintained, that the former were entitled to

relief against the sureties of their guardian ; and, if necessary, against Thompson and Norris, who had got possession of their funds by improper dealings with the guardian ; and, in case these parties should prove insufficient, against Broadus, who had aided the guardian to misapply the fund. That the sureties of the guardian were, by law, directly responsible to the wards ; and though in equity they might have recourse against others, if the sureties should fail, yet they were not bound to pursue their recourse against any but the sureties ; and though it might have been immaterial, perhaps, how the order of responsibility had been arranged, there was no occasion to correct the decree in this respect. That the sureties of the guardian, being held accountable to the wards, for the fund which he had transferred to Thompson and Norris, these parties, who had received the fund, ought to be compelled to pay it to the sureties ; and if they prove insolvent, Broadus, who had certainly aided in the misapplication of the fund, ought to be held responsible to the sureties. But, he said, there was no reason why Yates should be held responsible in any way, in any event, or to any body ; for, even supposing, with the chancellor, that he was a confederate with Gaines, Broadus, Thompson, and Norris, in the misapplication of the fund, yet he had received none of it himself, and it was not the province of the court to punish him ; however, no such confederacy was justly imputable to him. The dismissal of the original bill as to him and his wife was improper ; and it was yet more improper to decree the defendants their costs against him, and that before the final hearing. The decree was erroneous in two other respects : 1st, in requiring the plaintiffs to execute deeds of release of the land ; a condition imposed upon them, it seemed, upon the supposition that it was doubtful, at least, whether Gaines had a right to sell it under the will of his testator ; but there could be no doubt about it ; for, though the will

23 *of Thomas Gaines devised that the land should be sold, as was directed in a power of attorney to John Hilton, yet that power was annulled by the testator's death, and the administrator with the will annexed was the proper person, and the only proper person, to make the sale. 1 Rev. Code, ch. 104, § 52, p. 388. 2ndly, In deducting the amount of the claims of Thompson and Norris, for the goods furnished by them to Susan, Mary and Lucy Gaines, from their shares of the fund in question ; because there was no proof that the claims were just ; and because the guardian of an infant cannot apply the principal of his ward's estate to his maintenance, without an express order of court. *Myers v. Wade*, 6 Rand. 444. But if the chancellors properly allowed this deduction, he was plainly right in allowing only the amount of Thompson and Norris's bills against Susan, Mary and Lucy, respectively, to be deducted from the share of each ; they had no pretence to claim, that their bills against Clarissa, should also be deducted.

Stanard. The claims of Thompson and Norris for goods furnished the wards, were well proved ; for it appears, that their ac-

counts were settled by Gaines the guardian, who was competent to make such settlement, and had no motive to admit any item which was unjust. As to the expenditure of the principal of the wards' estate : it appears they had other estate ; and it nowise appears, that the whole expenditure for their support, exceeded the profits of their whole property.

TUCKER, P. It seems to be agreed on all hands, that there are errors in the proceedings and decree in this cause.

The first that occurs, is the dismissal of the original bill, as to Yates and wife, and decreeing them to pay costs. Whether he was or was not a participator in the fraudulent transaction complained of, his wife, and he of course, were necessary parties, either as plaintiffs or defendants, in this suit for

24 the proceeds of the sale of the land, which were to be divided among them all ; and he being a proper party with his wife, they might well be joined as plaintiffs, for conformity. The dismissal as to them was therefore erroneous, and the more so, as the defendants were decreed their costs against them, before the cause was finally heard. Out of this error grew another. Yates having been, by the amended bill, made a party defendant, solely upon the supposition that he was liable for the fraud, his wife was not made a party, and was not a party at the hearing. These errors, however, are rendered unimportant by the subsequent proceedings in the cause.

The errors in the final decree, are much more vital. All the parties complain of it. The plaintiffs complain, that Thompson and Norris's store accounts against them were allowed, and thus their recovery against the sureties of their guardian, was improperly reduced ; and that the chancellor improperly required them to execute deeds of release of the land to the purchaser ; which last objection, indeed, seems very obvious. The sureties of the guardian complain, that they are improperly charged, because the money claimed was not due to their principal Gaines as guardian, but as the representative of his testator, and he was responsible as administrator to the legatees, not as guardian to his wards ; that, supposing them chargeable, they ought not to have been charged in the first instance ; and that only their own costs are decreed to them against Thompson and others, without including the costs decreed to the plaintiffs against them. Thompson, Norris, Broadus and Yates, each and all, insist that there ought to have been no decree against them ; and complain yet more, that they are made jointly responsible for the whole of the sums decreed. Let us consider these objections, succinctly, in their order.

As to the plaintiffs' objection to the allowance of the store accounts. This rests upon two grounds ; that there is no sufficient proof of the advance of the goods ; and that, if there was, they were improperly paid for out of the principal of the infants' estate. The first of these grounds is

25 not tenable. As it respects Thompson and Norris's demands, the bona fide settlement and acknowledgment of the guardian, are, I think, conclusive. He and his sureties, indeed, are bound to shew, that those advances were necessary, and that they were

really made; but the merchant is not bound to shew that they were necessary, since it is the province of the guardian to judge of that; nor can he be called upon for further proof of the delivery and price, than the acknowledgment of the guardian with whom he dealt. The other question is more difficult. If the guardian runs up an account for his ward, and pays it out of the principal of his estate, the merchant cannot be bound to refund if he was ignorant of the fact. But, where he is aware that he is receiving payment out of a fund which the law will not permit to be encroached on without an order of the court, I think he stands on no more advantageous ground than the guardian himself. In this case, both Norris and Thompson knew, before they received this money, that it was a part of the wards' principal estate. As such, according to *Myers v. Wade*, it could not properly be applied to their current expenses, without the authority of the proper tribunal; and it is, therefore, as necessary in reference to them, as it would be in relation to Gaines, to institute an inquiry, if it be insisted on, as to the propriety of the charge upon this portion of those funds.

We come now to consider the objections of the sureties to the decree. They insist, that they ought not to be charged at all, because their principal was not chargeable as guardian, but as administrator to the legatees. But, in selling the land, he did not act as administrator, properly speaking; he acted as trustee. In taking the bonds as guardian, he charged himself with the fund as guardian; and in this he did right. But the sureties complain, that, at any rate, they should not be first charged. And this complaint I think well founded. If, as I suppose, Thompson and Norris are responsible and bound to refund, they ought to have been first charged. It is natural justice,

26 not only to put the burden *on the right person, but to place it there in the first instance; since, otherwise, the most innocent party will bear the brunt of the suit. The only injury the plaintiff can sustain by this compliance with the terms of the tribunal whose aid he invokes, is a short delay which is more than compensated by his proceeding here against all the parties together, instead of in detail. The claim of the sureties to have the costs which are decreed to the plaintiffs against them, reimbursed to them by the parties ultimately responsible, is deemed well founded.

The other parties, over against whom the decree is rendered in favour of the sureties, are most loud in their complaints. They complain, and very justly, that they are all banded together, and the whole made responsible on the ground of fraud and conspiracy, not only for what they have received, but for what they have not received. Yates, for instance, has received nothing over and above his wife's just portion of the money; yet because he is supposed to have connived at the fraud, he is made responsible for the whole amount, although he has neither participated in the spoils, nor been the means of enabling others to acquire them. He was only engaged, I think, and that very naturally, in securing his wife's portion of the proceeds of sale which he had a right to

receive. He was therefore improperly made a party with the view to charge him with this responsibility, but as he was a necessary party on other grounds (for a settlement of his accounts as guardian is demanded) the question of his costs must await the final decree as to that matter. Neither were Yates or Nalle, Gaines's sureties in the counter administration bond, necessary or proper parties in that character, since the sureties of the administrator were not liable for the proceeds of sale of the land. For the like reason, and because there was no foundation for proceeding against him, Wm. Broadus the younger was an improper party. And as to James Yates the surety in the guardian's bond of Boswell Yates, it is difficult to conceive on what ground he was made a party. As to all these the bill should have been dismissed.

27 *With respect to Norris and Thompson the case is very different. Thompson's case seems to me beyond all doubt. He procured the payment out of the funds of Gaines's wards, of debts which were not due from them, or fairly chargeable on them. He procured this payment from a guardian notoriously failing, if not intirely insolvent, with a full knowledge of the misapplication of the funds, to the prejudice of his wards or of his sureties. He was thus getting payment of his claims out of money which he knew could not be so applied without defrauding an infant or a surety. Equity has no allowance for such transactions, and will rigorously compel the restoration of the unjust acquisition. Whether he shall be made responsible directly to the infant, or held responsible over to the sureties, is a matter, indeed, which the court arranges with regard to the rights of the plaintiffs who have a title to charge them all: but in whatever mode the responsibilities are arranged, he is bound (and in my opinion primarily chargeable) for what he has illegally received, though for nothing more. This can only be finally adjusted by an account, ascertaining how far the store account against the wards was fairly chargeable on the fund in question, unless the plaintiffs in the cause should waive the inquiry, and admit the account.

The case of Norris is less clear so far as respects the money advanced for the bond. But, as by cashing the bond with a knowledge of the failing condition of Gaines, he must have foreseen, that he was facilitating the perpetration of a fraud and misapplication of the fund, I think he cannot shelter himself behind the technicality that Gaines had a right to receive the amount of the bond from Broadus, and that the transfer of it for the full amount in cash, was the same thing in effect. But for his interference the money might not, probably would not, and perhaps ought not to have been paid by Broadus, eleven months before it was due; and in the mean time, the sureties might have protected themselves by the ordinary remedies afforded by the law. I am therefore of opinion, that he too is chargeable in like manner as Thompson.

28 *As to Wm. Broadus the elder, if his case rested solely on the ground of his obligation to see to the proper application of the purchase money for the land sold by the administrator, I should regard him as exon-

erated by the execution of the bonds to the guardian, if the subsequent payment of them had been without objection. So far from its having been fraudulent to execute the bonds to the guardian, it was a prudent step, and not an improper one in Broadus, who was bound to see that those funds came to the guardian's hands. But his knowledge of the embarrassments of Gaines, his objecting to make any payment while his son was bound, and waiving all objection as soon as he was released, certainly place his conduct in an unfavorable light; and, as he has paid or in some manner satisfied the amount of the bonds or the greater part of them, notwithstanding the early warning he received not to do so, it cannot be denied that he ought to be held ultimately responsible in case of the insolvency of the other parties.

I, therefore, should reverse the decree, and enter a decree conforming with the opinions I have expressed on the several points. But the other judges differ with me in opinion upon some of the points, and concur in an order to be entered, which expresses the opinion of the court.

The decree which was entered upon Winston's appeal, declared, that he, and consequently his co-sureties for Gaines, were not injured by the decree of the court of chancery; and, therefore, affirmed it as to him, with damages and costs.

The decree entered upon the appeal taken by Broadus, Thompson and Norris, declared, that so much of the chancellor's decree as was pronounced between the appellants and Boswell Yates, on the one side, and the sureties of Gaines the guardian, on the other, was erroneous in charging the former, jointly, to indemnify the latter against their responsibility to the plaintiffs; that Yates was in no way liable to indemnify them in any respect; and that the appellants

29 *were bound to indemnify them only to the amount of the bonds of Broadus the elder assigned by Gaines to Thompson and Norris, respectively, after deducting their respective accounts against him as guardian, for the three female plaintiffs, respectively, and in respect to which, Thompson and Norris were severally liable, in the first instance, each for the amount of the bond assigned to him, subject to that deduction, and Broadus the elder was only responsible for any part thereof, which could not be recovered from them respectively; that Winston and others, the sureties, should not be at liberty to enforce payment of the sums of money decreed to them respectively, against Thompson, Norris and Broadus the elder, until they themselves should have paid the plaintiffs the sums decreed to be paid by them respectively; that the plaintiffs in case the sureties, or any of them, should fail to make due payment to them, should be at liberty to resort to this decree, and to prosecute it for their benefit, in the name of the surety so failing, against Thompson, Norris and Broadus, to make good the deficiency. And Thompson, Norris and Broadus were decreed to reimburse to the sureties, the costs of the court of chancery, decreed to the plaintiffs against them, as well as to pay them their own costs expended in their defence there.

30 *Christian and Wife and Another v. Coleman's Adm'r and Others.

May, 1831.

(Absent TUCKER, P. and BROOKE, J.)

Hotchpot—Advancements*—Profits of Lands in Possession of Children during Life of Mother.—A mother tenant for life of lands, gives possession of several parcels thereof, to four of her children, respectively, to be cultivated by them for their own use, but makes them no conveyance: these children hold the respective parcels of land, as tenants at will of their mother, till her death, taking the profits to their own use, no rents being rendered or demanded: HELD, they are not bound to account for these profits, and bring them into hotchpot, as an advancement, real or personal, in the division and distribution of the mother's estate, under the statutes 1 Rev. Code, ch. 96, § 17, ch. 104, § 29.

Elizabeth Coleman died in 1819, seized and possessed of sundry real and personal estate, and intestate. Her daughter Mary, who afterwards married Daniel Christian, her sons James, Thomas and Samuel, and her grandchildren, John, Elizabeth, Robert, Lindsay and James Hardwick, the children of her deceased daughter Anne Hardwick, were her heirs and distributees. Her son Thomas was her administrator. Mrs. Coleman had been, during her life, entitled to a life estate in lands devised to her by her husband, who died in 1778: and, many years before her death, she put several parcels of this land into the possession of her sons, Thomas, Samuel and James, as they attained to manhood, and her daughter Nancy, when she married, to cultivate for their own use, respectively; but she made no conveyance to either; they were all mere tenants at will; and so they continued to hold till her death, enjoying the profits without any account rendered or demanded. To her daughter Mary she did not give the use of any of the land: this daughter remaining unmarried, lived with her mother, after her attainment to full age, without being charged for board or maintenance, and on her part rendering her mother in her old age, such services as were proper to the relation between mother and daughter in their condition of life.

31 *In a suit brought by Christian and wife and James Coleman against their co-heirs and distributees, Thomas and Samuel Coleman and the five children of Mrs. Hardwick, and Thomas as the administrator of his mother, among various points of controversy between the parties, one was, Whether, in the division and distribution of the mother's estate, James, Thomas, Samuel, and the children of Mrs. Hardwick, respectively, were bound to account for the profits of the several parcels of land, of which their mother, during her life, had given them the use, and which they had held till her death without rendering rent, and to bring the profits into hotchpot as an advancement, real or personal, according to the statutes of descents and distributions? See 1 Rev. Code, ch. 96, § 17, ch. 104, § 29, pp. 357, 382.

The chancellor, in an interlocutory decree determining all matters in controversy in the cause, declared, that these profits were not to be regarded as advancements to the

***Hotchpot—Advancements.**—The principal case is cited in *Foot-note* to *Knight v. Oliver*, 12 Gratt. 33; *Kyle v. Conrad*, 26 W. Va. 780. See monographic note on "Advancements" appended to *Watkins v. Young*, 31 Gratt. 84.

parties, respectively, who had enjoyed them by their mother's permission, and that they were not bound to account for and bring them into hotchpot in the division of her estate. And upon an appeal from the decree to this court, taken by the plaintiffs below, this was the main point here, and the only one involving any question of law.

Johnson for the appellants.

Stanard for the appellees.

This court concurring with the chancellor upon the question, held, That the possession and use of the land given by the mother to the four children, being permissive and precarious, could not be considered as an advancement made towards their permanent establishment in life, nor could they have converted such a right as they held into money to be applied to that purpose.

32 *Boyd and Another v. Cook, Ex'or of Vass.

May, 1831.

(Absent TUCKER, P. and BROOKE, J.)

Wills—Testator Blind—Validity—Case at Bar.—The will of a blind man shall be admitted to probat and record, as a will of real as well as personal estate, if attested at his request in the same room with him, though it be not proved that the will was read to him in the presence of the attesting witnesses, or that it was ever read to him, provided it appears satisfactorily to the court, that he was acquainted with its contents, and intended to make the testamentary dispositions therein contained.

Same—Probate Court—Province.—A court of probat occupies the place of a jury as to questions of fact, and its province is, like that of a jury, to draw all just inferences from the evidence.

Same—Revocation—Belief as to Destruction.—A blind testator orders a will made by him to be destroyed, and believes it is destroyed accordingly, but it is not destroyed, and no act towards destruction done: this is not a revocation by destruction or cancellation, within the statute 1 Rev. Code, ch. 104, § 3. At least, a court of probat cannot consider this as amounting to a revocation.

A writing purporting to be the last will and testament of Philip Vass deceased, was offered for probat in the county court of Halifax, by J. W. Cook, the executor therein named; and the probat was contested by Alex. Boyd and John Shepperd. The county court, upon a hearing of the evidence on both sides, refused the probat. Cook appealed to the circuit court; which reversed the sentence of the county court, and ordered, in general terms, that the paper "should be recorded as the last will and testament of the decedent;" that is, admitted the will to full probat, as a will of real as well as of personal estate. The circuit court refused to admit some of the evidence offered by Boyd and Shepperd against the will; to which they filed exceptions; and, at their instance, all the evidence heard by the court, was ordered to be stated on the record. They then applied to a judge of this court for a supersedeas to the sentence; which was awarded.

***Wills—Attestation—Presence of Testator.**—The principal case is cited on this question in *Sturdivant v. Birchett*, 10 Gratt. 70, and *note*.

†**Same—Probate Court—Province of.**—On this question the principal case is cited in *Clarke v. Dunnavant*, 10 Leigh 34, and *note*; *Sturdivant v. Birchett*, 10 Gratt. 89; *Nock v. Nock*, 10 Gratt. 112; *Parramore v. Taylor*, 11 Gratt. 238.

‡**Same—Revocation—Belief as to Destruction.**—The principal case is cited in *foot-note* to *Malone v. Hobbs*, 1 Rob. 346. See monographic *note* on "Wills."

The following is a copy of the paper in question:

"In the name of God amen. I Philip Vass of Halifax county, do make this my last will and testament, in manner *and form as followeth, viz: It is my desire, that all my debts be first paid. If any of my children should die without an heir or will, their estate hereafter devised or given shall return again to my estate, to be divided as shall be hereafter directed. If any of the legatees shall attempt to break this will, or shall enter a suit in law against the legatees, or any one of them, shall forfeit his or their estate hereafter given to them; the forfeited estate returned back to my estate, to be divided as shall be hereafter directed. I give unto my daughter Mary Boyd, negro girl Lydia and her increase, to dispose of as she pleaseth: also I lend unto A. M. B. Rachel and her increase; which negro and increase shall not be sold for no debt or debts of Alexander Boyd or his wife Mary Boyd, in no case whatever; the aforesaid negro Rachel and her increase is not to be removed out of the county of Halifax, without the consent of a majority of the legatees concerned: in either of these two cases a breach be made, a sale or removal, negro Rachel and her increase is forfeited, and return immediately into my estate, to be divided as shall hereafter be directed. Negro Rachel and her increase is lent unto Alexander Boyd and Mary Boyd his wife during their lives, with the above exceptions; and at their death, to return into my estate, and to be divided as shall be hereafter directed. I give unto my son James, negro Amy and her child Leatha and their increase, to him and his heirs forever. I give unto my daughter Sarah L. Vass, three negroes Lucinda, Harriet her daughter, and Amanda Melvina, with their increase, to her and her heirs forever. I give unto my daughter Anna Vass, three negroes, Easter, Eliza and Caroline, with their increase, to her and her heirs forever. I give unto my daughter Apphia Vass, three negroes Martha, Ealle and Maria Louisa, with their increase, to her and her heirs forever. I give unto my son Philip E. Vass, Mary and her brother Jacob, with her increase, to him and his heirs forever. I give unto my grand daughter Mary Elizabeth Shepperd, negro girl Rose and her increase; provided my grand daughter Mary

34 *E. Shepperd dieth under age or without a child lawfully begotten, then negro Rose and her increase to be divided between her surviving brothers and sisters and their heirs forever. I lend unto my beloved wife Elizabeth Vass, during her widowhood, the land whereon I now live, and all the rest of my estate which I have not devised or given; recommending to her particular care my dear daughter Elizabeth Sheppard and her children, during your life. And at the death of my dear wife, my land whereon I now live, to be sold by my executor, on a credit of four annual equal payments, security taken on the land for the payment thereof; the one fourth of the sale of this land to be put out at interest, which interest is to support my daughter Elizabeth Shepperd, and her children with schooling &c. and the principal at her death, to be equally divided between her children, and their heirs forever. It is also my desire, that my western

land be sold, when there the Indian right is extinguished, and my land surveyed, it be sold at with four equal annual payments, security taken on the land for the payment thereof: this land may be sold sooner than above mentioned, if it is thought best by the legatees. The money arising from the sale of the western land, three-fourths of the money arising from the sale of the land whereon I now live, with all the remainder of my estate not already given, to be equally divided by commissioners appointed by court, between my children James P. Vass, Sarah L. Vass, Anna Vass, Apphia Vass and Philip E. Vass, and their heirs forever. I appoint my beloved friend Jarrett W. Cook my executor to this will who is to receive a reasonable sum out of my estate for his services. In witness whereof I have hereunto set my hand and seal this 13th day of December 1816.

"Witness, Anderson Powell,

"Moses Shearan.

"Philip Vass, [seal]."

The evidence for the will, was, in substance, as follows:

1. The subscribing witness, Anderson Powell, was examined in open court, and testified, that he attested the
35 *will, in the summer of the year 1817—that he went to the house of the decedent Mr. Vass; Moses Shearan was there; he took a seat, and entered into conversation; Mr. Vass said, he wished them to witness his will, and called to one of his daughters (the witness believed, it was Sarah) and directed her to bring his will, and she brought the paper now exhibited as his will. He asked the witness, if he had ever seen a blind man write his name; the witness answered he had not; he then told him, if he would hand him a pen with ink in it, he would shew him that a blind man could write his name. The witness handed him a pen: he placed the paper on a table before him, and asked the witness to put his hand at the proper place; which the witness did; and the decedent wrote his name, and then acknowledged it to be his will, and requested the witness and Shearan to witness it, which they both did, immediately, in his presence; that is, (as the witness explained himself) in the same room with him. Before the attestation of the will, the decedent told the witness, he had been "very near slipping off the other day without a will;" and then called them (the witnesses) as before stated. After the attestation, Mrs. Vass, his wife, came into the room, and remarked, that she thought he wished to have some alteration made in the will, and it was not worth while to have it witnessed before that was done: he answered, that he intended to have that alteration made, "but he expected brother Cook down in a few days, and he could then have it done." The decedent was of sound mind and memory at the time the will was executed, and was a man of good understanding: but he was quite blind, and had been so ever since the witness's first acquaintance with him, which was in 1809. The will was in the hand writing of the decedent's daughter, Sarah E. Vass, a legatee mentioned in the will. It might have been read to the decedent in the presence of others, for aught the witness knew;

but it was never read to him in his presence or hearing; nor did the decedent mention, that it had been written in 1816, or say
36 who had written it, *or explain why his daughter Sarah, who had in fact written it, could not also alter it.

2. The other attesting witness, Moses Shearan, was examined under a commission from the circuit court, and deposed, That the paper in question was attested by him, he thought in the year 1816, at the request of the decedent, who told him that it was his will; and the witness saw him sign his name to it. The will itself was not written in the witness's presence. The witness had been acquainted with the decedent only one or two years: he thought him very precise and particular about matters of business: at the time the will was executed, he was in good health and cheerful, and of sound disposing mind and memory. After it was executed, he gave it to one of his daughters to put away. The will was not read to the decedent in the witness's presence, nor had the witness ever heard it read. He did not recollect any conversation between the decedent and his wife, at the time of the execution of the will.

3. Francis Ford, a resident of North Carolina, examined under a commission from the circuit court, deposed, That he had been long and intimately acquainted with the decedent Mr. Vass, and had had many dealings with him; and he described him as very punctual, and exact in his dealings. He had been at the decedent's house to see him, since he was blind, several times; the last time was in March or April 1823, when the witness staid there with him five or six days, and there was a great deal of conversation between them concerning their respective family affairs, in the course of which, the decedent told him, that he had made his will: that he had not given Mr. Shepperd any of his property, but had, in his will, directed the land he lived on to be sold at the death of his wife, and one fourth of the proceeds to be put out at interest, and Mrs. Shepperd was to draw the interest for the support of herself and children as long as she lived, and at her death the money was to be divided among all her children: that he had given his grand daughter, Mr. Shepperd's
37 *eldest daughter, one negro girl

*on certain conditions, which the witness did not recollect: that he had given his daughter Mary Boyd one negro girl and her increase, to do as she pleased with, and the other negroes which she then had and their increase, at the death of Mr. and Mrs. Boyd, were to be returned back to his estate: that he had given his sons, James and Philip, two slaves apiece, and his three daughters, Sally, Anna and Apphia, three slaves apiece: that he had made ample provision for his wife, if she should outlive him; that she was to keep the land, and several of the best working hands, and all the stock, and household and kitchen furniture, as long as she lived: that he had traded his western lands for lots in Danville and a tract of land above Danville, and one below Halifax court house: that he had a notion of altering his will, and settling his son James's

property so that he could not spend it, for he wished his children to have the benefit of it: that his reason for not giving as much of his property to Mrs. Boyd as to some others of his children, was, that he did not think she would ever have children, and he did not wish her husband or any of his family to have any of his property; he wished his own children to have it: and that Mr. Sheppard had treated him and all his family coldly; and he believed for no other reason than because he would not make him a right to some of his property, which was what he never intended to do, and had so directed it in his will. As to that important provision of the will whereby the residue of the money arising from the sale of the land he lived on, with all the residuum of his estate, were bequeathed to be equally divided among his children, James, Sarah, Anna, Apphia and Philip, the witness did not state, that the decedent made any mention of it whatever.

4. Eight witnesses, residents of North Carolina, deposed as to the general reputation of the deponent Ford, that they esteemed him, and he was generally esteemed, a man of integrity and veracity.

38 *5. John Webb, also a resident of

North Carolina, examined under a commission from the circuit court, deposed, That he was the brother of Mrs. Vass, the wife of the decedent, and that he visited the decedent and his family some years before his death; and while he was with him, the decedent told him how he intended to make his will, for the purpose of providing for his two daughters, Mrs. Boyd and Mrs. Sheppard—that the property he intended for his daughter, Mrs. Boyd, she and her husband were to keep possession of as long as they both lived, and at their death it was to be returned to his estate; and his reason for intending to do this, was, that he thought Mrs. Boyd would never have children, and he did not wish his property to fall into the hands of the Boyd family; that what he intended to give Mrs. Sheppard, was to be in money to be put out at interest, and she was to draw the interest for the support of herself and children as long as she lived, and at her death the principal was to be divided among all her children. The witness farther deposed, that since Mr. Vass's death, he had made a visit to his sister Mrs. Vass; Mrs. Vass shewed him a paper, which she told him, was her husband's will; he read a part of it, but not being able to read it as distinctly as he wished, he desired it should be read to him; it was accordingly read to him; and the bequests to Mrs. Boyd and Mrs. Sheppard, therein contained, were nearly such as the decedent had told the witness he intended to make to those two daughters, according to the deponent's memory of the conversation: but the witness did not know, that the paper shewn to him was Mr. Vass's will; or that its contents were truly read to him; he believed it was correctly read. Being asked, how long it had been since he had the conversation with the deceased? he answered, "he did not recollect."

In the deposition of this witness taken under a commission from the county court, his answer to the same question, was, that "he supposed it was before the will was made."

39 *6. J. W. Cooke junior testified,

That, in a conversation he had with the decedent, the date of which he did not certainly remember, but he thought it was in 1823, Mr. Vass told him, he had a will, but he was not well pleased with it, and he intended to go to Mr. Bruce or Mr. Medley [gentlemen who lived in the neighbourhood] and have a will prepared, and in case he should not get there, that will was to stand; that when he was a young man, he did not keep a will, but since he had like to have dropped off in a fit of epilepsy, and after that "he had kept a will by him," or "had one prepared." The decedent said also, that he had given Mr. Sheppard's oldest daughter a negro girl; the witness did not remember the name of this girl, but believed it was Betsey. The decedent mentioned to the witness his reasons for not giving Mr. Boyd or Mr. Sheppard any of his property: he said, his daughter Mrs. Boyd had no children, and he believed would never have any, and if he gave Mr. Boyd any thing, it would fall to the Boyd family; and he did not think Mr. Boyd capable of managing an estate: and as to Mr. Sheppard, the witness had often heard him say, that if he gave him any part of his estate, he was such a drunkard, he would spend it, or drink it up.

7. D. C. Goode testified, That in a conversation between him and the decedent in August 1823, he made declarations of his intentions with respect to his daughters Mrs. Sheppard and Mrs. Boyd, to the same effect with those detailed by the other witnesses.

The evidence against the will, was, in substance, as follows:

1. Spencer Laws testified, That he had a conversation with the decedent, at his house, in October 1820, in the course of which the decedent said that some of his children (without saying which, did not please him: the witness remarked to him, that he had a good deal of property to dispose of; the decedent replied that he had, and "that he had had a will, but had destroyed it." And the witness then suggesting, that the laws of the country would make an equal distribution, *he said "they would, if a man could be reconciled to it." The witness's acquaintance with the decedent commenced in the spring preceding this conversation; he had been in his company some five or six times; they were on friendly terms, but there was no intimacy between them.

2. Notley Jordan testified, That shortly after the death of a Mr. Bruce, in the latter part of 1824 or the first of 1825 he went to see the decedent, to hire one of his slaves; when the decedent asked the witness if he had understood whether Mr. Bruce left a will or not? The witness told him, he understood he had, but it had been made fifteen or twenty years before. The decedent then said, "it was right that a man should keep a will by him, for he knew not what day or hour he was to die, but "that he himself had no will by him at that time, and intended sending for brother Cook in a few days, or sometime shortly, to write him a will;" which was all that passed about the will. According to the witness's

account, his acquaintance with the decedent was a slight one, and recently commenced.

1. William Cabaniss testified, That a few days after the decedent's death, the witness meeting with Mr. Cook, the executor, who had been to the house of the deceased, and was on his return from thence, he asked Mr. Cook, whether there was a will or not? Mr. Cook said, "there was no will; that the old lady had found a small piece of a will in the old man's pocket; they supposed he had put it in his pocket not knowing what it was, where it had been worn out." The witness supposed Mr. Cook said this, upon the information of Mrs. Vass.

4. Halcomb Bailey testified, That the deponent Francis Ford was at the house of Mrs. Vass before his deposition was first taken under a commission from the county court: he came there on his way to Lynchburg; he departed on a Sunday; returned to Mrs. Vass's the Thursday or Friday following, and went from thence on Saturday, to the place where his deposition was taken.

41 "The deposition of Ford, taken under the commission from the county court, was substantially the same with that taken under the commission from the circuit court.

The bill of exceptions filed by Boyd and Shepperd, stated, that, at the hearing in the circuit court, Boyd and Shepperd offered in evidence the deposition of one Morgan; the counsel for Cook objected to the reading of so much of it as related to declarations of Sarah E. Vass, the daughter of the decedent who wrote the will in question, and a legatee therein; and the court sustained the objection. They then offered to prove by a witness introduced for the purpose, that the same Sarah E. Vass admitted in the witness's presence, that her father had directed her to destroy the paper produced in court as his will, and that he believed it was done: the counsel for Cook objected to the admission of this evidence also, and the court sustained the objection.

Stanard, for the plaintiffs in error. I. The evidence rejected by the court, ought to have been heard, since the person whose declarations it was offered to prove, was a legatee named in the supposed will, and, in effect, a party to the controversy, who could not have been compelled to give evidence against the will. *King v. Woburn*, 10 East. 395; *King v. Hardwick*, 11 East. 578; *Burton v. Scott*, 3 Rand. 399. If this evidence had been admitted, and had established the fact, that the decedent had directed the paper in question to be destroyed, and believed it was destroyed, that would have amounted to a revocation. 3 Stark. Law of Ev. p. 1714, note 2,* and the cases there cited.

II. The execution of the will was not well proved. 1st, it was not well proved to have been duly attested as a will of real estate, according to the requisitions of the statute of wills: only one of the attesting witnesses, Anderson, says that he attested the paper in the decedent's presence,

42 meaning *in the same room with

him: the other, Shearan, says it was attested by him at the decedent's request, who told him it was his will, and that he saw him sign his name to it; but he does not say he attested it in the decedent's presence; and if he subscribed his name as a witness, in another room, and at another time, such an attestation would be perfectly consistent with his deposition. This court has decided, that there must be two witnesses to every fact material to the due execution of the will. *Burwell v. Corbin*, 1 Rand. 131. But, 2ndly, this is the will of a blind man; and the attesting witnesses both say, expressly, that it was never, at any time, read to him in their presence; and there is no proof by any witness, that it ever was read to him. According to *Swinburne*, a blind man "cannot make his testament in writing, unless the same be read before witnesses, and in their presence acknowledged by the testator for his last will. And, therefore, if a writing were delivered to the testator, and he not hearing the same read, acknowledged the same for his will, this were not sufficient; for it may be, that if he should hear the same, he would not own it." *Swinb. on Wills*, part II, § XI, p. 166. And this was always regarded as the law of England, till the case of *Longchamp v. Fish*, 2 New Rep. 415, in which case it was held not to be necessary, that the will of a blind man should be read over to him in the presence of the attesting witnesses; but it was agreed, that stronger evidence would be required in the case of a blind testator, than mere attestation of the signature; and the proof there was allowed to be sufficient, only on the ground that there was not the least reason to suspect fraud or unfair contrivance. In that case, the terms of the will had been dictated by the testator to a disinterested person who wrote it, and who was afterwards one of the attesting witnesses; after it was written, it was read over to the testator, by his desire, in the presence of several; a fair copy was prepared; and the testator, two months afterwards, had an alteration made, and perfectly understood what he was doing;

43 neither was there the least *ground to suspect any thing unfair. Though, therefore, according to that authority, it be unnecessary that the will of a blind testator should be read to him in the presence of the attesting witnesses to the execution; yet there must be proof by witnesses, that it was truly read to him before the execution, so as to ascertain that he was apprised of its contents at the time of execution; and there must be nothing suspicious in the transaction. Now here there is no positive proof by any witness, that the will was ever read to the decedent; and no proof of any kind, that it was ever truly and wholly read to him, before the execution, or indeed at any time. There is an effort to prove, that the decedent was apprised of the contents of the paper; and thence to infer that it must have been read to him. The principal evidence to this purpose is that of Ford, who details a conversation he had with the decedent in 1823, in which the latter recounted the dispositions of this will: which proves, at most,

*Ingraham's Edition, Boston, 1828.

that he was apprised of its contents in 1823, not that he was apprised of them before the execution of it in the summer of 1817. This witness details the specific bequests of this will, as having been stated to him by the decedent in conversation, in minute and exact conformity with the contents of the paper itself; so minute and so exact, indeed, as to leave little doubt that he gathered so much of the contents of the will, from a recent perusal or accurate communication to them (for which, it appears by Bailey's testimony, he had full opportunity) and not from the conversation with the decedent many years before; but of the general and by far the most important provision, that which disposed of the residuum of the estate, even this witness does not depose that the decedent said one word; so that there is really no proof, that the decedent was acquainted with the whole of the contents of this paper, and, therefore, no ground to infer, that it had ever been truly and wholly read over to him. The evidence relied on to corroborate this evidence of Ford, is that of the witnesses

44 Cook and Webb: but neither of them *says, that the decedent communicated to him any of his testamentary dispositions, made or intended, except those relating to his daughters Mrs. Boyd and Mrs. Shepperd; and as to Webb, though he says that the provisions of the will in respect to those two daughters, conform with the intentions of the decedent as declared to him in conversation, yet, according to his own account, there is no such conformity; for he deposes, that the decedent told him that what he intended to give Mrs. Shepperd, was to be in money to be put at interest for the support of herself and children as long as she lived, and at her death the principal to be divided among her children; but the will makes no present provision for Mrs. Shepperd, but gives her the money in remainder after her mother's death. There is too, a variance between the deposition of Webb taken for the circuit court, and that taken for the county court; in the one, he says he supposes his conversation with the decedent was before his will was made; in the other, that he cannot recollect when it occurred: a circumstance which shews the bias under which he was deposing: it was material to the interests of his sister Mrs. Vass, claiming under the will, that it might appear that the conversation occurred after the will was made. There are many very suspicious circumstances in the transaction. The singular provision in the beginning of the paper, imposing forfeiture on any legatee who should contest it, evinces such an anticipation of a contest as the testator could hardly have entertained, but natural enough to a penman interested and conscious of unfairness. The decedent was no wise in extremis; he had ample time and opportunity to get the aid of disinterested neighbours; yet, we are to believe, he chose to confide the writing of the will to a daughter and favoured legatee. This daughter to whom the care of the paper was confided, held it back for some time after her father's death, as was manifest from the evidence of Cabaniss: this

again shews her consciousness of something wrong. The decedent was warned by a sudden and dangerous illness, of the
45 prudence of keeping a *will by him, and had this paper prepared (as its date shews) as early as December 1816: why then was it not executed till the summer of 1817? The attesting witnesses he selected, were not his friends, neighbours or intimates; and he communicated his testamentary dispositions or intentions, to none of his neighbours, but only to residents of North Carolina, whom he was seldom in company with. He told one person in 1820, and another in 1824, that he had no will. And, according to the evidence of Anderson, (though the other witness Shearan remembers no such conversation, remarkable as it was) he told his wife, at the time of executing the paper, that he would wait till brother Cook came down, and then have his intended alteration made; which raises a suspicion, that the testator did not know that the paper he was executing, was one written by his daughter; for if he had trusted her to write his will, he surely would not have hesitated to trust her to write the alteration. The strongest case that can be made out from the evidence, is, that the decedent's knowledge of the contents of this paper, is proved by one witness, namely, Ford: and the decedent's knowledge of its contents being a fact certainly material to the due execution of it, either as a will of real or as a will of personal estate, the case of *Burwell v. Corbin* decides, that there must be two witnesses to that fact, to establish it as a will of real estate, according to the requisitions of the statute of wills; and *Redford's adm'r v. Peggy*, 6 Rand. 316, decides, that two witnesses to the same all important fact are also requisite to prove the paper as a will of personal estate.

Johnson and Leigh, for defendant in error. 1. The evidence of the declarations of Sarah E. Vass, was properly rejected. She was not, in any sense, a party to the controversy: it does not appear, that she claimed under the will, or that it was her wish, or her interest, to have it established: there is nothing to warrant the assumption, that she is a favoured legatee; and
46 so far from it appearing that *she will get more as legatee under the will, than she would get as heir and distributee in case of the intestacy of her father, it seems, on the contrary, that the decedent's widow is the only person who can be benefited by establishing the will. It does not follow, that because a legacy is bequeathed to a daughter by her father's will, she is therefore a party interested to establish it: that must depend, always, on the value of the legacy compared with her share of the whole estate in case of intestacy. But, if the evidence which the court rejected, ought to have been heard, this court may consider the rejected evidence as a part of the case, and decide upon the effect of it as if it had been received. The only object of it was to prove a revocation. But admitting that this testator directed this will to be destroyed, and believed it had been done, that was not destroying the will, or causing it to be done in his pres-

ence, within the words or policy of the statute of wills, 1 Rev. Code, ch. 104, § 3, p. 376. A destruction intended or ordered, without being actually done, in any manner or degree, can only amount to a parol revocation, which the statute discounts and renders void: there must be some act done, some act of destruction or towards destruction, done *animo revocandi*, to constitute a revocation by destroying. Roberts on Wills, ch. 2, part 12. That writer advances an opinion of his own (for he cites no authority for it) that where an intended destruction of a will has been prevented by fraud or contrivance, affirmative parol proof of the *animus revocandi*, should be received, and effect given to the intention so established; that "even if such intention so endeavoured to be defeated, were manifested by no act of the testator, it would be consonant to the general maxim of courts of equity, to give effect to the intention, and to treat as perfected that which would have been perfected but for the fraud." It would be difficult to reconcile this doctrine with the words or the policy of the provision of the statute touching revocations of written wills: but supposing it just, and that a court of equity

might inquire into such a fraud, put
47 *in issue by pleadings there, it is no inquiry for a court of probat. However, the evidence rejected in this case, would, if heard, be of little or no weight. The witness Laws testifies, that the testator told him, in 1820, that he had had a will, and that he had destroyed it; so that if he did direct this will to be destroyed, and believed it was done, such direction and belief must have preceded the conversation with Laws; and yet it is clearly proved, that he declared, in 1823, that he had a will, and approved its provisions, and gave such an account of them, as manifests that the will he then had and approved, was the very will now in question.

II. This paper is well proved as a will of real as well as of personal estate. The evidence of Shearan who was examined by commissioners in the country, is not so explicit as that of Anderson who was examined in open court; but viewing the evidence of the two witnesses in connexion each with the other, the inference is irresistible, that Shearan as well as Anderson attested the will in the presence of the testator, that is, both at the same time, and in the room with him; and that Shearan meant to be so understood. Burwell v. Corbin came up upon a special verdict, and the court was strictly confined to the case as found, and could intend or infer nothing; but this case comes before the court as a court of probat, whose province it is to deduce the just inferences of fact from the evidence: a distinction taken by this court itself, in Smith v. Jones, 6 Rand. 33. Besides, though the statute requires that the witnesses shall all attest in the testator's presence, it prescribes no particular mode of proof of the fact of attestation in the presence, and leaves that fact to be proved, like any other fact, according to the common law rules of evidence and modes of proof. Hence it is, that if all the

attesting witnesses to a will be dead, their hand writing may be proved to establish it: hence too, if all the attesting witnesses deny their attestation, the fact of their attestation, and of due attestation in the testator's presence, may be proved

48 by other evidence *direct or circumstantial: and, upon the same principle, if one witness testify, that he and the other attesting witnesses duly attested in the testator's presence, his single testimony proves the full execution of the will. Longford v. Eyre, 1 P. Wms. 741; Roberts on Wills, ch. I. part XVI.; 3 Stark. Law of Ev. p. 1688, note 1, and 1692, 3, where all the cases are collected. If then, this was the will of a man not blind, the proof of full execution would be complete. Our statute of wills requires, that all wills of lands, if not wholly written by the testator himself, shall "be attested by two or more credible witnesses subscribing their names in his presence." Tate's Dig. Wills, p. 519. But, as the statute does not prescribe the mode of proof of the fact of attestation in the presence, so neither does it define what shall constitute presence, or make any discrimination between the presence of testators who can read and those who are wholly illiterate, or of those who can see and those who are blind. In the case of the blind man, to say that an attestation of his will made, like the attestation in this case, immediately after his signing it, at his request, in the same room with him, is not such an attestation in his presence, as fulfils the requisitions of the statute, were in effect to deny the capacity of a blind man to make a will of lands, since he cannot possibly be any otherwise present at the attestation. But it is agreed, that a blind man is capable of making a will of lands; that is, that there may be an attestation in his presence. The requisitions of the statute, then, have been complied with here, in the only way in which it is possible to comply with them. But it is insisted, that in the case of a blind man's will, there ought to be some direct proof by witnesses, that the very will executed by him and attested, had been read to him before the execution; that this is a supplement to the attestation of the witnesses in the testator's presence required by the statute, essential to guard him against fraud and imposition; and that, though the case of Longchamp v. Fish has decided, that the will need not be read to the blind testator in the presence of

49 the attesting *witnesses, that case is no authority to dispense with proof by some witness or other, of the actual reading of the will to the testator. But the principle of that case, is, that an attestation of a blind man's will in his presence, that is, in the same place with him, is a literal compliance with the statute; but some stronger evidence than the mere attestation shall be required; some sufficient proof to rebut any imputation of fraud; to shew, that the blind testator was not imposed upon. No particular kind of proof is indicated. The question is, whether the instrument is really the will of the blind man, who executed and published it as such? whether the assent of his mind was given

to its provisions? The rules of evidence prescribed by the civil law, are of no authority: no statute prescribes any particular mode of proof touching any such question: every kind of proof admitted by the common law, which is proper upon any other question of fact, is equally proper in regard to this; the proof may be by one witness as well as by many, by circumstantial as well as direct evidence. If it be proved, that the blind man declared that he had a will, and gave such an account of the testamentary dispositions thereby made, as to ascertain clearly that the paper in question is the will he said he had; this is enough to prove that he approved the provisions of this will; to rebut any imputation of fraud; to shew, that he has not been imposed upon, and made to execute a paper different from that which he had declared and intended for his will. And this is proved here, if the witness Ford is worthy of credit; and there is abundant testimony to his character for integrity and veracity. It is objected to his evidence, in one and the same breath, that the minuteness and exactness with which he details the specific bequests of this will, as having been recounted to him by the testator in conversation, exposes him to the suspicion of having perused the will itself, shortly before he gave his deposition, and squared his evidence with its contents—and that his evidence is defective in not ascribing any remark to the testator concerning

the general and most important provision *of the will, namely, the disposition of the residuum of this estate.

But the very defect imputed to the evidence, ought to exempt the witness from the suspicion as to the source from which he derived it. His evidence is corroborated by that of other witnesses: but his evidence alone is sufficient to establish the will. *Lewis v. Lewis*, 6 Serg. & Rawle, 489.

CARR, J. This is a very interesting controversy, as to presents, for the first time, to this court, the case of a blind man's will offered for probat, and involves the question of the due execution of such a will under our statute. It was much to be wished, that the case had been heard before a full court: but as the judges present are not unanimous, the points will be considered as open, in any case which may hereafter occur.

Our statute enacts, that "every person aged twenty-one years or upwards, being of sound mind, and not a married woman, shall have power, by last will in writing, to devise his estate &c. so as such will be signed by the testator &c. and if not wholly written by himself &c. be attested by two or more credible witnesses subscribing their names in his presence." The ceremonies required by this law, were not intended to restrain or abridge the power of testators, but to guard and protect them in the exercise of that power; and in that spirit (as I think) should the law be administered. The requisitions of the statute must be satisfied, or the will is not valid; but beyond this, the court seldom looks, unless there be fraud. That will vitiate a will however strict the compliance with the stat-

ute; but that must be proved; and, in the absence of proof, the court will not imagine that fraud may possibly have been practised, and act upon that imagination. Such a course would convert the law which was meant as a shield, into a sword, and destroy twenty good and fair wills for one that was fraudulent. Nor ought courts, in their decisions on wills, to be at all influenced by the reflection, that the law

51 has made a just distribution for "such as die intestate: that law never meant to interfere with the right of every man to dispose, at his will and pleasure, of the property which it had been the labour of a life to acquire; a right dear to him, and held sacred wherever civilization has made progress, or law bears the semblance of science. Every one admits that a blind man may make a will; he is clearly within the statute; and yet it has provided no particular guards to protect him from imposition. A will signed by him, and attested by two witnesses in his presence, satisfies the statute. What is presence, the statute nowhere defines; and this is often a question of dispute in ordinary cases. In the case of a blind man, it certainly cannot mean, that the witnesses shall attest in his sight. The reason of the statute in requiring that the witnesses shall attest in the presence of the testator, is, not to assure them that he signed the will or knows its contents, but to protect him from having a forged will substituted for that he had signed. This danger is not obviated by the fullest proof that a blind man had heard a will read the day before, nor even by reading in the presence of the witnesses, for the will may have been changed in the first case, or read falsely in the last: yet all agree, that the reading the will in the presence of the attesting witnesses, in the case of a blind man, is sufficient; and the case of *Longchamp v. Fish* decides, that reading in the presence of the attesting witnesses is not necessary and that proof of a prior reading in the presence of the testator is sufficient. In the case of a man who can see, the signing his will in the presence of witnesses, or acknowledging it to them to be his will, as signed, although he be illiterate, is proof that he was acquainted with its contents: but, in the case of a blind man, although the forms of the statute be complied with, the jury, or the court of probat, (which, we have said, occupies the place of a jury,) will, "to rebut any imputation of fraud" (as justice Heath expresses it in *Longchamp v. Fish*) "require stronger evidence than the mere attestation of signature;" evidence to satisfy it,

52 that the instrument is really *and bona fide his will, which it could not be, unless he knew the contents. But this is no requisition of the statute, nor is the court or jury confined to any particular mode of proof; any evidence which convinces their minds of the fact, is enough. For this purpose, reading the will over in the presence of witnesses, is agreed to be sufficient; but is this the only proof allowable? There is no such rule in the common law: and justice Heath, in the case just cited, very sensibly remarks, great inconvenience would arise from any rule,

requiring the wills of blind men to be read over in the presence of attesting witnesses; nor would the mere reading it alone to them, be a certain guard against fraud, since it might be read falsely: and Chamber, J., adds, that testators are generally averse to have their intended dispositions of property made known in their families before their deaths; and blind men who stand so much in need of attention from their relatives, would, probably, be peculiarly averse to it. If there be no rule on this subject, and we are to be satisfied, as in other cases, by any circumstances and facts, which give us reasonable ground to conclude, that the testator knew the contents of the will; put the case of a blind man, proved to be shrewd, sensible, a punctual, precise man of business, in full possession of his mind; a man who had made his property, and was particularly anxious and careful in the safe and prudent disposition of it among his children; suppose such a man, while in good health, should send for two of his friends, tell them he wished them to attest his will, direct his daughter to bring it out, duly sign, and have it attested; and some six years after, this man should, in conversation with an old friend, detail with exactness most of the material provisions in that will, saying at the same time that it was his will: I ask, is there a mind which can resist the conclusion, that this man had dictated such a will to the scribe, and was well acquainted with its contents? And ought we, when this will is offered for probat, to reject it, because there is no proof that it was

53 read over to the testator, and because, *in detailing the contents, there being ten clauses of bequest and devise, he spoke of nine, and did not mention the tenth? The case I have supposed is the case before the court. The will contains, 1. a bequest to his daughter Bcyd; 2. to his son James; 3. to his daughter Sarah; 4. to his daughter Ann; 5. to his daughter Apphia; 6. to his son Philip; 7. to his grand daughter Mary Shepperd; 8. the devise to his wife for life; 9. at her death, the land he lived on to be sold, and one fourth of the money put to interest; that interest for the use of his daughter Shepperd, during her life, and at her death, the principal to be divided among her children: the 10th and last devise is, that the western land be sold, and the money, with the three fourths of the sale of the home place, and the residue of his estate, he divided between his two sons and three single daughters. Of these ten clauses, the testator in his conversations with Ford, in 1823, the will being executed in 1817, gave a distinct account of the first nine, but said nothing about the tenth, or if he did, the witness had forgotten it. If he had so forgotten, it would not be remarkable: it is much more remarkable, that he has remembered so much and so accurately as he has. This, indeed, was objected by the counsel, as going strongly to his credit; but, if he needed support, it is amply given him by eight witnesses, some of whom have known him thirty years, and all say he has the highest character for honesty, truth and correctness. We cannot, therefore, refuse him

our belief; and giving it, how can we doubt that Vasa knew the contents of this will? But this is not all. Before he made his will, he told Webb, that he never meant to leave his son-in-law Shepperd any of his property, but would have money put out at interest, of which his daughter during her life might have the profits; and for his daughter Boyd, the property was to remain with her and her husband during their lives, and then to return: and the reason he gave for this, was, that she had no children, and would probably have none, and he did not wish his property to go to

54 Boyd's family. These, we know, are *the provisions which he afterwards had inserted in the will. Again, in 1823, he told Cook he had a will; he was not satisfied with it; he intended to get it altered; but, if he did not, it should stand: he told him also several of the provisions of this will, namely, those with respect to his grand daughter, and his two married daughters; and he gave him his reasons for not giving either of his sons-in-law property; that Boyd had no children, and would have none probably, and that he did not think him capable of managing property; and as to Shepperd, that, if he gave him property, he was such a drunkard he would soon spend it, or drink it up. His language to Goode also, in 1823, was to the same effect. This evidence proves, beyond a question, to my mind, that the paper offered for probat, contains the deliberate and settled will of the testator in the disposition of his property; more especially, his fixed determination never to give his sons-in-law any of his property; and they are the only persons resisting the probat.

It was objected in the argument, that, the witness Shearan, does not prove that he attested in the presence of the testator; and the case of *Burwell v. Corbin* was mentioned: but that was a case differing from this. There the court was acting on a special verdict, where every thing must be directly found, and nothing inferred: here, the court of probat acts as a jury, and may draw from the evidence, every inference and conclusion which a jury could. Now there is no doubt on my mind, that the reasonable if not necessary inference from the evidence, is, that both witnesses attested the will at the same time, and both in the presence of the testator. No one can read Shearan's evidence, without concluding that the whole transaction took place at one time, in one room; and this even without the aid of the other witness, who swears directly, that both signed their attestation in the presence of the testator. Could I, as a jurymen, possibly resist this evidence? Certainly not; and holding the same station as part of the court of probat, I find it equally conclusive.

55 *With respect to the evidence rejected, it does not seem to me worth while to consider whether it ought to have been received or not. For if received, it could have been relied on solely as proof of revocation. We know, that no directions given by a testator to another, to destroy his will, amounts to a revocation. The

statute provides that no will "shall be revocable but by the testator destroying, cancelling or obliterating the same, or causing it to be done in his presence" &c. Mere parol directions given to a person to destroy the will, could never satisfy these requisitions of the statute; and to suffer them, would be to incur the very danger the statute meant to avoid. I think the sentence of the circuit court should be affirmed.

GREEN, J., concurred.

CABELL, J. Blind men are embraced by the general words of the statute of wills, giving the power to make a will of lands. A blind man may, therefore, make such a will. But the legislature has deemed it important to guard all persons against the substitution of surreptitious or fabricated wills. With this view, the statute has declared, that no will of lands, if not wholly written by the testator or testatrix, shall be valid, unless it be "attested by two or more witnesses subscribing their names in his or her presence." The policy of this provision extends to blind persons, not less than to others. In promoting this policy, the courts have been strict in their construction of the term "presence." In reference to those who have their eyesight, an attestation, to be in the "presence," must be in the same room with the testator, or where he can, if he will, see the witnesses sign their names. Thus, if the witnesses subscribe their names in a different room, but in a part of that room where he cannot see them, without a change of his own position, the paper cannot be established as a will of lands; and the construction would be the same, even if it should

56 appear that the testator was in perfect health, in the *full possession of all his faculties, mental and corporeal, and within three feet of the spot where the witnesses subscribed their names; and even although there should be the most positive and credible testimony that every thing was fairly done. This is required, in order that the testator may know, that the will which the witnesses attest, is the very will which he himself has signed. The term presence, in the statute, is as applicable to those who are blind, as it is to those who are exempt from that misfortune. But, as we cannot impart the power of vision to those who are blind, the term presence, when applied to them, must have an interpretation different from that which is given to it, when applied to those who can see. It must not, however, be divested of all its force. It must still be so construed as to promote the policy of the statute; the suppression of surreptitious wills. This will be effected by requiring, in the case of a blind man, proof that the testator knew the contents of the will which he signed, and which the witnesses attested. I do not say, that it must necessarily appear that the will was read to him. That is one mode of proving that he knew its contents. But any other testimony that satisfies the mind of the same fact, will be sufficient.

The will, in this case, was not written by the testator, who was a blind man, but it was signed by him, and attested by subscribing witnesses. There is certainly no

positive proof that it was read to him. What is the proof that he knew its contents? The most that can be said on this point, is, that it is proved that the testator declared that he had made a will, and that he had made certain dispositions of slaves to his children and grand children; that what he gave to Mrs. Boyd (one of his daughters) was to return to his estate at her death; that he had made a comfortable provision for his wife, and that at her death, the land on which he then lived was to be sold; that one fourth of the money arising from the sale was to be put out at interest, for the benefit of his daughter Mrs. Shepperd 57 during her *life, and at her death, to be divided among her children. And, when we look at the will offered for probat, we find in it certain provisions conforming with, or resembling the above declarations of the testator. But the will contains other provisions of much more importance than those alluded to. It contains the disposition of the remaining three fourths of the money arising from the sale of the land on which he lived; it directs the sale of his western lands, and the disposition of the money arising therefrom, and also of "all the remainder" of his estate; and it appoints J. W. Cook executor. As to all these important parts of the will, there is not a title of testimony that the testator had any knowledge of them whatever. What assurance have we, that these important dispositions were directed by the testator, or that he wished or intended them to constitute a part of his will? It is not sufficient to say, that no fraud appears to have been committed or intended. That argument would prove too much: it would make good a will signed by a person not blind, if attested by witnesses not in his presence: it would make good the will of a blind man, if signed by him, and attested by witnesses, although there be no proof that he was acquainted with any part of its contents. But this is a degree of confidence to which the law will not permit either of them to surrender himself, however willing he may be to become the victim.

I am not disposed to defeat wills by resorting to technical objections. But I can never assent to establish any paper as the will of a dead man, without proof that it is his will; or, in other words, without proof that the paper exhibited contains the dispositions which he intended to make, and none other.—I am therefore of opinion, that the sentence of the circuit court ought to be reversed and that of the county court affirmed; but the majority of the judges approve the sentence of the circuit court, which is therefore to be affirmed.

58

*Taliaferro v. Foote.

May, 1831.

(Absent TUCKER, P., and BROOKE, *J.)

Equity Practice—Lost Deeds—Bill—Averments.—Where a plaintiff resorts to a court of equity for relief, on the ground that a deed on which his claim depends has been lost or destroyed, the claim being such that if he had the deed he would have complete remedy by action upon it at law: the bill must distinctly aver the loss or destruction of

*He was nearly related to the appellant.

the deed, and it must be shewn that it could not be found upon due search; otherwise the court of equity, has no jurisdiction of the case.

Same—Same—Same—Affidavit.—And such a bill must be accompanied with an affidavit of the loss or destruction of the deed; the want of such affidavit is good cause of demurrer.

This was an appeal from a decree of the court of chancery of Fredericksburg, in a suit brought by Richard Foote, against James Taliaferro. The bill contained a great deal of matter, which Foote deemed pertinent to his object, and concerning which much was said in the argument, but which this court thought wholly irrelevant; and Taliaferro's answer related, for the most part, to the irrelevant allegations of the bill.

The bill set forth, that William Thornton Alexander deceased, in his lifetime, by deed executed in October 1802, conveyed about forty slaves inter alia to John Taliaferro, his wife's brother, upon trust, that he should hold the trust subject, and pay to Alexander, during his life, a stipulated sum yearly for the profits thereof, and with respect to the slaves, should convey them and their increase, at Alexander's death, to Lucy Alexander his wife and her heirs. That the same W. T. Alexander, by another deed executed in December 1804, conveyed about twenty-two other slaves inter alia to the same trustee, upon trust, that he should pay the profits of the whole trust subject, to Mrs. Alexander during her life, and in case she should die before her husband, then to him during his life, and, after the death of both, convey the

59 slaves and their increase, to *such person or persons as Mrs. Alexander should by last will and testament appoint, and in default of appointment, to such persons as would have been entitled thereto if she had never married Alexander. That the same W. T. Alexander and Lucy his wife and Taliaferro the trustee, joined in a deed executed in April 1808, conveying to the defendant James Taliaferro, who was also a brother of Mrs. Alexander, the reversion in fee of all the slaves settled upon her by the two first mentioned deeds, reserving to her a life estate therein; (this deed contained a general warranty of title to Taliaferro). That W. T. Alexander died in August 1816, his wife Lucy surviving him; and that she executed a deed and agreement with James Taliaferro in September 1816, whereby she released to him her life estate in all the slaves and their increase, except thirty-seven, whereof she retained the life estate to herself. That, shortly after the execution of the deed of September 1816, the plaintiff married Mrs. Alexander, and hereby acquired the possession of the thirty-seven slaves reserved to her for life by that deed. That then an agreement was made between Foote now the owner of his wife's life estate in these thirty-seven slaves, and James Taliaferro the owner of the reversion, whereby Taliaferro agreed to release to Foote his reversion in twelve of them, and Foote to release to Taliaferro the life estate in the residue; in

pursuance of which agreement, Taliaferro executed a deed to Foote, conveying the twelve slaves to him in absolute property, with a general warranty of title. That this deed was put into the hands of John Taliaferro, who promised to have it recorded in the county court of King George, in which county the deed was executed; it never was recorded or deposited there, and if it was not still in John Taliaferro's possession, the plaintiffs knew not where it was to be found; but the bill did not state that the paper was lost, or that any inquiry or search had been made for it. That not long after this transaction, Mrs. Foote died. That recently, in a suit in chancery prosecuted by the creditors of William T.

60 *Alexander, against the parties claiming under his two deeds of October 1802 and December 1804, those deeds had been declared void as to his creditors, and the subject held liable to his debts. That an execution sued out by some of the creditors, had been levied, at the particular instance of the defendant Taliaferro, on the twelve slaves and their increase held by the plaintiff Foote, which had been conveyed to him by the defendant Taliaferro in absolute property with general warranty, and those slaves had been all sold under the execution, for about 1800 dollars. And the prayer of the bill was in the alternative—either a decree against Taliaferro, for the value of twelve slaves, upon the strength of his alleged warranty of the title thereof; or, at the least, a decree for such proportion of the value thereof, as the value of the twenty-five slaves of which Foote released the life estate to Taliaferro, bore to the value of the twelve slaves which Taliaferro conveyed and warranted to Foote. (The bill represented the two deeds of April 1808 and September 1816, as perfectly voluntary on Mrs. Alexander's part, and flowing from her bounty to her brother; but it did not impute any fraud to him in those transactions, or seek to impugn the validity of the deeds upon any ground: it seemed, that the plaintiff set forth the deeds of October 1802, December 1804, April 1808, and September 1816, by way of inducement to the allegations touching the agreement made between him and the defendant, and the defendant's conveyance of the twelve slaves to him, to corroborate his assertion that this conveyance contained a general warranty of title, and to shew the reasonableness of the relief he prayed).

James Taliaferro, in his answer, detailed at great length, the history of the transactions between him and his sister Mrs. Alexander, afterwards Mrs. Foote; and exhibited some other contracts between them, besides the deeds of April 1808 and September 1816 mentioned in the bill, connected with and explanatory of those conveyances. He asserted, that the conveyances of April 1808 and September

61 *1816, instead of being voluntary on the part of his sister, were founded on valuable and adequate consideration paid and performed by him; which was the reason why the deed of April 1808 contained a general warranty of the title to him. And as to the contract between him and Foote, which was the foundation of the

*Equity Practice—Lost Deed—Bill—Affidavit.—To the point that an affidavit must accompany the bill alleging the loss of a deed, the principal case is cited in *note* to *Lyman v. Lyman*, 15 Fed. Cas. 1159.

claim set up in the bill, he denied, that his deed to Foote of the twelve slaves, contained any warranty of title; it was a simple conveyance of his interest; the contract consisted in mutual releases; a release by him to Foote, of his reversion in those slaves, and a release by Foote to him of his life estate in the residue of the thirty-seven slaves. He acknowledged, that he had procured the execution sued out by W. T. Alexander's creditors, to be levied on the slaves held by Foote; and justified it, on the ground, that the slaves held by him had been purchased for valuable consideration, and conveyed to him with general warranty, so that the slaves held by Foote ought to have been subjected to the creditors of Alexander, before those held by him; and that he had reason to apprehend that Foote intended to remove the slaves he held beyond the reach of process.

The depositions of Aaron Grigsby and John Taliaferro, who were both present when the contract was executed between the plaintiff and defendant, confirmed the account given in the answer, of its nature, purpose and terms.

The deponent Taliaferro was the person to whom (as the bill alleged) this instrument was confided, that he might have it recorded; yet the plaintiff made no inquiry of him concerning the disposition he had made of it. No affidavit that it was lost or destroyed, was annexed to the bill; nor was there any evidence, that it was in fact lost or destroyed, or otherwise not within the power of the plaintiff.

The chancellor decreed that Taliaferro should pay Foote the value of the twelve slaves, as ascertained by the sale of them under the execution levied on them, whereby he was evicted of the title and possession.

Taliaferro appealed to this court.

62 *The cause was argued here, by Johnson for the appellant and Harrison and Stanard for the appellee, upon its general merits, in the discussion of which, the several contracts between Taliaferro and Mrs. Alexander, and the character and effect of them, were minutely scanned, and the question as to the probable terms of the contract between Taliaferro and Foote, and consequently the effect of that contract, examined. But Johnson took an objection to the jurisdiction of the court of chancery to relieve in such a case, which was held fatal.

CARR, J., delivered the opinion of the court, That the case made by the bill was not within the jurisdiction of a court of equity.

A good deal is said in the bill, about the deed of 1802, the deed of 1804, the deed of 1808 and of 1816—but these make no part of the case on which relief is asked; nothing is charged with respect to them, or put in issue. If the bill had charged what has been advanced in the argument here, that the execution of the deed of 1808 was procured by Taliaferro from his sister Mrs. Alexander, by fraud, deception, or imposition, that would have given jurisdiction; but, as the case stands, that deed evidences a sale by her of a reversion, for a valuable consideration, with warranty. The bill should have stated such facts, in such a

way, as would give the court jurisdiction. But the case on which the plaintiff asks relief is, in substance, this: that he became the purchaser of a parcel of slaves from the defendant, the title of which afterwards failed, and that the defendant is liable on his warranty of title, to make good to the plaintiffs the damages he has sustained. Prima facie, this is surely a case for a court of law. The bill alleges, that the defendant gave him a deed or bill of sale of the slaves with warranty; but it does not allege, that this deed is lost or destroyed. It alleges, indeed, that it was confided to John Taliaferro, who promised to have it recorded; that it was not recorded or deposited in the clerk's office; and,

63 *if it was not in John Taliaferro's possession, the plaintiff did not know where it was to be found: but John Taliaferro was not made a party; no inquiry was made of him; no step taken to ascertain the loss, or to set up the instrument, if lost. And no affidavit that the instrument was lost, accompanied the bill; which is indispensable, where a party comes into equity to set up a lost deed. In the case of the East India Company v. Boddam, 9 Ves. 465, lord Eldon says, the course upon a lost bond, was to file the bill stating the loss, and "accompanying it with an affidavit, that it was lost, not as evidence of the loss, but as a security for the propriety of jurisdiction:" and it is laid down in all the books which treat on the subject, that the want of this affidavit is cause of demurrer. This bill then makes no case for a court of equity.

But if it did, the case is not supported. The bill states, that the defendant gave a deed with general warranty. The defendant answering this charge directly, "denies that he ever made the conveyance for slaves to the plaintiff, in the manner stated in the bill; the conveyance was for the claim of this defendant to the reversion, without warranty." And this assertion derives aid from the depositions of John Taliaferro and Grigsby: but it needs no such aid, being a direct and positive denial of the statement in the bill. We must take it, then, that this was a sale of the defendant's claim merely, and a deed conveying that without warranty. It was said, that every sale implied a warranty of title; and this is true, where it rests simply on the sale; but where there is a sale of a party's interest merely, and the deed is given without warranty, will not that rebut the implication? At any rate, when the warranty is contended to be implied by the sale only, there can be no propriety in coming into equity to set up a deed which contains no warranty: the resort should clearly have been to a court of law.

Decree reversed with costs, and bill dismissed.

64 *Henderson's Ex'ors and Devisees v. Peachy.
May, 1831.

(Absent TUCKER, P., and BROOKE, J.)

Wills—Construction—Limitation of Contingent Remainders in Moieties—Case at Bar.—Testator devises real and personal estate, "to his two daughters, viz. the one moiety thereof to M. and the other

moiety thereof to J. for their lives; remainder to their children, who shall be living at the time of the decease of either of his said daughters; which remainder to the children, to be per capita and not per stirpes; so that upon the death of either daughter, her moiety shall go in remainder, not to her children, but to them and the children of the surviving daughter, in fee."

Held, this was not a limitation of the whole remainder of the whole estate, to take effect on the death of the daughter first dying, and to vest in children of both then in esse, liable to open and let in children of the survivor after born; but, as it was a devise of the estate to the two daughters in several moieties for life, so the limitation was of the remainder in several moieties also; a limitation of the remainder of each moiety, expectant on each life estate, upon the death of each daughter, to children of both living at the death of each; so that, upon the death of the daughter first dying, the remainder of her moiety only should vest in children of both then in esse, and upon the death of the survivor, the remainder of her moiety should vest in children of both then in esse; a base fee in the real estate, and the undisposed of remnant of interest in the personal, descending and passing to the two daughters, the testators heirs at law and distributees, and awaiting the contingencies on which the contingent remainder of the real, and executory bequest of the personal, were limited.

John Blair* late of the city of Williamsburg, who died in 1800, by his last will and testament, devised and bequeathed as follows—"I give, devise and bequeath my plantation in Albemarle county, commonly called the Mountain Plain, together with the slaves and stock of every sort kept thereon, to my two dear daughters, that is

to say, the one moiety thereof to
65 Mary the wife of Robert Andrews, *the other moiety thereof to Jane the wife of James Henderson, for, and during their natural lives; remainder to their children who shall be living at the time of the decease of either of my said daughters or devisees for life, and the heirs of such children; which remainder to the children to be per capita and not per stirpes; so that upon the death of either of my said daughters, her moiety shall go in remainder, not to her children, but to them and the children of my surviving daughter in fee simple. As by this disposition to the children, the land, in case of many shares, may come to be divided in such small shares, that it would be better for all parties to sell the same, and divide the money among them, I hereby authorize that to be done during the minority of some of the parties, if from circumstances it should be thought advisable."

The testator's daughter Jane Henderson died in 1811, leaving one child, a son named Thomas, who died in 1814, an infant, without issue, and intestate, his father James Henderson and his aunt Mary Andrews him surviving. James Henderson, after the death of his son Thomas, claimed, as heir and distributee of his son, one moiety of the estate, real and personal, and the remainder of the other moiety expectant on

the life of Mary Andrews. He died in 1818, having by his last will and testament, devised and bequeathed all his interest in the estate, real and personal, to his three children by a second wife, James, Walter and Elizabeth Henderson, with a limitation over, in case of all of them dying in infancy, unmarried and leaving no children, to others of his kindred. William and Alexander Brown were his executors. Mary Andrews died in 1820, having first made her last will and testament, bequeathing to Thomas Griffin Peachy whatever was due to her on account of the profits of the estate, accrued since the death of her nephew Thomas Henderson, and devising and bequeathing all the residue of her interest in the estate, real and personal, to John Blair Peachy.

66 *J. B. Peachy and T. G. Peachy exhibited their bill in the superiour court of chancery of Staunton against the executors and devisees of James Henderson (who after the death of Mrs. Andrews, took and held possession of the whole estate, real and personal); wherein T. G. Peachy prayed an account of the profits accrued between the death of Thomas Henderson and that of Mrs. Andrews, and J. B. Peachy claimed that he was entitled to one moiety, at the least, of the estate real and personal, and prayed a decree for partition and division of the land and of the slaves and other personal estate, and an account of profits accrued since Mrs. Andrews's death.

The executors and devisees of James Henderson, in their answers, insisted that they were entitled, respectively, to the whole of the estate, real and personal.

The court of chancery held, that this was not a limitation of the whole remainder of the whole estate, to take effect on the death of the daughter first dying, and to vest in the children of both then in esse, liable to open and let in any after born children of the survivor; but, as it was a devise of the estate to the two daughters in several moieties for life, so the limitation was of the remainder in several moieties also; a limitation of the remainder of each moiety, expectant on each life estate, upon the event of the death of each daughter to the children of both who should be living at the death of each; so that, upon the death of the daughter first dying, the remainder of her moiety only, should vest in the children of both then in esse, and upon the death of the surviving daughter, the remainder of her moiety should vest in the children of both then in esse; a base fee in the real estate, and a remnant of interest in the personal, not being disposed of, descending and passing to the two daughters, who were the testator's heirs at law and distributees, and awaiting the contingencies on which the contingent remainder of the real, and executory bequest of the personal, were limited. And the court pronounced an interlocutory decree, declaring that the plaintiff J. B.

67 Peachy was entitled *to one moiety of the real estate in question, and to one fourth part of the slaves and other personal estate; appointing commissioners accordingly, to set apart and allot the same to him; and directing accounts of the slaves

*The testator was an eminent lawyer and judge. At the first organization of the high court of chancery of Virginia, that court consisted of three judges: Edmund Pendleton, George Wythe, and this gentleman, Mr. Blair, were the three chancellors. After the adoption of the present constitution of the U. States, Mr. Blair was appointed by president Washington, an associate justice of the supreme court of the U. States; which office he resigned a few years before his death. He was a man of learning, and most exemplary virtue. He died at a very advanced age. His will was written by himself the year before his death.—Note in Original Edition.

and their increase, and of the profits of the whole subject accrued since Mrs. Andrews's death. From which decree Henderson's executors and devisees appealed to this court.

Standard for the appellants, contended, that upon the just construction of the will, it was a devise and bequest of the estate to the two daughters, in equal moieties, for life, with a remainder, limited to take effect upon the death of the daughter first dying, to the children of both daughters then living, so as that, upon that event, the children of both then living, should take the intire remainder of the whole estate; that is to say, the remainder of the moiety of the daughter first dying in immediate possession, and a vested remainder in the moiety of the surviving daughter expectant on her life; subject, however, to open in case the surviving daughter should have any children afterwards born, and to let them in for an equal share of the whole subject. That, consequently, upon the death of Mrs. Henderson, the whole remainder of the whole estate vested in her son Thomas, one moiety immediately in possession, the other in expectancy after his aunt Mrs. Andrews's death. And that, as there were no children afterwards born to Mrs. Andrews, to participate with him in the estate; and as he derived his whole interest by purchase under the will of his grand father, not by descent from his mother as to any part; therefore, upon the his death, though he died in infancy, whole estate, real and personal, descended and devolved to his father James Henderson, his sole heir at law and distributee.

He said, there was no other construction, which would at once ensure the whole remainder of the estate expectant on the life estates of the testator's daughters, to his grand children by both daughters, and
68 give to all and each of them *equal shares per capita; which was the manifest purpose of the will. There was only one limitation over as to the whole remainder, and that limitation was to take effect upon the happening of one event. The event upon which the estate was limited over, was "the death of either" daughter; a phrase of well understood and definite signification, meaning the death of the one or the other: therefore, the death of the one first dying, was the event on which the remainder was to take effect. And the remainder was limited to "their children" (that is, the children of both) "who should be living at the death of either" (including all the children of both, who should be living at the death of one and at the death of the other) "so that, upon the death of either" (upon the death of one or upon the death of the other) "her moiety should go in remainder, not to her children, but to them and the children of the surviving daughter;" meaning clearly, the children which both should have at the death of the one first dying, and those which the survivor should have at her death. That the testator intended exact equality among all his grand children by both daughters, whenever born, and apprehended they might be numerous, was plainly indicated, by the direction that they should take per

capita and not per stirpes, and by the authority given to sell the land, and divide the money, in case it should come to be divided into many small shares.

He insisted, that the construction he proposed would effect the intent, and the whole intent, of the testator: and that any other construction would disappoint it; so far, certainly, as to defeat the purpose of exact equality among all the grand children by both daughters, which the testator so plainly wished and so carefully provided for. The testator could not possibly have intended, that the remainder should take effect as to the several moieties, at several times and upon several events, and devolve to different sets of grand children; that the remainder of the moiety given to Mrs.

Henderson for life, should take effect
69 at her death, and vest *in the children of both daughters then living, and that the remainder of the moiety given to Mrs. Andrews, for life, should take effect at her death, and vest in the children of both then living. He said, the consequences of such a construction, were enough to condemn it: for, suppose Mrs. Henderson to have died first, leaving one child, and after her death Mrs. Andrews to have had many children, and then died; Mrs. Henderson's child would have taken his mother's moiety, and then participated equally with the children left by Mrs. Andrews in her moiety, while these could claim no participation with him in his mother's moiety—or, suppose Mrs. Henderson to have died childless, Mrs. Andrews surviving her and having one child living at the time of her death; and then suppose Mrs. Andrews to have had many children born after her sister's death, and then died; the child born before that event, would have taken Mrs. Henderson's intire moiety absolutely, and then come in for an equal share of his mother's moiety with his brothers born after that event, while these would be excluded from participation with him in their aunt's moiety. Consequences like these would be utterly irreconcilable with the obvious intent and the whole scheme of the will; and the construction that would lead to them, could not be adopted, without supposing that the testator studiously selected the most ambiguous words to express his meaning.

And as the construction he contended for, upon which the intire remainder of the whole estate vested, upon the death of Mrs. Henderson, in the only grand child of the testator then living, subject to open to let in any grand child that might be afterwards born of Mrs. Andrews, would best effectuate the intent of the testator, so it was perfectly conformable with the rules of law, that the estate so vesting in one, should devest as to the proportions of others afterwards becoming capable. He referred to Butler's Fearn, 312-315, and the cases there cited, Matthews v. Temple, Comb. 467; 1 Ld. Ray. 311; Oates v. Jackson, 2 Stra. 1172; Doe v. Perryn, 3 T. R. 484; Doe v. Martin, 4 T. R. 39.

70 *Johnson and Leigh for the appellee, premised, that it was no uncommon case, that the provisions of a will calculated to operate on future events, the exact state of which, as they afterwards

turn out, the testator did not foresee, and therefore did not distinctly provide for, should produce, in their application to the actual events, effects not foreseen, and so not intended, by the testator. In this case, there was no possible construction, upon which the testator's intent, as expounded by the appellants' counsel, might not have been eventually disappointed. If, as he contended, the death of the daughter first dying, was the event upon which the intire remainder of the whole estate was limited over, then, in case Mrs. Henderson had died childless, her surviving sister being at the time also childless, the intire remainder of the whole estate would have been defeated and gone.

The first took up the question as to the real estate; as to which, the first proposition they advanced was, that upon the death of the testator, the two daughters took, by the will, each, a several life estate in a moiety, and by descent in parcenary, the fee simple of the whole, but a base fee, subject to contingent remainders limited to their children. They said, there was no doubt, that the will devised a moiety of the land to each of the daughters, for her life, in such manner as that the life estate of each in her moiety, was, in a legal view, several and distinct from that of the other. The testator apparently looked to an actual division between them; and, certainly, either might at any time have demanded and obtained one; but an actual division of the subject, was by no means necessary to sever their titles; for, by force of the will alone, so far as concerns the points in question, each took a several vested estate for life in a moiety. The remainder in fee expectant on these several life estates, being devised to the children of both daughters who should be living at the death of either, was a contingent not a vested remainder; a remainder limited to persons not ascertained by the limitation itself, nor ascertainable till the happening of a future

71 event or events, when "there might or might not be persons in being answering the description of the remaindermen, so that it was uncertain whether the remainder would ever vest at all, or if it should vest, in whom. This limitation too (though the distinction, in this case, might be unimportant) was a contingent remainder, not an executory devise; for it was an inflexible rule that such a limitation should never take effect as an executory devise, if it might possibly take effect as a contingent remainder; as this certainly might; the remainder being limited on particular freehold estates capable of supporting such a remainder, and limited on such a contingency that it must vest, if at all, instantly on the termination of the particular estates. Then, the limitation of the remainder in fee expectant on the preceding life estates, being a contingent remainder, not certain as to the persons in whom it should vest, nor certain to vest at all; and the fee simple and inheritance not being disposed of by the will, in the mean time; the fee descended to the testator's heirs at law, his two daughters, and remained in them, awaiting the appointed

contingency that should divest it in favour of the remaindermen.

In this state the title remained till Mrs. Henderson's death. Her surviving sister had no child; and she left but one. What did he then take, by force of testator's will? A vested estate in possession in his mother's moiety, and a vested remainder in his aunt's moiety expectant on her life estate? or, a vested estate in his mother's moiety, with a mere possibility of ultimately getting the whole of his aunt's moiety, depending on the contingency of his surviving her, and being the only grand child of the testator that should survive her? They contended, that as the will devised several life estates in several moieties to each daughter, so it devised the remainder of each moiety, severally and respectively, to their children; that the remainder, as well as the particular estate, passed in several moieties. The testator's language (after the devise of the life estate, in moieties expressly, to his two daughters)

72 was, "remainder to their *children who should be living at the decease of either" of the daughters. These words might, perhaps, in a strict sense, import alternative contingencies. But the word either, as here used, meant each, which indeed was one of the senses of it, in very common use; and the word remainder was explained by the context to means the several remainders of the respective moieties. For, they said, the word remainder was a word of relation: its antecedent here, was a several life estate, in each moiety, previously given to each daughter: the remainder was to take effect after each life estate, as it should be determined by the death of each daughter; and, as the life estate on which the remainder depended were several, so was the remainder expectant upon each of those life estates, a several remainder. And that this was the just construction, seemed plain from the subsequent words, professedly explanatory, whereby it was provided, that upon the death of either of the daughters, her moiety (only) should go in remainder, not to her children, but to them and the children of the surviving daughter. The death of either daughter was the event upon which her moiety was to go over in remainder, and the event by which the remaindermen to take that moiety, were to be ascertained; and the death of the other daughter, was the event, by which her moiety was to go over in remainder, and the remaindermen as to it were to be ascertained. And whatever might be the consequences of such a construction, they contended it was the just construction and true effect of the will, that the remainder was to take effect as to the several moieties respectively, at several times and upon several events, and devolve, perchance, to several sets of remaindermen.

It was argued by the appellants' counsel, that the consequences of this construction sufficed to condemn it: but the consequences of his construction would be equally, if not more, abhorrent from any intention that could possibly be attributed to the testator. If the death of the daughter first dying, was the event upon which it was intended

73 that *the contingent character of the intire remainder of the whole estate should cease, and by which the remaindermen should be ascertained, who should take the fee simple in possession of the moiety of the daughter first dying, and a vested remainder in fee in the other moiety expectant on the life estate of the survivor; then the grand children in being at the death of the daughter first dying, would take absolutely. Their estate so vested, would not open to let in any after born children of the surviving daughter, for an equal share of the subject. The after born children could never claim an estate limited in remainder upon a particular estate which determined, and upon a contingency which happened, before they were in being and capable to take; as to them, the contingent remainder would be gone, for the plain reason, that they were incapable to take, both when the estate determined, and when the event happened, on which the remainder depended, and was to take effect. The passage cited from Fearn, concerning shifting uses, and the cases there referred to, only shewed, that "where a contingent remainder is limited to the use of several, who do not all become capable at the same time; notwithstanding it vests in the person first becoming capable, yet it shall devest as to the proportions of the persons afterwards becoming capable before the determination of the preceding estate." Now, upon the hypothesis of the appellants' counsel, the preceding estate before the determination of which Mrs. Andrews's children must have become capable to take, in order to be entitled to come in, was the life estate of Mrs. Henderson, since it was her life estate upon the determination of which the contingent remainder was to vest. Thus, his own argument and authority concluded directly against the opening of the estate once completely vested, upon the death of the daughter first dying, in the grand children then living, to let in the children of the surviving daughter that might be afterwards born. And then, the consequence of the construction proposed for the appellants, would be, that all grand children of the testator, who should

74 be born after the death *of whichever of his daughters should first die, were wholly unprovided for. And again, if one of the daughters had died leaving a child, the other having none at the time, and that child had died before the surviving daughter, and then she had died leaving many children born after the death of her sister; in such case, the remainder of the whole estate having vested in the child of the daughter first dying in absolute fee, the estate would, on the death of that child, pass to his heirs his (father, or half brothers and sisters on the part of the father, if any, since he would have derived the estate, not by descent from his mother but by purchase under the will of his grand father) and the children of the daughter last dying, the sole remaining objects of the testator's bounty, would be excluded from any share of it.

They understood the will then, as a devise of the plantation &c. to the two daughters, in several moieties, for life; remainder,

as to each moiety respectively, expectant on each life estate, to the children of both daughters who should be living at the death of each of them; so that upon the death of each, her moiety was to go in remainder, not to her children only, but to them and the children of the other (meaning still such as should be living at the death of each, respectively) in fee simple, per capita and not per stirpes. And so understanding it, the effect of the limitation was, that on the death of Mrs. Henderson leaving one child, her sister surviving and being childless at the time, Mrs. Henderson's child, Thomas, took a vested estate in possession of that moiety whereof his mother had the life estate. The remainder of the other moiety, expectant on Mrs. Andrews's life estate therein, still continued a contingent remainder, that might or might not take effect: if she had died childless, and her nephew Thomas had survived her, he would have taken this moiety also: if she had had children born after the death of her sister, and then died leaving both her own children and her nephew Thomas surviving her, her children and her nephew would have

taken this moiety in equal shares, 75 per capita: if she had had *children born after her sister's death, and her nephew Thomas had died before her, and her own children had survived, they would have taken this moiety: and, in the case which actually happened, of Mrs. Andrews surviving her nephew Thomas, and then dying childless, the contingent remainder in this moiety was disappointed by the event, and gone. The reversion in fee of this moiety, as well as of the other—the base fee subject to the contingent remainder—not having been disposed of by the testator's will, had passed by descent from him to his two daughters, in equal moieties; and upon the death of Mrs. Henderson her share of this base fee of Mrs. Andrews's moiety, descended directly from her to her son Thomas. This base fee eventually became pure and absolute.

During the lives of Mrs. Andrews and Thomas Henderson, after his mother's death, the state of the title stood thus: Thomas had a vested fee simple in possession in his mother's moiety, which he derived by purchase under his grand father's will. Mrs. Andrews held the life estate in the other moiety; of which the fee simple, that is, the base fee subject to the contingent remainder limited by the testator's will, was vested in her and her nephew Thomas, he claiming this interest by descent from his mother.

Upon the death of Thomas Henderson, that moiety which had vested him in fee upon the determination of his mother's life estate therein, by force of the limitation in his grand father's will, and so was derived by purchase directly from his grandfather, descended to his own father, who was his heir at law as to it, and passed by his will to the appellants, his devisees. But that portion of the fee simple of the moiety wherein Mrs. Andrews still held the life estate, which had vested in Thomas Henderson at his mother's death, having been derived by descent from his mother, and he dying an infant, and leaving a maternal

aunt surviving him, descended to that aunt, Mrs. Andrews, to the exclusion of his father, according to the exception in the statute of descents, 1 Rev. Code, ch. 96, § 12, p. 356. So that *Mrs. Andrews now held not only her life estate in this moiety, but the fee simple also, subject still to the contingent remainder limited by her father's will, which might possibly still take effect in favour of any children she might have and leave.

When Mrs. Andrews died, there was no child living of either daughter of the testator; there was no person in being answering the description contained in his limitation of the contingent remainder expectant on her life estate in her moiety; no person capable to take this remainder. As to this moiety, the contingent remainder failed, because the contingency did not happen. Her fee in this moiety, therefore, which before her death was a base conditional fee, became upon her death, eo instante, a pure and absolute fee; which, consequently, passed by her will to her devisee thereof, the appellee.

Then, as to the personal subject, they said, the intention of the testator was, doubtless, to make the same disposition of the personal as of the real estate; but, in the events that had occurred, the law made a different disposition of the personal from that which it made of the real. The construction and effect of the will was the same as to both subjects, with this difference, that the executory limitation was a contingent remainder as to the real, but as to the personal, an executory devise or bequest; a difference, in many cases, by no means verbal, but immaterial here. The course and manner in which the title of the personal estate passed from the testator to his two daughters, followed exactly the real. Upon the death of the testator, Mrs. Andrews and Mrs. Henderson, took, each respectively, a several life estate in a several moiety of the personal subject; remainder, as to each moiety respectively, to the children of both, who should be living at the death of each; and they also took, as co-distributees of their father (and beneficiary owners of the interest, though it vested in his personal representatives), that possible residuary interest undisposed of by his will, which might eventually

77 result *from the failure of the executory bequest to take effect, as to both or either of the moieties. Upon the death of Mrs. Henderson, her son Thomas took, by virtue of the executory bequest in the will, an absolute vested estate in her moiety (which, upon his death, devolved, by the statute of distributions, to his father James Henderson) and a possibility, under the executory bequest of the other moiety, of taking that also at Mrs. Andrews's death, depending on the contingency of his surviving her, and being the only grand child of the testator who should survive her. Mrs. Andrews still holding her life estate in this remaining moiety, she and James Henderson (representing his deceased wife, being her sole distributee, and entitled to administration of her estate), became now tenants in common, each entitled to one half of the

undisposed of possible interest in her moiety, which should result from the failure of the executory limitation to take effect as to it. In the event, the executory limitation did fail as to this moiety, by the death of Mrs. Andrews, without leaving any child of herself or her sister surviving her, to take under the limitation. And then James Henderson's right to one half of this moiety, which before her death was a mere possibility, became absolute in his representatives, and her right to the other half of it, became likewise absolute in her representatives. Thus it was, that Henderson's representatives, claiming by distribution from his son, one moiety of the personal estate in question, and by distribution from his wife, one moiety of the other moiety, became entitled to three fourths of the personal subject in question; and Mrs. Andrews's legatee, the appellee, had the right to the remaining fourth.

They concluded, that the decree of the court of chancery was perfectly correct, in respect both to the real and personal subject.

PER CURIAM. The decree is approved, and affirmed in omnibus.

78 *Christian and Wife and Another v. Miller Assignee &c.

October, 1831.

[23 Am. Dec. 251.]

(Absent GREEN, J.)*

Appeal from Circuit Court—Right to inspect Minutes to Correct Mistake in Entry of Judgment.—Upon an appeal from a judgment of a circuit court, this court cannot inspect the minutes of the proceedings taken by the clerk, for the purpose of correcting a mistake in the entry of the judgment on the order book; aliter, in the case of a judgment of a county court.

Joint Bonds—Action on—Set-Off.—A. and B. execute a joint bond to C. part of the consideration of which is the price of a parcel of corn sold by C. to A. deliverable at a day subsequent to the date of the bond; the corn is not delivered according to contract; in debt on the bond by C. against A.

*He sat in none of the cases reported in the sequel of this volume, except the cases of *Burwell's exors v. Anderson's adm'r &c.* and *Doswell v. Buchanan's exors.* post. His absence was owing to bad health.

***Bonds—Action at Law—Set-Off.**—In *Fisher v. Burdett*, 21 W. Va. 629. It is said: "Before the adoption of said act of 1831, the courts of Virginia held, that the defendant could not vacate a bond at law because he was imposed upon in a settlement of accounts which preceded its execution, or because the bond was founded on a false or fraudulent statement of facts—*Taylor v. King*, 6 Munf. 338; or because the bond had been obtained by fraudulent misrepresentations made by the plaintiff—*Wyche v. Macklin*, 2 Rand. 429; or when the action was on a contract either by deed or by parol the defendant could not at law show, that the consideration had failed in part—*Tomlinson v. Mason*, 6 Rand. 169; *Webster v. Couch*, Id. 519; 1 Rob. Pr. (old) 227-8; *Christian v. Miller*, 3 Leigh 78." The principal case is also cited in B. & O. R. Co. v. Jameson, 13 W. Va. 844; note in 1 Va. Law Reg. 542. See monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.

Set-Off.—In *Kinzie v. Riely* (Va.), 43 S. E. Rep. 773. It is said: "Section 3298 of the Code provides that, although the plaintiff's claim be jointly against several persons, a debt due to only a part of the defendants may be set-off against the plaintiff's demand, if it appear that the persons against whom such claim is made stand in the relation of principal and surety and the persons entitled to the set-off is principal. The provisions of that section apply only where the set-off is a debt or liquidated demand. 4 Minor Inst. (3d Ed.) 787; 5 Rob. Prac. 964; *Webster v. Couch*, 6 Rand. 519; *Christian v. Miller*, 3 Leigh 78, 23 Am. Dec. 251; *Harrison v. Wortham*, 6 Leigh 206."

and B. the defendants cannot set-off the value or price of the corn.

Contracts to Deliver Goods—Failure to Deliver—Rights of Purchaser.—Where one purchases goods deliverable at a future day, and presently binds himself by deed to pay the purchase money, or pays it in cash: the purchaser, in case the goods be not delivered, cannot disaffirm the contract, and claim the stipulated price paid, or contracted to be paid, but can only recover damages against the vendor for breach of his contract.

This was an action of debt, brought in the circuit court of Amherst, by Boyd Miller assignee of Thomas Coleman against Christian and wife and Carter, upon a bond for 489 dollars, executed by Mrs. Christian while sole, and Carter. The defendants' plea was payment, on which an issue was made up. There was a trial, and a verdict and judgment for the plaintiff. But, in the record sent to this court, it appeared that there were only eleven men impaneled and sworn upon the jury.

At the trial the defendants relied upon a set-off (notice thereof having been given, according to the statute, 1 Rev. Code, ch. 128, § 87, p. 510), to establish which they examined witnesses, who testified, that Mrs. Christian (the principal obligor in the bond) had, a short time before the date thereof,

79 purchased a parcel of corn of Coleman the *obligee, to be by him delivered to her at a future day, which was subsequent to the date of the bond; that the corn was never delivered to her by Coleman, according to the contract; and that the price which she contracted to pay for this corn, was a part of the sum of which the bond was given. Whereupon, on the motion of the plaintiff's counsel, the court instructed the jury, that if it should find from the evidence, that the price of the corn was part of the consideration of the bond, it was not to be allowed as a set-off in this action. To this opinion the defendants filed a bill of exceptions, and appealed from the judgment to this court.

The cause was argued here, by Johnson for the appellants and by Stanard for the appellee.

Johnson said, the proceedings must certainly be reversed, for the defect in the number of the jury. Stanard suggested, that the record might be corrected in this particular, by the minutes taken by the clerk, by which it would probably be found that the number of the jury was complete. Johnson replied, that the minutes could not be referred to; that there was a distinction between the proceedings of a county court and those of a circuit court; in the former, the minutes were drawn up and signed by the presiding justice, and were the original record of the judgments, but in the circuit court, the minutes were not part of the record, but only memoranda taken by the clerk, to enable him to make the entries in the order book, and these entries were signed by the judge, and were the original record. *Cogbill v. Cogbill*, 2 Hen. & Munf. 477, 8, and *Vaughan & al. v. Freeland & al.*, *Ibid.* in *notis*.

But, both the counsel being desirous that the court should decide the point presented by the bill of exceptions, so as to put an end to the controversy, that point was examined.

Johnson said, the opinion of the circuit

court upon it, was apparently founded on (what he thought) a mistaken application of the principle, that the consideration of a sealed contract could not be inquired 80 into, in an action at law upon *the instrument. That principle was only just and applicable, where an attempt was made to go into the consideration, for the purpose of defeating the obligation of the instrument; but it was not applicable when the inquiry into the consideration, was intended to ascertain some collateral point in issue, perfectly consistent with the obligation. Here the defence was set-off; which admitted the obligation of the bond, and the debt thereby created, but alleged satisfaction of it.

Stanard said, 1. that this was an attempt to evade the principle, that the consideration of a bond could not be inquired into, in an action of debt upon it; it was an attempt to set up a failure of the consideration as a defence to the action; but failure of consideration, even want of consideration, was no defence. 2. That it was an attempt to set off a debt due to Mrs. Christian severally, against a demand against her and Carter jointly; they were not mutual debts. And 3. that it was an attempt to set off unliquidated damages against a certain demand; damages for the failure of Coleman to deliver corn at a future appointed day, and to be measured, of course, by the value of the corn at the day appointed for the delivery.

Johnson replied to the objection against the proposed set-off because the debts were not mutual. That, if Mrs. Christian had brought a suit for the debt due to her severally, this debt due from her and Carter jointly, could not have been set-off against her demand, since that would have been, in effect, to make her pay the whole debt for which she and another were jointly bound: but here, she was sued on the bond of herself and another, and if she took upon herself to pay the whole debt, by the application of her own money or funds to the satisfaction of it, there could be no injustice to the plaintiff, or to her co-obligor. And as to the objection, that this was an attempt to set off unliquidated damages, he said, the contract for the delivery of the corn, for the price of which Mrs. Christian

81 had given the bond, having been broken by Coleman, she had *a right, if she thought proper, to disaffirm that contract intirely, and to recover back the price; which was a sum certain.

CARR, J. It appears by the record, that there were but eleven jurors sworn. It was suggested by the appellee's counsel, that this might be an error of the clerk in transferring the proceedings from his minute book to the order book. Whatever power this fact might give the court below to correct the entry in the order book, I presume it gives to this court no power on that subject. For this error, therefore, the judgment must be reversed, and the cause sent back.

But there was another point argued, that presented by the bill of exceptions to the instruction given by the circuit court to the jury; and as that point will again arise in the trial there, it may not be amiss to give

our ideas upon it. It was, indeed, the only point which the appeal was intended to bring up. The attempt was to set off in this action, the price of a parcel of corn, not delivered according to contract by Coleman the obligee, which formed a part of the consideration of the bond on which the action was brought; in other words, (as it seems to me) to deduct the price of the corn from the bond, that part of the consideration having failed. This, I think, was inadmissible, upon the principle that one cannot at law, inquire into the consideration of a bond, in a case like this. Suppose the whole consideration had been corn, could the defendants have defeated the action by shewing a non-delivery? Here were two contracts. Mrs. Coleman gave her bond to pay so much money. The obligee bound himself to deliver her so much corn. Each had an action. But her's was for unliquidated damages, and they can never be set off against a liquidated demand. Besides, the claims were not mutual; not due in the same right. In a suit by Mrs. Christian for non-delivery of corn, the bond could not have been set off. The law is settled on this subject, both by english and american decisions; it is not

82 *necessary to refer to them. I think the instruction given to the jury was right.

CABELL and BROOKE, J., concurred. TUCKER, P. The reversal of the judgment is inevitable. The issue was tried by eleven instead of twelve jurors; which is a fatal error. It was suggested, indeed, that the minutes of the court's proceedings might shew, that there were twelve persons sworn to try the issue, the name of one of whom was omitted by mistake in drawing up the orders. But though the complete records in the county courts are amendable by the minutes, since these last are the act of the court, whereas the full record is the act of the clerk in his office, yet in the circuit courts the minutes are mere memoranda of the clerk, while the orders have the sanction of the court's authority. They are directed to be drawn up at large in the interval of the court; to be read over at its next sitting, and corrected where correction is necessary; and this for preventing errors in the proceedings. 1 Rev. Code, ch. 69, § 46, p. 237. It would be subversive of the spirit of this provision, to consider the orders thus examined and approved, as subject to be controlled by the loose memoranda of the ministerial officer; and so this court has decided.

With respect to the point appearing in the exceptions, on which the opinion of the court is desired, I have no doubt, that the set-off was properly rejected, though, perhaps, for reasons different from that which seems to have prevailed with the court below. 1st. The action was a joint action against two, and the set-off attempted was the individual demand of one of the defendants against the obligee. It is vain and useless to speculate now upon the reasonableness of permitting or refusing such a set-off: it has been too frequently settled by the practice of the courts, that such a set-off is not allowable, for the court now to act upon a different principle. Ritchie

& Wales v. Moore, 5 Munf. 388; 83 *Porter v. Nekervis, 4 Rand. 459. It is of very little importance, whether a defendant shall be permitted to make his discount or be driven to his cross action: but it is of vital importance, that the practice of the courts should not be in a state of continual fluctuation. If it were necessary to do more than to entrench ourselves behind the numerous authorities on the subject, perhaps, it might not be difficult to shew, that the courts could not have extended the doctrine of set-off farther than they have done, without subjecting themselves to the just imputation of judicial legislation. It might, moreover, be possible to shew, that justice and convenience conspired to impose a limit upon the power of introducing a variety of litigations into the same action. But I content myself with resting upon the authorities just cited, as conclusive of the point. 2ndly, The discount offered in this case, would have conflicted with an established rule. A demand for unliquidated damages cannot be set off against an ascertained demand, nor can cross demands for unliquidated damages be set off against each other. Howle v. Strickland, 1 Cowp. 56; Weigall v. Waters, 6 T. R. 488. What then, is the nature of the defendant's demand in this case? It arises out of a breach of a contract to deliver a quantity of corn. She has paid no money and there is none therefore for her to recover back. Her only remedy, in case the plaintiff gets a judgment on her bond, is to sue Coleman for damages for failing to deliver the corn, in which she would recover not the contract price, but the value of the article at the time it should have been delivered, with interest. Bull v. Douglass, 4 Munf. 303; Merryman v. Criddle, Id. 542; Douglass & al. v. M'Allister, 3 Cranch, 298; Gainsford v. Carroll, 2 Barn. & Cress. 624; 9 Com. Law Rep. 204. This, then, is strictly a demand for unliquidated damages, and therefore not a proper set-off. I am not inattentive to the principle, that if the vendor of an article to be delivered at a future day under a parol contract, fails to fulfil his engagement, the buyer may disaffirm the contract, and if he has paid

84 his money *may recover it back on a general count of indebitatus assumpsit. For, in such case the breach by one party, and the disaffirmance by the other, put an end to the contract. It is no longer an open and subsisting contract (upon which general indebitatus assumpsit will not lie) but the express contract is at an end, and the implied obligation to refund the price springs up from the transaction. But this doctrine, I take it, can have no application, where the contract to pay is evidenced by deed. In such case, the buyer can neither disaffirm the contract, nor plead that the consideration has failed. Thus, if one give his bond for 500 dollars to another (100 barrels of flour to be delivered at new year's day, being the actual consideration, though not expressed so to be) the obligor cannot disaffirm the contract upon the failure of the obligee to deliver the flour. His only remedy at law is, to submit to a judgment on the bond, and commence his action

for damages. The measure of the damages, in case the price be not paid, would be the difference between the contract price and the market price at new year, when the flour should have been delivered. *Gainsford v. Carroll*. But when the price has been paid, or the vendor has a judgment for it, the measure of damages is the whole value of the article at the time fixed for the delivery. Such is precisely the case here. The defendant bought corn of Coleman, and gave her bond for the price. She cannot vacate her bond by alleging the failure to deliver the corn, but she must resort to her cross action, to recover damages for the non-delivery. This, then, is strictly a right to unliquidated, and indeed very uncertain damages; depending upon the fluctuating value of corn in our market. In every aspect of the case, therefore, I think the set-off was properly rejected.

85 *Crawford v. Thurmond and Others.

October. 1831.

Injunction—Against Execution—Remedy at Law.*—A. recovers a judgment against B. and C. who had prosecuted the suit to judgment, as A's agent, sues out a *fi. fa.* upon it, and indorses on the execution, that it is partly for his C's own benefit: before this execution is delivered to the sheriff, B. the debtor, makes satisfaction to A. of the full amount of the debt, and A. gives him a receipt in full and discharge: HELD, though B. the debtor, might have made a motion to quash the execution, and thus had remedy at law, yet a court of equity has jurisdiction to give him relief by way of injunction to inhibit further proceedings on the execution.

Philip Thurmond and John Richeson exhibited a bill against Nelson Crawford and Daniel Shrader, in the county court of Amherst, in chancery, setting forth; that Shrader, a resident of Tennessee, recovered a judgment at law, in the same county court, against Thurmond and Richeson, for 993 dollars with interest and costs: that, before the execution upon this judgment was delivered to the sheriff, Shrader having come to Virginia to collect the debt, a contract was made between him and Thurmond, whereby the latter agreed to sell Shrader three slaves and a horse, and to pay him 30 dollars, and Shrader agreed to receive this property and money, in full satisfaction of his judgment; and the property being soon after delivered and the money paid, Shrader gave his receipt

*Execution—Injunction against—Relief at Law—In the principal case before the execution was delivered to the sheriff the debtor made full satisfaction to the creditor, and took his receipt in full for the debt: and it was held that though the debtor might have made a motion to quash the execution, and thus have had a remedy at law, yet equity may give relief by way of injunction to inhibit further proceedings on the execution.

In *Lewis v. Spencer*, 7 W. Va. 691, citing the principal case it is held, that a court of equity has jurisdiction to enjoin a sheriff from selling personal property for the payment of taxes, upon which he has levied, where the bill alleges that the said taxes have been fully paid.

The principal case is also cited with approval in *Hay v. Alexandria*, etc., R. Co., 11 Fed. Cas. 886; *Penn v. Ingles*, 82 Va. 72.

In the following cases the principal case is distinguished on the ground that there was a complete and adequate remedy at law: *Morrison v. Speer*, 10 Gratt. 230; *Beckley v. Palmer*, 11 Gratt. 684; *Coleman v. Anderson*, 30 Gratt. 428, 429; *Hall v. Taylor*, 18 W. Va. 555. See monographic notes on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518; "Executions" appended to *Palne, Surv.*, etc., v. *Tutwiler*, 27 Gratt. 440.

for the same, in full discharge of the judgment and execution thereupon; which contract, and receipt for the property and money, were evidenced by instruments under seal: that after this, the defendant Crawford, having previously taken out an execution upon Shrader's judgment, and made an indorsement in these words,— "This execution, except 480 dollars, is for the benefit of Nelson Crawford. (Signed) N. Crawford agent for D. Shrader,"—delivered the execution so indorsed to the sheriff, who proceeded to levy it on Richeson's property, which he had advertised for sale to satisfy the execution. The bill 86 prayed an injunction to inhibit *the sale, and all future proceedings upon the judgment; and the injunction was accordingly awarded.

Crawford, in his answer, said, that the bond of Thurmond and Richeson, on which the judgment was recovered, had been placed by Shrader in his hands as an agent to collect the debt; and that while the bond was in suit, he had advanced and paid to one Frazer, who was duly authorized by Shrader to receive the money for him, 550 dollars, which he was to reimburse to himself out of the proceeds of the bond when collected; and Shrader was apprised of this advance, and agreed, that Crawford should retain out of the proceeds of the bond, the money so by him advanced with interest: that thus, the judgment on the bond, when recovered, was, by Shrader's agreement, a judgment for the benefit of Crawford, to the extent of his advances for Shrader: and that Thurmond was well informed of the transaction between Shrader and Crawford, and of the right of the latter to retain the 550 dollars with interest, out of the debt due upon the judgment when collected, at the time he made the contract with Shrader mentioned in the bill, and was tempted by an exorbitantly high price for his slaves, to combine with Shrader to defraud and disappoint Crawford of the portion of the debt due on the judgment, to which he was justly entitled; and Shrader immediately after receiving the property he had purchased of Thurmond, absconded, and carried the property with him, from Virginia.

Shrader did not put in an answer; and the bill was taken for confessed as to him.

The controversy, upon the merits, turned intirely, on questions of fact, 1. as to the fairness of Thurmond's conduct in procuring a discharge of the judgment from Shrader; and 2. as to the justice of Crawford's claim, even as between him and Shrader, to the money he alleged he had advanced and paid to Frazer for Shrader, and (by consequence) as to the equitable 87 right of Crawford to the benefit *of any part of the judgment. And upon these points, there was a good deal of evidence filed by both parties.

Crawford moved the county court to dissolve the injunction; which motion being overruled, he carried the cause by appeal to the superiour court of chancery of Lynchburg, which approved the opinion of the county court, but retained the cause, and gave both parties commissions to take additional evidence; and upon the final hear-

ing, perpetuated the injunction, with costs. From this decree Crawford appealed to this court.

Johnson, for the appellant, and Leigh for the appellees, argued the cause, chiefly, upon the merits, which depended on the questions of fact before mentioned, and the evidence relating to them. But Johnson took an objection to the jurisdiction of the court of chancery to relieve the appellees upon their own shewing in their bill; for, he said, supposing the facts of the case truly stated in the bill, the appellees had a complete and summary remedy at law, by motion to the county court to quash the execution. And this objection presented the only point of law in the case.

CARR, J. After discussing the cause upon the evidence, and determining it upon the merits for the appellees, said—It was objected, that the appellees, instead of filing this bill, might have moved the county court to quash the execution; and that having this complete remedy at law, equity ought not to entertain them. It is true, that every court has a right to watch over its process, and where it has been irregularly or fraudulently executed, to quash it, as being the best and speediest mode of doing justice. But this was not a question of fraud or irregularity, in the execution of process; no officer of the court had acted improperly. The execution was taken out by Crawford, who had acted as the agent of the plaintiff Shrader, and was indorsed by Crawford for his own benefit, except as to 480 dollars; and at a date subsequent to this indorsement, Thurmond had

88 *obtained a complete discharge of the execution from Shrader: a state of things which presented several questions complicated of law and fact; as 1. the genuineness of Shrader's receipt and discharge to Thurmond; 2. its effect in law; 3. the fairness of that transaction; 4. the effect of Crawford's indorsement, involving the question whether his agency was not destroyed by the presence and acting of the principal; 5. the equity of Crawford's pretensions in fact and in law. Now I do not say, that the county court, sitting as a court of law, could not upon motion, in a summary way, try these questions: but I do say, that in that mode, it would not have afforded as safe or as convenient a tribunal for the trial of them, as a court of equity upon regular pleadings and proofs. And this consideration, it will be recollected, forms one of the grounds in equity for assuming jurisdiction. But there is another, perhaps a stronger ground. The indorsement of the execution for Crawford's benefit, gave him nothing but an equitable right, which could have no weight in a court of law, belonged exclusively to equity, and must finally have brought the cause there for decision. This consideration, it will be seen, had a good deal of weight with a majority of the court, in *Ambler v. Warwick*, 1 Leigh, 195. Taking all these things into view, I do not feel disposed to disturb the decree.

The other judges concurred, and the decree was affirmed.

89 **Burnett and Others v. Harwell and Others, &c.*

October, 1881.

Executors and Administrators—Bond—Liability of Sureties.—Under the former provisions of the statute concerning executors' bonds, 1 Rev. Code, ch. 104, § 21, the sureties of an ex'or are not responsible for the proceeds of land sold by him under a power in the testator's will.

Same—Same—Right of Assignee of Legatee to Bring Action on.—Under the provisions of the same statute, an action cannot be maintained on an executor's bond, at the relation of an assignee of a legatee of a decree for a legacy: such action can only be maintained at the relation of the person who has the legal right to the debt.

Same—Same—Action on—Allegations.—In such an action, the declaration must aver that assets sufficient to pay the debt came to the ex'or's hands, or the amount of assets that came to his hands, and the devastavit thereof; and if the declaration contain no such averment, it is bad on general demurrer: per TUCKER, P.

Debt, in the circuit court of Mecklenburg by Harwell and others, justices of the county court of Mecklenburg, at the relation of Bruce & Sydnor, against Burnett and five others his sureties, on a bond given by Burnett to the justices of the county court, upon his qualification as executor of John Davis, in February 1809, in the penalty of 100,000 dollars, with condition in the form prescribed for an executor's bond, by the statute, 1 Rev. Code, ch. 104, § 21, p. 380.

The declaration, after alleging the execution of the bond, and setting out the condition in *hæc verba*, assigned as the breach thereof, that Burnett, the executor, had not well and truly administered the goods, chattels and credits of his testator's estate, that came to his hands to be administered, and had not well and truly paid and delivered all the legacies in and by the testator's will bequeathed, as far as the said goods &c. extended, according to the value thereof, but had failed to pay and deliver the legacies, and had wasted the goods &c. in this, that he had not paid Susanna Davis the amount of a legacy by the testator's will bequeathed to her, for which she brought a suit against Burnett the executor, and others her co-legatees, in the superior court of chancery of Richmond, and recovered a decree against the executor for 6555 dollars with interest &c. for and

90 on account of the legacy bequeathed to her by the *testator's will, and the costs of suit; and then, by deed of assignment duly executed, (whereof profer was made) she assigned her decree and legacy to Bruce & Sydnor, the relators; and Bruce & Sydnor sued out sundry writs of fieri facias upon the decree, against Burnett the executor, which were returned satisfied only as to 1936 dollars, and nulla bona as to the residue; and so Burnett, the ex-

***Executors and Administrators—Bond—Liability of Sureties.**—The principal case is cited in *foot-note* to *Murphy v. Carter*, 23 Gratt. 477.

Same—Same—Right of Assignee of Legatee to Sue on.—See on this question, the principal case cited in *foot-note* to *Tolson v. Elwes*, 1 Leigh 435; *Poage v. Bell*, 8 Leigh 607; *Leightons v. Hinchman*, 1 Gratt. 156, and *note*; *Yerby v. Lynch*, 3 Gratt. 498, 513; *Calahan v. Depriest*, 13 Gratt. 276.

In *Lynchburg Iron Co. v. Tayloe*, 79 Va. 675, the principal case is cited to the point that where the assignee of a chose in action sues in equity the assignor is a necessary party. See monographic *notes* on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6; "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 400.

ecutor, had failed to pay and satisfy the decree aforesaid, except the 1936 dollars, and had not well and truly administered the goods &c. of the testator, but had wasted the same; by reason whereof right and action accrued to the plaintiffs, the justices, to demand and receive the penalty of the bond from the defendants, the executor and his sureties &c.

The defendants put in a general demurrer to the declaration, and also pleaded conditions performed, on which an issue was made up.

The court overruled the demurrer; and, upon the trial of the issue, the jury found for the plaintiffs 4140 dollars with interest &c. in damages; the court gave them judgment accordingly; and the defendants appealed to this court.

At the trial of the issue, the plaintiffs gave in evidence the record of the proceedings and decree, in the suit of S. Davis against Burnett the executor and others, in the superiour court of chancery of Richmond; by which it appeared, that the amount decreed to her against the executor, consisted, for far the greater part, of a share bequeathed to her by the testator's will, of the proceeds of real estate thereby devised to be sold by the executor, and accordingly sold by him. Whereupon, the defendants' counsel moved the court to instruct the jury, that the executor's sureties were no wise bound by the bond, for the proceeds of the real estate sold by their principal, and not accounted for; which instruction the court refused to give; and the defendants filed a bill of exceptions to the opinion.

Johnson for the appellants—1. The demurrer to the declaration ought to have been sustained. Bruce & Sydnor

91 *were not proper relators. The statute provides, that an executor's bond "may be put in suit, and prosecuted from time to time, by and at the costs of any party injured by a breach thereof;" but the party injured to whom the action is given, must be a party having a legal right to the damages sustained by the breach. The action lay at the relation of S. Davis, but not at the relation of Bruce & Sydnor, to whom she assigned her decree against the executor; the decree not being, at law, an assignable subject, and the assignment, therefore, passing only an equitable right. *Tolson v. Elwes*, 1 Leigh, 436; *Meze v. Howver*, Id. 442; *Garland v. Jacobs*, 2 Leigh, 651. There was no manner of privity between the assignees and the obligors in the bond. The right of the assignees had been ascertained by no judicial proceeding; and no action lies on an executor's bond, till the right of the party claiming has been judicially established. *Braxton v. Winslow*, 1 Wash. 31. Besides, the declaration does not allege, that assets sufficient to satisfy the legacy, and the decree for it, came to the executor's hands, or what amount of assets came to his hands, to be administered; neither is there any distinct averment, that the amount of the decree was not paid to the assignor. 2. The opinion given by the circuit court at the trial, was clearly erroneous. The sureties of the executor are bound by their bond,

for the due administration of the personal assets only. *Jones v. Hobson*, 2 Rand. 483.

Wickham for the appellees, did not abandon the last point, as to the liability of the sureties for the proceeds of real estate sold by the executor; but he submitted it without any remark. As to the points made upon the demurrer, he said,—The statute gives the action on the bond to any party injured by the breach; and the assignees of the decree in this case, were parties injured. They were entitled to receive the money, and to give a discharge of the debt; and after the assignment, the assignor had no right to receive the debt. Payment to the assignees would have 92 *saved the obligors from liability on their bond: payment to the assignor, after notice of the assignment, would have left them liable to the assignees. The objection is, that the assignment gave them not a legal but only an equitable right to the money; but the assignor herself had only an equitable right; namely, a right to a legacy. If, for this reason, the action cannot be maintained at the relation of the assignees, so neither can it be maintained at the relation of the assignor; and then the executor's bond is no security for a legatee. The other defects imputed to the declaration are merely formal; substantial objections only are to be regarded upon a general demurrer. The declaration avers, in substance, that the executor wasted the assets in not paying the amount of the decree.

CARR, J. The circuit court unquestionably erred in refusing to instruct the jury, that the sureties of the executor were not bound to make good the proceeds of land sold by their principal. This court, after the fullest investigation, has settled the law on that subject, in *Jones v. Hobson*. There was another point argued at the bar; whether Bruce & Sydnor could as assignees of Mrs. Davis, a legatee, sustain an action, in the character of relators, on the bond of the executor? I have felt some doubt as to this; but, from the reason and analogies of the law, am led to conclude, that they cannot. We have decided in *Tolson v. Elwes*, that where A. obtains a judgment, and the execution is indorsed for the benefit of B. he cannot make a motion in his own name against the sheriff, for a default, in the service and return of the writ. We have also decided in *Meze v. Howver*, that where an execution in the name of A. is indorsed for the benefit of B. if the sheriff levy it, and take a forthcoming bond payable to B. such bond is naught and will be quashed. These cases were decided on the particular words of the law; but the general proposition was also taken, that in no proceeding to carry a judgment or execution into effect, can the name of

93 the transferee be *substituted for that of the plaintiff on the record. The law requires bond and security of executors for the safety of creditors and legatees alone; but neither of these can sue upon the bond, till they have established their demand against the executor by judgment or decree. To enforce this judgment or decree, the bond may be put in suit; but can it be at the relation of any but the

plaintiff on the record? I think not. The words of the law are broad; "the bond may be put in suit and prosecuted, by and at the costs of any party injured by the breach thereof;" still, as the bond is given for the benefit of creditors and legatees alone, they seem to be the parties meant by the law. A creditor by bond or other assignable paper, may it is true, by assigning it, place his assignee in his shoes; but a legacy, decree or judgment, is not assignable at law. I do not think, therefore, that the legatee in this case, could by her assignment, enable Bruce & Sydnor to sustain this action on the bond, as relators.

CABELL and BROOKE, J., concurred.

TUCKER, P. The first error assigned in this case by the appellants is, that Bruce & Sydnor, the relators, who claim as assignees of a decree in favour of S. Davis, one of the legatees of John Davis deceased, were not proper relators; that the suit upon the executor's bond for the amount of the decree, should have been at the relation of the legatee, and not of her assignees. I am of opinion, that this objection is a valid one. The language of the statute is indeed very broad; that "the bond may be put in suit by any party injured by the breach thereof." But even this broad provision may be satisfied by conceding to those who have legal claims, a right to put them in suit at law, and to those who have equitable claims, a right to sue in equity. Or, it may be satisfied by conceding, that persons standing in the relation of Bruce & Sydnor to the case, may sue even at law, in the

94 name of the justices, upon the relation of their assignor, *and for their own use. If, however, this may seem too nice and technical, I am willing to place the matter upon the more liberal ground of the real meaning of the statute, and the mischiefs and embarrassments, which would proceed from the adoption of a different construction. The statute then, prescribes that any party injured by a breach of the bond may put it in suit. The question still recurs, who is to be considered a party injured? and how is the fact to be ascertained, that the suitor comes within that description? Now, it is agreed, on all hands, that no suit can be maintained upon the bond until the party suing has first established his claim against the estate, if he is a creditor, by the judgment of some court of justice, or if he is a legatee, by the decree of a court of chancery, or the judgment of a court of law upon the express assumpsit of the executor. It is believed, that the records of our courts furnish no instance of an attempt to sue on the bond, until the party has established his demand by a previous judicial proceeding. Indeed it cannot be. The action for a devastavit never could be maintained, until there was a previous judgment against the executor establishing the demand, and the action on the bond could only have been sustained, until within a few years past, after a judgment for a devastavit. And even now, the law expressly requires a previous judgment for the demand, and a return of nulla bona, before a suit can be sustained upon the bond. I think, therefore, we may safely affirm, that the party injured

must have established his right to sue, and the fact of his falling within the description of the statute, by some previous judicial proceeding, before he can be entitled to be a relator in an action upon an executor's bond. It may be said, that the demand in this case has been established by a judicial proceeding, and the requisitions of the statute thereby satisfied. But how has the connexion of Bruce & Sydnor with that demand, been established? Had S. Davis been the relator, and the action been indorsed for their use, every thing would have been right. She would have had a

95 legal title *to recover, founded upon the actual decree in her favour of a court of record of the highest authority; and the rights of her equitable assignees would have been secured by the indorsement. The defendant upon the service of the process (which is a demand in law) would have seen that that demand was the demand of an ascertained creditor, and might have satisfied it forthwith. But, as the suit is now brought, various principles of the law are set at naught. Persons having equitable interests are found asserting those interests in a legal tribunal, instead of filing their bill in equity upon the foot of the former decree, and seeking to enforce its provisions against principal and sureties, in the mode so familiar to the profession in that court. Invasions of the jurisdiction of courts of law by the courts of equity, about which we are so sensitive, are not more mischievous than many invasions of the jurisdiction of equity would be. This among others would be attended with great inconvenience. If the assignees, Bruce & Sydnor, had sued in equity, S. Davis, their assignor, would have been a necessary party. The question of assignment or no assignment, could there have been definitively settled, in the cause between Bruce & Sydnor, S. Davis, and the executor. But in the action at law, though the defendants should have pleaded no assignment from S. D. to the relators, no verdict could have been given, which could have protected them against a future claim on her part, if she should be able to negative the authenticity of the assignment, or to shew some subsisting equity or discount against her assignees. Let me add too, that the want of privity between themselves and the defendants, leads, I think, to another consequence, inconsistent with legal principles. In the theory of the law, the writ itself is a demand of the debt from the defendant. Upon the service of the writ, if he knows the demand to be just, he may discharge it forthwith. It is proper, then, that he who sues him should be known as a creditor; but this cannot be where the relator in the cause is an equitable assignee, unknown to himself, and not recognized

96 by a court of law. *I am of opinion, therefore, that this defect in the action is fatal. The next error assigned is, that there is no averment in the declaration, that assets to the value of the debt ever came to the hands of the executor. I think this also a sound objection to the declaration. The question here, it will be observed, does

not arise after a verdict. We are considering it upon the general demurrer filed in the court below to the declaration. The statute of jeofails is, therefore, out of the question, except the clause which declares that, upon general demurrer, the court shall only regard such errors as are specially assigned, "unless something so essential to the action or defence as that judgment according to law and the very right of the cause cannot be given, be omitted." That there is no averment in the declaration, that assets to the value of the debt, or indeed any assets, came to the hands of the executor, appears from the most rigorous examination. It remains then only to inquire, whether this averment be so essential to the action, as that judgment could not be given according to law and the very right of the cause? I think it was. The matters which go to make up the right of action, in cases of this description, are threefold; 1. an ascertained demand against the estate; 2. assets in the hands of the executor; and 3. the return of the sheriff, that no such assets can be had to satisfy the execution. It cannot be denied, that upon the trial, these three things must be shewn in order to establish a breach of the condition of the bond. The necessity of proof of assets is obvious, from the consideration, that if no assets were received, there could be no breach by devastavit; and the necessity of establishing by proof the amount of assets, is also clear, because it has been repeatedly decided, that the jury must find either sufficient assets or the amount of assets. *Sturdivant v. Raines*, 1 Leigh, 481; *Gardner's adm'r v. Vidal*, 6 Rand. 106. This, then, is obviously one of the most essential ingredients in the action. It may safely be

called, indeed, the very gist of the action. And if it be the important inquiry before the jury on the trial of the plea of plene administravit, or conditions performed, it is not less important in the case of a demurrer. For it must be remembered, that upon overruling the demurrer of the defendant to the plaintiff's declaration, peremptory judgment is pronounced against him for the plaintiff's demand. If, therefore, the declaration omit what is essential to constitute a right of action, it is impossible to give such judgment without palpable injustice. For, though the demurrer admits what is set forth in the declaration, it does not admit what is not; and hence it is that (sweeping as are the provisions of our statute of jeofails) they reach no case of a demurrer for matter of substance. Much, indeed, may be cured by a verdict; but no errors, except those of mere form, are protected from the effect of a demurrer. A further consideration may illustrate the essential character of an averment of assets, in order to enable the court to pronounce judgment. Even a verdict for the plaintiff for his demand will not justify a judgment of the court, unless that verdict expressly finds a sufficiency of assets, or the amount of the assets, so as to enable the court to graduate thereby its own judgment. How, then, can the court give judgment according to law and the very right of the case, when, so far from knowing the amount or

sufficiency of the assets, it does not even know from the plaintiff's own declaration, that the defendant ever received any assets at all? I cannot perceive. I therefore conclude, that on this point also, there is error in the judgment of the court below.

The third objection relied upon, arises on the bill of exceptions; the court refusing to instruct the jury, that the securities of the executor were not bound for the proceeds of the land sold under John Davis's will. This decision is in conflict with the case of *Jones v. Hobson*, and is therefore erroneous.

Judgment reversed, and judgment entered on the demurrer, for the defendants.

98

*Carthrae v. Brown.

October 1831.

Pleading—Covenant—Failure to Crave Oyer—Effect Where Covenant Set Out in Bill of Exceptions.—Upon an appeal from a judgment in covenant, the covenant not being set out in the pleadings upon oyer, and the question being whether the declaration shewed good cause of action; the court can only look at the covenant as pleaded in the declaration; and though the instrument be set out in a bill of exceptions taken at the trial, the court can pay no regard to it in deciding on the sufficiency of the declaration.

Covenants—Several—Action on.*—C. covenants with B. and J. that he will pay them \$300, to wit, to each of them one moiety thereof, and also the sum of \$400, upon a certain condition: HELD this is a covenant to B. and J. severally, to pay each a moiety of each sum; so that J. being dead, B. cannot maintain an action to recover the whole.

This was an action for breach of covenant, brought by Brown against Carthrae in the county court of Rockingham. Brown's declaration stated his case thus: "that the defendant Carthrae, on the 8th December 1804, and during the life of one Jarman since deceased, by his certain written obligation sealed with his seal (of which profert was made), covenanted to and with the plaintiff Brown and the said Jarman, that he Carthrae would pay the plaintiff and the said Jarman, the sum of 300 dollars, to wit, to each of them one moiety thereof, on or before the 25th December then next ensuing, and also the sum of 400 dollars at and upon the day when a certain turnpike road in the obligation after mentioned, should be completed and delivered, but with this condition, that if the plaintiff and Jarman should fail to complete the turnpike road across the south mountain agreeably to contract, they thereby bound themselves to refund all moneys received of the defendant Carthrae, with legal interest, but should the said road be completed agreeably to contract, then the obligation whereby the defendant bound himself to pay the moneys aforesaid, should be valid and binding on the defendant. And the plaintiff averred, that he and the said Jarman in his lifetime, and the plaintiff since the death of the said Jarman, did complete and deliver the said turnpike road agreeably to contract, to wit, on &c. Yet the defendant did not, and *would not, on or before the 25th December next ensuing the said 8th December 1804, pay to the plaintiff

*The principal case is cited in *Armstrong v. Henderson*, 99 Va. 238, 37 S. E. Rep. 839. See monographic note on "Covenants" appended to *Todd v. Summers*, 2 Gratt. 167.

or the said Jarman in his lifetime, or to the plaintiff since the said Jarman's death, the said sum of 300 dollars, or any part thereof,—and did not and would not, at and upon the day when the said turnpike road was completed and delivered as aforesaid, pay to the plaintiff or the said Jarman in his lifetime, or to the plaintiff since the said Jarman's death, the said sum of 400 dollars,—according to the form and effect of his said covenant &c. and so the plaintiff in fact said, that the defendant had not kept the said covenant so made" &c.

Carthrae pleaded in bar, that the plaintiff Brown and Jarman in Jarman's lifetime, and Brown since Jarman's death, failed to complete the turnpike road according to contract. And upon this plea an issue was made up.

Oyer was not taken of the covenant, on which the action was brought, nor was it otherwise made part of the record by the pleadings; but, exceptions having been taken to an opinion of the court at the trial (on a point not necessary to be here stated), the covenant was set out in the bill of exceptions, and in that way only appeared in the record.

Upon the trial, the jury found a verdict for Brown, for both the sums demanded, 300 dollars and 400 dollars, with interest, subject to some credits which they also found the defendant entitled to for payments made by him. The county court gave judgment accordingly. Carthrae appealed to the circuit court, which affirmed the judgment; and then he applied by petition to this court for a superseas, which was allowed.

Johnson for the plaintiff in error, objected, That the covenant, as it was set forth in the declaration, was a covenant of Carthrae to pay moieties of both the sums of money therein mentioned, certainly moieties of the first sum of 300 dollars, to Brown and Jarman, each severally, not to both jointly; and, consequently, Brown could not maintain this action, as surviving

covantee, to recover the whole of the
100 *money. *Eccleston v. Clipsham*, 1 Wms. Saund. 153-5, notes 1 and 2. Yet he had recovered a verdict and judgment for the whole of both sums.

Leigh, contra, endeavoured to maintain, that the covenant as alleged in the declaration, was a covenant to pay both sums to the covenantees jointly. It was stated, that Carthrae covenanted to pay Brown and Jarman the sum of 300 dollars, to wit, to each of them one moiety thereof: the first part of the allegation representing them as joint covenantees, and the addition under the scilicet, being intended to represent their interests not as several but only as equal. This part of the covenant is laid in the declaration as a covenant to both to pay a sum of money to each; which is not distinguishable in principle from a covenant to two to perform a duty to one of them, which would certainly give the covenantees a joint action. As to the 400 dollars, that was stated as having been covenanted to be paid to them jointly. And this construction of the allegation of the covenant, ought the rather to prevail, seeing that it appeared in the sequel of the

declaration, that both sums of money were to be paid to Brown and Jarman for a duty to be performed by them jointly, and that they covenanted jointly to refund the money, in case they failed to perform the joint duty. It was easy to see how, both being concerned in a joint undertaking, each might be interested that the other as well as himself should receive his compensation; their contract with each other might have given them a common interest, each in the compensation to be paid the other. And he referred to the covenant itself, set out in the bill of exceptions, and argued from the frame of the instrument, that it was a covenant to the parties jointly.

BROOKE, J. As the bond is not made part of the record by the pleadings, it is not to be so treated, though it is noticed in the bill of exceptions, but the declaration alone is to be looked to, for the terms of the covenant on which the suit is brought.

101 *It is a well settled principle. that covenants are to be considered as either joint or several, according to the rights and interests of the parties; and this on the soundest reason; for though a covenant with several persons be joint and several in its terms, yet if the legal interest and cause of action be joint, the action must be brought by all; and, on the other hand, if the interest and cause of action be several, the action must be brought by one only, though the covenant be in its terms joint. *Anderson v. Martindale*, 1 East, 497; 1 Wms. Saund. 153. This rule of construction of covenants, though apparently technical, effects the great purposes of justice, and avoids great inconvenience, and the costs of multiplied suits. So, where there is but one duty covenanted to be performed to two or more, they have a joint interest and but one action, otherwise, the defendant would be vexed with two or more suits for one thing, and the court would not know for whom judgment should be pronounced. On the other hand, where the rights are distinct, and plainly separate, the action must be several: for if a joint action be brought, there must be a joint judgment; and one might recover a judgment for the rights of another, and by survivorship at the common law, claim the whole interest instead of his due proportion. It may happen also, that where there is but one duty to be performed to one of two individuals, yet both may be interested in the performance of it; in such case, the contract is joint, and both must sue: as where A. owes B. £100. and C. owes A. a like sum, and covenants with A. and B. to pay it to B. here A. though he is to receive nothing, is interested in the payment to B. and the action must be joint. Indeed, where a party covenants with two to pay money to one only, the law presumes an interest in the other, although he is to receive nothing; because he is joined in the contract, and there can be no other assignable motive for it; and there, the action must be joint, as in *Anderson v. Martindale*. The interest presumed in such case, must be a joint interest, as two could not have a several interest, in the per-

102 formance *of a single duty to one of them. But where the covenant is with two jointly to pay to them £50 each, or to deliver a horse to each; in that case, though the language of the covenant is joint, yet the interest is several; for there are two duties to be performed, instead of a single duty, which two duties may be severed; and, as the interest of each is distinct and separate, and the one has no interest in the performance of the duty to the other, by any inference from the covenant being joint, it is to be considered several and not joint: it is unlike the case in which the covenant is with two, and the duty to be performed to one only. So, where the covenant is joint and several, in its terms, yet if it appears that the interest and cause of action are joint, the action must be joint: as if one covenants to do an act for the benefit of two, and binds himself to them and each of them for performance, the action must be joint, though these last words are words of severalty. *Slingsby's case*, 5 Co. 19, a., 2 Bac. Abr. Covenant, D. p. 68. For, as there is a single duty only, a single action only will lie, or there would be a double recovery.

These principles govern the case before us. The declaration alleges, that the defendant "covenanted with Brown and Jarman to pay them 300 dollars" (had it stopped there, it would have been a joint covenant; but it proceeds) "to wit, to each of them one moiety thereof." These are obviously words of severalty: two distinct duties are to be performed, in which each has a distinct and several interest. The words that follow—"also the sum of 400 dollars"—do not alter the character of the preceding covenant, but on the contrary take its character from it, as in *Northumberland v. Errington*, 5 T. R. 522. Neither do the words "to each of them a moiety thereof," give to that part of the preceding covenant, a several as well as joint character merely: they extinguish its joint character, not by adding a new principle to the contract, but by explaining that which the previous words seemed to give it.

Those words "to each of them a moiety thereof," do not make *the covenant joint and several, but several only. 103 It is a covenant to pay several sums to each of them, and not to perform a single duty to both of them; a covenant to pay several sums to each of two persons, respectively, 150 dollars to one and 150 dollars to the other. Each has a distinct interest in one of the sums, and no interest in the other. Nor does the joint contract of Brown and Jarman for the labour or duty to be performed on their part, affect the covenant of Carthrae to pay for that labour. Though their contract for the labour was joint, they might intend to be paid for it severally.

Upon this ground, without noticing the point presented by the bill of exceptions, both judgments are to be reversed.

Callava, e. d. Bryant and Wife and Others v. Pope.

October. 1831.

Wills—Construction—Estates Tail—Case at Bar.—Testator devises all his land and slaves to his wife D.*

**Wills—Construction—Estates Tail.—On this ques-*

P. during life or widowhood, for her and his son M. P.'s support; and if his wife should be then pregnant, and with a boy, he should have same benefit of the property with the son M. P. and at the wife's death or marriage, both land and slaves should be sold, and the proceeds equally divided between the two sons; if with a girl, she should share equal benefit of the property with the son M. P. while in the mother's hands, but, at her death or marriage, should have only an equal share of the slaves; and if the son M. P. should die without lawful issue, then the whole estate to go to his brother or sister, and if he should have neither to testator's wife's brothers and sisters: the testator's wife was not enseint, so that he left only one child, the son M. P.

Held, that if the land, in consequence of the direction to sell, were considered as money, the son took the remainder expectant on his mother's estate for life or widowhood in absolute property, and the ulterior executory limitation was void; and considering it as real, he took an estate tail in the remainder, with a contingent remainder limited on his estate tail, upon the failure of his issue.

This was an ejectment for 250 acres of land, brought in the circuit court of Southampton, by B. Bryant and Dicey his wife, H. Smith and Lucy his wife, E.

104 Turner and *Martha his wife, Margaret Simmons and Thomas Underwood, against Joseph Pope. Upon the trial, the jury found a special verdict, by which it appeared that the case was thus:

James Porter, late of Southampton, died in 1801, and by his last will and testament, made the following disposition of this property: "As for my worldly goods, I give and devise as follows—I leave to my beloved wife Delilah Porter, the whole of my land and negroes, during her natural life or widowhood, for her and my son Miles Porter's support, and for giving him a good education; and if my said wife should now be with child with a boy child, it is my desire that that child should share the same benefit of said land and negroes as my son before mentioned, and at her death or marriage, the said land and negroes and their increase to be sold, and the money equally divided between them two children; and if it be a girl child, for it to share the same benefit of the aforesaid land and negroes whilst in the hands of its mother, as though it were a boy, but at her death or marriage for it only to have an equal share of the negroes—And it is my desire, that enough of my other estate should be sold to pay all my just debts; and the balance, be it of what kind soever, to rest and remain with my wife for the purpose the other was devised for, and at her death or marriage for it to be sold and the money equally divided between them my offspring remaining—And if my son Miles Porter shall die without lawful issue, it is my desire that the whole of my estate should go to his brother or sister, and if he has neither for it to go to my wife's brothers and sisters, to be divided amongst them as they may think proper." And the testator appointed John Underwood the elder his executor, who took upon him the execution of the will.

The testator's wife was not enseint (as he supposed when he made his will) and he left no other child but his son Miles Porter, who died an infant, unmarried and

tion the principal case is cited in *Deane v. Hansford*, 9 Leigh 250, and note; *Nowlin v. Winfree*, 8 Gratt. 348; *Foot-note* to *Callis v. Kemp*, 11 Gratt. 78; *Moore v. Brooks*, 12 Gratt. 150; *Tinsley v. Jones*, 13 Gratt. 298. See monographic note on "Wills."

without issue. The testator's widow Delilah Porter survived the son, and died before this suit was brought.

105 *At the death of the testator, his wife Delilah had eight brothers and sisters living; namely, Dicey the wife of Bryant, and Lucy the wife of Smith, Martha the wife of Turner, Margaret Simmons and Thomas Underwood (who were the lessors of the plaintiff) and Willie, Jacob and John Underwood, which last three died before the testator's son Miles Porter; Willie died intestate, leaving one or more children yet living; Jacob died intestate, leaving one child, since dead in infancy and without issue; John left a will, by which he devised all his estate to Eliz. Turner.

After the death of the testator's son Miles Porter (whether before or after the death of the widow was not found) his executor John Underwood the elder, sold the land in the will mentioned to Pope, the defendant, and, by deed dated the 14th April 1817, reciting, that the sale was made in conformity with and in execution of his testator's will, for the consideration of 1500 dollars, conveyed the same to him.

This was the same land for which the ejectment was brought.

Lastly, the testator's son Miles at his death left paternal uncles and aunts him surviving, who were his heirs at law; and the defendant Pope had purchased of them, and held, all their interest, right and title in the premises.

Upon this state of the case found by the verdict, the circuit court held that the law was for the defendant, and gave him judgment accordingly; from which the lessors of the plaintiff, Bryant and wife and others, appealed to this court.

Johnson for the appellants.

Stanard and Leigh for the appellees.

CARR, J. I think the judgment right. The provisions made by the will for the expected child seem to me to have no influence on the construction of the will, in the actual state of things; but if they had, it would not vary the conclusion

106 *to which I have come. My understanding of the will is, that the wife took an estate for life or widowhood in the whole property. Whether at her death or marriage, the direction to sell, was absolute, or conditional depending on the birth of an after child, I do not think it material to consider, as it cannot affect the limitation under which the plaintiffs claim. Under the words "if my son Miles should die without lawful issue, it is my desire that the whole of my estate should go to my wife's brothers and sisters" &c. it is clear to me, that Miles took (if you consider the subject to be money) the absolute property; but if not money then he took the land (the subject of this suit) in fee tail; it being the plain intention of the testator to provide for the issue of Miles indefinitely. Whether Miles took an estate tail express or by necessary implication, make no difference; as is shewn in *Jiggetts v. Davis*, 1 Leigh, 368, which case, as also that of *Griffith v. Thompson*, Id. 321, settle the law on this subject, as it had been often settled before in this court. I think it better to refer to these cases, and to say

that they rule the present, than to enter again into the discussion of the reasons and authorities which belong to the subject.

BROOKE and CABELL, J., concurred.

TUCKER, P. The principal question in this case turns upon the construction of James Porter's will, and involves some interesting principle in relation to contingent limitations, which have been firmly settled by a series of adjudications now too numerous to be disturbed. The effort of the appellants' counsel, therefore, has rather been to keep the present case clear of the influence of those adjudications, than to attempt to call in question, what the interests of society so emphatically require to be regarded as no longer questionable. It must be admitted on all hands, that the principle *stare decisis*, is of peculiar importance in whatever relates to the title to property, and to real property in particular. Among other things, a continual

107 fluctuation in *the decisions of the courts on the construction of wills, is calculated to produce the most serious evils. No testator can with certainty dispose of his estate, no counsel can advise, no conveyancer can transfer, no purchaser can with safety acquire, if the language which is on one day construed to convey but a limited interest, shall on the next be held to pass the greatest estate that can be enjoyed in real property; or if what is at one time considered as a vested and certain interest, should at another, be regarded as contingent and uncertain. The purchaser, under the first decision, supposing he was acquiring a substantial estate, finds, when the next is promulgated, that he is but the holder of an interest which may never vest. By this judicial inconsistency, as by *legerdemain*, his gold is turned to dust; and if such a course of things could long prevail, property would lose its exchangeable value, because no one could certainly know what he was acquiring. However little, therefore, any rule or set of rules may square with our own peculiar notions of propriety or expediency, or without opinions of the design of the contracting party, we must sacrifice those notions and opinions to the established course of decision and construction. In this case for instance, the interpretation of the phrase "if he die without issue," comes for the hundredth time before the court. There can be no doubt, I think, that we should adhere to the meaning heretofore attached to it, though we have a strong evidence in a legislative declaration, that these terms are used by most testators, in a sense very different from the artificial meaning attributed to them by the courts. I shall not stop to inquire, whether this is really the case, though I think it probable that many a testator would renounce what is called the natural signification, if its consequences were explained to him, and adopt the technical exposition of the courts, as best calculated to effect his principal object and intention. Be this as it may, I do not think we can depart from the great landmark which has been erected on this subject, and I shall accordingly make it my guide on the present occasion.

108 *What then is the provision of this

will? The testator devises his land and negroes to his wife, during life or widowhood, for her own and her son's support and for his education. Presuming her to be pregnant, he directs that if the after born child be a boy he shall partake of the advantages given to his son Miles, who was in esse: and he afterwards provides, that at the death or marriage of the wife the land and negroes should be sold and the money equally divided between the two sons; and that if Miles (the son in esse) should die without issue, the whole should go to his brother or sister, and if he should have neither, then to his wife's brothers and sisters to be divided among them, as they might think proper.

Before we consider the effect of these last two clauses, it may be well to consider what would be the effect of the will, and how the property would have passed, without them. In that event, there would only have been a life estate given to the wife for her own and her son's support, with a reversion in fee descending upon him, which would have immediately vested. If, however, after the testator's death another child had been born, the reversionary interest in fee would have devolved as to one moiety, and that moiety in fee would have instantly vested in such posthumous child. Had either of these children then died leaving children, such children would have inherited the estate of their father; or if either had died without children, the other would have been his heir.

The testator, however, aware, perhaps, that the land was not worth dividing in kind, superadds the provision, that, if his wife should now be with child, and that a boy child, that child should be supported and educated as the other, and that, at the death or marriage of the wife, the land and negroes should be sold, and the money divided between those two children.

Here then is a provision which materially affected the character of the interest of the son Miles. On his father's death he became immediately invested with 109 a reversion in *fee in lands (for I am still considering the case without regard to the ulterior limitation). This reversion was, indeed, subject to be devolved as to one moiety, in favour of the posthumous child, independent of the direction to sell; but by virtue of this direction, Miles, at his father's death held the fee in the land itself, subject however to be defeated, not as to a moiety only, but as to the whole, by the birth of a son; upon whose birth neither would have any real estate, but only a right to one moiety each of the proceeds of the sale directed by the will.

In this aspect of the case, then, and still keeping out of view the ulterior limitation, each would have had a vested interest in a personal subject, that is the money for which the land might have sold. (See Selby and wife v. Morgan, 6 Munf. 156.) And if either had died without children, the other and the mother would have taken his share; or if either died leaving children, the children would have taken their parent's portion; or rather, in both these cases, the interest would have passed to the personal representatives, and have been distributed

accordingly. But, in the event of the whole interest devolving upon either, he would have had a right to waive the conversion of the land into money, and to have demanded the land. It is not amiss to remark, that as the happening of this event of the birth of a second son, must have concurred within nine or ten months, this contingency could not long have suspended the ultimate character of the estate. And, as no child was ever born; as the event never occurred, upon which Miles's reversionary interest in the land was to be converted into a mere interest in a personal subject; it is obvious, that his interest always was real estate, and has been transmitted to his heirs as such, or has passed to those in remainder, if the limitation over is effectual; which is the next point we have to consider.

In doing this, we shall consider the limitation over, as if no provision had ever been made for the sale of the estate; for, in this view, I do not see that that provision 110 will make *any difference, and in point of fact it never was brought into life by the happening of the contingency. Putting that provision out of the question, the case in effect is thus: the testator devises his land to his wife for life or widowhood, and then provides that if his heir at law dies without issue the estate shall go over first to a posthumous son or daughter, if there be one, and if there be none, then to his wife's brothers and sisters. The operation of this limitation would, in one respect, differ in the two cases. In the case of the brother or sister, the limitation over could only be of a moiety, since he or she would already have had the other moiety; but if there was no brother or sister, the limitation over to the wife's brothers and sisters was of the whole land, since the whole would have been vested in Miles.

The case presented seems to me to be precisely that which has often been decided. It is the case of a devise over to another in case the heir at law dies without issue. This has been construed to give the heir at law an estate in tail. *Walter v. Drew*, cited 1 Leigh, 401. But, in that case, as the devise was over to another, the reversion in fee was in another person than the heir; whereas in the case at bar, the estate tail would be in the heir with a reversion in fee (dependent upon it) also in him. I do not perceive that this would make a difference. For a man may make a limitation to his own heirs special, which will be good, and the heir will take such estate as purchaser, and will take also the reversion thereupon by descent. *Butler's Fearn*, 51, 2. If this be so, then the limitation in question vested an estate tail in Miles Porter, which was converted into a fee, and thus cut off effectually all the subsequent limitations. But if these words are not considered as creating an estate tail, but as only subjecting Miles's fee to be defeated by the event of his dying without issue, then the limitation is void, because it is upon an indefinite failure of issue. It is, however, my own opinion, that, following the decisions which require all constructions of words of entail to be made as

the law aforesaid was, except in the 111 *cases which fall within the influence of the principle settled in *Smith v. Chapman*, 1 Hen. & Munf. 240, the words of Miles Porter should die without lawful issue must be construed in this will, as giving him an estate tail, and leaving the reversion in fee to descend upon him. If so, the entail is converted into a fee and bars the remainders over.

A great effort was made to take this case out of the influence of the long train of adjudications on this subject, and to extract from the will something to tie down the words dying without issue, to a definite period, within the time prescribed by the rules of law. The very able view which has been taken of the case by the appellants' counsel, has convinced me, however, much more, that nothing is to be despair of under his auspices, than that there is any thing whatever to tie up the indefinite failure of issue. The consequences and supposed difficulties and absurdities which grow out of the construction contended for, have been strongly presented. They are such, however, as must very frequently occur in the wills of uninstructed and unassisted testators. But, on the other hand, there are considerations which are, and have for centuries been, recognized as having great weight in the construction of wills. A respect for that intent of the testator, which is supposed to have in view a provision for the issue, and a desire to avoid the introduction of what are called perpetuities, lay at the foundation of these rules. In the application of them, what is called the particular intent is often violated to satisfy the general intent, and the ordinary sense of terms yields to that which seems artificial; but it is by no means certain, that if the consequences of thus giving to the language of a testator, what is called the natural meaning, were duly explained to him, he would not shrink from the interpretation, and fly to the technical signification. Thus, in the present case, suppose the appellants' counsel to succeed in proving, that the words die without issue are tied up so as to render the limitation over valid: what is the state in which the testator has left his only son's interest in his small estate?

112 1st, He has *given to his wife the whole of the land during her life for her own and her son's support. Until her death or marriage, she is the mistress of it; and she might live until her son reached an advanced age. The reversion dependent upon this life estate, remote as may be the period of its vesting, he is not content to leave without a clog. It is, indeed, a reversion in fee, but it is defeasible by his dying without issue in the lifetime of his mother; a contingency that might not be determined for half a century. And for whose benefit is this fragment of his estate in the hands of an only child, to be defeated by this contingency? Not his own kin, but his wife's brothers and sisters. And what is the effect upon his interest? to destroy its exchangeable or saleable value, at the least; the only value that a reversion often has to the owner. For, as his fee simple is a defeasible one upon the contingency of his dying without issue in his

mother's lifetime, no purchaser could be found to venture in so hazardous a lottery. Had the question been asked of the testator, whether he was willing so to clog the reversionary interest of his son, as that he could not use it, and this for the purpose of securing it to his wife's relations, I can not persuade myself that he would have answered affirmatively. He would, unhesitatingly, have preferred the construction, which would have left in his only child an efficient power over the estate, to that which would have fettered him by restrictions, for the benefit of strangers to his own blood. It is obvious too, that the construction contended for, would have other effects which the testator never could have contemplated. Had a posthumous son been born, he would have held his portion unclogged with a limitation over, and might therefore have sold or disposed of it; and, if Miles had died and his portion devolved on his brother, the brother would have held even that, unfettered by any further limitation over; while Miles himself, the child endeared to his father by having received his caresses, is less favoured than one whose existence was merely in contemplation,

and who in point of fact never had 113 existence. *By my rule of construction, both are on an equal footing, for the interest of both is absolute.

I am, therefore, decidedly of opinion, that the limitations over to the brothers and sisters of the wife are void, and that the judgment should be affirmed.

Glassell v. Thomas.

October, 1831.

Contracts—Mutual Mistake—Rescission.*—Where, in an agreement, a mutual mistake is made, by both parties, in a matter which is the cause and subject of the contract, that is, in the substance of the thing contracted for, no fraud being imputable to either party: such mistake is good ground in equity for rescinding the agreement, even after it has been fully executed by conveyances by both parties.

Same—Same—Same—Total.†—And where an agreement is rescinded, it must be intirely rescinded. **Foreign Attachments—Garnishee—Defences.‡**—In the

***Contracts—Mutual Mistake—Rescission.**—Where a contract has been executed in mutual mistake in a matter which is the cause and subject of the contract, no fraud being imputable to either party, such mistake is good ground in equity for rescinding the agreement even after it has been fully executed by conveyances by both parties. *Worthington v. Staunton*, 16 W. Va. 242, citing *Glassell v. Thomas*, 3 Leigh 113. To the same effect the principal case is cited in *Ferry v. Clarke*, 77 Va. 400; *Crislip v. Cain*, 19 W. Va. 475; *Butcher v. Peterson*, 26 W. Va. 451; *Pearon Lumber & Veneer Co. v. Wilson*, 51 W. Va. 30, 41 S. E. Rep. 130. And in *Leas v. Eldson*, 9 Gratt. 278, it is said by MONCURE, J.: "It is now well settled that a mutual mistake of the parties in a matter which is part of the essence of the contract and substance of the thing contracted for, will be corrected by a court of equity, and may be good ground for rescinding the contract or executing it on equitable terms of compensation, according to circumstances, even though the contract be in writing, and required to be so by the statute of frauds. 1 Story's Eq. Jur., § 134, 144, 152, 142; 1 Munf. 330; 6 Id. 283; 3 Rand. 504, 6 Id. 552, 3 Leigh 113."

†**Same—Same—Same—Total.**—And where an agreement is rescinded such rescission must be entire.

For this proposition the principal case is cited in *Bailey v. James*, 11 Gratt. 475, and note; *Ferry v. Clarke*, 77 Va. 408; *Worthington v. Collins*, 30 W. Va. 413, 19 S. E. Rep. 530.

See monographic note on "Contracts" appended to *Enders v. Board of Pub. Wks.*, 1 Gratt. 364.

‡**Foreign Attachments—Rights of Garnishee.**—A creditor proceeding by foreign attachment can stand

case of a foreign attachment in chancery, to attach a debt alleged to be due from a home defendant to the absent defendant, to satisfy a debt due from the absentee to the plaintiff, the garnishee may set up any equitable defence, which shews that in equity he owes no debt to the absent defendant.

In 1815, Joseph Towles, then of the county of Madison, Virginia, was the owner in fee of a tract of about 400 acres of land in that county, which he was desirous of selling; and Andrew Glassell, of the same county, was (or claimed to be) the owner in fee of a tract of 2000 acres of land lying on the waters of Deer creek, in the county of Henderson, Kentucky, which he claimed under a patent granted to James Mercer, dated the 14th December 1787, and which he was desirous of selling; and Towles and Glassell entered into a treaty for the sale and purchase of these their lands, respectively, by each to and of the other. During this treaty, Glassell shewed Towles the grant to Mercer under which he claimed the Kentucky lands, and the title papers whereby he deduced the title from Mercer to himself, and a plat which, he said, 114 was a plat of his *Kentucky lands made by his son Robert: this plat exhibited a parallelogram, without line trees, courses or distances, divided by a line through the middle, into two tracts of 1000 acres square, lying on both sides of Deer creek; and represented the lower tract as having upon it, a mill seat and some low land, upon the creek running through the tract, one large and three smaller springs, and two licks. The plat so shewn by Glassell to Towles, was made in 1814, and its history was this: Glassell in that year, sent his son Robert to Kentucky, to get an accurate account of his lands there: Robert Glassell went to Ruby, a public surveyor in that country, and shewed him a copy of the courses, distances and descriptions of two adjoining 1000 acre surveys, each of a square figure, lying on Deer creek, and requested him to shew him the lands: Ruby professing to be well acquainted with the lands, shewed him the beginning corner tree of George Lewis's two 1000 acre surveys, through which the creek ran, which (he deposed) he knew, at the time, was the land that Lewis had transferred to Andrew Glassell, and which Robert Glassell said was his father's land; and he shewed him also a mill seat, a large spring, and a scite for a distillery, which were in fact on the lower of the two tracts; and then Robert Glassell and Ruby made out a plat of the two tracts, indicating the form, the course of the creek running through them, and the mill seat, the large and small springs, and the licks on the lower tract, but without courses, distances or line trees, which Glassell said he had, and could make the plat complete when he got home. Robert Glassell brought this plat home, and delivered it to his father Andrew. But this was

not a plat of the lands which Glassell in fact owned or claimed, though he believed it was, and intended no misrepresentation, or deception upon Towles, when he shewed it to him as a fair description of his Kentucky lands.

The treaty resulted in a contract between the parties, evidenced by the following articles signed and sealed by them, dated the 15th August 1815—"Memorandum 115 of an *agreement entered into between J. Towles of &c. on the one part, and A. Glassell of &c. on the other. The said J. Towles agreeth to sell all his land whereon he now liveth, being 400 acres more or less, to the said A. Glassell for fifteen and a half dollars per acre, agreeably to the survey hereafter to be made; the land to be delivered up in October 1816, at which time the money is to be paid down, if there is any left after the agreements hereafter mentioned are complied with. The said J. Towles agreeth to take one of two tracts of land, each containing 1000 acres more or less, lying on Deer creek one of the waters of Green river in the state of Kentucky, and owned at present by the said A. Glassell, for whatever it may be valued at, at eighteen months credit; the valuers to be Paul Leathers who lives near the said land, and any two men he may choose. The land in Kentucky to be surveyed by an authorized legal surveyor, and the land in Madison to be surveyed by the county surveyor, at the expense of A. Glassell. If the said J. Towles should draw any money before he gives possession of his land, he is to allow lawful interest until such possession is given. The said J. Towles agreeth to take such bank notes as pass currently in Virginia—Witness our hands and seals &c." Afterwards, in September following, additional articles were agreed to, indorsed on the other, and signed and sealed by the parties, in these words: "In addition to the within agreement, it is agreed by the said A. Glassell, that the said J. Towles shall have the said 1000 acres of land mentioned within, at fifteen shillings per acre, provided he shall see cause to take it at that price before valued. Should he not see cause to take it at that price, and in case the said A. Glassell should not be satisfied with the valuation of the said land, he is to have till the 1st February next, to determine whether or not he will abide by the valuation within concluded on. In case the said A. Glassell should not abide by the valuation, and determine on keeping the land in Kentucky he the said A. Glassell 116 sell is to have three years *to pay the amount in money that the Kentucky land would have paid. Agreed this 28th September 1815."

In 1816, Towles sent his son Henry Towles to Kentucky, as his agent to take a view of Glassell's lands there, to select one of the tracts, and to have it surveyed and valued: and by this agent, Glassell sent a letter to Paul Leathers, (the person named in the articles of August 1815, who lived in the neighbourhood of the Kentucky lands), requesting Leathers to shew the agent the lands, and to attend for Glassell to the surveying and valuation thereof, according to his contract with Towles, and especially

upon no better footing than his absent debtor, whose moneys, goods, or effects he seeks to subject: and his claim to satisfaction therefrom is subordinate to the rights and equities of the garnishee. *Williamson v. Gayle*, 7 Gratt. 154, citing *Glassell v. Thomas*, 3 Leigh 113. The principal case is also cited in *Hobbs v. Interchange*, 1 W. Va. 67. See monographic note on "Attachments" appended to *Lancaster v. Wilson*, 27 Gratt. 624.

to shew young Towles the large spring and mill seat on the lower tract (those, namely, laid down in the plat made in 1814, which had been shewn to Towles before the contract was concluded). Young Towles repaired to Kentucky, with this letter from Glassell to Leathers, but without carrying with him the title papers by which Glassell claimed the land. The letter being delivered to Leathers, he with Ruby the surveyor (the same who had shewn the lands to Robert Glassell in 1814) shewed Towles the same lands laid down and described in the plat of 1814, and the spring and mill seat on the lower tract indicated on that plat, and a convenient scite for a distillery; upon which young Towles selected the lower tract for his father; and then Leathers, together with Ruby the surveyor chosen by Towles, and Ashby chosen by Leathers and Ruby, valued the tract at two and a quarter dollars the acre; and Ruby made a survey of it, whereby it was found to contain 1155 acres; the price of which at the valuation, amounted to 2598 dollars 75 cents.

Henry Towles, the agent, returning to Virginia, with Ruby's new plat of survey of the lower tract thus selected by him, and the valuation so made of it, Glassell in execution of the articles on his part, by deed dated the 26th September 1816, in consideration of 2598 dollars 75 cents (the price ascertained by the valuation), conveyed this tract of 1155 acres to Towles, describing it by reference to Ruby's recent survey, and by the line trees, lines, courses and
117 distances *in that plat mentioned, and as being one half of a 2000 acre survey of land, number 1291, granted to James Mercer, by patent dated the 14th December 1787,—with general warranty, and covenants of good title, and good and lawful right to convey. And Towles, on his part, conveyed his land in Madison to Glassell. Thus, the articles were fully executed.

Towles, shortly afterwards, sold the Kentucky land conveyed to him by Glassell, to Robert Thomas, for the same price which he had given for it, and by deed, dated the 7th November 1816, conveyed the same to Thomas, with general warranty, and covenants of good title, and good and lawful right to convey, describing the land by reference to Glassell's deed thereof to him, and by the metes and bounds and other description in that deed contained; and Thomas paid him the purchase money 2598 dollars 75 cents. Soon after this sale, Towles removed from Virginia to Kentucky.

Thomas, in October 1819, made a lease of the land conveyed to him by Towles, to one Walker, for ten years, reserving to himself the right to improve the mill seat and the distillery. Walker going to Kentucky to take possession of the premises under the lease, found that the land was claimed by and in the possession of a son of George Lewis. And then, it was discovered, that the land laid down in the plat of 1814, which Robert Glassell brought from Kentucky, as a plat of his father's lands, and which A. Glassell had shewn to Towles as such, and the lower tract thereof which Henry Towles selected and had surveyed by Ruby

in 1816, and which was conveyed by Glassell to Towles, and by Towles to Thomas, according to the latter survey, never was Glassell's property; that this land had been granted to George Lewis, according to survey number 617, by patent dated the 13th January 1792; but that adjoining to this tract, was another tract of 2000 acres, lying not on Deer creek, but on a branch thereof, which had been granted to James Mercer, according to survey number 1291, by patent dated the 14th December 1787, and
118 that this 2000 acre tract was the land which Glassell really claimed under Mercer's patent.

Upon this discovery of defect of title, Thomas exhibited his bill against Glassell and Towles (now a non-resident) in the superiour court of chancery of Fredericksburg, wherein—after stating that Towles, in the year 1815, was the owner of the tract of 400 acres in Madison, which, being desirous of removing with his family to the western country, he was offering for sale; and that Glassell, about the same time, being anxious to sell some land lying in Kentucky, to which he supposed he had the fee, simple title, and to vest the proceeds in land in Madison or the adjacent counties, in order to effect his wishes, proposed trading with Towles; that Glassell informed Towles, that he was the owner of two tracts of land lying upon Deer creek in Kentucky, containing 1000 acres each, conveniently situated, well watered, heavily timbered, of a fertile soil, having upon it a valuable mill seat, and a scite for a distillery, which could be watered from a large and never failing spring; that Glassell exhibited to Towles the plat of 1814, which his son Robert had brought in, as a true description of his Kentucky land, and particularly recommended it, on account of its being so well watered, and having the mill seat, and scite for a distillery; and that Towles, well aware of the advantages resulting from those considerations in a new country, and yielding to their influence, concluded a contract with Glassell, by which he sold Glassell his Madison land at fifteen and a half dollars per acre, and agreed to receive in part payment for it one of Glassell's Kentucky tracts of land at valuation—he proceeded to set forth the articles between Glassell and Towles of August and September 1815—the mission by Towles of his son Henry in 1816, to view the Kentucky lands, and select one of the two tracts; the selection he made of the lower tract; the survey and valuation thereof; the conveyance thereof with general warranty by Glassell to Towles, according to Ruby's survey of 1816; the sale and conveyance of the same tract by Towles
119 to Thomas, *with warranty; the fact, recently discovered, that Glassell never had any title whatever to the land by him conveyed; and Towles's departure from Virginia and present residence in Kentucky. He also represented, that his main, indeed, his only inducement to purchase the land of Towles, was the mill seat and the scite for a distillery upon it. And upon this state of the case, he insisted that he was entitled to receive, directly from Glassell, the amount of the purchase

money he had paid to Towles, with interest. And he prayed a decree against Glassell for the same, and such general relief as should seem equitable in the case.

Glassell, in his answer, said, that Towles first proposed the sale of his Madison land to him, but the price Towles asked was so high, that he declined the purchase, unless Towles would take 1000 acres of his Kentucky land at valuation, in part payment; and his main leading inducement to purchase Towles's land, as Towles well knew, was that it enabled him to sell half of his Kentucky land. That he really owned a tract of 2000 acres of land, which he claimed under a patent granted to James Mercer, and shewed Towles his title papers; and this was the land of which he intended to sell, and Towles to buy, one half. That he did, indeed, shew Towles the plat of 1814, but he told him it had been made by his son, and it did not purport to be an official survey. That the mistake on which that plat was founded, was unknown to him at the time; he had not the least reason to suspect it, nor, as the plat specified no line trees, courses or distances, had he any means of detecting it. That Towles's own agent fell into the same mistake, and confirmed him in it, by bringing him an official survey, not of his own, but of Lewis's land; and he misled thereby, and still not suspecting the mistake, made the conveyance to Towles, describing the subject, indeed, by the metes and bounds specified in that survey, but also by reference to Mercer's patent by its date, and to the precise number of his survey, which shewed what was the land intended by the parties. That he made no particular recommendation

120 of *the land to Towles; nor was Towles at all influenced in making the contract, by its qualities, since he was to take it at a fair valuation. That he, Glassell, still held the land he claimed under Mercer's patent, and had good title to it; and this land lay on the waters of Deer creek adjoining the other, and was as valuable, in all respects, as that which he had conveyed by mistake. That Thomas could justly claim of him only what Towles, if he had held and been evicted, could justly claim of him; that Towles could only have claimed, either that the whole contract should be rescinded, so that the Madison land should be restored to him, and the purchase money thereof refunded to Glassell; or, that the mistake in Glassell's conveyance should be corrected, and a quantity of the Kentucky land which Glassell really owned, equal in value to that he had conveyed through mistake, should be now conveyed to him. That he Glassell was ready to assent to either alternative. And that he had offered Thomas all that Towles, or by consequence Thomas, could justly claim of him; namely, to convey to Thomas, an equal number of acres of the land he really owned, in lieu of that he had conveyed to Towles through mistake, and that at valuation; and to pay him in money, whatever difference there might be in the value of the two pieces of land, if indeed there was any, to be estimated by valuers as at the time of the contract, with interest from the date of the conveyance to Towles.

The absent defendant Towles did not put in an answer, and the bill as to him was taken pro confesso: but he was examined as a witness, by consent, and he deposed, that in the treaty between him and Glassell in 1815, Glassell agreed to purchase his Madison land, upon condition that he would take 1000 acres of Glassell's Kentucky land lying on Deer creek, a plat of which was shewn to him; and he believed Glassell would not have purchased his Madison land, unless he had agreed to take the Kentucky land; at least, he said he would not: that he did not wish to take the Kentucky land, but rather than not sell his own land, he 121 *agreed to take Glassell's at valuation, being (as he understood) one half a 2000 acre tract patented in the name of George Lewis: that the plat of the Kentucky lands shewn him by Glassell, was one which, he said, had been made by his son (it was the plat of 1814): that as he did not intend to remove to the Kentucky land, he did not care how low it should be valued, since the lower the valuation, the more money he would be entitled to receive of Glassell; nor would he have cared how high it was valued, provided he could have sold it for the same price; he wished it valued low, being in need of money; yet, after seeing the plat, he instructed his son, when he sent him to make the selection, to be particular in examining the land for water, and not to take any land without water; in short, to take the land that was best watered, which appeared from that plat to be the lower tract: that he believed Glassell had sold and conveyed that land to him in perfect good faith, honestly believing it was his own: and that he believed Thomas would not have bought the land of him, but for the mill seat, the scite for a distillery, and the springs upon the tract.

As to the 2000 acre tract granted to James Mercer by the patent in December 1787, Glassell deduced the title thereto from the grantee to himself, thus: Mercer conveyed that tract to George Lewis, by deed dated the 25th September 1793; Lewis conveyed it to William Glassell, by deed dated the 5th October 1796; and William conveyed it to Andrew Glassell, by deed dated the 3rd May 1798. The patent to Mercer, and his deed to Lewis, were exhibited; but Lewis's deed to William Glassell, and William's deed to Andrew, were not filed in the cause, though Thomas said such deeds had been shewn to him, but alleged, that the deed from William to Andrew Glassell had not been duly recorded; and his counsel argued, from the contents of Mercer's deed to Lewis, and from some proofs in the cause, as well as from the absence of the deeds from Lewis to William Glassell, and from William to Andrew, that his title to this land was by no means clear.

122 *There were many depositions taken and filed by both parties, as to the value of the land actually conveyed by Glassell to Towles and by Towles to Thomas, and of the mill seat, scite for a distillery and springs upon that tract, and as to the value of the adjoining 2000 acre tract, which Glassell owned or claimed under Mercer's patent, and the advantages of the like kind afforded by the running water

upon it; and the opinions of the witnesses were various and contradictory: but in the opinion of the judges of this court, the evidence proved, that the one parcel of land was as valuable as the other, and as well or better watered.

The court of chancery was of opinion, that Glassell really intended to sell, and Towles really intended to buy, the identical tract of land, designated on the plat of 1814 exhibited during the treaty, through which Deer creek flowed, and on which were the natural objects of low land, mill seat, springs and licks, according to the description on the plat, and that the same identical land was conveyed, and intended to be conveyed, by Glassell to Towles by the deed of September 1816; that, as it now appeared, that Glassell never had any title to this tract of land, his covenants of good title and good right to convey, in that deed contained, were broken at the moment of the execution of the deed; that, therefore, these covenants did not pass to Thomas by force of Towles's deed to him of November 1816, so as to enable Thomas to maintain an action at law against Glassell for the breach of those covenants; but that, as Towles had in like manner broken his covenant of good title contained in his deed to Thomas, at the moment of the execution of that deed, and as Towles was an absent defendant, the court had jurisdiction to give Thomas relief, under the statute concerning attachments and suits against absent defendants, 1 Rev. Code, ch. 123, p. 474,—that, though it appeared, that both Glassell and Towles did really believe, that Glassell had title to the land he sold and conveyed to Towles, under the patent to Mercer, yet that was no valid objection to the demand of Towles against Glas-

123 sell for damages for the breach *of his covenants, since the error originated with Glassell and was by him communicated to Towles; but that the measure and amount of damages could be best and most properly ascertained by a court of law and jury: therefore, the court directed issues to be tried at the bar of the circuit court of Spotsylvania, to ascertain the damages sustained by Thomas, by reason of Towles's breach of his covenants of good title and good right to convey, contained in his deed to Thomas of November 1816, and the damages sustained by Towles by reason of Glassell's breach of his covenants to the like effect, contained in his deed to Towles of September 1816.

The issues were accordingly tried in the circuit court, and the jury found upon the issue between Thomas and Towles, that Thomas had sustained damages to the amount of 3806 dollars, with interest on 2598 dollars 75 cents, part thereof, from the 30th May 1823 till paid; and, upon the issue between Towles and Glassell, that Towles had sustained damages 3639 dollars, with interest on 2598 dollars 75 cents, part thereof, from the 30th May 1823 till paid.

The circuit court having certified this verdict to the court of chancery, the chancellor decreed, That Thomas should recover of the absent defendant Towles, the damages assessed for him against Towles, by

the verdict; and that Glassell, in part satisfaction thereof, should pay Thomas the amount of the damages assessed by the verdict for Towles against Glassell; and that Glassell should pay the plaintiff his costs: with a direction, that the effect of the decree should be suspended, till the plaintiff should enter into bond with sufficient surety, in the clerk's office, in a penalty equal to double the amount decreed to him against the absent defendant Towles, for abiding such future order or decree as might be made for refunding the amount decreed with interest to Towles, upon his appearing and answering the bill, according to the rules of the court and the statute concerning absent defendants. (1 Rev. Code, ch. 123, § 2, p. 475.)

124 *From this decree Glassell appealed to this court; where the cause was argued by Stanard for the appellant, and Johnson and Leigh for the appellee.*

CARR, J. Taking this as a foreign attachment, by which the plaintiff seeks to condemn in the hands of Glassell, a debt which he owes the absent defendant Towles, to satisfy a debt which Towles owes Thomas, the first inquiry seems naturally to be, whether Glassell owes Towles such a debt as will justify the decree sought? It was agreed on all hands, that the rights and interests of Towles and Glassell must be settled precisely as if they were the only parties before the court, Thomas's claim being only to such debt or duty as Glassell might be found to owe to Towles. The deed from Glassell to Towles contains covenants of warranty, good title, and lawful right to convey, and Towles's deed to Thomas the same. Suppose Thomas had recovered at law on the covenant of title, his purchase money and interest of Towles, and Towles had recovered a judgment for the same, against Glassell, could Glassell have had relief from that judgment, in a court of equity, in any form? It is in clear proof, that the mistake with respect to the land, was intirely innocent. Glassell had 2000 acres of land lying along side of Lewis's, to which his title is undoubted, and which in point of soil, water and seats for a mill and distillery, was (if we may credit the evidence) superiour to that conveyed: this was the Mercer tract. He shewed his title papers, at the time of the contract; and both the parties knew, that it was the Mercer land (part of it, at least) that he meant to sell; but, unluckily, Lewis's land was mistaken for it. It is not so strange, that persons living in Virginia, and wholly ignorant of the land, should have fallen

into this error, as that the neighbours
125 and the *surveyor of the county himself, should have led them into it. It is well settled law, that although there be no fraud, or default on either side, yet the mutual error of the parties, if that error be in a matter which is the cause of the con-

*The state of the case has been made so very minute and full in order to make it intelligible, and two of the judges have discussed it so elaborately, that it is thought best not to report the equally elaborate argument at the bar, which might extend the report of the case, necessarily too prolix, to a length disproportioned to its importance.—Note in Original Edition.

tract, that is, in the substance of the thing contracted for, is a good ground for rescinding even an executed contract. *Graham v. Hendren*, 5 Munf. 185; *Chamberlaine v. Marsh's adm'r*, 6 Id. 283, 7; *Tucker v. Cocke*, 2 Rand. 66; *Thompson v. Jackson*, 3 Id. 504, 7; *Lamb v. Smith*, 6 Id. 552. Under this rule, I have no doubt, that, if Towles had obtained a judgment at law on the covenant in the deed, Glassell might have filed a bill injoining that judgment, bringing the whole subject before the court, and praying that Towles might, if he elected to do so, take his choice of 1000 acres of the Mercer land at valuation, or that, in case of his refusal, the contract might be rescinded and the parties placed in statu quo. When I speak of the contract, I mean the whole contract, embracing the Madison as well as the Kentucky land. It was strenuously contended, and ably too, that there were two several and distinct contracts; and that, therefore, the mistake in the Kentucky land, ought not to disturb the sale of the Madison land, about which there was no error. But to me it is quite clear, that it was all but one contract. The very terms of the agreement, the admissions of the parties to it, and the proof of the witnesses establish this. By the agreement Towles sells his land to Glassell for 15 dollars 50 cents per acre, and agrees to take 1000 acres of Kentucky land at valuation, and at the delivery of his land to Glassell, the money to be paid down, if there is any left after deducting the valuation of the Kentucky land: this incorporates and makes them one intire contract. Again, the plaintiff in his own bill states, that Glassell having land in Kentucky which he wished to sell and invest the proceeds in Madison land, in order to effect his wishes, proposed trading with Towles for his land; and that Towles, yielding to the influence of the considerations pressed upon him by Glassell, concluded

126 *a contract with him, by which he sold him his Madison land at 15 dollars 50 cents per acre, and agreed to receive in part payment for it, one of Glassell's tracts at valuation. The answer of Glassell, after stating that the proposal to sell came from Towles, and that the price he asked for his land was so high, that he declined the purchase unless Towles would take 1000 acres of his Kentucky land at valuation, adds, that his main leading inducement for the purchase of Towles's land, as Towles well knew, was the selling his Kentucky land. Towles, in his deposition, so far from denying this, confirms it; he says, that Glassell agreed to purchase his land of him, upon condition that he would take 1000 acres of Kentucky land; that he did not wish to take the Kentucky land, but rather than not sell, he agreed to take it at valuation; and that he does not believe Glassell would have bought his land, if he had not agreed to take the Kentucky land. It is most clear to me, that in the purchase of the Madison land, the making payment in the Kentucky land, so far as it would go, was as much a part of the contract, as the payment of the balance in money was: and any man acquainted with the ordinary transactions of life, must know, that with Glassell

it would probably be a most important consideration. How often do we see a price given for property, when it is to be paid for in barter, labour or other facilities, which the buyer would not have an idea of giving if it were to be paid in money?

The mistake which occurred, was as much the work of Towles as of Glassell; for though the plat taken by Robert Glassell, described the land of Lewis, instead of the Mercer tract, yet this was a mere transcript from the surveyor's book, not founded on actual survey, with no courses and distances, and was not intended to govern, and did not govern, the parties, in the consummation of the contract. This is clear, from that part of the agreement, which provides that the land in Kentucky shall be surveyed by an authorized legal surveyor at the expense of Glassell. Under this

provision, it was the business of 127 Towles to see to the *survey, and have it correctly made: he sent his son to attend to this, and if he had taken along with him the description of the land from the patent to Mercer, the mistake into which the plat of 1814 was leading them, would have been discovered; the true land would have been surveyed; and, as no particular tract was specially wished for by Towles, the contract would have been correctly executed. But, instead of this cautious course, young Towles went, without any title papers, to the surveyor Ruby; and he surveyed the Lewis instead of the Mercer tract. Both parties then may be considered equally instrumental in producing this innocent mistake. Would it not, in such a case, be exceedingly harsh to say that the whole loss should fall upon Glassell? that he should be obliged to hold the Madison land, and pay 6200 dollars for it, all in money, when he had contracted to pay nearly half of it in land, and would have bought on no other condition? and this too, when the very land, which he meant to give in part payment, was there, lying by the side of the land conveyed, and equal if not better than that land in every respect; and when from the moment the mistake was discovered, Glassell was willing and offered to convey an equal quantity of this land, at valuation, and to pay with interest whatever it might fall short of the amount to which the Lewis land was valued. I cannot think that such a decree would be consistent with the settled course of decisions, or the true spirit of equity.

It was contended, that though the parties were in a court of equity, yet that the plaintiff had come here upon his legal rights (which the absence of Towles enabled him to do); and that in such cases, equity must proceed according to strict legal rule; that if Towles were in a court of law, suing Glassell upon his covenants, no equitable defence, no correction of the mistake, or rescinding of the contract, could be heard, and, therefore, that Glassell can make no such defence in this foreign attachment. To this position I can, by no means assent. I admit, that the legal claim, in such cases, must be governed by legal rules; but 128 if there *is an equitable defence, of which, after judgment at law, the defendant might avail himself in equity,

of that defence he may take advantage in the foreign attachment, otherwise he would lose it intirely. Upon the whole case, I think the court below erred exceedingly, in considering Glassell the debtor of Towles, and decreeing against him the sum of 3639 dollars, or any sum in money.

CABELL, J. I have given very great consideration to this case, and have found unusual difficulty in forming an opinion upon it. My mind is not, even now, free from doubts. But I fell constrained to yield my doubts, to the positive and unanimous convictions of the other judges. I concur in the decree which has been prepared.

BROOKE, J. I concur in the decree, without doubt or difficulty.

TUCKER, P. I have no doubt in this case, that the mistake on the part of Glassell was intirely an innocent one. No fraud, or intention to deceive, can fairly be imputed to him. The parties in the cause have not imputed it, and their counsel have disavowed it. He had no motive for it. Anxious to sell his own land, it is inconceivable why he should have pointed out the land of another as the subject of the contract, unless he designed to consummate a gross fraud by conveying inferior land of his own at the price of that other. But this he has not done. The error, indeed, was the obvious error of his son, arising, we cannot tell how, but committed on a visit to Kentucky anterior to the treaty between the parties. It was an error too into which Towles fell, through his agent, and in which, strange to tell, Leathers and the surveyor also participated. In them it can only be accounted for by a want of the title papers, which the younger Towles omitted to take with him. Be this as it may, it was a common error in all concerned; and as the surveyor, and

Leathers a near neighbour to the 129 land, have *fallen into it, it cannot be considered as a gross or blameable error in any of the contending parties.

The principle of equity applicable to such a transaction, is as plain and familiar as it is just and equitable. Where there is an error in the substance of the thing contracted for, so that the purchaser cannot get what he substantially bargained for, or the seller would be compelled to part with what he had no idea of selling, the contract ought to be vacated even if it had been executed. To say that one party shall be compelled to take what he had no idea of purchasing, or that the other shall be forced to part with what he had no idea of selling, would not be justice; it would be tyranny; it would be to make a contract rather than enforce one. Such a power is disavowed by the courts of justice; and, accordingly, the books abound with cases in which contracts have been rescinded, or their specific execution refused, because of an essential mistake in the thing contracted for. *Graham v. Hendren*, 5 Munf. 185; *Chamberlaine v. Marsh*, 6 Id. 283; *Calverley v. Williams*, 1 Ves. jr. 210, and the general principles on this subject stated 2 Rand. 66. But this rule to be just must like all others be mutual. The privilege extended to one party cannot be denied to the other;

for equality of rights is of the essence of justice. The rule must work both ways and for both parties, where there has been no fault or culpable negligence in either.

Such is the case here. An innocent mistake has been committed. Towles contracted to buy one half of a specified tract of land. It was described by a plat, and though there was not a marked boundary upon it, yet the position of Deer creek upon it ascertains its identity beyond all controversy. It is true he was to buy half of the Mercer grant which Glassell owned. But the plat of Lewis's land was shewn him as the true Mercer grant which Glassell owned; and as the land was the important matter whencesoever derived, the substance of his engagement was to take one half of that identical tract which had Deer creek upon *it, and turns out to be

Lewis's land. It is true also, that the defendant Towles was very particular about the tract he should get; and it was very truly said by Mr. Leigh, that the Lewis land was in fact what he expected to get, and we cannot make him take any other against his will.

What then are his rights growing out of this transaction? According to the authorities, he may say to Glassell, I will take the Lewis land or none at all; you must procure me that, or I will not execute the contract. Or, he may waive the right of rescission, and take what Glassell acknowledges he had agreed to give—the Mercer tract. Thus he has an election between these two courses; either to rescind, or to take what it is in Glassell's power to convey.

How is it with Glassell? He has committed an innocent mistake. He has erroneously conceived the plat made in 1814 to be the plat of his own land. We will suppose, for the sake of argument, that he has even conveyed it. He may invoke the aid of the principle above stated, and say to Towles—This contract has been entered into under a mutual misunderstanding, I will either convey to you what I innocently understood I was selling, or I will rescind the contract.

Towles, would have a right to select which he pleased of these alternatives. But he would have no right to rescind one half the contract, and enforce the other. I know of no middle ground between a rescission in toto and a specific execution in toto. I know of no power in this court, to half-ratify, and half-annul, this or any other contract. If the contract is intire; if the reciprocal transfers of the Madison and Kentucky land, are indissolubly linked in the agreement of the parties; I can see no justice in compelling Glassell to keep the Madison land and the Kentucky land too. If they be so linked, and Towles refuses to take the latter, he must take back the former, and refund what he had received.

Accordingly, Mr. Leigh having discerned, that this contest would mainly turn upon the character of the contract *in this regard, he has strenuously urged upon the court, to bear in mind that this was not the case of an exchange of Madison and Kentucky land, but of independent, though mutual sales, and that, therefore,

the failure of the contract respecting the Kentucky land, could not affect the Madison tract, the contract for the sale of which was independent of it. To sustain this position, he referred among other things, to the right which Glassell reserved to himself, of retaining the Kentucky land upon a certain event. In reference to this argument in support of his opinion, I shall only say, that at most the provision could only have given a right to disunite things which otherwise were linked together, and, moreover, that it never was introduced into the contract, until six weeks after the execution of the original articles: add to which, Glassell never exercised the power of disuniting the two subjects of the contract of August 1815. But, though I think Mr. Leigh's position is not sustained, yet it struck me so forcibly, that I have thought it all important to examine it with care, as constituting the very gist of this matter. And, upon the most deliberate reflection, I am intirely satisfied, that the mutual engagements between the parties, respecting the Madison and Kentucky lands, constitute one dependent contract, the parts of which are indissolubly connected and linked together, and not two separate and distinct sales, which stood so independent of each other, that one might be annulled without in any wise affecting the validity of the other.

That such is the case, the object of the parties, the nature of the contract, its very language, and the distinct admissions of Thomas and of Towles, conspire to prove. The object of each party was to dispose of his land. Towles wished to dispose of his Madison land, altogether for money if he could, but was willing to take western land in part, rather than fail. Glassell's object was to convert his Kentucky property into Virginia property. The bill tells us, he was anxious to sell his Kentucky land, and to vest the proceeds in lands in Madison; and, in order to effect

132 his *wishes, he proposed trading with Towles; that Towles yielded to the influence of Glassell's persuasions, concluded a contract with Glassell, by which he sold him the Madison land at 15 dollars 50 cents per acre, and agreed to receive, in part payment for it, a tract of Kentucky land at valuation. Towles tells us, that Glassell agreed to purchase his Madison land, upon condition that he would take 1000 acres of Kentucky land; that he did not wish to take it, but rather than not sell, he agreed to take it at a valuation; and that he did not believe Glassell would have purchased the Madison land, unless he had agreed to take the Kentucky land; at least, he said he would not. Here, then, the Kentucky land is to be taken by Towles in payment for that in Madison, and Glassell would only agree to take the Madison land, on condition that Towles would take 1000 acres of Kentucky land in payment. If, then, Towles is entitled to rescind the contract for the Kentucky land, because he cannot get the Lewis land, which was his object, Glassell is equally entitled to a rescission, if he cannot make payment in Kentucky land, which was his object.

The agreement in writing is as explicit as these representations of the parties. Towles agrees to sell to Glassell the Madison land at 15 dollars 50 cents per acre, to be paid in October 1816, when possession was to be given, "if there is any left after the agreements hereafter mentioned are complied with." This agreement was, that Towles was to take 1000 acres of land on the waters of Green river &c. at a valuation, at eighteen months credit. That it was to be taken in payment is obvious, because from what went before, it appears the balance to be paid in cash was to depend upon the amount to be deducted on account of this payment in land. Now, it is not conceivable, either upon any principle of law or the ordinary sense of mankind in relation to affairs, that two things can be more inseparably connected, than the sale of a tract of land and the stipulation as to the mode of payment. Nothing is more common than that men are willing to

133 purchase land, *provided they are permitted to pay for it in property; and, moreover, instances must have occurred like this of Glassell's, where a man has been willing to give a high price for Virginia lands, upon the other party agreeing to take payment in Kentucky lands. In such a contract, the disposition of the Kentucky land, is as much the substantive part of the contract with the owner, as the acquisition of any particular tract can be with the purchaser. To compel him to pay money when he contracted to pay in land, would be as unreasonable and unjust, and as substantially making a new contract for the parties, as to compel the buyer to take a tract he did not agree to purchase. And the two things are inseparably connected, for the one is the consideration of the other.

If this view of the case be correct, then I think it will follow, inevitably, that Towles may have a rescission of the whole contract, but cannot refuse to receive the Kentucky land, and insist upon Glassell's retaining the Madison land. In short, the rights of the parties stand thus: Towles may demand a rescission, or the Kentucky land at his pleasure; but, if he says he will not take the Kentucky land, Glassell will then have a right to resist any other terms than an intire rescission. He is, in no aspect, the debtor of Towles. He may well say, I owe you nothing: I engaged to pay you land which I am ready to pay, I did not promise to pay money and I will not pay it. This election on the part of Towles, is essentially necessary to ascertain the character of his demand against Glassell, as I shall presently shew. But I will first observe, that the right of election may be vitally important to him. Exposed as he may be to Thomas's demand, it is, perhaps, not so embarrassing, as that of Glassell might be, in case of rescission. For, in that event, he must refund what he has received in cash from Glassell for the Madison estate. It is true, in this case, he would get back the land, as the representative of the money refunded; but so also would it be on his refunding to Thomas.

134 *If this right of election then be vitally important to Towles, I think

it may be safely affirmed, that he alone can exert it, so far as the rescinding of the contract would go. Far as the principle of substitution has been pushed (and with great benefit, by the way) I do not think it could extend to vest in Thomas the right of deciding for him, that the whole contract should be rescinded. Having bought from him, indeed, his purchase from Glassell, I have no doubt he might assume to himself, on the principle of substitution, one branch of the alternative, and demand, that as the Lewis land cannot be conveyed to him, the Mercer tract shall. But he cannot go farther than even Towles—insist on Glassell retaining the Madison land, and paying up the value of the Lewis tract in money, when he was only bound to pay in land. This would be to rescind, in part only, this contract which I have shewn to be one and indivisible.

The view of the case which I have taken, if it be correct, at once settles the whole matter of the attachment remedy, on the ground of Glassell being the debtor to Towles for the value of the Lewis tract. There may, indeed, be sufficient ground of jurisdiction in the fact, that Glassell holds both the Madison and the Mercer tracts, in one of which Towles certainly has an interest; but there is, in my mind, no foundation for regarding him as subject to a money demand, and decreeing against him accordingly.

In the view which I have hitherto taken, I have had no eye to the execution of the deed from Glassell to Towles. It is upon the covenants in that deed, that the plaintiff's claim has been principally rested. Towles has been supposed to have had an immediate right of action upon the covenant of seizin, of which right of action the plaintiff may avail himself, either upon the ground of the attachment law, or of a supposed equitable assignment of that covenant. These views of the rights of Thomas have led to a protracted discussion, in which the construction of the attachment law has been involved. I shall not follow the steps of counsel herein. Ad-

135 mitting that Towles had a right of action, which was *liable to attachment, yet I cannot doubt, that it was competent for Glassell, the garnishee, to defend himself by shewing that whether chargeable or not in a court of law, by the covenants in the deed, he had a good equitable defence, in the fact that the very covenant on which his adversary rested his demand, if, indeed, it was an assurance of the Lewis tract, was founded in a mistake, against which it is the province of a court of equity to relieve, by arresting the demand and compelling Towles, either to accept a conveyance of the Mercer tract, or to rescind the contract in toto. The same answer presents itself, to the idea of the supposed equitable assignment to Thomas, implied by the transfer of the land to him; for the assignee could not resist the equity which would have prevailed against his vendor.

The covenant in the deed from Glassell to Towles, however, having constituted so large a subject of discussion, it may not be improper to examine the deed in which it

is found. It seems to have been considered, on one part at least, as a deed for the Lewis tract, and the covenants and warranty as of course protecting the title to that land. I am by no means satisfied, that it is not either void for uncertainty, or a conveyance of the Mercer tract. The deed describes the land thereby conveyed, by reference to Ruby's recent survey, and by the line trees, lines, courses and distances in that plat mentioned, and also as being one half of a 2000 acre survey number 1291, lying on Deer creek, patented to James Mercer on the 14th December 1787. No notice is taken of Deer creek running through the tract. I readily concede, that the lower tract in the plat of 1814, the same tract laid down in Ruby's recent survey, was what the parties intended to convey: but it is equally clear, that they thought it was within the Mercer patent, when in fact it was Lewis's. But a court of law could only look to the deed; and, in a court of law, if ejectment were brought for one half of the Mercer tract, the description of boundaries agreeing in no wise with the real boundaries of that land, would probably be rejected as surplusage. In

136 every deed, *there are various matters of description, some more vital and characteristic than others. As if a man should sell the house he purchased from A. B. situate in F. street, whereas it is really situate in H. street; the fact that the house purchased by him of A. B. was situate in H. street would control the description of the deed as to its being in F. street, and the title would pass. So here, the Mercer tract of 2000 acres lying on Deer creek (for it lies very near to the main stream of the creek, and a branch of that passes through it) patented to James Mercer on the 14th December 1787, is a known, ascertained, well identified tract. Of this tract, so described, 1155 acres are conveyed. Had the deed stopped here, there can be no question that it would have been a sufficient description of the tract to have passed a title to an undivided moiety. Nor do I think the subsequent description would probably be regarded. It would be rejected as surplusage, or proved to be erroneous, by shewing that the boundaries did not coincide with the boundaries of the patent land. Could the court of law permit the party to shew that it was a different tract of land, held under a different patent, that was intended to be conveyed? I doubt it. If, however, this evidence were permitted, then there would be two inconsistent, incongruous and conflicting descriptions, which would probably avoid the deed for uncertainty. In either event, the warranty and covenant of title would be ineffectual to secure the Lewis tract. For, if the deed conveyed the Mercer tract, the warranty applied to that: if it was void for uncertainty, the warranty and covenants were void also.

The aspect in which I have regarded this case, renders unnecessary a consideration of much that has been urged on both sides. The objections to requiring Towles to take the Mercer tract, which have been raised for him, but not by him, are all of them answered by the single remark, that he has

his option to do either of two things; to take that tract, or rescind the contract. That he bought to sell again, and that the Mercer tract may not be saleable; 137 that Thomas *insists, as he perhaps is entitled to do, upon a rescission which will call upon Towles to refund the purchase money received, and that Glassell's title to the Mercer tract, is not yet clearly made out; these are considerations, indeed, to be weighed by Towles, in making his option, but, surely, they cannot add to his rights, or detract from Glassell's. The inconvenience to him, cannot lead us to rescind the contract, so far as it is prejudicial to him, and to enforce it, where it may subserve his interests, though ruinous to his adversary.

Some inconvenience is inevitable, where a mistake so vital, and so long undiscovered, has tangled up a transaction. The conveyance to Thomas is the principle source of difficulty. Were he willing to take the Mercer tract at a fair valuation, according to the state of things in 1816, every difficulty would be removed; for the court sees none in the objections that were made to the title of Glassell to the Mercer tract.

The decree pronounced by the court, declared, that there was error in the decree of the court of chancery: that that court ought not to have considered Towles as the creditor of Glassell, and Thomas as entitled to attach in the hands of Glassell, the supposed debt due from him to Towles, the absent defendant: that, an innocent mistake having arisen in the transaction, not more chargeable upon Glassell than upon Towles, the defendant Towles had a right to waive the contract, or to accept the performance of it, as understood by Glassell; and, as Thomas was a purchaser from Towles, of the land which he had purchased from Glassell, Thomas was entitled to select one half of the Mercer tract of 2000 acres, granted to James Mercer by the patent of the 14th December 1787, and to have a conveyance thereof from Glassell, with general warranty and the usual covenants of title; and also to have a decree against Glassell for such sum as the tract so selected might, upon a proper proceeding instituted for that purpose, have 138 been ascertained to be *inferiour in value (if at all) to the Lewis tract on the 31st October 1816, with interest thereon from that date till paid; and upon rendering such decree, no costs should be awarded to either party: and that, in case of the refusal of Thomas to accept such a decree, within a reasonable time, to be fixed by the court, his bill should have been dismissed with costs, but without prejudice to any suit he might choose to prosecute against Towles. Therefore, the decree was reversed, with costs, and the cause remanded to the court of chancery to be proceeded in according to the principles here declared.

After this decree was announced, the counsel for the appellee reminded the court, that Glassell had not exhibited all the title papers, by which he deduced the title to the Mercer tract from the grantee to himself; and they suggested, that it might turn out,

upon further inquiry, that he had really no better title to the Mercer tract than he had to the Lewis tract, in which case, surely, he would owe the absent defendant Towles a debt upon the breach of his covenants, that might well be attached in his hands, to satisfy the debt due from Towles to Thomas; and that provision ought to be made in the decree for this state of things, in case it should occur.

Sed per curiam. No alteration in the decree is necessary. The question of the validity of Glassell's title to the Mercer tract, was not made in the cause. The record presents no reasonable doubt of its validity, even if it had been so made. The vendee contracted for the deed of Glassell with the usual covenants of title; and, although this court will not compel a vendee who has even thus contracted, to take a bad title, or one of questionable character, yet that fact must be properly established, before it can serve as the foundation of a decree. But, in truth, in this case, the court compels neither Towles nor Thomas to take the

Mercer tract. Though, in considering the rights and remedies *of 139 Thomas, the rights and remedies of Towles were necessarily a subject of inquiry; yet the court has rendered no decree as between Towles and Glassell, except that, if Thomas chooses to take the Mercer tract, he may do so on the terms prescribed; and that, indeed, incidentally, would put an end to the controversy between Towles and Glassell. The court has only pronounced, that Glassell is liable to a rescission of the intire contract, or to a decree for conveyance of the Mercer tract, and to nothing more; that Thomas in right of Towles, may demand the latter, though Towles only can insist upon the former. Thomas, therefore, may refuse to take the Mercer tract, on account of his doubts about the title, or for any other cause; but if he does refuse, he has no title to any other redress in this suit, and his bill must then be dismissed. It is, however, obvious, that if the deed be made to him, and the title proves defective, a right of action upon the warranty and covenants of title, will at once accrue to him, and in that action the validity of title may fairly be put in issue and decided. It has not been so put in issue in this cause; and the court, therefore, cannot found its decree upon any supposed defect.

140 *Winn v. Bob and Others, Paupers.

November, 1831.

[23 Am. Dec. 258.]

Nuncupative Wills—Essentials to Validity.—It is essential to the validity of a nuncupative will, that it should appear, that the deceased, at the time he spoke the alleged testamentary words, had a present intention to make his will, and spoke the words with such intention, and should distinctly indicate that intention by calling upon persons present to take notice or bear testimony that such is his will, or by saying or doing something tantamount in substance, indicating plainly that the words spoken were designed to be testamentary.

***Nuncupative Wills—Essentials to Validity.**—On this question, the principal case is quoted from in foot-note to Page v. Page. 2 Rob. 424.

Wills—Right of Slaves to Have Will Proved.—*Quære.*—Whether slaves claiming to be emancipated by will, can properly be allowed to prosecute. In *forma pauperis*, a suit to have the will proved and recorded in a court of probat. under the provisions of the statute, 1 Rev. Code. ch. 124. § 4, 5.

Nuncupative Wills—Emancipation of Slaves.—*Quære.*—Whether slaves can be emancipated by nuncupative will, under the provisions of the statute. Id. ch. 111. § 58? And it seems they cannot; per TUCKER, P., and BROOKE, J.

The appellees, Bob and ten others, who had been the slaves of John Andrew Schwartz late of Nottoway county deceased, in his lifetime, preferred their petition to the county court of Nottoway, setting forth, that they had been emancipated by their late owner, by will duly made to that purpose, but no executor was named in the will, and it had not been proved and recorded, nor had any one as yet taken administration of the decedent's estate; and that they were still held in slavery by the testator's next of kin and distributees, or some of them; and praying permission to sue in *forma pauperis*, to have the will proved and recorded, and thus to recover their freedom, according to the statute, 1 Rev. Code, ch. 124, § 4, 5, p. 481. The county court gave them the permission, and assigned them counsel. And then their counsel offered for probat, a paper containing, as they alleged, the written or the nuncupative will of the decedent, in the following words:

"In the name of God, Amen. I J. A. Schwartz of the county of Nottoway, being in my perfect senses, do make and declare this my last will and testament. 1. My will and desire is, that all my real estate shall be disposed of at public auction, and the proceeds of the same appropriated to the payment of my debts. 2. My will and desire is, that my servants, Bob, Frank, Polly and her children, be emancipated, and entitled to all the privileges of free persons of colour forever, also Bob's wife Letty and her children. 3. It is my will and desire, that one half of the remaining part of my estate be given to Juliana Malvina Winn"——

A. B. Winn, husband of one of the distributees of the deceased, appeared in court and contested the probat.

The county court, upon a full hearing, was of opinion that the paper did not contain the will of the decedent, and refused to record it. The counsel for the paupers took an appeal for them to the circuit court.

At the hearing in the circuit court, the evidence was stated at large and made part of the record. There were four witnesses, whose testimony was not materially variant, and was in substance, this: About three hours before the decedent's death, which happened at his own house, one of the witnesses, Dr. Worsham, his attending physician, suggested to him the propriety of making his will; he said, he could not think it then necessary, as he was so much better; upon which Dr. W. desisted from farther conversation on the subject, until

+**Wills—Right of Slaves to Have Proved.**—The principal case is cited in *Manns v. Givens*, 7 Leigh 718.

•**Nuncupative Wills—Emancipation of Slaves.**—The principal case is cited in *foot-note* to *Phoebe v. Boggess*, 1 Gratt. 120. See monographic note on "Wills."

Mrs. Winn, the sister of the deceased, came into the room, to whom Dr. W. mentioned what had passed, and she earnestly desired him to renew the subject, saying she had often heard her brother say he intended to make a will, and to liberate some of his slaves. At her instance, Dr. W. repeated the suggestion to the decedent, who again said he thought it unnecessary, but if it was his sister's wish or if it was thought best, he had no objection. There were present in the room, besides Mrs. Winn and Dr. Worsham, the other three witnesses, Pollard, Eanes and Morgan, and the appellees Bob, Frank and Polly. Dr. W. handed Morgan, pen, ink and paper, telling him that Mr. Schwartz wished his will written: Morgan seated himself at a table, in a distant part of the room, some twelve feet from the sick man's bed. Then Dr. W. returned to the bed side, and Schwartz commenced by saying "he wished his real estate to be disposed of, and the proceeds *appropriated to the payment of his just debts." Dr. W. went to

Morgan, and reported this disposition to him, and he committed it to paper. Dr. W. again returned to Schwartz, and he then asked his servant Bob, whether he wished to be freed; Bob said he was very willing to serve him, but he had rather be freed than have another master: Schwartz said "he should be freed." Schwartz then asked Frank, whether he wished to be freed; a conversation ensued similar to that with Bob, which ended in Schwartz's saying "he should be freed." Polly then said to her master "what are you going to do for poor me?" Schwartz said, "Polly and her children should be freed." Bob then asked, "as he had freed him, would he not also free his wife," Letty? Schwartz said, "Letty and her children should be freed." These dispositions being thus declared by Schwartz, Dr. W. went to Morgan, and reported them to him, and he reduced them to writing. Schwartz then said, "he desired that one half of the remainder of his property should be given to his niece Juliana Malvina Winn" (which was in like manner communicated to Morgan, and by him written) "and the other half to his niece Virginia;" upon which Mrs. Winn asked him, if he did not intend to leave her sister Mary something? and his answer was understood to be, that Mary was to share equally with Virginia; but this was said so indistinctly, that it was not communicated to Morgan and written down, and being connected with the gift to Virginia, neither was that, though distinctly uttered, written down. At the time the dispositions which were written down, were uttered by Schwartz, he was perfectly in his senses: as he spoke the last indistinct words, he was taken with a strangling, and it was soon perceived he was dying. He did not desire that Morgan, or any one else, should write his will; he was not expressly told, that Morgan was to write it; it was doubtful, whether he knew that Morgan was engaged in writing it; it was probable he did not know it; it was doubtful, whether he could have seen, and probable he did not see, Morgan *writing at the table, from the bed where he was ly-

ing. He did not call upon any person present, to take notice, that the words he spoke were his will.

The circuit court reversed the sentence of the county court, and admitted the contents of the paper to probat and record, as a nuncupative will. And from this sentence, Winn appealed to this court.

In the argument of the cause here, by Spooner and Johnson for the appellant, and by Macfarland and Leigh, assigned by the court counsel for the appellees, three points, made by the counsel for the appellant, were discussed:

1. Whether it was competent to the appellees, being in fact held in slavery, to prosecute such a suit as this in forma pauperis? A suit not to recover their freedom by reason of an emancipation by a will duly recorded, but to have the will under which they claimed freedom, recorded in a court of probat. The question turned upon the construction of the statute concerning pauper suits, 1 Rev. Code, ch. 124, § 4, 5, p. 481, and the statute authorizing the emancipation of slaves, Id. ch. 11, § 53, p. 433.

2. Whether an emancipation of slaves could be made by a nuncupative will? Which depended on the construction of the statute last cited, which provides, that "it shall be lawful for any person, by his or her last will and testament, or by any other instrument in writing, under his or her hand and seal, attested and proved in the county or corporation court, by two witnesses, or acknowledged by the party in the court of the county where he or she resides, to emancipate and set free his or her slaves or any of them" &c.

3. Whether this was a good nuncupative will? The counsel for the appellant referred to the provision of the statute of wills concerning nuncupative wills, Id. ch. 104, § 7, p. 377, which is taken (with some variation not affecting this question) from the english statute 29 Car. 2, ch. 3, § 19. And they said, it was impossible a man 144 could make "a nuncupative will, without intending to do so, and without knowing that he was doing it. Here, if the deceased intended to make any will, and with that intention, uttered the supposed testamentary words, he intended to make a written will, and was prevented from completing his purpose by the approach of death. But the words were not themselves testamentary at all; they were, at the most, only declarations of what would be his dispositions when he should make his will. *Weeden v. Bartlett & al.*, 6 Munf. 123. He did not know, that his words were reported to Morgan, and that he was committing them to writing: he did not know, that Morgan was writing down his words. He did not, and could not, see him at the table. He did not call upon any person present "to take notice or bear testimony that such was his will, or words of the like import;" which the statute expressly required to make a good nuncupative will.

The appellees' counsel cited *Mason v. Dunman*, 1 Munf. 456, to shew, that notes taken by the bed side of a dying man, may be a good nuncupative will, provided it appeared that the words noted were uttered

with a testamentary intent, though it appeared that the testator intended to make a written will, and that he did not call upon persons present "to take notice or bear testimony that such was his will:" any circumstance tantamount to that, would suffice. That the words spoken by Schwartz, were spoken with testamentary intent, appeared from the evidence. He agreed to make his will; and after the preparation for writing it had been made, though he was not expressly told that such preparation was made, he commenced (of his own accord, as they understood the evidence) with the direction for the sale of his land, which was plainly a testamentary disposition. He commenced, likewise, the conversation with Bob and Frank, which ended in the declaration that they should be free. The emancipation, indeed, of Polly and her children was suggested by her, and that of Letty and her children, by her husband: but the gift of one half of the residue of

his estate to his niece J. M. Winn, 145 uttered of his own accord, *distinctly evinced, that he was, and had been from the beginning, speaking with a present testamentary intent. They thought it the fair inference from the evidence, that he did know, that Morgan was writing down his dispositions as he uttered them to Dr. Worsham, and that he could and did see Morgan writing.

CARR, J. In this case, three points were made in the argument: 1. Can the petitioners appear as parties in this controversy? 2. Can slaves be emancipated by a nuncupative will? 3. Is this a good nuncupative will? I shall consider this last point only. The doctrine of nuncupative wills, was taken from the civil law, and is of very ancient date. The abuses and frauds, which were practised under it, gave rise to the provision of the statute 29 Car. 2, ch. 3, § 19, from which our act is, with some variations, taken. The intention of the statute was not to give a new principle, but to correct a mischief; and it should be so construed as to advance the remedy. It is said, in a note on *Matthews v. Warner*, 4 Ves. 196, that the case of *Cole v. Mordaunt*, before lord chancellor Nottingham, in the 28th year of Charles II. was the principal case which gave rise to the english statute of frauds. That was a case in which nine witnesses swore to a nuncupative will; and yet, on a trial at bar in the court of king's bench, it appeared that most of them were perjured, and Mrs. Cole guilty of subornation. In the case before us, there is not the slightest imputation upon the witnesses; but that must not influence our decision upon the law. The deceased was truly in extremis; for before the business was finished, his mind began to wander; he was taken with a strangling; they found he was dying. He seems to have been indisposed to make a will, if capable: he desired no one to write it; he did not know that Morgan was writing; Morgan sat in a distant part of the room, and did not pretend to take the words from the sick man, but they were reported to him by another; and, if the reporter misunderstood the speaker, or Morgan the *re- 146 porter, the paper would not contain

his will. The statute is imperative in requiring that it be proved by two witnesses, "that the testator called on some person present, to take notice or bear testimony that such is his will, or words of the like import." Here we have neither the words, nor any of like import; no expression, indeed, or act of the sick man, to shew that he thought himself making his will; or whether he intended it to be by parol, or in writing; or that he wished any person to bear testimony to what was doing. To establish such a will as this, would, I think, be of the most dangerous tendency. I am clear, then, that the very foundation of the claim of the appellees fails here. It is not necessary, therefore, for the decision of this case, to consider the other points; and, as they are of great importance, and perfectly new, I had rather leave them open for future consideration.

BROOKE, J., and TUCKER, P., said, they concurred in the opinion of Carr, J., that this was not a good nuncupative will. And they intimated, that they thought, slaves could not be emancipated by a nuncupative will, and had intended to give that opinion on that point; but they yielded to the suggestion of Carr, J., that the point should be left open for consideration when it should be necessary to decide it.

Sentence reversed.

147 *Hansbrough's Ex'ors v. Thom.

November, 1831.

Demurrer to Evidence—Setting Out Evidence—Joinder—Admissions on Record.—It is the settled practice in Virginia, on demurrers to evidence, that the demurrant shall set out the whole evidence, and that the court may compel the other party to join in the demurrer, without requiring the demurrant to make a formal admission on the record, of all the inferences of fact which the court may think fairly deducible from the evidence demurred to.

Same—Effect—Inferences.*—By demurring to evidence the demurrant waives all evidence on his own part that conflicts with that of the other party, admits the credit of the evidence demurred to, admits all inferences of fact that may be fairly deduced from the evidence, but only such facts as are fairly deducible, and refers it to the court to deduce the fair inferences from the evidence.

Same—English and Virginia Practice—Compared.—The English practice, and that which prevails in Virginia, in respect to demurrers to evidence, compared.

Slaves—Sale—Evidence of—In detinue for slaves, the question being whether a contract between plaintiff and defendant's testator, was a gift or a sale of the slaves by the latter to the former, the defendant demurs to the plaintiff's evidence:

***Demurrer to the Evidence—Effect—Inferences.**—On this question, the principal case is cited in *Clopton v. Morris*, 6 Leigh 290; *Rohr v. Davis*, 9 Leigh 84; *foot-note* to *Ware v. Stephenson*, 10 Leigh 155; *Patteson v. Ford*, 2 Gratt. 28; *foot-note* to *Boyd v. City Savings Bank*, 15 Gratt. 501; *Union Steamship Co. v. Nottinghams*, 17 Gratt. 120; *Trout v. Va. & Tenn. R. Co.*, 23 Gratt. 637, and note; *foot-note* to *R. & D. R. Co. v. Anderson*, 31 Gratt. 812; *R. & D. R. Co. v. Moore*, 73 Va. 97; *Clark v. R. & D. R. Co.*, 78 Va. 712; *R. & D. R. Co. v. Williams*, 86 Va. 167, 9 S. E. Rep. 990; *N. & W. R. Co. v. Thomas*, 90 Va. 206, 17 S. E. Rep. 844; *Miller v. Ins. Co.*, 12 W. Va. 123; *Allen v. Bartlett*, 20 W. Va. 52; *Hemlebow v. Detrick*, 27 W. Va. 21; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 535, 2 S. E. Rep. 892; *Mapel v. John*, 42 W. Va. 35, 24 S. E. Rep. 610. See monographic note on "Demurrer to the Evidence" appended to *Tutt v. Slaughter*, 5 Gratt. 364.

***Sales and Gifts—Proof.**—The principal case is cited in *Miller v. Neff*, 33 W. Va. 206, 10 S. E. Rep. 381, to the point that sales and gifts need not be positively proved. They may be inferred from the circumstances. See monographic note on "Gifts" appended to *Barker v. Barker*, 2 Gratt. 344.

HELD, the evidence states facts, from which it may fairly be inferred, that the contract was a sale, though there was no express proof of any valuable consideration paid or stipulated, and that therefore it was a sale.

This was an action of detinue, brought in the circuit court of Culpeper, by George I. Thom against James and Peter Hansbrough executors of Peter Hansbrough the elder, late of Culpeper, for slaves. The declaration stated, that the slaves had been delivered by the plaintiff to the defendants' testator in his lifetime, on the 16th September 1822, to be by him re-delivered to the plaintiff when thereto requested, and the failure and refusal of the testator, in his lifetime, and of the defendants, his executors, since his death, to re-deliver them to the plaintiff. The defendants pleaded the general issue.

At the trial, the defendants' counsel, after the argument before the jury had been begun and was nearly concluded, offered a demurrer to the evidence, and the plaintiff's counsel objected that, in that stage of the trial, it was too late to demur; but the court overruled the objection. Then the defendants' counsel demurred to the evidence, and the plaintiff's joined in the demurrer.

148 *It appeared from the demurrer, that the plaintiff adduced four witnesses, Massie, Mallory, Nalle and Willis; whose testimony was, in substance, as follows:

1. Massie testified, that on the third Sunday of September 1822, Peter Hansbrough deceased, called on the witness, and requested him to go with him to the plaintiff Thom's house, saying he had made an arrangement with Thom to let him have some negroes; the number was mentioned, but that the witness did not remember; the witness Mallory was present, and he probably remembered it. That Hansbrough further said, he was going to Thom's house to complete the arrangement; and, at the same time, told the witness, that Thom had purchased a tract of land at an unfortunate time, and (as he, Hansbrough, thought at the time the purchase was made) had given too much for it; that he had already assisted Thom, and intended to do more for him, if necessary; that it gave him pleasure to do so, as Thom had been very kind and attentive to him, and had rendered him services; that he had given Thom 3000 dollars; that he had given him a claim upon one Carneal of Kentucky (but the witness did not understand, that that claim was part of the 3000 dollars, nor did he remember that the amount of the claim was mentioned); that the 3000 dollars he had given Thom, was to enable him to comply with his unfortunate purchase of land, before alluded to, from one Armistead. The witness went with Hansbrough to Thom's house, according to his request, but returned without alighting from his horse.

2. Mallory testified, that, in September 1822, he fell in company with Peter Hansbrough deceased, who, in the course of conversation, informed him, that he was on his way to Fredericksburg, and below. That the witness invited Hansbrough to go

home with him, as he lived immediately in his route; which Hansbrough declined, stating as his reason for taking another route, that he had made arrangements with Thom to let him have some slaves, and that there was to be a final close of the 149 arrangement the next *morning; he mentioned the number of slaves, seventeen. That, in the same conversation, Hansbrough said, that he had great confidence in Thom; that Thom appeared from his habits and management likely to do well; that Thom had rendered him considerable services, for which he had fully compensated him; that he had let Thom have some money that was due him in Kentucky, and had more than compensated his services. That, some two or three weeks after this conversation, as Hansbrough was returning home from the lower country, the witness fell in with him again, and he went home with the witness to breakfast; he then told the witness, he should have come to his house the evening before, but for some business he had with Dr. Waugh, relative to the slaves he had let Thom have, as Dr. W. had hired one of them. That Hansbrough's residence was some twelve or fourteen miles from Thom's. That Hansbrough was a man of strong mind, and particular in matters of business; and both he and Thom were well acquainted with the mode and forms of doing business.

3. Nalle testified, that, in the spring of 1822, there having been some motions made in the circuit court of Culpeper against Thom as the surety in some forthcoming bonds, Peter Hansbrough deceased observed to the witness, that he had a great regard for Thom, and wished him to do well; he thought him too liberal in becoming surety: upon which the witness observed to Hansbrough, that if Thom should have the money to pay to any of them, he Hansbrough was so wealthy he would not let him lose it: Hansbrough answered, he would like to aid Thom. That, about a month before Hansbrough's death, in another conversation between him and the witness concerning Thom, Hansbrough said that he had done a good deal for Thom; that Thom had purchased land at an unfortunate time, and that he had aided him in paying for the land. And the witness was induced to believe, from what Hansbrough said in this conversation, though he did not expressly say so, that he intended to pay for the land.

150 *4. Willis testified, that, in September 1822, a day or two before Peter Hansbrough deceased set off on his journey below (to the county of King George) the witness had a conversation with Hansbrough, in which Hansbrough observed he had some women and children that rendered him but little service; that, on his way down he should call at Thom's house, and expected to let him have some of his negroes. That, some time previous to this conversation (it might be two, three, or six months before), Hansbrough told the witness, he intended selling a parcel of his negroes to Thom; that Thom might pass them off to Armistead, for a debt he owed him; and that he Hansbrough could wait with Thom for the purchase money. That

Hansbrough lived twelve or fourteen miles from Thom's residence. That when Hansbrough went down the country in September 1822, he was absent from home about two weeks; and he was taken sick about three days after his return home, and died the 15th October 1822. That, in November 1822, Thom shewed the order herein after mentioned to the defendants, and demanded of them the slaves in the declaration claimed, which they refused to deliver to him. That Hansbrough had four children, Peter (the father of Mrs. Thom) James and William Hansbrough, and Amelia the wife of James Bell; and he had had another son, John, who was dead leaving five children. This witness also proved the values of the slaves claimed in the declaration.

5. It was admitted by the parties, that the whole number of the deceased Peter Hansbrough's grand children, was thirty-five; and that he was a very wealthy man, not much in debt; his estate disposed of by his will, was worth from 100,000 to 150,000 dollars.

6. The plaintiff also gave in evidence the order mentioned by Willis; which was in these words: "Mr. John Henderson will shew and deliver to Col. George Thom, the following negroes, viz: Pompey (he has seen), Moses, Harry, Sarah and her three children with her, Patt, (about the house,)

Caroline and her two boys, Sally and 151 her three *children, Linda and her child. And oblige P. Hansbrough. 16th September 1822." And it was admitted by the defendants, that this order and the signature thereto, was in the hand writing of Peter Hansbrough deceased; and that John Henderson, to whom the order was addressed, was at its date, and at Hansbrough's death, his overseer, and had in his custody the slaves in the order mentioned.

The slaves mentioned in the above order, were the slaves claimed in the declaration. And this was all the evidence in the cause.

The jury found a verdict for the plaintiff, for the slaves in the declaration claimed, ascertaining the value of them respectively, subject to the opinion of the court upon the demurrer to evidence. The court held that the law upon the demurrer was for the plaintiff, and gave him judgment upon the verdict. And the defendants appealed to this court.

Leigh for the appellants, said, that upon the evidence stated in the demurrer, Thom certainly could not sustain his claim to the slaves in question, upon the ground of a gift made to him by Hansbrough. The statute, 1 Rev. Code, ch. 111, § 51, p. 432, annulled every gift of slaves, unless the same be made by deed or will, duly proved and recorded, or unless the subject at some time come into the actual possession of, and remain with, the donee or some person claiming under him. Yet, he had little doubt, the judgment of the circuit court proceeded upon the opinion, that here was proof of a gift of slaves to be delivered at a future day, and that the provision of the statute applied not to gifts of that kind, but only to gifts of slaves which, by the terms of the gift, are to be presently delivered to the donee. But this distinction had

been exploded by a decision of this court, of which the circuit court, when it decided this cause, was not apprised. *Durham v. Dunkly*, 6 Rand. 135. Then, the only question was, whether a sale of these slaves by Hansbrough to Thom, could fairly
 152 be *inferred from the evidence set out in the demurrer? For though, upon a demurrer to evidence, the court may and must presume every fact, which the jury might have inferred from the evidence; yet those conclusions of fact must be such as a jury might from a just and reasonable construction, have made, and not arbitrary inferences or such as might be drawn from a part only of the whole evidence; per Roane, J., in *Stephens v. White*, 2 Wash. 210, 11. The demurrant waives all evidence on his part, that directly or by inference conflicts with the evidence adduced by the other party, and admits all that can reasonably be inferred from his adversary's evidence; per Green, J., in *Whittington v. Christian*, 2 Rand. 357. Now, he said, the definition of a sale was, a transmutation of property from one man to another, in consideration of some price or recompense in value; for there is no sale without a recompense; there must be a quid pro quo. And though there be a contract to sell goods for a stipulated price, yet if neither the money or some part of it be paid, nor the goods or some portion thereof delivered, nor tender made, nor any subsequent agreement entered into, it is no contract, and the owner may dispose of the goods as he pleases. 2 Black. Comm. 446, 8. In the case at bar, there was no evidence of any price or recompense stipulated to be paid or given by Thom to Hansbrough; not even a pretence of the kind; much less, that any money was actually paid; and it was certain, that there was no delivery of the slaves, or any of them. Bearing these principles in mind, it would not be a reasonable inference from the evidence, it would be a very strained inference indeed, that here was a sale of these slaves by Hansbrough to Thom.

Johnson and Stanard for the appellee, premised, that a party cannot by demurrer to evidence, withdraw a contested question of fact from the jury, and submit it to the court; that would be to abrogate pro tanto, the trial by jury; the demurrant admits every fact which the jury could find
 153 from *the evidence; *Green v. Judith*, 5 Rand. 1. And then, they said, it was apparent, that Thom claimed these slaves, upon the ground of a sale, not a gift, thereof by Hansbrough to him; that was the question of fact contested between the parties; that the point to which Thom's evidence was adduced. And the sale might be fairly inferred from the evidence; or rather nothing but a sale could be inferred from it. Hansbrough, in the first conversation with Willis, told him he intended selling some of his negroes to Thom, and that he could wait with him for the purchase money; and, in the second conversation with that witness, just before the transaction, he told him he intended to let Thom have some of his slaves. He told Massie, he had made an arrangement with Thom, to let him have some negroes, and

that he was going to Thom's to complete the arrangement. He told Mallory, he had made arrangements with Thom, to let him have seventeen slaves, and that there was to be a final close of the arrangement the next morning; and afterwards, that he had been to Dr. Waugh's on business relative to the slaves he had let Thom have, as Dr. W. had hired one of them. This language was wholly incompatible with the idea of a gift, and only to be accounted for upon the supposition that a sale was intended and made. The order of the 16th September 1822 sufficed of itself to shew that a sale had been made: Why else was the property to be shewn to Thom? As to the want of evidence of the price to be paid, that was evidence which would naturally be placed in Hansbrough's own hands, and (it might fairly be presumed) was in the hands of the defendants, his executors. And Johnson said, he had laboured in *Whittington v. Christian*, to induce the court to bring back our practice, in relation to demurrers to evidence, to the true, convenient and just practice of the English courts, that of compelling the demurrant to make a distinct admission upon the record, of the facts which the evidence demurred to conduces to prove: it conformed best with the right
 of jury trial; it was due to the party
 154 whose evidence was demurred *to; it was safest for the demurrant himself. If the Virginia practice was to be persisted in, he said, the court upon the argument of the law on a demurrer to evidence, must take the demurrant as admitting all that the evidence conduces to prove; otherwise, these demurrers will be only a device to give the trial of questions of fact to the court.

CARR, J. This case comes before us upon a demurrer to evidence. My general view of the practice with respect to such demurrers, has been given in the case of *Green v. Judith*, to which I refer. In the case before us, the evidence is all on the side of the plaintiff, and we are to say whether it makes such a case as would authorize a jury, by fair inference, to say that the slaves for which this action was brought, are the property of the plaintiff? (Here the judge stated the substance of the evidence, and then proceeded.) In my mind the natural, fair, and, I might say, necessary inference from the evidence is, that Hansbrough sold these slaves to Thom; and the order to the overseer was such a transfer and delivery, as passed the property, and enabled him to maintain detinue for them. That it was a sale, the whole course of the transaction seems to shew: Hansbrough said nothing about giving Thom the slaves: and if it had not been for the relative situation of the parties, and the wealth of Hansbrough, such an idea could never have arisen. He told one witness, that he meant to sell slaves to Thom; and to others he said, he had made or was making arrangements for letting him have slaves &c. What arrangements could be necessary if he meant to give them? Finally, the order itself imports a sale: "you will show and deliver &c." Why shew them, if Thom was a donee merely? That such an order upon a sale is a transfer of

the property, was decided by this court in *Pleasants v. Pendleton*, 6 Rand. 473, and many cases there cited to shew that it is settled law. I am well satisfied, therefore, that upon this record the plaintiff has a good title to the slaves, and that the judgment must be affirmed.

155 *CABELL, J. I cannot perceive that any inconvenience arises, from the practice in this country, of compelling a joinder in demurrer, without a formal admission on the record, on the part of the demurrant, of all the inferences of fact which the court may conceive to be fairly deducible from the evidence demurred to. On the contrary, I think our practice is better calculated to effect the purposes of justice, than the practice, said to prevail in England, of compelling the demurrant to make the admissions, before the opposite party is compelled to join in the demurrer. It is the court, according to both practices, that is to determine on the inferences which are fairly deducible from the evidence, and the court can, certainly, perform this function much more correctly, on grave consideration, on the final argument of the demurrer, than in the hurry and bustle of a jury trial. Nor is it any objection to a demurrer to evidence, that the evidence is circumstantial, and even complicated; as will clearly appear from the case of *Stephens v. White*. In the case before us, the evidence, circumstantial in its nature, was all offered by the plaintiff, and was free from contradiction. If the defendant chose to risk a demurrer I can perceive nothing in the case, to deprive him of the right to do so. Sales and gifts need not be positively proved. They may be inferred from circumstances. And the defendants here, in admitting by their demurrer, the truth of all the facts positively proved by the plaintiff's witnesses, necessarily left with the court the right to infer from those facts, whatever the jury might have fairly and reasonably inferred from them.

The real question before us is, whether we are to infer a sale or a gift? It seems to be admitted, that the one or the other may be fairly inferred. And I will here take occasion to say, that a demurrer admits only those things which may be fairly inferred.—I am decidedly of opinion, that the just and fair inference from the testimony, is that Hansbrough sold the slaves to Thom, and that he did not give them.

It is true, that he regarded Thom with 156 eyes of *favour, and that his object was to aid him in paying for the land which he had bought. But a gift was not the only mode by which that object could be accomplished. Aid might be extended by a sale of slaves, which Thom could readily apply towards discharging his debt; the vendor Hansbrough consenting to take a very low price, or even a full price, on long time of payment. It is in express proof that Hansbrough said, two, three, or six months before the transaction took place, that he intended to sell Thom a parcel of his negroes, and wait with him for the purchase money; and that Thom might apply them to the discharge of his debt. And the testimony exhibits him to the last moment, as engaged in negotia-

tions and arrangements, in relation to these negroes, to which he regarded the concurrence of Thom as necessary. All this is intirely consistent with the idea of a sale, but is utterly incompatible with the idea of a loan or gift. The order, therefore, given to Thom for the slaves, proves, when taken in connexion with the other testimony, a sale and not a gift. I think the judgment should be affirmed.

BROOKE, J., concurred.

TUCKER, P. Upon the trial of this cause in the circuit court, the defendants by their counsel tendered a demurrer to evidence, which was joined by the counsel for the plaintiff. He objected, it is true, to the court's permitting the defendants to demur; but this seems to have been because it was allowed after some progress had been made in the cause before the jury; an objection which according to the case of *Hoyle v. Young*, 1 Wash. 150, was not tenable. It is not distinctly asserted, that he was compelled to join in the demurrer, and may therefore be considered as having voluntarily done so.

Upon this demurrer to evidence, nothing appears but the evidence produced by the plaintiff to support the issue joined on his part; and the case is, therefore, freed 157 from *the embarrassment which has arisen, and may often arise, where a variety of testimony is introduced on both sides, and all inserted in the demurrer, in pursuance of our settled practice in Virginia. But, though the case is disembarassed in this regard, it is not without its difficulties, arising out of the exceedingly remote inferences, which it is proposed to draw from the matters set forth in the demurrer. The discussion has given rise to renewed remarks upon the difference between the english practice and ours, on demurrers to evidence; a subject fully discussed in *Green v. Judith*, *Whittington v. Christian*, and other cases. The practice with us is assailed, both as inconvenient, and as trenching upon the unquestioned privileges of the party, to have the facts of his case determined by the jury, instead of their being submitted to the decision of the court. Without meaning to bring these matters into serious discussion, or to compare the relative conveniences of the two modes of proceeding, I shall avail myself of the occasion to make one or two observations.

In the first place, I will remark, that I perceive no essential difference between the english practice and ours, as to the privilege of jury trial. By the former, it is required that the demurrant shall admit every fact, which the evidence of his adversary conduces to prove; *Gibson v. Hunter*, 2 H. Black. 207. Who is to decide what facts the evidence thus conduces to prove? Not the jury, assuredly, but the court. *Id.* 209. So with us: the demurrant being held to admit all that the jury could reasonably infer against him from the evidence, and to waive all his own testimony which contradicts that offered against him, and all objections to the credit of the testimony demurred to, the court no more passes upon the credit or the weight of evidence here, than in the english courts. The only

difference is, that in England, according to what is said in the cases, the facts which the evidence conduces to prove, are ascertained by the court at the time of the demurrer, and spread upon the record, and thus distinctly admitted by the demurrant; whereas, in *Virginia, those facts are ascertained by the court at the time of the argument of the demurrer, as fairly inferrible from the testimony of the party, the verity of which his adversary is not permitted to question. Whether the one or the other course is most convenient, seems to be a subject of difference between the most able judges: Compare the opinion of Green, J., in *Whittington v. Christian*, 2 Rand. 357, with that of Carr, J., in *Green v. Judith*, 5 Rand. 4. But, I confess that I am upon reflection strongly inclined to think with judge Green, that with the limitations prevailing in our courts, "the party whose evidence is demurred to, has all the benefit of the ancient practice, without subjecting the other party to its inconveniences; and no disputed fact is taken from the jury and referred to the court." There are, it is true, some difficulties, where there is a variety of facts on both sides, the practice in reference to which yet remains to be settled. With those I shall not meddle here.

I remark, next, that, notwithstanding the position that the demurrant must admit upon the record, the facts which the evidence conduces to prove; and notwithstanding the observation of lord chief justice Eyre in *Gibson v. Hunter*, that the court is to regulate the admissions which are to be made upon the record; yet the demurrer to evidence in that case, set forth, as we do, the evidence at length, and not the facts it was supposed to prove. And though it is true the court decided "that the examination of witnesses had been conducted so loosely, or the demurrer been so irregularly framed, that there was no manner of certainty in the state of facts, upon which judgment could be founded," and moreover declared that the defendant could not compel the plaintiff to join in demurrer, "unless he distinctly admitted upon the record, every fact and every conclusion which the evidence given for the plaintiff conduces to prove;" yet this rule does not appear to have been rigorously followed in other cases, even in England. For, in *Cocksedge v. Fanshaw*, Doug. 119, long anterior to *Gibson v.*

Hunter, the demurrer was framed precisely like our own; as *will appear from the note to *Gibson v. Hunter*, 2 H. Black. See too, 2 Plow. 1, and Tidd's prac. forms 325. I doubt not, our practice has been taken from that case, decided in the court of king's bench by Mansfield and Buller. Be this as it may, our reports, from Pendleton's time to the present day, bear recorded evidence of the uniformity of the practice in Virginia, of inserting the evidence in the demurrer, putting no admissions upon the record, and leaving the inferences from the evidence, to the court, as is now customary in our tribunals. In all our courts (and there are more than two hundred of them) this is the received practice. It would be pregnant with mischief to attempt to change it judicially. On

the faith of the decisions of this court, parties litigant have acted, and are perhaps at this moment acting. It is one of those matters of practice which goes to the very right of the parties, and not to form merely; and he who has rested his case upon a demurrer drawn according to the established practice of our courts, may lose his estate through faith in our adjudications, if we should now unexpectedly alter the course of them.

Lastly, I will observe, before I proceed to pronounce on the particular case before us, that I think the expression, "that the demurrant must admit, or is considered as admitting, every fact which the evidence may conduce to prove," must not be understood too broadly. The language of this court is more appropriate; "that the demurrant must be considered as admitting all that could reasonably be inferred by a jury from the evidence given against him." For evidence may conduce, that is, tend or contribute towards the proof of a fact, which it is very far from establishing, and which could not be fairly inferred from it. Thus, in the present case: the order from Hansbrough to his overseer to shew and deliver the slaves to Thom, is one link, and a very important one, in the chain of proof to establish the fact of a sale by the former to the latter; and, in this sense, it may very truly be said to conduce to prove a sale. But, surely, from that fact alone, no jury or court could be justified
160 *in inferring a sale, which is a transaction complicated of various facts, such as the transfer of the property by the vendor, and the actual delivery of the possession to, and the payment of a consideration by, the vendee.

What then, is the case under consideration? It is a case in which, according to my conception, nothing can be inferred in favour of the plaintiff, except that Hansbrough had made him a present of the slaves from motives of regard. So strong, indeed, is this evidence—evidence too introduced by the plaintiff himself—that I have not the slightest doubt he went for a gift upon the trial of the cause, and that the judgment of the court proceeded upon the sufficiency of the evidence to establish such gift. On no other principle, can we account for his introducing this sort of evidence, instead of that of agreed price. The circuit court was not apprised of the decision in *Durham v. Dunkly*, 6 Rand. 135, and it is very possible, that very decision has induced the appellee to shift his battery, and go for a sale, as he now finds he cannot sustain his title as a gift. Be this as it may, there is nothing which, to my mind, can justify the inference that there was a sale. A sale implies a contract, for a valuable consideration. The case, as it is presented, affords no foundation, on which to rest even a violent presumption, that there was a consideration paid, contracted to be paid, or contemplated by the parties. Had there been such a consideration, the evidence would lead us very fairly to infer that we should have heard of it, through the witnesses, from the communicative old man. But his design was to aid his grandson, not to traffic with him. He meant to

relieve him by paying his debt, not by shifting his burden. The only instance of his speaking of selling the slaves, occurred some months before; while all his recent conversations pointed to an act of benevolence from a rich old man to a favourite kinsman. The whole testimony, indeed, conduces, that is, leads or tends, to prove that a gift was intended and not a sale. I am, therefore, of opinion, that the judgment ought to be reversed. But the opinion of the court is that it be affirmed.

161

***Jackson v. Ligon.**

November, 1831.

Wills—Construction*—Case at Bar.—Testator, after making provision for his wife by his will, devises, that after his wife's death or marriage, his land shall be sold, and the money arising from the sale equally divided among all his children: widow renounces the will, and dower is assigned her: **Held**, ex'or has no power to sell during widow's life and widowhood, or to sell part of the subject.

Specific Performance—Sale of Land—Title—Reference to Commissioner.—Bill in county court, by vendor against vendee, for specific execution of agreement for sale and purchase of land: vendor insisting he has a good title to convey, and vendee that title is defective, and both parties by the pleadings referring the question (which is a question of law on the construction of a will) to the court; and the cause is brought to hearing by consent, neither party asking a reference of the title to a commissioner: **Held**, in such case, the court ought not to refer the title to a commissioner, nor, if title be defective, to give vendor time to perfect it, but should proceed to decide the question.

Same—Same—Decree Compelling Vendee to Take Defective Title;—Reversal—Case at Bar.—County court, in such case, though the title is, in truth, defective, without reference of the title, decrees specific execution: vendee appeals to superior court of chancery: **Held**, the chancellor ought to review the decree of the county court, upon the

***Wills—Construction.**—Under a power given the executor to sell the real estate of his testator after the death or marriage of the testator's widow, who renounced the will and dower as assigned her, such executor has no power to sell the land during her life or widowhood. For this proposition the principal case is cited and followed in *Raper v. Sanders*, 21 Gratt. 73.

***Sale of Land—Title—Reference to Commissioner.**—Where the facts are all before the court, and the objection to the title to land purchased is a question of law, it is unnecessary to refer the title to a commissioner. *Goddin v. Vaughn*, 14 Gratt. 128, citing *Jackson v. Ligon*, 3 Leigh 161, 180 (see also, *note*). The principal case is also cited in *Hudson v. Max Meadows, L. & I. Co.*, 97 Va. 347, 33 S. E. Rep. 586.

***Same—Specific Performance—Defect in Title.**—In *Newberry v. French*, 98 Va. 484, 36 S. E. Rep. 519, it is said: "It is well settled that a purchaser of land, at a private sale, will not be required to pay his purchase money and take in exchange therefor a defective or even doubtful title, and especially is this true where, as in the case at bar, he has contracted for a good and sufficient deed, which undertaking is not confined to the form of the deed, but includes a good title. *Garnett v. Macon*, 6 Call 309, 367; *Jackson v. Ligon*, 3 Leigh 174; *Christian v. Cabell*, 22 Gratt. 82; *Hendricks v. Gillespie*, 25 Gratt. 181; *Clark v. Hutzler*, 96 Va. 73, 30 S. E. Rep. 469; and *Matney v. Ratliff*, 96 Va. 231, 31 S. E. Rep. 512." See also, citing the principal case, *Max Meadows, L. & I. Co. v. Brady*, 92 Va. 84, 22 S. E. Rep. 845.

And in *Creigh v. Boggs*, 19 W. Va. 252, citing the principal case, it is said that the rule governing courts of equity and suits for specific performance of a contract for sale of land is, that if the purchaser can get substantially what he contracted for, the agreement will generally be enforced at the suit of the vendor. To the same effect see, citing the principal case, *foot-note* to *McKee v. Barley*, 11 Gratt. 340.

Also in *Butcher v. Peterson*, 26 W. Va. 450, citing the principal case, it is said, when a purchaser has notice of a defect or encumbrance and requires from the vendor a warranty, the presumption of law is that the covenant was expressly taken against such known defect or encumbrance.

Courts do not sit to overthrow the agreement of

actual state of case at time of the decree there; and as the decree was erroneous in compelling vendee to take defective title, to reverse it, and dismiss vendor's bill; and he ought not to open the proceedings, refer the title, give the vendor time to perfect it, and in case he succeeded in doing so, decree specific execution.

Same—Same—Time Made of the Essence of Contract by Acts of Parties—Effect.—In the case of an executory agreement, though the time appointed for performance may not be made (originally, by the terms of contract) of the essence thereof, yet it may be made material by the conduct of parties or circumstances afterwards; and, if so made material, the party in default is not entitled to demand specific execution against the other.

Same—Same—Right of Vendee to Perfect Title.—If, in an agreement for sale and purchase of land, vendee is apprised that vendor's title is defective, and agreement stipulates that vendor shall convey to vendee, a good and lawful right by a given day; at appointed day, vendor insists that his title is perfect, though in truth it is defective, upon which vendee, having received possession under the contract, abandons the possession, and refuses to proceed with the purchase, upon a bill for specific execution, by vendor against vendee, **Held**, vendee's previous knowledge of defects in the title, is no reason for compelling him to take such title as vendor can convey, that being defective.

Same—Same—Title to Part of Land Defective.—Upon bill for specific execution of agreement for sale and purchase of a tract of 686 acres of land for cultivation, vendor's title to 200 acres of tract is defective; this is separated from the residue by a public road, and all the improvements are on the residue, in which vendor has a perfect title: **Held**, vendee shall not be compelled to take the residue.

This was a bill exhibited by Ligon against Jackson, in the county court of Prince Edward in chancery, for spe-

parties but to carry them into effect where they are legal and equitable and reasonable. *Rader v. Neal*, 13 W. Va. 388.

***Same—Time of Essence of Contract.**—It will not be presumed that time was intended to be of the essence of a contract for the sale of land, from the mere fixing of a day for the delivery of the deed or payment of the purchase price. *Smith v. Fromitt*, 82 Va. 849, 850, citing the principal case. To the same effect the principal case is cited in *Barrett v. McAllister*, 83 W. Va. 750, 11 S. E. Rep. 294; *Hukill v. Guffey*, 37 W. Va. 472, 16 S. E. Rep. 530.

In *Abbott v. L'Honnmedieu*, 10 W. Va. 677 (citing the principal case at page 712) it is held that, ordinarily, time is not considered in courts of equity of the essence of the contract for the sale of realty, and especially as to the payment of purchase money. There may, perhaps, be circumstances or terms employed which will take the case out of the general rule.

***Same—Specific Performance—Title to Part of Land Defective.**—In *Kenner v. Bitely*, 45 Fed. Rep. 134, citing the principal case, it was held that where the deficiency between the actual survey of the land and the amount as described in the agreement was so very great that a conveyance could not be a substantial compliance with the contract and a court of equity cannot decree specific performance *pro tanto*.

A vendor, in the absence of any stipulation to the contrary, is bound to make a good title free from encumbrance of every description which may embarrass the full and quiet enjoyment of the premises by the purchaser. *McAllister v. Harman (Va.)*, 42 S. E. Rep. 922, citing *Garnett v. Macon*, 6 Call 308, Fed. Cas. No. 5,245; *Jackson v. Ligon*, 3 Leigh 161; *Hendricks v. Gillespie*, 25 Gratt. 193, 194; 2 Min. Inst. (4th Ed.) 876.

In *Johnston v. Jarrett*, 14 W. Va. 238, it is said: "Where the contract made between the parties compels the vendor to convey the land with covenant of general warranty, and to put the party in possession of the land, a court of equity will protect the vendee against a defect of title to any part of the land included in the contract, although that defect was known to the purchaser, when the contract was made, unless there has been a waiver by the purchaser of such objection to the title. *Jackson v. Ligon*, 3 Leigh 161. The parties must be bound by the contract they made, if it was free from fraud and mistake." See monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 3 Gratt. 243.

See the principal case cited in *Fidelity Ins., etc., Co. v. Shenandoah Val. R. Co.*, 33 W. Va. 265, 9 S. E. Rep. 187.

162 cific *execution of articles of agreement between the parties, executed the 12th November 1822, whereby Ligon covenanted to sell to Jackson, a tract of land in that county, containing by estimation 686 acres, but the quantity was to be ascertained by actual survey: for which Jackson covenanted to pay Ligon 15 dollars per acre, in four equal instalments, the first on the 1st January 1823, the second on the 1st May 1824, the third on the 1st September 1825, and the last on the 1st January 1827, and to give bond, with good and sufficient surety, for the payment of each of the instalments. And Ligon covenanted to give Jackson full and complete possession on the 25th December 1822, and meantime to allow him the privilege of preparing or using the land for crops, so that he should not interfere with Ligon's crop of tobacco then in the tobacco houses, or with any other property of Ligon then on the land. And Ligon bound himself to make Jackson a good and lawful right to the land, on or before the 1st January 1823, at which time the first payment was to be made.

In the interval between the date of the articles and the 25th December following, Jackson sowed a crop of wheat on the land, and full possession was given him on the 25th December 1822, according to the covenant. The parties met on the 1st January 1823, for the purpose of executing the articles; when Jackson requested that the business should be postponed for a few days, alleging (according to the account given by one witness) as his only reason for the request, that, as he had not been apprised of the exact quantity of the land, he was not then prepared with his bonds with surety for the deferred payments, but (according to two other witnesses) he suggested also, the same doubt about the title, which he afterwards specially objected, and which he then said it was necessary to examine; and, as those doubts arose out of the provisions of Owen Haskins's will, under which part of the land was claimed, he required Ligon to produce the will. Ligon assented to the postponement; and the

163 *the parties agreed to meet again on the saturday following. They both attended at the day and place appointed; Jackson prepared to make the first payment, and to give his bonds with surety for the deferred payments, and tendering them, if Ligon should make him a good and clear title; and Ligon prepared with a deed duly executed by him, conveying the land to Jackson in fee, with several warranty. Ligon tendered this deed to Jackson, and he shewed him the will of Owen Haskins under whose executor he claimed a large portion of the land, but Jackson refused to accept Ligon's deed, alleging specific objections to Ligon's title to that portion of the land claimed under Haskins's executor, requiring that the title should be cleared of those objections, and declaring that unless the defects or doubts of the title were removed, he would not proceed with the purchase. Ligon denied that there was any defect in the title, and insisted, that his deed with warranty was a full and just execution of the articles on his part,

and that nothing more could be required of him. Upon this, the parties separated, without executing the contract. And, a few weeks afterwards, Jackson abandoned the land, and the contract.

In January 1824, Ligon exhibited his bill in the county court in chancery, wherein, after setting forth the articles of agreement, and Jackson's refusal to proceed with the purchase, he proceeded to state his title to the land: that the whole tract was found, by survey, to contain 698 acres; 489 acres of which, he held under a conveyance from his father, and as to that the title was indisputable; and as to the residue of the tract, 209 acres, he claimed two thirds thereof under a sale and conveyance with general warranty, made to him by Thomas Haskins, executor of Owen Haskins, in virtue of a power to sell vested in him by his testator's will; and the other third thereof he claimed under a contract made between him and Albert Haskins, one of the devisees of the testator Owen Haskins, who was entitled to this third; to which contract, he said, Thomas Haskins, the executor, had given his assent, and

164 which *Ligon had completely executed on his part, but Albert, though of full age, had died without making him a conveyance. He exhibited Owen Haskins's will, and the conveyance made to him by Thomas Haskins the executor, but he did not exhibit the contract between him and Albert Haskins. He then alleged, that, at the time of the contract between him and Jackson, Jackson was exactly informed of the state of the title; that the title was, in fact, such a good and lawful title, that Jackson could never be disturbed in the enjoyment of the subject; that his conveyance with general warranty, tendered to Jackson in January 1823 (which he also exhibited) was such a good and lawful right to the land, as he was bound to make, and Jackson bound to accept, by the articles of the 12th November 1822, and that he was not bound to do any thing more on his part, to entitle himself to demand performance of the contract on Jackson's part. And he prayed a decree for specific execution.

Jackson, in his answer, admitted that Ligon's title to the 489 acres, which he claimed under the conveyance from his father, was perfect; but as to the 209 acres, whereof Ligon claimed two thirds under the sale and conveyance of the executor of Owen Haskins, and the other third under the contract between him and Albert Haskins, he objected, that the executor had no authority under his testator's will, to make such sale and conveyance, so that Ligon had no title whatever to the two thirds he claimed under him; and that, as to the other third thereof, which he claimed under Albert, he had, by his own shewing, only an equitable title. He acknowledged, that he was present at the sale made by the executor, which was a public one, and was apprised that the executor professed to make the sale in execution of a power vested in him by his testator's will; and his confidence in the executor's judgment was such that he did not doubt he had the power; but he never was informed of the actual provisions of the will, until after his

contract with Ligon was made. He said, that he expressly stipulated *that Ligon should make him a good and lawful right on the day appointed; and relying on that covenant, he took possession of the land, as stated in the bill, and prepared himself to execute the contract on his part, in good faith; but, finding that Ligon had no good title to so large a portion of the land, and yet refused to take any steps to perfect the title, insisted that his title was already perfect, and that his own conveyance with warranty, was a full compliance with his covenant to make a good and lawful right to the land, and declared he would do nothing more, he, therefore, immediately declined to complete the purchase and abandoned the contract, and as promptly as he could abandoned also the possession of the land. He referred to the terms of the covenant, whereby Ligon bound himself to make him a good and lawful right to the land on or before 1st January 1823, when the first payment was to be made by him; and insisted, that Ligon was absolutely bound to perfect the title in himself, and to convey a clear title to him, at or before the time appointed, and that his failure to do so absolved him, the purchaser, from all obligation to complete the purchase.

The controversy, then, turned upon the state of the title of the 209 acres.

This was parcel of a tract of 438 acres, whereof Owen Haskins died seized in fee in January 1808, having by his last will and testament devised and bequeathed as follows: "It is my will and desire, that all my just debts shall be paid by my executor; and that the following slaves (naming three men) shall be sold on twelve months credit, and the money arising from the sale thereof shall be laid out in young female slaves, for the benefit of my wife and children. It is my will &c. that all the money due me, after my debts are paid, shall be laid out by my executor in any manner he may think best for the benefit of my wife and children. It is my will &c. that my estate shall be kept together for the support of my wife and children, and as my children come of age or marry, they shall receive their proportionable *part of my personal estate, reserving one third part for the support of my wife, and at her death or marriage to be equally divided among all my children, to them and their heirs forever. It is my will &c. that my executor shall be at liberty to put such improvements on my land, as he in his discretion shall think proper, for the accommodation of my wife and children, and shall be at liberty to buy stock of any kind, and exchange or barter it, in any manner he may think best. It is my will &c. that, after my wife's death or marriage, my land shall be sold, and the money arising from the sale be equally divided among all my children." And the testator appointed Thomas Haskins his executor, who took upon himself the executorship.

The testator's widow renounced the provision made for her by the will, real and personal, and claimed her dower of the real, and thirds of the personal, estate of her deceased husband.

The testator left at his death, six children, all infants; Mary, Catharine, Albert, Edward, Henry and Francis. Mary and Catharine died infants, unmarried and intestate, their mother and four brothers them surviving.

Albert attained to full age; and exhibited his bill in the county court of Prince Edward, against the widow and the executor of his father, and his three brothers, who were still infants; setting forth his father's will, and the widow's renunciation of the provisions thereby made for her; and praying, that the widow's dower of the testator's lands might first be assigned her, and then partition made thereof among himself and his three infant brothers. To this bill, the widow and executor filed their answers, and an answer was put in for the infant defendants by a next friend; no guardian ad litem was assigned them. The court made an interlocutory decree, appointing commissioners to assign the widow her dower, and to make partition among the four brothers. At this stage of that proceeding, Albert, the plaintiff therein, died without issue and intestate. And then Ligon

(Jackson's vendor) exhibited his bill, 167 in the same *court, against the same parties defendants, referring to Albert Haskins's bill, and the proceedings thereupon; stating Albert's death; alleging that Albert, before his death, had transferred his whole interest in his father's land to him, as well what he derived from his father, as what he derived from his two deceased sisters, Mary and Catharine; that these having derived their shares of the land from their father, and died in infancy, their shares descended to their four brothers, to the exclusion of their mother; that, therefore, Albert, and Ligon claiming under him, was entitled to one fourth of the land, subject to the widow's dower; praying, that he might be substituted in Albert's place, and that the widow's dower might be assigned her, and partition made between him and the three infant brothers of Albert. To this bill also the widow and executor of the testator Owen Haskins, and the three infant defendants, Edward, Henry and Francis Haskins, not by guardian, but by next friend, put in an answer, admitting the allegations of the bill, and assenting to the decree therein prayed for. Upon the strength of this admission in the answer, without any proof whatever of the alleged transfer by Albert of his share to Ligon, the county court at July term 1822, made an interlocutory decree, appointing commissioners to assign the widow her dower, and to make partition among the other parties according to the prayer of the bill. In October 1822, the commissioners, in pursuance of this decree, assigned 146 acres of the testator Owen Haskins's land to the widow for her dower, and allotted 86 acres to Edward Haskins in severalty, and the residue, 209 acres, to Henry and Francis Haskins, and Ligon claiming Albert's share, jointly. The commissioners having made a report of this division of the land, the court, at July term 1823, made a final decree, confirming the report and establishing the division, and directing the same commissioners to convey Albert's one undi-

vided third of the 209 acres to Ligon, without giving the infant parties any day, after their attainment to full age, to shew cause against the decree.

168 *And this was the precise state of Ligon's title to Albert Haskins's third of this parcel of 209 acres of land, at the time this suit of Ligon against Jackson was heard in the county court, and of the decree of that court in the same. The commissioners appointed to convey it to Ligon, had made no such conveyance.

As to the other undivided two thirds of the 209 acres, which belonged to Henry and Francis Haskins, which Ligon claimed under the sale and conveyance of Owen Haskins's executor, it appeared, that the executor made the sale and conveyance thereof to Ligon in October 1822, while Henry and James Haskins were still infants, in virtue of the provision contained in his testator's will, which directed that, "after his wife's death or marriage, his land should be sold, and the money arising from the sale be equally divided among all his children," notwithstanding the testator's widow was still living, and still remained unmarried. And she was still living, in widowhood, at the time of the hearing of Ligon's suit against Jackson, and of the decree of the county court therein. So that the sufficiency of Ligon's title to these two thirds of the 209 acres, depended on the question, whether the testator Owen Haskins's will gave his executor power to sell his lands, after his widow had renounced the provision made for her by the will, but before her death or marriage.

The evidence as to the precise time when Jackson abandoned the possession of the land, was vague. A witness examined for Ligon, deposed, that Jackson, after sowing a crop of wheat, received full possession on the 24th December 1822, and that he abandoned the possession within a few weeks afterwards.

It was doubtful also, upon the proofs in the cause, whether or no Jackson was apprised of or suspected the defects in the title, at the time of his contract with Ligon. It was proved, that the sale by the executor of Haskins, was made at public auction, in October 1822; that the executor stated publicly, that he was selling as
169 executor under his testator's will, for the benefit of his two infant children Henry and Francis, and that he would give a deed with a special warranty, and his own bond with surety, that the title should be made good, when the infants attained to full age, and that Jackson was present, and the witnesses supposed must have heard this; he was a bidder at the sale. On the other hand, it was proved, that, at the time of the treaty and contract between Jackson and Ligon, Jackson told Ligon he knew nothing about the title, and told the person who wrote the articles, to write such a contract as would bind Ligon to convey him a good title, and bind him to pay the purchase money. The deed of Haskins's executor to Ligon contained a covenant of general warranty; but no bond with surety, that the title should be made good when the infant owners attained to

full age, was given by or demanded of him.

The cause was pending in the county court, from January 1823 till July term 1826, when it was brought on for hearing by consent of the parties, upon the state of the case as above detailed, neither party asking or proposing a reference of the title. The county court decreed a specific execution of the articles; that Jackson should accept Ligon's deed with general warranty for the whole tract of 698 acres, which had been tendered to him in January 1823, and pay the purchase money according to the articles.

From this decree Jackson appealed to the superiour court of chancery of Richmond. And before the cause was heard in that court, viz. in November 1827, Ligon filed the following deeds:

1. A deed, dated the 9th February 1826, executed by Henry Haskins (now of full age) to Ligon, releasing and confirming to him all his right in the land sold him by his father's executor.

2. A deed, dated the 26th December 1826, executed by the commissioners appointed by the decree of the county court, of July 1823, in Ligon's suit against the widow, executor and infant sons of the testator Owen Haskins, in pursuance *of
170 that decree, conveying to Ligon, Albert's third of the 209 acres of land; and along with this deed, Albert's covenant to sell Ligon this property, and the receipt of Albert's administrator for the purchase money.

3. A deed, dated the 19th December 1826, purporting to be executed by Catharine Haskins, the widow of the testator Owen Haskins and mother of all his children, and all the persons who could possibly have any interest, as heirs of that testator, or of his children, or any of them,—reciting the sales made to Ligon by Albert Haskins, and by the executor of Owen Haskins, that the testator's sons Edward and Henry attained to full age and then died, having both by their wills devised their whole estates to their mother Catharine, and that his daughters, Mary and Catharine, and his son Francis, died infants,—and conveying, releasing and confirming, to Ligon, all the right, title and interest, of the grantors in the 209 acres of land.

The cause was not heard in the court of chancery, till June term 1828, when the chancellor, without affirming or reversing the decree of the county court, referred Ligon's title to a commissioner, with directions to report the state of it, and whether Ligon had made, or could make, a clear title to the whole, or any part, of the land; if only part, what part; if his title was defective as to any part, whether that was essential to the beneficial enjoyment of the part of which he had conveyed or could convey a good title; and if he had a good title to the whole to convey, at what time he acquired the title.

The commissioner reported, that Ligon's title to the 489 acres he derived from his father, was perfect, and never had been doubted; and, as to the 209 acres, he referred to the three deeds filed since the cause had been pending in the court of chancery, and reported, that they conveyed,

released and confirmed, to Ligon, a perfect title in this parcel of the land, except as to about one seventh of Francis Haskins's one third thereof, which, it seemed to the commissioner probable, though not certain, belonged to three persons, who
171 *were entitled to shares as his heirs at law, and who had not joined in the general deed of the 19th December 1826. And he reported, that the parcel of 209 acres, was separated by a public road from the 489 acres, and all the buildings on the whole tract were upon the latter parcel: that, upon the question whether the former was essential to the beneficial enjoyment of the latter part, the affidavits of many persons had been laid before him (which he returned with the report) and these were very variant and conflicting: that his own opinion was, that, though the parcel of 209 acres was a convenient appendage to, it was not essential to the beneficial enjoyment of, the 489 acres.

The chancellor, upon the final hearing, in April 1830, was of opinion, that at the time of the decree of the county court, Ligon's title was defective, and that court erred in decreeing specific execution without having first referred the title to a commissioner, to be examined and stated; and, therefore, he reversed that decree with costs. But he was also of opinion, that Ligon's title was now perfect, and that if the county court had perceived the defect of the title when the cause was heard there, and had proceeded regularly, and made a reference of the title, Ligon could have perfected the title there, as he had done here; and, therefore, proceeding to make such decree as the county court ought to have pronounced, if it had proceeded regularly, and the same results that now appeared had appeared there, he decreed a specific execution; adjudging that Jackson should pay the whole purchase money with interest; and, in case of his failure to pay it within four months, ordering a sale of the land to be made by the marshal, and the proceeds to be brought into court to be applied by future order to the satisfaction of the debt. From this decree Jackson appealed to this court.

The cause was argued by Johnson and Leigh, for the appellant, and by the attorney general, Taylor and Stanard, for the appellee. There were five points made and discussed at the bar.

172 *1. Whether the time appointed by the articles of November 1822, for the conveyance by the vendor to the vendee of a good and lawful right to the land, was of the essence of the contract? or was made material by the circumstances of the transaction, and the conduct of the parties? For if it was, and if the vendor had not then a clear and perfect title, no matter whether or at what time he afterwards got the title in, he was not entitled to specific execution.

The appellant's counsel thought, that, in the case of a purchase of land in this country for cultivation, where the purchaser covenants to pay the purchase money in several and distant instalments, and stipulates that a good title shall be assured to him at an early day before he shall part

with any of the purchase money, the time, in general, was highly material, and ought to be regarded as of the essence of the contract: that, in such a case, while the credit enhanced the price of the subject, the purchaser always reckoned on the profits, to be derived from his own labour and capital applied to the cultivation of the land, as a fund to aid him in making the deferred payments; but, unless he should be assured of the title at the time stipulated, he could neither safely make any improvements, nor certainly know whether the profits would be his own to dispose of; for if evicted, he would have to account to the true owner for the profits, while the owner would not be bound to make him any compensation for his improvements, nor would he be entitled to recover, on the usual covenants for assurance of title, the value of the improvements from the vendor: that, thus, the failure of the vendor to make a perfect title at the time stipulated, disappointed the purchaser, in very material respects, of the benefit of his purchase: therefore, that the case of such a purchase here, was different from the common case of purchase of lands in England—lands already improved to the utmost and yielding a certain rent; it was, in principle, like the case of a purchase of a house for a residence, and other cases

173 *specific view, in which the time appointed for the conveyance of a clear title is regarded as of the essence of the contract, on the ground that the failure of the vendor to perfect the title, defeats the purpose of the purchase. But, however this might be in the general case, they said the circumstances of this particular case, and the conduct of the parties, made the time appointed for the performance of the vendor's covenant to convey, unquestionably material. The vendee expressly stipulated, that the vendor should make him a good and lawful right on the 1st January 1823, when the first payment was to be made; the time was extended to the Saturday following, by mutual consent; the vendor then tendered his own deed with warranty, and upon the vendee making specific objections to the title, he insisted that the title was good, and neither offered to take measures to perfect it, nor in fact took any: he left the vendee no alternative but to take a title, doubtful at least if not plainly defective, or to decline to proceed with the purchase. The vendee did immediately decline to proceed, and shortly after abandoned the possession; yet the vendor acquiesced for a year without insisting on the contract; for his suit was not brought till January 1824. They cited the opinion of C. J. Marshall in *Garnett v. Macon*,* p. 15, 53, 4; *Lloyd v. Collett*, 4 Bro. C. C. 469, 4 Ves. 689, in notis; *Harrington v. Wheeler*, 4 Ves. 686; *Guest v. Homfray*, 5 Ves. 818.

The appellee's counsel said the case of *Garnett v. Macon* alone sufficed to refute the suggestion, that there was a peculiarity, in respect of the question whether time was of the essence of the contract, in a sale of

*This was a case decided in the circuit court of the U. States for the district of Virginia. It was reported and published in a pamphlet form by Collins & Co. Richmond.—Note in Original Edition.

lands in this country for cultivation; that case was like this, and though it was held that a change of circumstances rendered the time material, yet time was not held to be of the essence of the contract. Time may indeed, be made essential, but only
 174 *by plain agreement to that effect; Sugd. Law Vend. ch. 8, § 2, p. 284-292; Append. No. VI, p. 6.* But, so far from there being any thing of that kind in this contract, the provision, that partial possession should be immediately permitted to the vendee, and full possession given to him, before the time appointed for the conveyance of the title, shewed, conclusively, that time was neither of the essence of the contract, nor originally deemed by the parties at all material. And the vendee held the possession till after the time for the conveyance of the title had passed by; and that was a waiver of all objections founded on the failure of the vendor to make a good title at the precise time appointed. Therefore, they said, this case was to be added to the numerous cases, in which a vendor has been held entitled to specific execution, if he can make the title at the time of the decree. They cited Sugd. ch. 8, § 2, p. 282, 3, where the cases are collected; and they referred, particularly, to *Langford v. Pitt*, 2 P. Wms. 630; *Wynn v. Morgan*, 7 Ves. 202; *Coffin v. Cooper*, 14 Ves. 205; *Levy v. Lindo*, 3 Meriv. 80; *Boehm v. Wood*, 1 Jac. & Walk. 419; *Hepburn v. Auld*, 5 Cranch, 262, 275; *Hepburn v. Dunlop*, 1 Wheat. 179; *Brazier v. Gratz*, 6 Wheat. 528, 533.

II. Whether, in fact, Jackson had knowledge of the alleged defects of the title, at the time the contract was made? and supposing he had, what influence that circumstance would have on the construction of the contract? and how far such notice, coupled with the fact of possession taken by him, would bind him to proceed with the purchase, notwithstanding the defects of the title?

As to the point of fact, both parties appealed to the evidence. Supposing Jackson had full knowledge of the defects of the title, the appellant's counsel said, it could not bind him to take a bad or doubtful title; and it rather served to account for and explain the stipulation he insisted upon, that a good and lawful right should
 175 be made to him at the *precise day when he was to make the first payment. The appellee's counsel said, it was apparent, that if Jackson was apprised of the defects of the title, he must have known that they could not be removed at so early a day; and they cited Sugd. ch. 8, § 2, p. 286, 7; *Pincke v. Curteis*, 4 Bro. C. C. 329; *Seton v. Slade*, 7 Ves. 265; *Syme v. Johnston*, 3 Call, 558.

III. The appellant's counsel insisted, that it was quite clear, that, at the date of the articles, at the date appointed for the conveyance of the title, and at the date of the decree of the county court, Ligon, the vendor, had no title to 209 acres of land. As to the third of that parcel, he claimed only an equitable title, and that upon the strength of a decree palpably erroneous,

and subject to be set aside by the infant parties whenever they attained to full age. And as to the other two thirds, claimed under the executor of Owen Haskins, they said, the will of that testator gave the executor a mere naked power to sell, after the death or marriage of the wife, and gave all the children an interest in the profits till one of those events should happen, and gave them unequal interests. The wife's renunciation of the provisions made for her by the will, entitled her to dower, but only disturbed the testator's disposition of his property pro tanto. The power to sell could never arise so long as the wife was living and remaining in widowhood.

The counsel for the appellee said, that, when the wife renounced the provision made for her by the will, the reason that induced the testator to postpone the sale till her death or marriage, ceased; but the purpose for which he authorized the sale remained, and that purpose required the sale to be presently made. This was not a naked power, but a power coupled with an interest, or (which is the same thing) with a trust. *Osgood v. Franklin*, 2 Johns. Ch. Rep. 20, 21, 14 Johns. Rep. 553, 4 S. C. Such powers ought to be expounded liberally, so as to accomplish the intention and purpose for which they are given. *Jackson v. Veeder*, 11 Johns. Rep. 169; *Roberts v. Stanton*, 2 Munf. 176 129. *A power to sell after the death of a tenant for life, may be executed during the life. *Harg. Co. Litt.* 113a, note 2; Sugd. on Powers, 272; *Uvedale v. Uvedale*, 3 Atk. 117; *Sutherland v. Northmore*, 1 Dick. 56.

IV. And then, the question was—supposing this a case, in which the vendor was entitled to specific execution, if he could make a good title at the time of the decree, and supposing the decree of the county court erroneous, because he was then unable to convey such a title—what ought the court of chancery to have done, on the first hearing of the cause there, upon the appeal from the decree of the county court? Ought it to have reversed that decree, merely because the county court had not referred the title to a commissioner, and then to have retained the cause, referred the title, and made its final decree upon the commissioner's report shewing the title perfected since the decree of the county court? or, to have reversed that decree in omnibus, and dismissed the bill?

The counsel for the appellant maintained, that the latter was the only decree that could properly be made. They said, the doctrine that a vendor is entitled to specific execution, if he enable himself to convey a perfect title at the time of the decree, must have relation to the time of the decree of the court to which he resorts for relief, not to the time of a final decree in an appellate court, to which the cause may eventually be carried, by appeal from a decree which he himself has asked and obtained. The error of the county court consisted simply in decreeing specific execution when the plaintiff was no wise entitled to it, and when the defendant was entitled to a dismissal of the bill. There was no error, not the least irregularity, in the omission

to refer the title to a commissioner: 1. because the cause was brought to hearing by consent, and neither party asked a reference of the title. 2. Because the plaintiff, without having taken, without offering to take, any steps to perfect the title, or pretending that he could or would make a better title, relied upon the title he 177 already had as a good one, *such as the defendant was bound to take; which the defendant denied; and both parties joined in submitting the dry question to the court, as to the sufficiency of the title in the then actual state of it. *Rose v. Calland*, 5 Ves. 186; *Omerod v. Hardman*, Id. 722. 3. Because there was no certainty, that the title could be perfected in any reasonable time: that depended on the infant owners living to attain to full age, and then confirming the title, or, if they should die in infancy, leaving no infant heirs entitled to share the inheritance (a very uncommon case under our system of descents) but only heirs of full age, competent and willing to confirm the title. Nothing could exceed the hardship of keeping the purchaser in such suspense. In this respect, the case was like *Mackreth's* part of the case of *Whittaker v. Whittaker*, 4 Bro. C. C. 31.

The appellee's counsel contended, that wherever a case is made by the pleadings, in which a vendor will be entitled to specific execution of the contract of sale, if he shall be able to make the title at the time of the decree, it is the duty of the court to refer the title to a commissioner, in order to ascertain whether the vendor can make a good title, or has the means of compelling others to do it, and to give him the opportunity to perfect the title, unless such reference be waived, unequivocally and without fraud or surprise; *Jenkins v. Hiles*, 6 Ves. 646. And this, though the questions upon the title, are mere questions of law; *Marlow v. Smith*, 2 P. Wms. 198; *Cooper v. Denne*, 1 Ves. Jr. 565; *Abel v. Heathcote*, 2 Ves. Jr. 98; 4 Bro. C. C. 278; *Roake v. Kidd*, 5 Ves. 647. As to the question, whether an appellate court may direct a reference of the title, when the inferior court has improperly neglected to do so, they said the case of *Omerod v. Hardman*, cited for the appellant for another purpose, was decisive on this point; for there, though it was not thought proper to refer the title, yet the question as to the reference was entertained in an appellate court.

And this court upon an appeal from 178 a decree of the *court of chancery, has directed a reference of the title; *Beverley v. Lawson*, 3 Munf. 317.

V. The last point was, whether admitting that the plaintiff was not entitled to specific execution of the contract as to the 209 acres, he was entitled to specific execution as to the other parcel of 489, as to which it was agreed on all hands he had, from the beginning, an undoubted title? The authorities cited upon this point were, *Sugd. Law Vend. ch. 6*, p. 209-214, and the cases there cited, particularly *Poole v. Shergold*, 2 Bro. C. C. 118; *Thompson v. Jackson*, 3 Rand. 508.

CARR, J. This is a bill by a vendor

against the vendee, for the specific execution of a contract for the sale of a tract of land. The county court decreed a performance: On appeal to the superiour court, the chancellor, without acting upon the decree, referred the title to a commissioner; upon whose report and other evidence taken in that court, the chancellor on a final hearing reversed the decree, as having been entered prematurely, and then decreed a specific execution.

Was the decree of the county court right? It is a principle laid down in many cases in equity, that an unwilling purchaser shall not be compelled to take a title with a cloud upon it; and that principle is assuredly strengthened here, where the party has contracted for a good and lawful right. What was the state of the title at the time of sale? The tract consisted of 698 acres; to 489 acres of which, the vendor had an unquestioned title. To the residue, 209 acres, his title was of a different character: he held two thirds of it, by a deed from the executor of *Owen Haskins*, who had sold it under the will of his testator; and the other third, by a purchase from *Albert Haskins*, a son of the testator, of his undivided third part, but for this part he had no conveyance. The validity of his title to the part purchased from the executor, depended on the question, whether the executor had power under the will to 179 sell when he did? *The words of the will are—"It is my will and desire, that after my wife's death or marriage, my land shall be sold, and the money arising from the sale be equally divided among all my children." The testator had in a former part of the will, directed that his estate should be kept together for the support of his wife and children. The wife renounced the will, but was neither dead, nor married; and the children whose shares of the 209 acres the executor sold, were infants. It seems to me too clear for discussion, that the sale of the executor, under these circumstances, was not authorized by the will. Call it a naked power, or a power blended with a trust; construe it strictly or liberally; still you cannot make it a power to sell the land, while the wife was living and unmarried. The title, then, to these two thirds was clearly defective. The title to *Albert's* part was equally so: it was at best, nothing but an equity.

But it was insisted, that the vendee, at the time of his purchase, was well acquainted with the nature of the plaintiff's title, and therefore is bound to take such as he can make. I do not consider the fact of his knowledge sufficiently established: he denies it in his answer; and we hear him calling for a sight of the will, when the deed was tendered to him. However, suppose him to have had this knowledge, I do not think it would oblige him to take a defective title, even on a sale at auction; it might induce the court to give the vendor time to perfect the title; but, surely, the court would not oblige him to take a defective title, in the teeth of his covenant, by which he stipulated to get, and the vendor bound himself to give, a good and sufficient right, at a short day.

It was contended, that admitting the title

to the 209 acres, to be defective, there are still 489 acres, about the title of which there is no dispute, and that the court ought to have executed the contract thus far: and much evidence, pro and con, was taken, as to the importance of these 209 acres to the enjoyment of the tract of land purchased. There are 180 *many cases that say, a trifling deficiency of a few acres in a tract of land, possessing no peculiar value in relation to the general tract, will not prevent the specific execution of a contract, as such deficiency lies in compensation (10 Ves. 306, 14 Ves. 413,) and this is interfering sufficiently with men's contracts. I have never seen, and I hope never shall see, a case going so far as is asked here. A man buys a farm of a certain size for cultivation; you deprive him of nearly a third, and insist that he shall take the residue, as a substantial compliance with the contract. This would be truly to make contracts, and not to execute those already made.

At the time, then, of the hearing before the county court, I am clearly of opinion, that the plaintiff had not made out such a case as authorized a decree for specific execution. Ought that court to have dismissed his bill, or to have referred the title to a commissioner, and given further time for perfecting the title? As to further time, no such thing was asked or thought of; no imperfection in his title was admitted by the plaintiff; on the contrary, he insisted by his bill, that his title was perfect, and that the deed which he had tendered, and which he exhibited with his bill and made part of it, was a full compliance with his contract. This was the issue made up by the parties, and submitted to the court; and to try this, they went to hearing by consent. Further time then for improving the title, was wholly out of the question. Ought the court to have sent the case to a commissioner for his report upon the title, before it proceeded to decide upon it? I think clearly not. The whole depended upon a dry point of law, which the court had as directly before it upon the pleadings and the evidence, as it ever could have it. To have sent the case then to a commissioner would have been to incur a vain and useless expense and delay; and that, when neither party wished it, but both were anxious for an immediate decision of the case in its actual posture. Even in England, where 181 their commissioners are men of learning and professional skill, a *reference would not have been ordered in such a case. This is clear from the cases cited at the bar, of *Rose v. Calland* and *Omerod v. Hardman*, where a reference was pressed and refused by the chancellor, —in the first case, saying, "he should create a needless expense by it"—and by *Chambre justice*, and *baron Graham*, in the last case, (sitting in the duchy court of Lancaster,) upon the same ground. I conclude, then, that the county court, on the hearing, ought neither to have given further time, nor to have referred the title; but finding it essentially and materially defective, should have dismissed the bill.

It is equally clear to me, that on the ap-

peal, the chancellor ought to have tried the case upon the record, as it stood before the court below, and to have reversed the decree and dismissed the bill; which having failed to do, I think we should now reverse his decree and dismiss the bill.

CABELL, J., concurred.

BROOKE, J. The plaintiff put his claim to a specific execution of the contract, on two grounds; 1. on the validity of his title to the 209 acres purchased of the executor of Haskins and of Albert Haskins, his title to the 489 acres not being questioned; and 2. on the defendant's knowledge of the defect of the title to the 209 acres, supposing it to be defective.

I think there was nothing in the allegation that the defendant was apprised of the defect in the title, if any, at the time he entered into the contract. It is probable enough, that both parties believed that the title to the 209 acres of land was a good title, when the contract was entered into: yet the plaintiff stipulated to make the defendant a good and lawful right to the land: and the defendant's knowledge of its defects could not affect him, since he did not rely on that knowledge when he made the contract. *Stockton v. Cook*, 3

Munf. 68. If Jackson was asking 182 for a specific execution *of the contract, the case would be different: proof that he knew of the state of the title when he made the contract, would compel him to take the title, as he understood it at the time; or the court would dismiss his bill; it would not execute the contract in the terms of it. But he is here asking nothing of the court, and insisting on his legal rights under the contract; and there is nothing in his conduct to affect his conscience. If he had purchased the land at the sale made by Haskins's executor, at which he was a bidder, and had relied on his understanding of the title, and that alone, on a bill for specific execution, he would be compelled to take the title, as it was represented to him by the auctioneer; that is, the title he bargained for. But, in the case before us, however confident he may have been, when he made the contract, that the title was a good one, he was not bound to make an adventuring contract on his knowledge of the title; and he did not do so; on the contrary, he took a contract binding the vendor to make him a good and lawful title.

In this view of the case, there was nothing before the county court, to justify a reference of the title to a commissioner. Its validity depended on a just construction of the will of Owen Haskins, and the authority of his executor to sell the land under it. It was a dry question of law, for the decision of which the report of a commissioner could furnish nothing, and which the court alone was competent to decide.

That the county court erred in its decision is very clear. The sale by the executor was certainly premature. There are cases, in which the power of a trustee to sell, may be executed before the expiration of the time prescribed by the instrument giving the power; as in the case of *Uvedale v. Uvedale*, where the widow claimed as a creditor. But, in the case before us, the sale

cannot be justified by the authority of that case, or any other. The renunciation of the will by the widow, was a release of her interest in the execution of the power, but was not equivalent to her marriage *or death (the events, on the happening of either of which, the executor was authorized to sell) either in the intention of the testator, or as regarded the interests of the parties, under the power. Some of them were infants; and they entitled to unequal interests in the subject, until one of the events prescribed by the will should happen. The intention of the testator was, in either of those events, the marriage or the death of the widow, the whole, and not a part, of the subject should be sold. The power to sell the whole and divide the money among the children, was a trust, which was not properly executed by selling a part after dower was assigned to the widow. The county court erred, then, in deciding that the title was a good and lawful title. There is nothing in the case to justify its decree, on the ground of a waiver by Jackson, of his title according to the terms of his contract. There is no proof, that, at the time he took possession of the land, he agreed to take any but a good and lawful title according to his written contract. His abandonment of it, in a few weeks after he discovered that the vendor could not make him a title until infants should come of age, nor then, if others also, in whom the title was in part, should dissent and elect to take the land, was evidence to the contrary.

Neither is this a case for compensation. It would be to make a contract for him, to compel him to take the 489 acres only, at a value not put on it by himself; for he has valued it in connexion with the 209 acres, and not by itself. As to time not being of the essence of the contract, unless expressly made so (which it is not in this case); time, nevertheless, may be very material to the justice of the case. Jackson was to pay for the land by instalments, and might reasonably calculate on the profits to assist him in the payments. To continue in possession under a doubtful title (at least) might be ruinous to him: he might pay the instalments, and put improvements on the land, or its value might be enhanced by other causes, and then he might lose all.

184 *It is the settled rule of this court, not to compel a vendee to pay the purchase money until he gets a title. In the state of the case before the county court, the bill ought to have been dismissed. And when the cause came into the court of chancery by appeal, that court ought to have reversed the decree of the county court, and to have rendered such decree as the county court ought to have rendered; there being no ground on which to retain the cause in that court, laid in the proceedings of the county court. Both decrees ought therefore to be reversed, and the bill dismissed.

TUCKER, P. In examining this case, I shall begin with the inquiry, what decree the court of chancery ought to have pronounced upon hearing the appeal from the decree of the county court? The practice

in such cases is perfectly familiar to the profession. Where the appellate court is of opinion, that the inferior court has erred, it proceeds not only to reverse its decree, but to make such decree as the court below ought to have made. Thus, its reversal may be absolute and in omnibus, not only annulling what has been done in favour of one party, but entering an absolute decree in favour of the other; or it may be partial and interlocutory, when the court below has proceeded prematurely to adjudicate finally between the parties, without such preliminary inquiries, as appear, upon the face of the record, to have been essential to enable the court to pronounce upon the rights of the parties, with a full understanding of the case. Thus, in the present instance: if the county court ought to have decided, that there was no ground for specific performance, the decree should have been wholly reversed, and the bill dismissed with costs: for this the appellant's counsel contend. But, if there was enough in the record to shew that, instead of decreeing specific performance, on the one hand, or dismissing the bill on the other, the court should have directed a reference of the title to a commissioner, before it proceeded to pro-

185 nounce definitively between *the parties, then the court of chancery ought to have reversed the decree, and to have proceeded to direct that reference, which ought to have been directed by the inferior tribunal. Nor do I think the irregularity of omitting to affirm or reverse the decree, definitively, when the appeal was first heard, is material, provided the chancellor did not, in his subsequent decision, bring matters, introduced into the cause ex post facto, to bear upon the antecedent question of error or no error in the county court. This, indeed, would be altogether erroneous; for, except in a few cases, founded on the practice of the spiritual court, and some others resting on particular statutory provisions, it is a practice unknown to our law, for a superior court, when reviewing the sentence of an inferior, to examine the justice of the former decree, by evidence which was never produced below. We must, therefore, consider the decree of the county court, upon the proofs in the cause at the hearing there.

In that state of the cause, ought the county court to have pronounced the decree it did? If not, ought it to have dismissed the bill? or directed a reference of the title to a commissioner? That the decree of the county court was not justified by the proofs in the cause, was admitted by the chancellor. But I go further than he has done, being of opinion, that nothing appeared before the court to justify even a reference of the title, and that the bill of the plaintiff should therefore have been dismissed. This brings us to an examination of the merits of the controversy.

By the contract between the parties, Ligon contracted to give Jackson possession on the 25th December 1822, and to make him a good and lawful right, on or before the 1st January following. It was not a mere engagement to seal and deliver a conveyance, with the usual covenants of title,

which Jackson regarded; the vendor bound himself to make a good and lawful right, and this, by the terms of the contract, was to be accomplished by the 1st January.

Whether Jackson knew, or did not know, at the time of the *contract, that the title was defective, is wholly immaterial: if he did not know it, he surely ought not to be compelled to take a defective title that was concealed from him, and which he could not have intended to receive: if he did know it, he provided against it expressly, by the covenant that required a good and lawful right to be made by a given day; and if, in the present case, the purchaser would be concluded from objections to the title, by the fact of his prior knowledge of its defects, it is not perceived what course a buyer is to take who desires to secure himself against known defects. The case of *Stockton v. Cook*, 3 Munf. 68, very clearly shews the understanding of this court, that a covenant against incumbrances, comprehends known as well as unknown incumbrances, and that the vendee is not precluded by his previous knowledge, from claiming the fulfilment of the covenant. Were it otherwise, it would be impossible for him to provide for his security.

The contract, then, having bound the vendor to make a good and lawful right, not with reference, as he supposes, to Jackson's notions of a good title, but with reference to the well established principles of the law, the next question is, whether a rigorous compliance with this engagement on the appointed day, was essential to Ligon's right to specific execution? This brings us to the subject of time being of the essence of the contract.

At law, in every case of dependent covenants, time is of the essence of the contract, since the plaintiff cannot recover without shewing performance on his part, or readiness and ability to perform. But, in equity, it is, upon general principles, otherwise. It is the boast of that court, that it looks at the substance of things, and is regardless of forms; that it relieves against penalties and forfeitures incommensurate to the injury which the party has done, and where ample compensation can be made will compel his adversary to accept such compensation. On like principles, although a vendor may not have complied in strictness with his contract to convey,—or the vendee 187 may not have paid his money *precisely at the stipulated time, equity will, nevertheless, upon a proper case made, enforce the contract, instead of permitting either party to insist on an arbitrary forfeiture of its benefits. Out of the exercise of this jurisdiction has grown the idea, that, in equity, time is not regarded as of the essence of a contract, and a false report of an opinion of lord Hardwicke, in *Gibson v. Patterson*, 1 Atk. 12, carries it to an extent in no wise justified by reason or later authorities. That parties may, if they please, make time of the essence of their contract, is not clearly admitted, and seems to follow from the unquestioned right of parties to frame their contracts at pleasure, unless, indeed, it can be shewn that this stipulation is against moral right, or positive law. It would seem, then, that the in-

tention of the parties is, in this, as in other cases, to be looked to; and where it is plain that, in default of a strict performance on one part, it was the intention that the contract should cease to be binding on the other, that intention must be carried into effect: for courts do not sit to overthrow the agreements of parties, but to carry them into effect, where they are legal, equitable, and reasonable.

It cannot be denied, however, that the mere appointment of a day for the payment of money, or delivery of a title, has not been regarded as a sufficient indication that time is of the essence of the contract. *Seton v. Slade*, 7 Ves. 273-5. And, in the case at bar, there appears to me nothing to shew, that the parties so designed it here. There is, indeed, a strong provision to prove the contrary; the provision, namely, that Jackson might proceed to prepare for a crop, and should have possession on the 25th December, only seven days before the day fixed for making a title. On that day, he accordingly took possession, and actually went on the land to reside. Now, if time was of the essence of the contract, the first of January must have decided that it was either good or void; and, in that view, it is scarcely to be conceived, that Jackson would have contracted for the possession on the 25th December, with the risque 188 of being *obliged to relinquish it on the 1st January for want of title, instead of fixing the day of possession to the 1st January, only seven days later, when all suspense would have necessarily terminated.

But though time may not have been of the essence of the contract, yet it may have been rendered by the conduct of the vendor or vendee, subsequent to the contract, of the essence of the transaction between the parties. Such, I conceive, has been the case here. Jackson, I have little doubt, supposed that the title from Haskins the executor, and perhaps, that from Albert Haskins, would be good. But when he had, as I suppose, taken counsel of his friend, or of his lawyer, and found that the will conferred no authority on the executor, to sell during Mrs. Haskins's life and widowhood, he distinctly announced his objection to Ligon, refused to receive the title, and, in a few weeks, renounced the possession. It is said, indeed, that the time of his quitting the premises does not appear; that it might have been months, or a year. But I think we cannot infer that Ligon's own witness would have used the terms weeks, if the continuance of possession had been for months; nor, indeed, does any man, even in common parlance, ordinarily use the lesser denomination where the use of the greater is appropriate to the fact. I take it, then, that the possession was relinquished within a month; the rejection of the title was distinctly announced, and Jackson returned to his own home. In this, I think, he was fully justified, if he had good reason to be dissatisfied with the title. To have continued the possession would have been to close the door upon his objections. Moreover, if his objection to the title was a valid one, (the want of power in the executor to sell) it was most for-

midable, since it would have required years, and a fortuitous occurrence of events, ever to make it good. Whether, therefore, time was or was not of the essence of this contract, I think the vendee was justified at this early stage of the transaction, in this prompt, and (as far as we can see)

189 this bona fide rejection of the title, and of the "purchase. He has not, in the language of the books, "turned round the contract upon frivolous objections." He has renounced it upon vital and well founded objections, which it would have required years to remove, if indeed they were ever susceptible of removal. After this measure, Ligon is not heard of until the commencement of the suit, just twelve months after the renunciation of the contract by Jackson: he gives no notice to Jackson, that he shall attempt the completion of the title, or the enforcement of the contract; nor does he sue for that purpose until twelve months have elapsed. Neither has he proved, that he also abandoned the property, which, if true, would have been a fact of some importance in estimating his conduct in this affair. The case is thus brought, I think, strongly within the influence of that of *Lloyd v. Collett*, 4 Bro. C. C. 469; 4 Ves. 689. See also 4 Johns. Ch. Rep. 559. It is not reasonable, that a purchaser, who in proper time has urged his objections to a title, and who on discovering that a good title cannot be made, has at once refused to perform the agreement, should be compelled to abide by it.

In this view of the transaction, it will be perceived, I have assumed as a postulate, that the title in this case was clearly defective, and that there was no reasonable calculation that it could be rendered otherwise. It is, therefore, proper that this question should in its turn be examined, though very cursorily.

The better opinion, upon the authorities cited at the bar, seems to me to be, that a power given to an executor to sell after the determination of a life, cannot be executed during that life. The sacrifice inevitably attendant upon the sales of reversionary interests, renders such a measure always hazardous; and, therefore, it is not fair to presume, where such a power is not given by the testator, that he could have designed it should be exercised by his executor. In this case, however, the widow by renunciation of the will has relieved two thirds of the estate from the incumbrance of her life, and has thus enabled the executor to

190 *proceed to a sale, which would not be liable to the objections, applying to the sales of reversionary interests. But, while one difficulty is removed, another is substituted of a not less formidable character. The testator directed the whole tract to be sold after his wife's death or marriage. His wife has claimed her dower; that has been laid off to her. If, as usual, it comprehends the dwelling house, and curtilage, and other improvements on the land, then it is impossible to say, that either the sale already made by the executor has not been injured by this partition, or that the sale of the dower land, after the widow's death, will not be so affected. It is not only very possible, but highly prob-

able, that the sale of either without the other, would be prejudicial to both; and this is a matter which the heirs of Haskins, at a remote period, might have thought proper to litigate with Ligon, or with Jackson, if he had been the purchaser. It is impossible, I think, (to use the language of the books) that this court should compel Jackson to buy a law suit. Whether the legal title was in the executor or not, whether there was a trust, or an imperative duty or a mere power, the act of the executor in selling under such questionable circumstances, and in selling, moreover, the shares of two out of four heirs, when each had a right that the intirety should be sold for the joint benefit,—was liable to a rigorous scrutiny by the heirs, when they should attain to full age. When this would have been, does not distinctly appear in the record; but, as there were several under age at the time of the contract, it is certain that several years must have intervened, before the youngest would attain his full age, so as to ratify the act of the executor, and to quiet the title of the vendee. Could it be expected, that Jackson was to be held in suspense during this interval; and encounter, when it was determined, the sheer chance of the children ratifying the transaction? But this is not all. Those children might die before they attained their majority. Their interests might have devolved upon numerous heirs scattered over the country, some perhaps femes

191 covert, and *others infants of more tender years than themselves, whose acquiescence in the premature exercise of his power by the executor, would be the less easily acquired, in the disadvantageous situation in which he was placed. Thus circumstanced, I do not think Jackson was bound to accept a title so defective, and which could not be rendered good for several years, and might never be rendered good. He was not bound to speculate on the possibility of Ligon's being able to buy out or quiet the claims of the heirs. He was not bound to take an estate, which he must either suffer to remain unimproved, till the cloud had passed which hung over the title, or which he must improve at imminent hazard. He was not bound to take an estate without a marketable title, since without such title he might be subjected to the heaviest loss. Had he taken it, and found it necessary to sell, the doubt about the title would have rendered it a dead property on his hands; and (as this very decree shews) it might be forced by Ligon himself into the market for sale, with a cloud hanging over it, arising out of his own failure to fulfil his express engagement to make a good and lawful title.

It may be said, indeed, that it was impossible for Ligon to obtain the title. Be it so. Then what is the consequence? The answer is plain. As he cannot do what he undertook to do, as he cannot perform his contract, he ought not to expect Jackson to abide by it. He ought to be well satisfied, that there are no worse consequences, from his having contracted to do, what he now finds he cannot do. I have no doubt, that he contracted in good faith; that he supposed the executor's conveyance

and Albert's contract were sufficient; and so, very possibly, did Jackson. But the latter did not choose to rest upon this opinion: he bound his vendor to make him, by a given day, a good and lawful right; and that vendor, too confident in his title, undertook accordingly. When he found he could not perform, and that Jackson promptly renounced the contract, he ought not to have hesitated to abandon his pretension to enforce it.

192 *In the view which I have taken of the title under the executor, I have not thought it necessary to scrutinize narrowly, the character or extent of his power; since, under any aspect, a purchaser under him must inevitably be exposed to the hazard of loss and litigation. It is, however, my opinion, that the executor in this case had but a bare power; that there is nothing from whence a technical trust can be inferred; and that the legal title descended to the heirs, subject indeed to the provision made for their support during the life and widowhood of the wife, and subject further to be divested by a due execution of the power after her death or marriage. If this be so, then the legal title was not conveyed by the premature exercise of his power by the executor, and all that his deed could pass was a questionable equity; which no purchaser is bound to take.

It is not necessary to point out the other defects of this title, at the time of the decree rendered by the county court. The invalidity of the conveyance of the executor, is itself sufficient to vacate the contract, unless it could be shewn that the vendee, even without this land, would get what he substantially contracted for. Of this, no evidence was before the county court; nor is it reasonably to be inferred, when we find that Jackson himself was a bidder for this very property at the executor's sale; that Ligon purchased it and sold it as an appendage to his own land, and that, to say the least, others besides Jackson deem the Haskins tract an important appendage to the Ligon tract. Besides this, there is no such allegation in the pleadings, but they stand solely upon the question, whether there has or has not been a compliance with the contract on the part of Ligon.

Upon the whole, I think it clear, that at the time of the decree in the county court, Ligon had not complied, and could not comply, with his contract; and, of course, the bill ought to have been dismissed, unless that court ought either to have referred the title to a commissioner, or have given further time for the completion of the title. Neither of these things, in my opinion, ought to have been done.

193 *As to reference of title: This practice, now so well settled in England, has not, I believe, prevailed very generally with us. The reason for having a report, is said to be, that the ground upon which the court proceeds, may appear upon the record. And, in England, where titles are complicated by mortgages, terms, family settlements, and outstanding trusts, it is of great importance as well as convenience, that such references should be made. The necessity can more rarely exist with us,

where the title is generally more simple and the question of its validity is fairly presented by a few title papers of the simplest form. For, as the commissioner's opinion upon the validity of the title, is liable to exception, and to the revision of the court, it is obvious, that where the question of title is already fairly presented, and a distinct point is offered to the court for its consideration, a reference would only lead to embarrassment and expense, without subserving any beneficial end. The english practice will be found, indeed, I think, to coincide with this principle.

There, when a vendor files a bill for a specific performance, stating that he was unable to complete his title at the time fixed, but that he is now ready to do so, if he makes such a case as entitles him to relief in case he can make a good title, the court will refer the title to a master for his report. And, even when the vendor states that he is yet unable, but shews that he will soon be able, to perfect the title, the court, upon a proper case made, will direct the master to report whether a good title can be made at the time of the report, and if so, or if it can even be made at the date of the decree, it may suffice. In these cases, it must be observed, a single naked question is not often presented to the court, but the general question of the validity of the title proposed to be made; and, therefore, a reference is directed, in order that the necessary abstracts and information may be laid before the court, and the points of dispute fairly and distinctly pointed out, either by the report, or by exceptions which may be filed to it. So, if the defendant

194 *in answer to the allegation that the plaintiff can now make a good title, asks for a reference, by his answer or by motion, he is peculiarly entitled to it, as the plaintiff is asking relief beyond the law. 6 Ves. 646.

But, I think, there is no invariable rule, even in England, that the court ought never to decide upon the validity of the title, but should send the title to a master. This is established by the cases of *Rose v. Calland*, and *Omerod v. Hardman*. The latter is peculiarly strong and appropriate. (By the way, the remarks of the judges, upon the merits of the case, have a strong bearing upon this case.) The bill was filed in the court of chancery of the county palatine of Lancaster, for specific performance by a purchaser. The defendant by his answer took a variety of objections to the plaintiff's ability to make a good title; all of which, however, grew out of the instrument under which the plaintiff assumed the power to sell the premises. The vice chancellor dismissed the bill, without referring the title. In the argument, this omission is made the substantive objection to the decree of dismissal, although the counsel admitted, that if it had incontestably appeared, that a good title could not have been made, the decree would have been right. *Chambre, J.*, said, 'against this decree it is said, that there is an invariable rule that the court ought not to decide upon the validity of the title, in the first instance, but that the title ought to be sent to the master, and should be

taken into consideration by the court upon his report. If there was an inflexible rule of that sort, it would dispose of the case. But if no authority had been cited, I should find it very difficult to accede to that idea, that there should be such inflexible rule: for if it should clearly appear to the court, upon the pleadings and the evidence, that there are objections not to be removed, it would be an idle and unnecessary expense to the parties, to answer no purpose, to make such a reference. We are, however, relieved from any difficulty from the circumstance of a very recent and decided authority by the lord chancellor,"

195 (meaning *Rose v. Calland*) *Baron Graham coincided in this opinion: "What" (he emphatically asks) "is the effect of sending the case to a master, when we see the title can only be good, if the heir and other persons join?" And these opinions seem to be strongly sustained by the lord chancellor, in the case of *Jenkins v. Hiles*, which was cited for the appellee: he there distinctly intimates, that it is not the practice of the courts to refer the title to a master, where the answer of the defendant offers, "for the decision of the court, one neat dry point upon which his objection rests." Speaking, moreover, of the case of *Omerod v. Hardman*, he appears to approve the principle laid down by the judges as to this doctrine of reference, though (if I understand him rightly) he had some doubt of the propriety of its application to that case. He considers the cases of *Rose v. Calland*, and *Omerod v. Hardman*, as not within the ordinary rules requiring a reference, being cases where the vendor comes for specific performance, and the vendee calls for a decision upon the title offered by the vendor, who, instead of shewing by his bill that he can heal defects, puts himself upon the title he has offered, and chooses to abide by that. He says, that admitting the vendor's right, under the general rule, to clear away difficulties between the hearing and the report, "it would be difficult to say, that there could be no case, in which the plaintiff might not have stated himself so conclusively, that the court should hesitate in the first instance to decide. If I am to state a doubt upon the case in the duchy court, it would be a doubt, whether it could be collected from what was stated by the plaintiff, that, if the title was imperfect, it was stated conclusively, or whether, if stated conclusively, it was doubtful."

From this view of the cases, I am clearly of opinion, that a reference to a commissioner by the county court, was neither necessary nor proper, as this case appeared in that court; and a fortiori, it could not have been proper to give time to the plaintiff, from month to month, or from year to year, to see whether he could buy out or extinguish the outstanding rights to this

196 property. It is going far enough *to give time, as is sometimes the effect of a reference, to enable the party to get in the title, where he has already a right to the estate, and where the vendee is in possession, as was the case in *Beverley v. Lawson*, a fact I conceive of the utmost importance in these cases. But, I doubt whether

any case can be made, in which it would be proper to give a plaintiff, who seeks a specific performance against a defendant, who has promptly rejected the title as defective, and thrown up the possession, an indefinite time to see, whether he can purchase up the rights of others in the estate, in order to enable him to comply with his engagements after the lapse of years. Such, in effect, I conceive this case to have been.

Both decrees reversed, and bill dismissed.

Jackson's Adm'x v. Henderson &c.

November, 1831.

Appeal Bond—Miscrital—Effect—Case at Bar.—The condition of an appeal bond miscrits the judgment appealed from, as being for \$3900, when in truth it was for \$3957, but recites the judgment correctly in all other respects: *Quære*, whether such miscrital renders the appeal bond naught? **Same—Defective—Objection after Five Years—Effect.***

—Judgment for H. against J. in circuit court, from which J. appeals to court of appeals; circuit court requires an appeal bond, and J. gives one, which though defective is accepted by circuit court, and the appeal brought up; pending the appeal J. dies, and the appeal is revived by his adm'r; after lapse of five years from date of judgment, which is the limitation to a writ of error or supersedeas, appellee objects that the appeal bond is defective and naught, and moves that the appeal shall be dismissed, unless the appellant's adm'r shall give a good bond: Motion overruled.

Case Agreed—Evidence Variant—Effect.—The parties to an action agree the case, by detailing the evidence, and then admitting the facts stated in the evidence; the evidence detailed is in some respects variant and conflicting: *Held*, the court can give no judgment on such a case agreed.

New Trial—Verdict Contrary to Evidence—Evidence Certified.—Upon a motion to set aside a verdict, and for a new trial, on the ground that the verdict is contrary to evidence, the motion is overruled, but the circuit court refuses to certify the facts proved by the evidence, and only certifies the evidence, and that nothing appeared to

197 impeach the credit *of any part of it: bill of exceptions states the evidence at large, which is, in some respects, variant and conflicting: *Held*, this bill of exceptions is not well taken, and the appellate court cannot review the judgment of the circuit court overruling the motion for a new trial.

Same—Same—Proper Remedy;—Quære.—What is the party's remedy, in such case, when the court refuses to certify the facts proved in evidence?

Bill of Exchange—Assumpsit—Allegations—Proof.—A declaration in assumpsit on a bill of exchange, by holder against endorser, alleges that "when the bill became due and payable according to the tenor and effect thereof, to wit, on the 27th Decem-

***Appeal Bonds—Objection—Waiver.**—On this question the principal case is cited in *foot-note* to *Johnston v. Syme*, 3 Call 522; *Pugh v. Jones*, 6 Leigh 304; *Va. F. & M. Ins. Co. v. N. Y. Carousal Mfg. Co.*, 95 Va. 517, 28 S. E. Rep. 888. See monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 263.

***Bills of Exception—Verdict Contrary to Evidence—Certification of Evidence.**—The principal case is cited in *foot-note* to *Callaghan v. Kippers*, 7 Leigh 608; *foot-note* to *Tallaferro v. Franklin*, 1 Gratt 332; *Patteson v. Ford*, 2 Gratt. 34, and note; *Pryor v. Kuhn*, 12 Gratt. 618; *Valden v. Com.*, 12 Gratt. 724, and note; *foot-note* to *Ewing v. Ewing*, 2 Leigh 337; *Gimmi v. Cullen*, 20 Gratt. 450; *Read v. Com.*, 22 Gratt. 929; *Morgan v. Fleming*, 24 W. Va. 192. See monographic note on "Bills of Exception" appended to *Stoneman v. Com.*, 25 Gratt. 887.

***Bills of Exception—Mandamus to Compel Court to Sign.**—The principal case is cited in *Page v. Clopton*, 30 Gratt. 423, where it is held that mandamus is the proper remedy to compel the court to sign a bill of exceptions. The principal case is also cited in *Henry v. Davis*, 13 W. Va. 248, where the same is held. See monographic note on "Bills of Exception" appended to *Stoneman v. Com.*, 25 Gratt. 887.

***Bills of Exchange—Presentment—Variance between Allegation and Proof—When Immaterial.**—The princi-

ber 1816, at the bank of Marietta in Ohio" (where it was payable) it was presented for payment, and dishonoured; the 27th December was not the third but the fourth day after the time appointed for the payment of the bill: *Held*, that, as it was averred that the bill was presented when it became due and payable according to its tenor and effect, and the date of the presentment was stated under a scilicet, the date so stated was not material, and the plaintiff might have proved presentment on the third day of grace.

Same—Same—Same—Presentment on Fourth Day of Grace—Usage.—It seems, that when a bill is made payable at a place or bank, at which there is a special established usage, that bills there payable shall be presented on the fourth and not on the third day of grace, such special usage must be alleged in the declaration upon such bill, otherwise proof of presentation on the fourth day of grace is not admissible.

Same—Same—Same—Allegations—Variance in Proof.—In assumpsit on a bill of exchange, drawn in Virginia, payable at the bank of Marietta, Ohio: the declaration counting on the general law merchant, and the general issue being joined: *Held*, that as the general law merchant requires presentation on the third day of grace, proof of presentation on the fourth day of grace does not support the issue on the plaintiff's part.

In a suit of Henderson against Jackson, in the circuit court of Harrison, judgment was rendered against Jackson in his lifetime, for 3957 dollars, with interest and costs; from which Jackson prayed an appeal, which was allowed him, "upon his entering into bond with sufficient surety, in the penalty of 8000 dollars, conditioned as the law directs." An appeal bond was forthwith executed by Jackson and his surety, in open court, in the condition whereof the judgment appealed from was recited as a judgment for 3900 dollars only, omitting fifty-seven dollars; and the court, not advertent to this misrecital of the judgment in the condition, accepted the appeal bond, and the cause was brought up to this court. While the appeal was pending here, Jackson died, and the appeal was afterwards revived by his administratrix;

and before the cause came on to be argued *in this court, more than five years (the limitation to a writ of error or supersedeas, 1 Rev. Code, ch. 128, § 19, p. 492,) had elapsed since the date of the judgment of the circuit court.

And now Stanard, for the appellee, objected that the misrecital of the judgment in the condition of the appeal bond, rendered the bond naught, so that, if the judgment should be affirmed, the appellee could never have any remedy upon it; and, therefore, he moved, that the appeal should be dismissed, unless a good and sufficient appeal bond should now be filed, and for a rule upon the now appellant to that purpose.

Johnson and Leigh for the appellant, did not admit that the defect in the appeal bond would be a fatal objection to it in an action upon it; but supposing it was so, they said the motion came too late. The bond had been accepted by the circuit court, or rather by the appellee, for he made no objection to it, and the appeal had been so long pending here, that, if it should now be dismissed, no writ of error or supersedeas could be obtained; and the original

appellant himself being dead, his administratrix certainly could not be required to execute an appeal bond, which would bind her personally, whether she had assets to pay the debt or not.

TUCKER, P. The appellee cannot, at this late day, have a dismissal on the ground of any supposed defect in the appeal bond, nor can he, Jackson being now dead, be entitled to a rule upon the now appellant, Jackson's administratrix, to give further security upon pain of having the appeal dismissed. The circuit court, which allowed this appeal, has certified in the record before us, that Jackson with his surety, upon the appeal being allowed, did execute such a bond as was required by the order. Admitting that the bond in the record is the bond alluded to, and that it is truly

copied, the defects of that bond (if it be indeed defective, *which I do not mean to decide) were disregarded by the court, or were considered as not fatal to its validity. This defect, if such it be, was an error in the judgment of the court upon a matter vitally affecting the interests of the plaintiff Henderson, and which he ought to have promptly corrected, or to have been considered as waiving. The mode of correction was obvious, by an early motion to this court to dismiss the appeal, if the bond was not good. The appellant could take no step. He had executed such bond as the court required; his appeal was docketed without objection, and has been now depending so long, that, if it be dismissed, there can be no writ of error or supersedeas allowed. This would, surely, be grossly unjust. It would be to permit the appellee to derive a benefit from his own acquiescence in this legal appeal, and to take from the now appellant the right of correcting the error of the inferior tribunal, when neither she nor the intestate has been in any default; for the bond, in this case, was executed and prepared under the supervision of the circuit court, and of the appellee and his counsel. If, indeed, Jackson were now alive, the error, though so lately discovered, might be corrected; but as the appellee cannot now be relieved, without depriving his administratrix of her appellate rights, or requiring her to give security, which as administratrix she is not bound to give, no step should be taken in the cause for its dismissal. It ought to proceed without a new bond to a hearing; which, fortunately, in the present instance, will not be delayed. The case of *Syme v. Johnston*, 3 Call 523, and the rule there established, though not exactly in point, strongly sustains the course the court thinks proper in the present case.

The cause was then heard upon the appeal.

It was an action of assumpsit brought by Alexander Henderson, for the benefit of Gilman & Ammidon, against John G. Jackson, as indorser of a bill of exchange, drawn at Clarksburg (in Harrison county, Virginia) on the 26th *June 1816, by Jonathan Jackson, upon Jonathan Walmesley, in favour of James M'Cally, for 5000 dollars, payable 180 days after the date, at the bank of Marietta in the state of Ohio, which was accepted by Walmesley,

pal case is cited in *Taylor v. Bank of Alexandria*, 5 Leigh 477.

Same—Same—Custom—Pleading and Practice.—The principal case is cited in *foot-note* to *Liggatt v. Withers*, 5 Gratt. 24; *Hansbrough v. Neal*, 94 Va. 725, 27 S. E. Rep. 563. See monographic note on "Bills, Notes and Checks" appended to *Archer v. Ward*, 9 Gratt. 622.

and then indorsed by M'Cally to the defendant John G. Jackson, and by him to the plaintiff Henderson, cashier of the bank of Marietta. The original declaration contained two special counts upon the bill, and two money counts. The defendant pleaded the general issue. And upon the trial of the cause on these pleadings, the jury found a verdict for the plaintiff "subject to the opinion of the court on the facts agreed by the parties." But what was called the facts agreed, was a detailed state of all the evidence adduced by both parties (which in the opinion of the circuit court, and of this court, was variant as to some material particulars, and part of it, indeed, was objected to as incompetent) to which state of the evidence was subjoined an agreement of the parties, in these words: "The parties admit the facts in the foregoing evidence, and agree that the jury shall find a verdict for the plaintiff, subject to the opinion of the court on the said facts, reserving exceptions to the admissibility of any of the evidence aforesaid." The circuit court, at a subsequent term, upon a motion of the plaintiff, set aside the verdict, gave him leave to amend the declaration, and remanded the cause to the rules.

The amended declaration, besides the usual money counts, contained six special counts upon the bill alleging the dishonor thereof, and the defendant's liability, in various ways, but all alike in two respects, 1. All the counts,—after setting out the bill of exchange, as bearing date at Clarksburg, the 26th June 1816, and drawn by Jonathan Jackson, on Jonathan Walmesley in favour of James M'Cally, for 5000 dollars, payable 180 days after date, at the bank of Marietta in Ohio, and setting out the acceptance thereof by Walmesley, the indorsement by M'Cally, the payee, to John G. Jackson, the defendant, and his indorsement to Henderson, the plaintiff,—alleged, that
201 "afterwards, when *the said bill of exchange became due and payable, according to the tenor and effect thereof, to wit, on the 27th December 1816, at the bank of Marietta in Ohio," the bill was then and there duly presented for payment, and payment was then and there duly demanded, and the acceptor then and there failed to make payment; and 2. all the counts charged (as usual) that the defendant became liable to pay the contents of the bill, according to the usage and custom of merchants. (It will be found, upon counting the time, that the 27th December 1816 was the fourth day after the expiration of the 180 days limited in the bill for the payment of the contents.)

To this amended declaration also, the defendant pleaded the general issue. The jury found a general verdict for the plaintiff, and that for a larger sum than the court thought him entitled to; but the plaintiff releasing the excess, the court gave him judgment for the sum to which it held him entitled; namely, 3957 dollars with interest from the 27th December 1816, and costs.

The defendant, having filed five bills of exceptions, two to opinions of the court given at the trial, and three to opinions of the court on motions to set aside the ver-

dict, and direct a new trial,—appealed from the judgment to this court.

1. The first bill of exceptions, stated the facts upon which the points of law submitted to the court arose, and the points of law themselves, so imperfectly and vaguely, that, in the opinion of this court, as it was impossible to decide, so it was unnecessary and improper to examine them.

2. The second bill of exceptions stated, that the plaintiff, at the trial, offered in evidence the bill of exchange in the declaration mentioned, with the acceptance, and the indorsements thereon, which were in these words: "Exchange for 5000 dollars (350 cents stamp) Clarksburg, 26th June 1816. One hundred and eighty after this
first of exchange (the second of the
202 same tenor and date unpaid) *pay to the order of James M'Cally, at the bank of Marietta in the state of Ohio, five thousand dollars, value received, and charge the same, with or without further advice, to account of your obedient servant." (Signed) Jonathan Jackson." (Addressed) "To Jonathan Walmesley, Clarksburg, Virginia." (Underwritten "Accepted; Jonathan Walmesley." (Indorsed) "Pay to John G. Jackson; J. M'Cally"—"Pay to Alexander Henderson, cashier of the bank of Marietta; J. G. Jackson." And the plaintiff proved, that the bill was presented at the bank of Marietta, and demand of payment made there, on the 27th December 1816. Whereupon the defendant moved the court to instruct the jury, that the said 180 days in the bill mentioned, and three days of grace, having expired before the said 27th December, the demand then made was not a good and sufficient demand of the bill, and that for want of a good and sufficient demand, the defendant was discharged from liability upon his indorsement. But the court refused to give this instruction to the jury; to which the defendant excepted.

3. The third bill of exceptions was filed to an opinion of the court, after the verdict was rendered, overruling a motion made by the defendant, to set it aside, upon the ground that it was for a larger sum than the plaintiff was entitled to, for reasons detailed in the bill of exceptions, but which it is needless to state here; for the court concurred with the defendant, and declared that it would set aside the verdict, unless the plaintiff would enter a release for the excess of the sum found by the jury, over and above the amount which the defendant contended, and the court thought, was just; and upon the plaintiff entering the release accordingly, the court overruled the defendant's motion.

4. The fourth bill of exceptions was filed to an opinion of the court overruling another motion made by the defendant to set the verdict aside, and direct a new trial, on the ground that the verdict was contrary to the justice of the case, upon the facts
proved by the evidence. This motion
203 *being overruled, the defendant moved the court to state and certify the facts proved in evidence at the trial, which the court declined doing, otherwise than by setting out the whole evidence on both sides, and certifying that nothing appeared to impeach the credit of any of the witnesses.

Accordingly, this bill of exceptions did not profess to state the facts which the circuit court thought well proved by the evidence: it detailed the whole evidence adduced by both parties at large; and that evidence was, in the judgment of this court, variant and even conflicting, as to some material points. It is only necessary to state, that among the evidence set out in this bill of exceptions, there was evidence adduced by the plaintiff, which he and his counsel, both in the circuit court and here, relied on to prove; that the defendant, with full knowledge of the circumstances touching the dishonour of the bill, and affecting his liability as indorser, had afterwards assumed the payment of the contents to Gilman & Ammidon, the real holders of the bill, for whose benefit the suit was brought; though the appellee and his counsel, in both courts, insisted that the evidence did not prove any such assumpsit.

5. The course which the cause took in this court, rendered the fifth bill of exceptions wholly immaterial, and no notice was taken of it at the bar or by the court.

Johnson and Leigh for the appellant, contended, 1. That the circuit court ought not to have set aside the verdict rendered at the first trial, subject to the opinion of the court on the facts agreed by the parties, but should have proceeded to judgment upon it; for, though the facts agreed by the parties consisted in a state of all the evidence adduced by them both, yet (as they endeavoured to shew) the case and the evidence was such, that the facts, and the whole merits of the case, could no otherwise be stated, more fully, more fairly, or with more certainty, than by stating the evidence. And, therefore, they proceeded to argue the law of

the case upon the facts so agreed at 204 the first trial, *and contended, that judgment ought to have been given for the defendant, upon the conditional verdict then found. 2. They said, the fourth bill of exceptions, also (that taken to the opinion of the circuit court, overruling the motion for a new trial, made on the ground that the verdict was contrary to the justice of the case upon the evidence) presented the merits of the case fully and fairly, for examination, so that this court, reviewing the opinion of the circuit court on this point, might, in effect, determine the cause upon the merits, and put an end to the controversy at once. The circuit court, indeed, refused to certify the facts proved by the evidence, and would only certify the evidence itself in detail, and that nothing appeared to impeach the credit of any of the witnesses; but it was justified in that course, and could only be justified, by the consideration, that the evidence was so simple and consistent throughout, that no serious contest as to any question of fact could arise. Therefore, these exceptions were well taken, according to the principle settled in *Ewing v. Ewing*, 2 Leigh, 337. And then, proceeding to examine the evidence set out in the fourth bill of exceptions, they contended that the plaintiff could never be entitled to a verdict. 3. They took up the case upon the second bill of exceptions, and maintained, that the circuit court erred in refusing to instruct the jury, that the 180

days appointed in the bill of exchange for the payment of the contents, and three days of grace, having expired, before the 27th December 1816, when the bill was presented at the bank of Marietta and payment demanded there, that was not a good and timely demand, and therefore the defendant was discharged from liability upon his indorsement. The instruction prayed by the defendant, propounded the general law merchant applicable to such cases, exactly and truly. And though the days of grace to be allowed on bills of exchange, are regulated by the law or usage of the place on which the bill is drawn, and though, if a bill be made payable at a particular bank, and if it be the established usage of that bank, to present the bill and 205 demand payment *on the fourth day of grace, such a presentation and demand are sufficient to charge the drawer and indorsers; yet, this usage constitutes an exception to the general law merchant of this country, which requires that the bill shall be presented, and payment demanded, on the third day of grace; and if no such usage appear, the general law merchant must govern the case. 3 Kent's Comm. 71; Bailey on bills, 151-5; *Renner v. Bank of Columbia*, 9 Wheat. 581; *Mills v. Bank of U. States*, 11 Wheat. 431; *Bank of Washington v. Triplett &c.*, 1 Peters, 25. It was the duty of the circuit court to have stated the general rule of the law merchant to the jury; and if the plaintiff relied on any special usage constituting an exception to the general rule, or upon any fact which dispensed with his observance of the general rule, it was for him to present such matter to the court, and to ask its instruction as to the effect of it.

Stadard, for the appellee, did not decline the argument upon the merits of the case, as disclosed by the evidence stated in the case agreed by the parties upon the first trial, and in the fourth bill of exceptions to the opinion of the court overruling the motion for a new trial: he contended that if the court could or would look into the evidence, the justice of the appellee's claim would be found to be clearly established. Indeed, he thought it so apparent, that the verdict and judgment conformed with the justice of the case, that this court ought not to reverse the judgment and direct a new trial, on the ground of errors or misdirection of the circuit court, that could not and ought not to affect the result of the case. If it appeared that substantial justice was done, a new trial ought not to be directed. But, he said, the conditional verdict rendered at the first trial, subject to the opinion of the court upon the facts agreed, was necessarily set aside; because, in truth, there were no facts but only the state of the evidence agreed, upon which (as he shewed to the satisfaction of this court) there arose many controverted questions of fact; so that neither the circuit 206 *court, nor this court, could give any judgment upon that verdict. *Henderson v. Allens*, 1 Hen. & Munf. 235; *Blank's adm'r v. Foushee*, 4 Munf. 61. And the fourth bill of exceptions was not well taken; for that also stated the evidence in detail, and evidence from which the parties

and their counsel, in the circuit court and in this court, endeavoured to deduce directly contrary inferences; and, therefore, this court could not review the opinion of the circuit court refusing the new trial, upon such a bill of exceptions as this. *Bennett v. Hardaway's adm'r*, 6 Munf. 125. The principle of that case was no wise impugned, but on the contrary approved and confirmed, in *Carrington v. Bennett*, 1 Leigh, 340, and *Ewing v. Ewing*, 2 Leigh, 337. Then, as to the point made upon the second bill of exceptions, he said, the instruction prayed by the defendant, did not truly propound the law merchant applicable to the case. For, according to the law merchant, the days of grace were regulated, in this case, by the laws of Ohio, or by the usage of the bank of Marietta; yet the court was asked to instruct the jury, in effect, that, without regard to what might be the law of that state or the usage of that bank, it was absolutely necessary to charge the indorser, that the bill should be presented, and demand of payment made, on the third day of grace. The exception to the general rule was as much a part of the law merchant as the rule itself. Besides, the court was well warranted in refusing to give the instruction, because it was asked upon a garbled state of the facts; for it distinctly appeared in the record, that the plaintiff had adduced evidence to prove such an assumption of the defendant to pay the contents of this bill, as (if proved) would have put an end to all questions as to laches in presenting the bill for payment, or notice of dishonour; and the case before the jury turned mainly upon the sufficiency of the evidence to establish this assumption.

Cur. advis. vult. And a few days after, Cabell, J., said—The six special counts in the amended declaration are all
207 *against the defendant as indorser of a bill of exchange, charging him to be liable to pay the same under the custom of merchants. I understand, that all the judges are of opinion, that these counts shew that the defendant was not liable to pay the bill, under the custom of merchants; because they shew, that the demand of payment was not made until the day after the expiration of the three days of grace allowed by that custom. I understand, that all the judges are of opinion, that if these counts had been demurred to, the demurrer must have been sustained, or that if the defendant had, at the trial, moved the court to instruct the jury to disregard them, the court ought to have given that instruction. I understand, moreover, that it is the opinion of all the judges, that the plaintiff could not properly have introduced any evidence, at the trial, tending to prove a special custom of the bank of Marietta, allowing four days of grace; he having declared on the custom of merchants, and not on the special custom of the bank. In all these opinions I concur. But the defendant having taken issue on the faulty counts, and having failed to demur, or to move for an instruction to disregard them, a question arises, whether, under these circumstances, it was competent to him, on the trial of the issue, to move the court for

the instruction set forth in the second bill of exceptions; namely, that the three days of grace according to the custom of merchants, having expired before the demand of payment was made, "the demand was not a good and sufficient demand of payment of the bill, and that for want of such good and sufficient demand, the defendant was discharged from his liability arising from his indorsement." This question was not adverted to in the argument at the bar; and as it involves a principle of great importance, not only to the parties in this case, but to the public generally, I wish, before I decide it, to hear all that the counsel on both sides may be disposed to urge upon it.

The question thus propounded by the court, involved the construction and effect of the new provision in the statute
208 *of jeofails, 1 Rev. Code, ch. 128, § 103, p. 512, that, no judgment, after verdict, shall be staid or reversed, for any defect whatsoever in the declaration or pleadings, whether of form or substance, which might have been taken advantage of by a demurrer, and which shall not have been so taken advantage of." And this question was argued by the counsel for both parties; but Leigh intimating that the declaration appeared to him to be a good one, and the court telling him he was quite at liberty to argue that point—

He said, he understood the only objection to the six special counts of the declaration to be, that they all (of course) founded the plaintiff's demand upon the defendant's liability as indorser, under the usage and customs of merchants; and yet they all shewed (as the objection supposed) that the defendant was not so liable; because they all alleged, that the demand of payment of the acceptor, was not made until the day after the expiration of the days of grace allowed by the custom of merchants, in other words, by the general law merchants. These counts, all, after stating the drawing, the acceptance, and the indorsements of the bill, allege, that, "afterwards, when the bill became due and payable according to the tenor and effect thereof, to wit, on the 27th December 1816, at the bank of Marietta, in the state of Ohio," the bill was duly presented for payment &c. Now, the time when the bill became due and payable, according to its tenor and effect, depended on the law merchant applicable to the case: if there was no particular law of the state of Ohio, and no particular usage of the bank of Marietta, then, by the law merchant, the bill was payable on the third day of grace: if there was any law of Ohio, or any special usage of the bank of Marietta, regulating the days of grace, and requiring bills to be presented and payment demanded on the fourth day of grace, then (and still according to the law merchant) the bill was payable and properly demandable on the fourth day of grace; and the plaintiff alleging presentation and demand when the bill became due and payable according to the tenor and effect
209 thereof, was entitled to *shew any particular law or special custom requiring presentation and demand on the fourth day of grace, since the law merchant made

the bill due and payable on the day when such particular law or local custom required it to be presented and demanded. In this respect, the view, which Mr. Stanard had taken in his first argument, of the law of the case, was certainly just. The effect of this general form of pleading, and letting in evidence of a local law or usage under such a declaration, would not be to surprise the defendant at all; since he, having indorsed the bill payable at a particular bank, was held to take notice of the special usages of the bank, if there were any, and to know that the bill would be dealt with accordingly (1 Peters, 32,) and was, therefore, as distinctly apprised, that evidence of the special usage would be adduced to prove the plaintiff's case, as if the usage had been specially pleaded by him. Accordingly, he said, in declarations upon bills payable in foreign places, where the days of grace allowed were different from those allowed by our general law merchant, the law or usage of the foreign place on which the bill is drawn, though that must regulate the days of grace, was never set out by the plaintiff in his declaration. He referred to the form of a declaration on a bill drawn on Venice, in Bailey on bills, 265, in which, though six days of grace are allowed at Venice, Chitt. on bills, 339, yet the law and usage of Venice in this particular, are no wise set forth, and the time of presentation and demand, alleged under a scilicet, is not the sixth day of grace, but an earlier day. And in Bailey's commentary on his form of the declaration (p. 283, 4,) the distinction was stated very clearly—that if the declaration allege presentation and demand on a particular day, without any express averment that the presentation was made on the day when the bill became payable, then the day stated must be the very day when in truth it became payable; but, if there be such an express averment (meaning, if due presentation and demand is averred, and then the date of such presentation stated under a scilicet) exact-

210 ness as to the day *is immaterial—perhaps, said Bailey—but all doubt was removed by the case of Bynner v. Russell, 7 Moore, 266; 1 Bingham, 23, S. C. There, the declaration against the drawer of a bill averred, that “when it became due and payable according to the tenor and effect thereof, to wit, on the 31st March 1822,” it was duly presented for payment. And upon special demurrer, shewing for cause, that the 31st March was Sunday, the court held the declaration good: that “the presentment was stated to have been made when the bill became due and payable according to the tenor and effect thereof,” and “that was quite sufficient, as the tenor and effect of the bill would appear upon the face of it. Besides, as it was laid under a scilicet, the precise day was not material, and need not be proved. Therefore, in the present case, he said there could be no doubt, that under all the special counts in this declaration, the plaintiff might have proved presentation and demand on the third day of grace, if the bill had in fact been presented on that day. But he went farther; he thought, that, if by any local law or usage, the bill ought to have been

presented on the fourth day of grace, the plaintiff might have given evidence of such local law or usage, and proved presentation and demand according to it, though the local law or usage was not alleged in the declaration. Mr. Justice Thompson, indeed, in delivering the opinion of the court in Renner v. Bank of Columbia, 9 Wheat. 596, said, that if that case had come before the court upon demurrer to the declaration (which it did not) “there being no averment of the special custom as to the demand on the fourth day, and the general rule being that the demand must be made on the third, if the declaration alleged it to have been made on the fourth, the joinder in demurrer would admit the fact, and, of course, that the demand was too late. But had the declaration contained an averment of the special custom, it must have alleged the demand on the fourth day; that is, according to the legal effect of the note; and a demand laid on any other day, would have been bad.”

And, probably, it was this dictum
211 *(for it was avowedly nothing more)

that had led the judges of this court to the conclusion which had been announced, that the special counts in this declaration were faulty and demurrable. But, after it was settled, that the law merchant, though it in general requires the bill to be presented on the third day of grace, yet respects any local law or usage of the place on which it is drawn or where it is made payable, and requires, if the local law or usage requires, presentation on the fourth day;—and after it was also settled, that all parties to the bill are bound by the local law or established usage of the place where it is made payable or negotiable, whether they have a personal knowledge thereof or not, *Mills v. Bank of U. S.*, 11 Wheat. 438, *Bank of Washington v. Triplett &c.*, 1 Peters, 32, 3, he had never been able to see any reason why the local law or usage should be pleaded in the declaration, in order to entitle the plaintiff to give evidence of it at the trial, and of presentation in conformity with it, any more than that the holder suing upon a bill drawn upon a foreign country, should be required to set forth the law or usage of the country on which it is drawn, in order to entitle him to give evidence of the law or usage of the foreign state, and of the bill having been dealt with as the foreign law or usage required. The parties to a bill are held to have notice of, and to contract with reference to, the local usage of a particular bank at which the bill is made payable or negotiable, just as they are held to have notice of, and to contract with reference to, the law or usage of a foreign country, in case the bill be drawn upon it; and both alike are matters of fact, and matters of fact known, or presumed to be known, to the defendant as well as the plaintiff; so that the very nature of the demand apprises the defendant, that he must come prepared to try, whether the bill has been dealt with according to the law or usage of the place where it was made payable or negotiable, that being the very point on which his liability depends.

212 *CARR, J. On my first examination of this case, I inclined to the opinion that the second exception was well taken, and must reverse the judgment. Some of my brethren differed with me, and on conference, and further consideration, I acceded to the opinion, that in the actual posture of the case before the jury, the defendant had no right to the instruction of the court on the point submitted and stated in the second bill of exceptions, it being foreign to the issue joined between the parties. This was founded on an understanding of the declaration, which the arguments and authorities of Mr. Leigh have satisfied me was erroneous. The six counts all averring, that the bill was "presented when it became payable according to the tenor and effect thereof," I do not think the scilicet, which follow can vitiate these positive averments: and upon the issue taken upon these counts, I think the whole matter, whether of the general custom, or any special custom, which might be proved, was fairly before the jury. With these preliminary remarks, I proceed to the examination of the case.

I do not see how we can look to the case agreed on the first trial. A new declaration was afterwards filed at rules, whither the cause was sent for that purpose; a new plea put in; a trial upon it, and a general verdict for the plaintiff. On that trial the defendant took several exceptions to the opinion of the court; and to these I think we are confined.

The first bill states, that the defendant asked the opinion of the court on several important points; but they are so defectively stated, that it is impossible from the case made by the exceptions, to say that the court erred in refusing the instruction.

Then, as to the second bill of exceptions: as I understand it, the defendant propounded to the court a naked point of law, arising upon the face of the bill, and the proof of the demand; asking the court to instruct the jury, that it is a general rule of the law merchant, that a demand of payment

of a bill of exchange, must be made on the third *day of grace, and that a failure to make such demand discharges the indorser. Now, if this be, in truth, a correct statement of the general rule, the court ought so to have declared it. Nor could such declaration have injured the plaintiff in the slightest degree, if he had evidence to take his case out of the rule, either by proof of a particular custom at the bank of Marietta, or by a subsequent binding promise of the defendant: for, in such case, the plaintiff would immediately move for an instruction, that the special custom governed the case, or that the subsequent assumpait dispensed with proof of a regular demand. But how did the refusal of the court to give the instruction prayed by the defendant affect him? He contended, that this was a rule of law to the benefit of which he was entitled, and he asked the court (the proper tribunal) to declare this law. When the court refused to tell the jury that such was the law, giving no reason for such refusal, it, in effect, instructed the jury that such was not the law. Was this correct? The supreme court of the

U. States, in *Renner v. Bank of Columbia*, said, "we admit, in the most unqualified manner, that the usage of making a demand, on the third day of grace, has become so general, that courts of justice will notice it ex officio, and in the absence of any proof to the contrary, will presume that such was the understanding of all parties to a note when they put their names to it." In *Mills v. Bank U. States*, the court said, "There is no doubt, that according to the general rules of law, demand of payment ought to be made on the third day, and that it is too late, if made on the fourth day of grace." In *The Bank of Washington v. Triplett &c.* the chief justice, delivering the opinion of the court, after stating the third as the last day of grace, said, "The allowance of days of grace is a usage which pervades the whole mercantile world. It is now universally understood to enter into every bill or note of a mercantile character, and to form so completely a part of the contract, that the bill does not become due on the day mentioned on its face, but on the last day of grace."

214 A *demand of payment previous to that day will not authorize a protest, or charge the drawer." This is the unquestionable general rule; and so in this case, ought the circuit court to have declared it. Its refusal to do so, was clear error.

With respect to the third bill of exceptions, the ground of that was removed by the release of part of the damages.

As to the fourth. A motion was made for a new trial, on the ground that the verdict was contrary to the justice of the case upon the evidence. We have no facts certified by the judge of the court below, but the whole evidence set out at large, and that evidence (as I understand it) contradictory in several respects. In *Bennett v. Hardaway*, this court (apparently, after great consideration) decided that it would not examine the evidence, which had been before the court below, on a motion for a new trial, but such facts only as the judge would certify; and though in *Carrington v. Bennett*, this case was, as I thought, a little departed from, a majority of the court disclaimed any such intention; and being a divided court of three judges, could not overrule the previous solemn decision, or settle the law. Nor does the case of *Ewing v. Ewing*, according to my recollection of it, purport to overrule *Bennett v. Hardaway*: I am sure I should not have concurred if I had so understood it. That case, therefore, I still consider as giving the law; and under it we cannot look into this evidence set out at large, and contradictory. This answers the remark also, that if upon the whole record, the court should see that the case of the party, against whom the instruction is given, is a bad one, the judgment should not be reversed, though the instruction were wrong. Here, we cannot look into the evidence to see how the whole case is: for, if we may not look into it, to see whether the party has a right to a new trial, surely we cannot, to support an erroneous instruction given against him, upon the ground that his case is bad.

I think that the judgment must be reversed, and the case sent back, with direction to the court to give the instruction 215 *stated in the second bill of exceptions, if it should be asked on the new trial.

CABELL, J. I am of opinion, that the defendant was entitled to the instruction stated in the second bill of exceptions, and, therefore, the court erred in refusing to give that instruction; and, consequently, that the judgment must be reversed.

BROOKE, J., concurred.

TUCKER, P. The first question in this case is, that which arises out of the first verdict, and the order setting it aside; and of this I shall dispose by the single remark, that as the verdict consisted of an undigested mass of evidence, instead of finding the facts, to be submitted to the court, it was not such a verdict as would have justified the court in pronouncing judgment in the cause. The cases cited at the bar are decisive.

Proceeding then to the second trial, we find five bills of exceptions. The fourth of these arose out of a motion for a new trial, on the ground that the verdict rendered by the jury was against evidence, which motion was denied by the court. The defendant thereupon moved the court to certify the facts, which the court refused to do, but certified the evidence given upon the trial. This, according to the case of *Bennett v. Hardaway*, was irregular, nor can the case even be brought within the broader principles, which seem to be avowed by one of the judges in *Carrington v. Bennett*. For the bill of exceptions, presents a mass of mere evidence for the consideration of this court. In this mass of evidence, is the conflicting testimony of witnesses upon points probably of vital importance. The facts are not, therefore, so stated as to enable the court to decide. But this seems not to have been the fault of the defendant or his counsel. The court refused to certify the facts. What is the consequence? Can this court set aside a verdict for

216 *an error of the court below posterior to its rendition? This would be to make the effect precede the cause. Or, must the party agreed resort to compulsory means, to compel the court to certify the facts? a question which seems to have been discussed in *Vaughan v. Green*, 1 Leigh, 292. Such a course would, in this case, be impracticable, as the judge who signed this bill of exceptions, is no longer the judge of the circuit, and he who now presides knows nothing of the case.

From these difficulties we must seek relief, in a resort to the other points in the cause. The next I shall consider, is the second bill of exceptions. I was, at first, inclined to think that this was not well taken in point of form, as it seemed to have selected a garbled state of the evidence, and the instruction asked seemed broader than would have been justified. But I am satisfied this is not so. The facts upon which the motion was rested, were alone necessary to be stated, provided it suffi-

ciently appeared the instruction asked was relevant and material. This has been done; and the instruction asked, not only did not and could not have precluded the defendant from moving a counter instruction upon other facts (such as that four days of grace were allowed at the bank of Marietta, which would have made the demand and protest valid) but it did not go farther than it ought to have done, provided the instruction asked was proper in point of law. This, then, is the question to be solved, and this appeared to me to depend upon a preliminary question as to the declaration in the case.

My impression was, that the six first counts were defective in this, that the statement in each of them of the presentment for payment, "when the bill became due and payable, to wit, on the 27th December 1816" (which was the day after the expiration of the days of grace) was inconsistent with itself: or that, if the words "on the 27th December" were to be taken as explaining or modifying the former words, which seemed the fair construction, then the declaration did not shew presentment until after the expiration *of 217 the three days of grace, and so furnished no ground of action against the defendant. This scilicet, indeed, is often rejected, when it makes nonsense or is repugnant; but when it only serves to explain or to modify the meaning of what goes before, it will not be disregarded, and particularly where the day laid is material. For it is said in *Hobart*, 172, that a videlicet shall make a restriction, where the words are general; and where it is not repugnant to the preceding matter, but well agrees with it, there it amounts to a direct affirmation. See 1 Wms. Saund. 170, note 2, 2 Id. 291, note 1, Salk. 325, 6 Com. Dig. 60, 19 Viner, 46, 12 Mod. 579, 611. Upon examination, however, I find that the case of *Bynner v. Russell* in 7 Moore, cited by Mr. Leigh, is a direct authority upon the point before us, and establishes that in a case like this, the scilicet must be rejected. To this authority I refer (and the rather because I am averse to technicalities) though it appears to me at variance with the established doctrines in relation to the scilicet. The scilicet, then, being rejected, the declaration states the case of a presentment "when the bill became due and payable," that is on the third day of grace; for as no custom is stated, the general law merchant must be intended; and, as the evidence proved the presentment on the fourth day instead of the third, it neither supported the declaration nor shewed a cause of action. Hence, the instruction would have been proper.

The judgment must therefore be reversed, and the cause sent back, when, if the pleadings remain unchanged, and the evidence of presentment and protest should be the same as set forth in the second bill of exceptions, without any thing more, the instruction asked for at the last trial, must, if again required, be given.

The judgment entered by the court conformed with the opinion of the president.

218 *The Mutual Assurance Society &c. v. Stone and Another.

November, 1831.

(Absent BROOKE, J.)

Mutual Assurance Societies—Lien of—Effect as to Bona Fide Purchasers.—By the statutes relative to The Mutual Assurance Society against fire on buildings, and the constitution and rules of the society, the society has a lien on property insured, for all quotas called for under the original act of incorporation of 1794, and for additional premiums upon revaluation and reassurance under the act of 1805, and for all contributions required under the act of 1809 or 1819: and this lien attaches to, and follows, the property in the hands of a subsequent bona fide purchaser without notice of the lien or of the insurance.

Same—Same—Purchaser—When Complete.—Upon a plea of purchaser without notice, if the purchaser has paid the whole purchase money, though he has not got a conveyance of the legal estate, yet if he has acquired the preferable right to call for the legal estate, he is a complete purchaser entitled to avail himself of this defence: per TUCKER, P.

The act of assembly, passed December 1794, for establishing The Mutual Assurance Society against fire on buildings in this state—after declaring the principles of the society to be, “that the citizens of this state may insure their buildings against losses and damages occasioned accidentally by fire, and that the insured pay the losses and expenses, each his share according to the sum insured;” and providing, that subscriptions should be opened in different parts of the state; that so soon as the subscriptions should amount to 3,000,000 dollars, there should be a meeting of the subscribers to make rules and regulations, which should be binding on all those who should insure their property in the society; that they should be incorporated, with the usual powers of bodies corporate, and, among the rest, with power to alter and amend their bye laws and regulations from time to time; and that certain premiums of insurance should be agreed upon to constitute a fund to pay losses—enacted further, § 6, That “if the funds should not be sufficient, a repartition among the whole of the persons insured, shall be *made, and each shall pay, on demand of the

cashier, his, her or their share, according to the sum insured and the rate of hazard at which the building stands, agreeably to the rate of the premiums, for which purpose it is hereby declared, that the subscribers, as soon as they shall insure their property in the assurance society aforesaid, do mutually for themselves, their heirs, executors, administrators and assigns, engage their property insured (but none other) as security, and subject the same to be sold, if necessary, for the payment of such quotas.—§ 7. That these quotas shall always be so rated, as to raise and keep up a fund so that the interest thereof may be deemed by the president and directors (to be elected by the said society) sufficient to pay the annual losses and expenses. If such quotas are found necessary, the president is to publish in the public newspapers, how much the quota is of each rate of hazard per every hundred dollars; whereupon the insured shall pay the same on application to the cashier, in whose office the property is insured. Whensoever any person or persons shall neglect to pay such quotas, the assurance to him made shall cease and discontinue, from the day on which they became due until paid.—§ 8. And to the end that purchasers and mortgagees of any property insured by virtue of this act, may not become losers thereby, the subscribers selling, mortgaging, or otherwise transferring such property, shall at the time apprise the purchaser or mortgagee of such assurance; and indorse to him or them, the policy thereof. And in every case of such change, the purchaser or mortgagee, shall be considered as a subscriber in the room of the original, and the property so sold, mortgaged, or otherwise transferred, shall still remain liable for the payment of the quotas, in the same manner, as if the right thereof had remained in the original owner.”—§ 9. Provided a compensation to W. F. Ast, the author of the scheme of the society.—§ 10. “The subscribers, in default of paying the premiums at the time fixed therefor, shall, on request of the cashier, be compelled to pay the same with six per cent. interest *thereon to the day of payment; and their property shall be liable to be sold for the same as aforesaid.”

By an explanatory act, passed December 1795,—after some regulations as to the manner of calling and holding general meetings—it was enacted and declared, “That the premiums for the non-payment of which, property, agreeable to the said first recited act, may be sold, shall be understood to be those premiums only, which under the regulations to be formed by the said society, shall become payable in consequence of any insurance to be hereafter made or subscribed for with the society.”

An act to amend the act of incorporation, passed January 1799, gave the society a summary remedy by motion, on ten days notice, to recover the whole or any part of such premiums or quotas, as were then or might afterwards become due, from any delinquent subscriber or member, under his subscription or declaration for insurance made to the society: but it was provided, that this act “should not have a retrospect

***Mutual Assurance Societies—Lien of—Bona Fide Purchasers.**—In *Shirley v. Mutual Assurance Society*, 2 Rob. 709, in reference to the lien given by the legislature in favor of mutual assurance societies, it is said: “There can be no doubt of the intent of the legislature to give a valid and effectual lien, not only against the original member, but against all persons deriving any ownership of the property from him. And this lien was held by this court, in the case of *Mut. Ass. Soc. v. Stone, etc.*, 3 Leigh 218, to attach to and follow the property in the hands of a subsequent bona fide purchaser without notice of the lien or of the insurance.” The principal case is cited in note to same case on this question. See monographic note on Insurance, Fire and Marine” appended to *Mutual, etc.*, Soc. v. Holt, 29 Gratt. 612.

***Bona Fide Purchasers—When Complete.**—In the principal case it is said by TUCKER, P. upon a plea of purchase without notice, if the purchaser has paid the whole purchase money, though he has not yet a conveyance of the legal estate, yet if he has acquired the preferable right to call for the legal estate he is a complete purchaser entitled to avail himself of this defence. On this question as to what constitutes a complete purchaser, the principal case is cited in the following: *Preston v. Nash*, 75 Va. 954, 956; *Preston v. Nash*, 76 Va. 6, 8; *Lamar v. Hale*, 79 Va. 156; *McCormack v. James*, 36 Fed. Rep. 18. See also, citing the principal case, *foot-note* to *Cox v. Romine*, 9 Gratt. 27; *Briscoe v. Ashby*, 24 Gratt. 475, and note; *Camden v. Harris*, 15 W. Va. 563; *Hoult v. Donahue*, 21 W. Va. 300.

to persons who had subscribed before the organization of the institution, and had not sent in their declaration for insurance, unless they should afterwards send them in."

An act was passed January 1805, for carrying into execution a constitution of the society then lately adopted at a general meeting, by which very important and even vital changes were made in the principles of the institution. An entire separation was made between the interests of town and country insurers; provision was made for the revaluation of houses insured in towns and in the country, respectively, and that where such revaluation should exceed the former valuation, an additional premium should be paid; and provision was also made for enabling any member to withdraw from the society, upon giving six weeks notice, and paying all arrearages due at the time of withdrawing. There was no provision in this act declaring in express terms, that the premiums or quotas should be or continue a lien on the property insured—but it was enacted (§ 16.)

221 that the several "acts of assembly previously passed, relating to the society, and all rules and regulations of the society, should be thereby repealed, so far as the same or any part thereof might be repugnant to that act—and (§ 18.) "that all debts, demands, rights, interest and claims of the society, now due or existing, or hereafter due or existing, may be sued for, prosecuted and recovered, in the name of the society, after the commencement of this act, in the same manner, in the same courts, and upon the same principles, as they may be now sued for, prosecuted and recovered," &c.

In February 1809, another act was passed, making material alterations in the principles of the institution; by which it was enacted (§ 6,) "That hereafter no quota or quotas shall be assessed upon the members of the said society; nor shall any member who may have paid his original premium, cease to be insured, notwithstanding he may have failed to pay any additional premium, quota or parts of a quota, heretofore required, and that the general meeting of the said society, or the committee aforesaid, be and they are hereby authorized to require the members of the said society, or such as may hereafter become members, to pay annually for the next succeeding ten years, such part of the original premium as they have or may deem proper, to be collected and accounted for in the mode herein after directed; Provided, that such annual sum do not exceed one fifth of the original premium in the towns, and one seventh in the country; and provided also, that no person or persons be required to pay such part of a premium, until the first day of January next after he shall have paid such original premium."

And by an act passed in March 1819, the society was again authorized to require from the members thereof, the payment of such part of the premium upon their property, as the general meeting or the standing committee should deem necessary, provided such annual requisitions should

not exceed one fifth part of such premiums &c.

222 *The constitution, rules and regulations of the society, formed and adopted in general meeting on the 11th January 1805 (the same which the act of assembly of January 1805, was enacted to carry into execution) contained the following provisions: Art. 8, § 6. "Any person refusing or failing to have his building revalued agreeably to the rules and regulations of the society, shall forfeit his right to claim any benefit under his insurance, till a revaluation thereof be made; and any person failing, for the space of three months after revaluation of his building shall be made, to return thereupon to the general office a new declaration, or to pay the additional premium, if any, which may be due, shall forfeit every benefit he might otherwise claim under his insurance, till the declaration be filed, and the additional premium, if any, be paid.—§ 7. The additional premiums, required by the new rates of hazard fixed by the president and directors, shall also be paid on buildings, which may have been declared for insurance, and on which policies may not have been issued: Provided the materials of which they are erected, or their contiguity to other buildings, be such as to subject them, agreeably to the said rates of hazard, to the payment of additional premiums; to ascertain which fact, buildings so liable to the payment of an additional premium, shall be specially reported to the principal agent, by the special agent of the district, borough or town, in which they may be situated; and before policies shall be issued on such buildings, the principal agent must have like proof as is required in other cases, that the additional premiums, as well as those originally due on the declaration returned to this office, have been paid to the cashier general, or to some authorized collector of the society."

But, by the constitution, rules and regulations of the society, revised in May 1819, it was provided, art. 13, § 13, that "The failure to revalue a building shall not produce a forfeiture of the insurance nor a suspension of the same; but any additional premium, arising on a subsequent revaluation *of such building, shall be paid, with interest from the time at which such revaluation should have been made; and in case of loss by fire, of any building not revalued according to the rules and regulations of this society, before any warrant shall issue for the payment of such loss, a regular estimate of the value and hazard shall be returned to the general office; and the additional premium, if any, with interest thereon, shall be deducted from the amount of such loss; and in all such cases, the premium shall be estimated upon four fifths of the smallest valuation; according to which, the loss shall be paid."

And by the constitution of the society, under all its modifications, and its rules and regulations from the beginning, every person insured became a member of the society, and by his declaration for insurance, bound himself, in express terms, to abide by, observe and adhere to the constitution, rules and regulations, already es-

tablished, or afterwards to be established, in general meeting.

In January 1821, the society exhibited a bill against James Vaughan, executor of William Vaughan deceased, and Daniel Stone, in the superior court of chancery of Williamsburg, setting forth, That William Vaughan, on the 15th October 1802, made a declaration for insurance of buildings in the borough of Norfolk; and afterwards, on the 2nd January 1806, made another declaration for insurance on the same buildings, which had been revalued pursuant to law (meaning the act of January 1805). That by deed executed in May 1808, Vaughan conveyed the buildings so revalued and reassured, to the defendant Stone. That, according to the rules and regulations of the society, there was, upon the revaluation and reassurance of these buildings, duly assessed, and due to the society, for additional premiums, 76 dollars 76 cents, bearing interest from the 1st December 1806, and the further sum of 437 dollars 88 cents, the aggregate of the annual

quotas of 36 dollars 49 cents, due on the said buildings so reassured, commencing in 1809 and ending in 1820, with interest on each quota from 1st April in each year, the date when it fell due. That Vaughan died in 1811, and the defendant James Vaughan was his executor. And that application had been made by the agents of the society, to both defendants, for payment, which they both had refused. Therefore, the bill prayed that the premises insured should be declared subject, in Stone's hands, to the debt due the society for premium and quotas, and sold for satisfaction thereof; and that, if necessary, the defendant James Vaughan should be required to render an account of his administration of his testator's estate, and the assets in his hands, if any he had, should be applied to the payment of the debt.

The executor of Vaughan answered, that his testator gave notice of withdrawal from the society in October 1806, and therefore, was exempt from the duty of paying any quotas subsequently called for; and that he had fully administered the assets of his testator's estate.

The defendant Stone in his answer said he purchased the premises in 1808, without notice that the vendor had ever insured the buildings or made any declaration for insurance in the Mutual Assurance Society; and he himself had effected an insurance with the Eagle Fire Company of New York, and continued his assurance there till 1818, when, for the first time, he was apprised of the demand now set up by the society; and as it was a rule of that company, as of this society, that insurance effected with any other company avoids the policy effected with it, the consequence to him was, that he had been insured in neither. That his vendor Vaughan's estate was certainly liable for the debt, in the first instance; yet the society had so long neglected to assert its claim, that the assets of Vaughan's estate, which he believed would have been sufficient to have paid the debt, and applicable thereto, if it had been timely claimed, had been probably fully administered, without notice of the claim; and this

225 laches of the society alone, *ought, under the circumstances to exonerate his property from the lien asserted, if indeed any such lien ever existed. But he denied, that the society ever had the lien it claimed. And if it had such lien on the property in the hands of his vendor Vaughan, he insisted that it was only an equitable lien, and pleaded that he was a purchaser without notice.

There was no proof, that Vaughan withdrew, or took any measures to withdraw, from the society, in October 1806.

It appeared, that Vaughan, first, by deed dated the 14th March 1806, conveyed the insured premises to James Wallace, in trust, to secure a debt of 500 dollars due to Thomas Newton as guardian of George Kelly, and to indemnify James Taylor, who was indorser at bank for Vaughan's accommodation to the amount of 2500 dollars, against loss in consequence thereof; and in this deed, Taylor and Newton covenanted, that upon tender of the money, at any time before a sale of the trust subject, they would receive the same, "and upon receipt thereof, that, they would grant good and sufficient discharges for the same, thereby releasing and waiving all power to demand of the trustee the execution of the trust therein before declared." That Vaughan's deed to the defendant Stone, dated the 23d May 1808, recited the deed of trust of the 14th March 1806, and that Stone had undertaken to pay the debts thereby secured to Taylor and Newton the guardian of Kelly; and in consideration thereof, conveyed the property to Stone, with general warranty. That, in January 1816, Taylor, by deed, acknowledged the receipt in full, from Stone of the money which he had paid as Vaughan's indorser, and released all claim under the deed of trust; and Kelly also, by deed, in consideration of satisfactory arrangements made with him by Stone, for the payment of the debt due to him, released all his claim under the deed of trust. But that Wallace, the trustee to whom the legal estate was conveyed by the deed of trust, had never conveyed or released to Stone. This was the state of Stone's title at the hearing of the cause in the court of chancery.

226 *The chancellor was of opinion, that, according to the 6th and 7th sections of the 8th article of the constitution, rules and regulations of the society, formed and adopted in January 1805 (above quoted verbatim) no policy could issue on a declaration of revaluation, unless the additional premium was paid, and the society was not responsible for any loss, unless a revaluation was made and the additional premium paid, so that no insurance was effected, and therefore no quotas could arise in such case; and that no pledge of property was ever, at any time, made by the assured to secure the payment of premiums or additional premiums: therefore, he dismissed the bill with costs. The society appealed to this court.

The cause was argued here, by Daniel for the appellants, and by Leigh for the appellee Stone.

I. One question was, Whether Stone's purchase was so completed, as to sustain

his plea of purchaser without notice? Upon which Daniel remarked, that Stone had even now only an equitable title, the legal title being yet outstanding in Wallace, the trustee, to whom it was conveyed by the deed of trust of March 1806—he cited *Tourville v. Naish*, 3 P. Wms. 307; *Wigg v. Wigg*, 1 Atk. 382, 4; *Hoover v. Donally*, 1 Hen. & Munf. 316; *Blair v. Owles*, 1 Munf. 38. Leigh, adverting to the peculiar covenant of Taylor and Newton, the cestui que trust, in the deed of trust of March 1806, and to the deeds of release executed by Taylor and Kelly to Stone in January 1816, said, that these were tantamount, in effect, to a defeasance of the deed of trust; and, if they did not amount quite to a defeasance, they certainly gave Stone a right to call for the legal title, in preference to all the world, which was equivalent with actually getting it in. *Williamson v. Gordon's ex'ors*, 5 Munf. 257.

II. Then there arose several points peculiar to the case of policies or declarations for assurance in this society. 1. Whether there was any lien provided by the 227 6th section of *the act of December 1794, on the property insured or declared for assurance, for original or additional premiums, or whether the lien was provided to secure the quotas to be afterwards called for, only? 2. Whether the act of January 1805, making so vital a change as it did, in the constitution of the society, and by separating the town from the country assurance, altering the obligation, duties and rights of assurers and assured, was not an abolition of the lien for quotas given by the original act of incorporation? If not, 3. Whether the 6th section of the act of February 1809, providing that no quota or quotas should afterwards be assessed, but authorizing the society to exact from the members, annually, for ten years, portions of the premium, these requisitions were quotas to which the 6th section of the original act of December 1794 applied, and gave a lien for, on the buildings insured? 4. Whether, in case the additional premiums or quotas were not paid, on any property declared for insurance, before the act of February 1809, the declarant was to be regarded as insured, by force of the 6th section of that act, or of the 13th section of the 13th article of the revised constitution, rules and regulations, of May 1819? If such declarant was not insured, 5. Whether, nevertheless, the effect of the 6th section of the original act of December 1794, was to give a lien on the property declared for insurance, for premiums or quotas? 6. Whether, if the lien was given, to any extent, on the subject in the hands of the declarant for insurance, such lien did or could follow it into the hands of his assignee, without notice, and though he be not insured? Lastly, Whether the society had not lost its claim against Stone, if any it ever had, by its laches in not earlier giving notice of or asserting it? In the discussion of these questions, the counsel went into a minute examination of the provisions of the several acts of assembly above quoted, and the general principles of law which, they supposed, might influence the construction and effect of them: the

general course of the argument will be collected from the opinions of the judges.

228 *The following authorities were cited: *Currie's adm'rs v. Mut. Ass. Society*, 4 Hen. & Munf. 315; *Greenhow &c. v. Barton*, 4 Munf. 590; *Korn & al. v. Mut. Ass. Society*, 6 Cranch, 192; *Mut. Ass. Society v. Watts's ex'or*, 1 Wheat. 279; *Stratton v. Mut. Ass. Society*, 6 Rand. 22.

CARR, J. It was admitted by the counsel who argued this cause for Stone (as well as it could be argued), that by the 6th section of the original act of 1794, a lien for quotas attached to the property insured, in the hands of the insurer. But, though it was admitted as a point too plain to be argued, that this lien bound the property in the hands of the first owner, it as strongly denied, that such lien existed when the land had passed into other hands, and the broad position seemed to be taken, that the legislature could not raise a lien which should thus follow the subject into all hands. That the act meant to create such a lien, is clear from the use of the word assigns, which could have been introduced for no other purpose; nor can I doubt the power of the legislature to do this, since the law violated no right, but merely settled the terms of the contract, between the society and the insured, and left every one at liberty to become a member or not. Every man has a right to bind his property by a lien, a mortgage, for instance, which when perfected according to law, follows it into all hands. This was nothing more. The party insuring, for himself, his heirs and assigns, engaged his property as a security for all moneys due or to become due on it.

But it was insisted, that the 8th section of the same act made the insured property liable in the hands of vendees, only where they received a notice of the insurance from the vendor. That section enacts, that to the end, that purchasers, and mortgagees of property insured by virtue of this act, may not become losers thereby, the subscribers selling, mortgaging or otherwise transferring such property, shall at the time apprise the purchaser or mortgagee of such assurance, and indorse to him the policy thereof; and in 229 *every case of such change, the purchaser or mortgagee shall be considered as a subscriber in place of the original &c. It was contended, that such change meant a sale or mortgage accompanied by notice and assignment of the policy. I cannot think, that the language used renders this construction necessary; and it is most clear to me, that, so far from being the intention of the law, it would mar and prostrate the whole scheme on which the institution was founded. The law was speaking of changes of property by sale, mortgage or other transfer; and the following phrase "in every case of such change," means of a change by sale, mortgage or other transfer. If the act, meant to hold the property bound, only where the sale was attended by notice, why did it say, that notice should be given to save purchasers or mortgagees from loss? They could incur no loss, where there was no notice, if the sale to them without notice discharged the lien. There are many other

considerations, which I need not state, that convince me, that such a construction would go far to destroy, at a blow, the whole institution.

But it was insisted, that the act of 1805 was a new constitution, abolishing all pre-existing laws, liens &c. I think clearly not. It was an amendment, and only abolished former laws, rules and regulations, so far as they were repugnant to that act. Such are its words. The former act creating a lien on the property insured, was so far from being repugnant, that it was the very foundation on which this amendment rested. This is apparent; for take away that act, and there is no lien on the property insured, even in the hands of the original subscribers. It was also insisted, that the company has been guilty of laches. I do not think that doctrine attaches, farther than it would to a mortgagee. The lien of the society is by an instrument under seal, which the law says binds the property, as a security for all charges growing due under the laws, rules &c. of the society; and this is the exact definition of a

230 mortgage. *There has been no such laches here as would affect the claim of a mortgagee.

There were several other objections made, but none of any weight. I think the decree should be reversed.

CABELL, J., concurred.

TUCKER, P. 'The merits of this controversy mainly depend, upon the true construction of the laws, constitution, rules and regulations of The Mutual Assurance Society.

The scheme of this society, however simple in its principles, has, unfortunately, not been carried into effect, with an ability proportioned to the benevolence of the design. We have the authority of the act of 1794 for saying, that the plan upon which the simple idea of an association of individuals for their mutual insurance against fire, was to be carried into effect, was formed, suggested and published, by Mr. Ast; and though he may have had the aid of some professional gentleman to throw it into the form of a law, its clumsy and artificial execution can leave little doubt of its real parentage. Drawn without system, and expressed, in many instances, in terms wholly inappropriate, it is not wonderful, that it has been a fruitful source of litigation; and so deeply imbued was the first act with these defects, that all the subsequent legislation seems to have been marked by the original vice of its constitution. Such an instrument therefore requires to be construed with a liberality which will attain the real objects of the contracting parties, instead of a critical rigour which would defeat their most obvious intentions; and this, indeed, is the more proper, as the parties stand in the double relation of insurers and insured, and their contract cannot properly be interpreted, more strongly against them in one character than in the other.

Awkward as is the draft of the original constitution, it is not difficult to penetrate its real design. Contemplating an association, which might embrace every owner of a building in the commonwealth, and

231 which should engage to insure *all its members against losses from fire, it was intended, that each member of the association should contribute, to the common fund out of which losses were to be repaired, a certain per centage, called a premium, upon the value of the property he should himself seek to have insured. And as the original sum thus subscribed or contributed, would in the ordinary course of things be exhausted, unless provision was made for replenishing the fund, it was provided, in substance, that whenever the reduced state of the funds should require a further contribution, there should be a call upon the members for such contribution, and each should be bound to pay an equal per centage upon his original premium. These subsequent contributions were called quotas; and thus, if the wants of the society required that it should call for a sum equal to half the original capital, each member was called upon to pay a sum equal to one half his original premium, which was called a half quota; et sic de similibus. Having ascertained the sums to be paid by each, as contributors to the common stock in which they were interested as insurers, or (which is the same thing) the sum to be paid by each as insured, it next became necessary to provide for the enforcing of these contributions from the refractory or the backward. To effect this object, the project (whether wise or unwise) was to render the property, thus insured from destruction, and supported and upheld by the society, responsible for the payment; doubtless, upon the idea of some supposed relation between the advantage it derived, and the duty to be imposed. So it is, it was declared in the original act of 1794, that the subscribers mutually for themselves, their heirs and assigns, engaged the property insured (but none other) as security, and subjected the same, if necessary, to be sold for the payment of such quotas; that is to say, for such future contributions as might be necessary from time to time to maintain the integrity of the fund.

A question has been much discussed heretofore, whether the property insured was or was not bound for the original

232 *premium, if the subscriber failed to pay it; and, in *Greenhow v. Barton*, judges *Fleming* and *Roane*, though differing in the judgment they gave, seem to have agreed in the opinion, that until the payment of the premium the insurance was incomplete, and the property was not bound in the hands of the purchaser. It seems, however, to be a question of no importance in relation to the original insurance in this case, as the original premium was paid, and the assurance was of course complete; but we shall have occasion to examine it, as it respects the new declaration. Nor can it admit of doubt, that *Vaughan* himself was personally responsible for quotas anterior to the act of 1805, and that the property was in like manner responsible while it continued in his hands.

By that act, considerable changes were effected in the constitution of the society: some of them so vital, as to have been arraigned as unconstitutional and void. The

separation of the town from the country insurance, in other words, the absolving a large portion of the society from the burdens of the contract, and thus depriving the rest of that aid in sustaining them, for which they had in effect contracted, was deemed by many, high-handed, unjust and unconstitutional. The small towns, particularly, complained of being left to encounter the hazard of the sweeping losses of the cities, without the aid of the country contributions. But this question was put at rest by this court, in *Currie's adm'r v. The Mut. Ass. Society*. One very salutary and acceptable provision, however, was introduced; I mean the clause which permitted any dissatisfied party to dissolve the contract as to himself, by withdrawing from the society. After the enactment of this provision, no party who did not avail himself of it, could fairly be understood to wish to give up its benefits, or get rid of the burdens it imposed.

This act has been called a new constitution, out and out; but I think it must be regarded rather as an innovation ingrafted on the original stock. It did not repeal the old constitution and laws in toto, 233 but only in such matters as were repugnant to the act itself. What was its effect upon some of the most material provisions of the first act will be presently examined. At the time it passed, Vaughan was living, and still owner of the property, and the act having authorized, and indeed required, a revaluation, he acquiesced in the measure. A revaluation was made, and he signed a new declaration, binding himself to abide by the constitution &c. of the society. A further premium was however required of him, as the revaluation proved the property to be worth more than before, which premium, it seems, never was paid by him, and constitutes in fact a part of the society's demand. It was the opinion of the chancellor, that no pledge of the property was at any time to be made to secure the payment of the original premiums, or of the additional premiums; and it appearing that part of the demand was for additional premiums, the bill was yet dismissed in omnibus. This would seem to have been an error, even if the premises were true; for, though the property was not bound, it does not follow, that Vaughan's estate, if there was any (which ought to have been ascertained), was not responsible for the additional premium which accrued in his time. For judge Roane and judge Fleming concurred in the case of *Greenhow v. Barton*, in thinking the subscriber personally bound for the unpaid premium, though the former thought the property was not so liable in the hands of a purchaser, and the latter supposed it not so liable even in the hands of the insurer. Moreover, unless the failure to pay the additional premium, not only left the new contract incomplete, but also abrogated the old one, which cannot be pretended, it is not easy to conceive why the bill should have been dismissed as to the whole demand, merely because a part of the demand could not be sustained.

Let us, however, pursue this subject of the non-payment of the premiums somewhat

farther. The personal liability of the declarant, for the premium, has been already shewn to have been established by the concurrent opinions of judges Roane and Fleming, which opinion is sustained 234 by the 10th section of the act of 1794.

The liability of the property of the declarant, for the premium, seems equally to be provided for by the same section; which declares, that, in default of payment of the premiums, the subscribers may be compelled to pay them, and their property shall be liable to be sold for the payment of the same. The meaning of this section, is further explained by the act of December 1795, which may be considered, indeed, as part of the *res gesta*. From this act also it is clear, that the property was to be held liable for the original premiums, as a general principle; but, it was declared to apply only to subsequent insurances, obviously with a view to favor those who had contributed to carry the scheme into execution by becoming subscribers, but who seem, from the preamble of the act, to have been inclined to withdraw before they were irrevocably bound, unless such a provision was enacted. With these views, I intirely concur with judge Roane, that the property was bound for the premiums, while it remained in the hands of the declarant; nor can I perceive how judge Fleming, who expresses a different opinion, could avoid the force of the enactment in the 10th section. The fact, that by the law the society was not bound, while the premium was unpaid, cannot sustain this opinion; for it was not bound while a quota was unpaid, and yet it is agreed on all hands, that the property was subject to quotas. The truth is, the legislature obviously discarded (in relation to this institution) the ordinary principle of contracts, that both parties shall be bound, or neither; for it expressly provided, that the responsibility of the society for losses, should be suspended the instant a quota was in arrear, and yet left the insurer liable to the recovery of the quota with interest thereupon.

Having thus shewn, that the contract of insurance, however incomplete as to the responsibility of the society, was nevertheless complete as to the liability of the declarant, and of the property insured, while it continued his, it may next be asked, how the property can be considered as absolved in the hands of an assignee, who pur- 235 chases with notice. *If the property be bound in the declarant's hands, can he by his act remove that liability? If the contract was complete before the sale of the premises, so far as to render both person and property liable, is it rendered incomplete by the sale? I cannot think so; and cannot therefore concur in the opinion expressed by judge Roane that "the 8th section of the act of 1794, relating to the liability of purchasers and mortgagees, is confined to cases of property, the insurance of which has been perfected by the payment of the premiums." For, according to this opinion, if one declares for insurance, and then sells to another before he pays the premium, though the vendee have full notice of the assurance, the property, which in the hands of the vendor was bound, is

in the vendee's hands absolved, because, as it is said, the insurance was not perfected, when the assignment was made. This does not seem reasonable; and I am, therefore, clearly of opinion, that the property continues bound, for payment of premiums, as well as quotas, in the hands of an assignee with notice.

How is it as to an assignee without notice? This question becomes important to be decided in the present case, because the defendant has not only pleaded, but has shewn, I think, that he is a purchaser without notice. As this matter was much discussed at the bar, it is my duty to shew the reasons of this opinion. The rule is unquestionable, that he who would protect himself as a purchaser without notice, must shew himself to be a complete purchaser. If, therefore, either his purchase money remains unpaid, or he has not completed his title by obtaining a conveyance before he receives notice, the notice will affect him; for, if he receive that notice before both of those acts are perfected, he ought to stop until the equity is inquired into, or he will be bound by it. Sugd. Law Vend. 530. Thus, although he has paid every cent of his purchase money, and the hopeless insolvency of his vendor would prevent his ever recovering it back, yet if he has not completed his title by having a conveyance

prior to his notice of the prior equity, 236 he must stop, and will not be permitted to go on to secure himself by obtaining the legal title, from the common vendor. And this is in strict consonance with justice, and in strict analogy with equitable principles. It rests upon the maxim which prevails in equity, as well as at law, *Qui prior est in tempore, potior est injure*, where two equities are equal, the prior equity shall prevail. If then A. has made the first purchase of an estate, he has prior equity to B. who purchases afterwards; and, in a mere contest of equities, A. must prevail; for if the vendor refused to make title to either, and a suit were brought in equity for a title, the court would obviously decree a conveyance to A. Such then being the case, as soon as B. receives notice of the prior equity of A. he becomes at once apprised of the fact, that he has the best right to the land, and that a court would so decree. It is then, obviously, a fraud in B. to proceed to get a title to that property which he knows to belong to another, though the formality of a conveyance has not been complied with. But if he has paid his money and obtained his conveyance before notice, his conduct has been fair, and having equal though posterior equity, he will be protected, because he has the legal title also, fairly acquired. He must, however, have obtained the legal title, or must shew, that, though posterior in time, he has the best right to call for the legal title. In this case, Stone most certainly has not the legal title: that legal title is in the trustee Wallace: the releases of the cestuis que trust never can pass it. But, though he has not the legal title, he has the best right to call for it. He stands, in relation to the purchase, in the shoes of the creditors whom he has paid. He bought from Vaughan with the knowledge of the

creditor's claims, and upon engagement to pay them; and his case comes clearly, I think, within the principle of *Williamson v. Gordon's ex'or*; and he has proved, very clearly, that he had paid the purchase money.

I recur then to the question, whether an assignee without notice, will be protected in equity against the claim of this 237 *assurance society? On this subject, we have the express decision of the supreme court of the U. States in *The Mut. Ass. Society v. Watts's ex'or*, and also the opinion of judge Fleming in *Greenhow v. Barton*, that the clause of the act, which requires the seller to give notice to the purchaser, is a matter merely between themselves, with which the society has no concern, and that the property is bound in the assignee's hands without notice. Let us examine this matter for ourselves.

The contract of assurance is a covenant real, entered into by the insured with the insurer. It is a covenant entered into by the fee simple holder, whose *jus disponendi* is absolute. His charges upon the property by way of covenant, cannot be gainsaid by a subsequent purchaser. That purchaser, in making his purchase, takes the property cum onere, and he can only look to his vendor's covenants to protect him against the incumbrance. Like the grant of a right of way, or of a right to divert a water course, this covenant is binding upon a subsequent purchaser, who has notice of its existence, and even if he has no notice, provided the rights arising under the covenant are legal and not merely equitable. For the covenant is one of those which runs with the land. It is indissolubly connected with a covenant on the part of the society to insure against fire; a covenant which goes to sustain, support and uphold, the property which is charged. It is emphatically, then, one of those contracts, which being for the benefit of the estate, and annexed to it, passes with the title to all who purchase with a knowledge of its existence. And having taken with such knowledge, they are personally bound in respect of the estate which they hold, so long as the property continues theirs. A fortiori, the lien upon the property remains; and neither can be removed but by notice of withdrawal, as provided by law. But, not only is the assignee with notice bound both in person, and as to the property purchased; but the property is bound even without notice, whether he is bound personally or not; a question, which I do not mean to

238 touch. *For, the liability of the property is not only imposed by the party himself, in adopting and consenting to abide by the constitution, laws &c. of the society; but the act of the legislature itself declares, that the subscribers, as soon as they shall insure, "do mutually for themselves, their heirs, executors, administrators and assigns, engage their property insured, as security, and subject the same to be sold, if necessary, for the payment of quotas." This charge declared and imposed by the law itself, cannot be regarded as a mere equitable claim. The jurisdiction exerted by a court of equity for carrying it into effect, does not change its nature from

a legal lien into a mere equity. Like other cases, in which parties are before a court of equity, where the claim of one is superior to the other in the estimation of the law, equity will respect the legal preference. Thus, if various creditors are before the court, seeking the distribution of legal assets, the legal superiority of a claimant is duly respected. If various creditors have judgment liens, which are obstructed by a fraudulent conveyance; upon setting aside that conveyance, the eldest judgment creditor will have his priority of right duly preserved. So in this case; though equity lends its aid to the enforcement of this lien, yet it is emphatically a legal and not an equitable lien. It is declared by the law itself, as strongly as the lien on the debtor's land created by judgment in behalf of private individuals, or the lien on the lands of public defaulters in behalf of the commonwealth. It must, therefore, be treated as a legal lien, and as such it cannot be successfully repelled by the plea of purchaser without notice; a plea which can avail only against a merely equitable title.

In the argument of this case, it has been contended, that whatever may be the effect of the act of 1794, the act of 1805 contains no provision giving to the society a lien on the insured premises, for the additional premium, and the annual instalments required, by that act, or for those which have been subsequently authorized by the act of 1809. It is true, there is no such express provision in either of those
239 acts, but the first of them repeals only such parts of antecedent laws as are repugnant to itself. It left untouched the sections of the act of 1794, which declare the liability of the property insured, for the payment of the quotas. But it was said there are no longer any quotas, but instead of them, an annual contribution, first by the act of 1809 for ten years, and now continued by that of 1819, at the discretion of the society. These are, however, the same thing in effect. For, as I have already said, the quota was itself but such contribution as might be necessary from time to time, to maintain the integrity of the fund. And what else are the annual assessments made, first under the act of 1809, and afterwards under that of 1819? The terms, indeed, are changed, but the substance is the same; and so, for more than twenty years, the law has been universally understood.

With respect to some other topics, I must content myself with very succinct remarks. No fault is attributable to the society, for not giving notice to the purchaser, for it is not presumable the agent in this city is consant of the sales made in remote parts of the state. Nor am I aware, that the legal rights of the society can be affected by their omission to demand payment at an earlier day; by which failure, as it is said, the defendant Stone will be a sufferer. Whether it would have forfeited its lien by failure to give notice of it, if a notice of Stone's purchase and of Vaughan's situation could have been brought home to it, is a question which the facts in the case do not require me to examine; but without any

evidence of fraudulent concealment on the part of the society or its agents, or of knowledge of the interest of Stone in the transaction, it is impossible, I think, that it can justly be deprived of its lien. I cannot but observe, that common prudence would naturally dictate an inquiry on the part of a purchaser, whether his vendor is or is not an insurer; an inquiry so easily satisfied, by an application to the public office established by the society according to law. Yet, on the other hand,
240 I will remark, that it is singular the society have not made an effort to prevent, as far as possible, disputes as to notice, by affixing, as is usual with insurance companies, some emblem of the insurance on some conspicuous part of the tenement insured. For, although I am of opinion, that, notice or no notice, the lien is preserved, yet this opinion, it is well known, has not always nor universally prevailed.

The decree entered by this court, declared, that the appellants were entitled to have a sale of the premises for the amount of their demand, unless the appellees or one of them should pay and satisfy the same within a reasonable time to be fixed by the court of chancery: therefore, the chancellor's decree was reversed with costs, and the cause remanded, to be proceeded in, according to the principles here declared.

241 *The Auditor of Public Accounts v. Dugger and Foley.

November, 1831.

(Absent BROOKE, J.)

Tobacco Warehouses—Effect Where Amount of Duties Insufficient to Pay Officers' Salaries—Liability of Commonwealth When Tobacco Burned.—Though a tobacco warehouse established by law, shall not yield a sufficient amount of duties, to pay the inspectors' salaries and rents to the proprietor, for three years in succession, yet such warehouse is not thereby ipso facto discontinued, under the 3rd section of the statute, 2 Rev. Code, ch. 220. and if inspectors continue to be duly appointed, and so the inspection be in fact kept up, and such warehouse be burnt, the commonwealth is liable to make good the loss to the owners of tobacco there inspected and deposited within the year preceding the loss, under the 67th section of the statute.

Claim against Commonwealth—Doubtful—Interest.—A claim against the commonwealth is presented to the auditor, which though just is yet doubtful, and therefore the auditor disallows it: and an appeal is taken from the auditor to a court of justice, which adjudges the claim against the commonwealth: **Held**, in such case, the court ought not to allow interest.

Same—Interest—Quære.—Whether, in any case of a claim adjudged against the commonwealth, interest should be given?

Dugger and Foley, having each had seven hogsheads of tobacco in Westbrook warehouse, Petersburg, and the warehouse, with their tobacco in it, having been destroyed by fire, presented their respective claims against the commonwealth, for the value of their tobacco so destroyed, to the auditor of public accounts. The auditor disallowed both claims in toto; and they took an appeal to the superior court of chancery of Richmond, according to the statute, 2 Rev. Code, ch. 174, § 6, p. 2.

***Claim against Commonwealth—Doubtful—Interest.**—On this question the principal case is cited in footnote to Skipwith v. Clinch, 2 Call 233; Stearns v. Mason, 24 Gratt. 494. See monographic note on "Interest" appended to Fred v. Dixon, 27 Gratt. 541.

The claims were founded on the 67th section of the tobacco inspection law, 2 Rev. Code, ch. 220, p. 166, 7. The auditor disallowed them, mainly upon the ground,—that, at the time the warehouse was burnt, it was not an existing public warehouse established by law, but ought to be regarded as a warehouse discontinued under the 3rd section of the statute, Id. p. 137.*

242 *In the court of chancery, the two claims were presented together, and proceeded in as one cause, and the facts were agreed, as follows: Westbrook warehouse had been, for a great many years, a public warehouse established by law for the inspection of tobacco. But, for more than three successive years before it was burnt, the duties received from it had not amounted to a sum sufficient to pay the inspectors' salaries and the rents of the warehouse. Nevertheless, during those three years, and in the year when the fire happened, the inspectors had been regularly and annually recommended by the county court of Dinwiddie, and commissioned by the executive, and no proceedings had ever been had or commenced for discontinuing the inspection. Dugger had seven hogsheads in the warehouse when it was burnt, which had been inspected there; but of these five had been inspected, and the inspectors' receipts for them bore date, more than a year before the fire; the other two had been inspected within the year. Foley had seven hogsheads in the warehouse, all of which had been inspected there, within the year preceding the fire, and was burnt with it.

The chancellor directed a commissioner to ascertain the value of the tobaccos. He reported that Dugger's five hogsheads that had lain in the warehouse more than a year, was worth 561 dollars, and his two hogsheads inspected within the year, 120 dollars—and Foley's seven hogsheads, all inspected within the year, 642 dollars

243 —at the time they *were destroyed by the fire. Whereupon, the chancellor decreed, that the auditor should give his warrants upon the treasury, to Dugger for 120 dollars, and to Foley for 642 dollars, with interest thereon from the date of the loss. From which decree, the attorney general took an appeal to this court.

And in the argument to the cause here, he insisted, 1. That the commonwealth was not bound to make good this loss: that the warehouse having failed for three successive years, to yield an amount of duties sufficient to pay the inspectors' salaries and the rents to the proprietor, the inspection

was ipso facto discontinued by operation of law; that this must necessarily be the construction of the 3rd section of the statute, since no particular method of proceeding was provided to discontinue an inspection, in such a case; that as, therefore, the inspection had been kept up in violation of law, and as only the surplus of duties imposed on tobacco inspected, over and above the inspectors' salaries and the rents, was paid into the treasury, and was the only premium which the commonwealth received for the insurance of tobacco, it was unreasonable and unjust that it should be held to insurance in this case, in which it received no premium. 2. That the decree was erroneous in giving interest. The commonwealth ought in no case to pay interest. It provided funds for the payment of all its debts. If claims against the treasury, presented to the auditor, were plainly just (as in most cases they were) the officers of the treasury allowed, and paid them, on demand. If the claims were doubtful, it was the auditor's duty to reject them; in which case, the laws gave the claimant a most summary remedy, by appeal to the courts of justice to decide the question of right. The commonwealth was obliged to confide the liquidation of claims to its officers, and to rely on their judgment and discretion. It was impossible to impute it as a default to the commonwealth, that it should not pay what the proper officer, the auditor, thought an unjust de-

244 mand; *and the auditor, having no motive to commit the injustice of rejecting claims concerning which there was no reasonable doubt, must be presumed, whenever he disallowed a claim, to act fairly according to the duty of his office. There had been cases, indeed, in which interest had been adjudged against the commonwealth; but there had been cases also, in which it had been denied to the claimant; and he believed it would be found, that, whenever the point had been made, interest had been denied. In Lilley's case, 1 Leigh, 525, the point was made, and interest was denied by the court, according to the opinion of Green, J., Id. 528. In the state of that case, in the report p. 526, it was stated, that the judgment of the circuit court was "for five years full pay with interest from the 22nd April 1783:" but that was a mistake: the judgment of the circuit court was for the five years full pay without interest; and this was the judgment that this court affirmed.† As to the case at bar, it could hardly be denied, that the claim was doubtful at least, and very doubtful, in principle; neither was the value of the article ascertained; it was not only a disputable, but an unliquidated, demand: therefore, however right it might be to allow interest in cases differently circumstanced, it ought not to be allowed here. Kerr v. Love, 1 Wash. 172; M'Connico &c. v. Curzen, 2 Call, 358. At any rate, the interest ought not to have been carried back beyond the date of the demand made at the auditor's office.

*§ 3. provides, that "In case any warehouse now or hereafter to be established, shall not, in the space of three succeeding years, receive a sufficient quantity of tobacco to pay the inspectors' salaries and rents of the warehouses, the inspection of tobacco at such warehouses, respectively, shall be thenceforth discontinued, unless the same shall be supported at private expense."

†§ 67. provides, that "If any warehouse, already or hereby or hereafter to be established, shall happen to be burnt, the loss sustained thereby for tobacco either there inspected or stored, shall be made good and paid to the several persons injured, by the commonwealth, and no inspector or inspectors shall be held accountable for the same in consequence of any receipt by him or them given; provided, that if the receipt given be of an older date than twelve months"—"such tobacco shall not be paid for by the public, but the owner or proprietor thereof shall bear the loss."—Note in Original Edition.

*Upon looking into the original record, I find that the attorney general was right: there was the mistake he pointed out, in the state of Lilley's case, in my report of it.—Note in Original Edition.

Macfarland for the appellees, contended, 1. That the 3rd section of the statute was merely directory to those officers of government, upon whom it depended to continue or discontinue a particular inspection; namely, to the justices of the county court whose duty it was to recommend, and to the executive whose duty it was to commission, inspectors, only at such inspections as ought to be continued, and to omit the recommendation and appointment of inspectors for warehouses that ought no longer

245 to be continued. This *was the

method provided by law for discontinuing inspections, when the duties ceased to yield enough to defray the charges. It was impossible to hold, that the planter, seeing an inspection existing de facto, was bound to examine the state of the accounts returned to the treasury, of the duties collected for three years before he brought his tobacco for inspection, to see whether the inspection was properly kept up or not.

2. As to the claim of interest, he said it was material to consider the nature of the claim, and of the duty which the commonwealth had taken upon himself. The law required the planter to carry his tobacco, intended for exportation, to some public warehouse for inspection, and to leave it there in the care of the inspectors, who were officers of the public, not bailees of the planter; and the commonwealth, levying a duty upon all tobaccos inspected, professedly to provide a fund to indemnify the planters against losses by fire, undertook to insure the property. It was tantamount to a contract of assurance; the planters paid the premium, in paying the duties; and, it was well known, that the fund thus provided, had greatly exceeded what was necessary for the avowed object, and that these duties had been made a source of revenue for general purposes. The commonwealth, then, was bound to insure the planter; to indemnify him against loss by fire. Whatever was the true measure of his loss, that was the measure of justice to be meted to him. Then, plainly, his loss was the value of his property at the time it was destroyed, with interest from that time till retribution was made to him: the interest which the principal would have yielded, was as much a part of the loss as the principal. If the proper officer of the government, charged with the duty of adjusting such claims, should think a particular claim doubtful, and disallow it, and drive the creditor of the public into the courts of justice; the officer might be blameless in this, but yet he acted for the benefit of the commonwealth; and if he should reject a claim as doubtful, which turned out to be just, the

246 public, whose agent he was, and not the injured creditor, ought to *bear the consequences of his mistake: the public ought to pay, not the creditor to lose, the interest. As well might any ordinary insurance company refuse to pay interest on losses, which its agents refused, whether with or without reason, to adjust and pay. As to these claims being unliquidated, they were no otherwise so than that the market value of the tobaccos at the time of loss, was to be ascertained by evi-

dence; which was the case in every instance of the kind; and, if that were to justify the auditor in disallowing these claims, and should be held to exempt the commonwealth from the duty of paying interest on such claims during years of litigation, the planters, who were compelled to bring their property to the public warehouse, to leave it there, and trust to the insurance of it by the public, would, in every case, be only partially indemnified. It was, however, the duty of the auditor to ascertain and adjust the loss, as well as to give his warrant upon the treasurer for the payment of it.

CARR, J. These claims are founded on the 67th section of the tobacco inspection law; and, as it is agreed that the tobaccos for which the chancellor has given the appellees a decree, were in the warehouse and consumed with it, there could be no doubt as to the liability of the commonwealth to pay for them, but for the 3rd section of the act. It is agreed, that for the three successive years preceding the fire, this house had not received tobacco enough to pay the warehouse rents and salaries of the inspectors; yet that no step had been taken to discontinue the inspection, but on the contrary, that for those years inspectors had been regularly recommended by the county court, and commissioned by the executive. Under this state of things, the attorney general insisted, that the inspection was ipso facto discontinued by the law, and could not be kept up by the improper conduct of the county court in recommending inspectors, or of the executive in commissioning them. But I cannot think so.

It has long been the policy of the 247 commonwealth *to take into her own hands the regulation of this staple; and many are the laws, and various the duties and penalties imposed, all having for their object, the improvement of that article, and the benefit and security of those who make and those who deal in it. A number of public warehouses are erected, to some one of which all tobacco must be carried. There it is to be inspected by officers, appointed, commissioned and paid by the public, and there it is to remain, the inspectors giving receipts describing each-hogshead, and binding themselves to deliver it to the owner or his order when demanded for exportation; with many other regulations which it is needless to enumerate. The 3d section, which enacts that warehouses not receiving tobacco enough to pay the rent and salaries of the officers, shall be discontinued, is made for the benefit of the commonwealth, that she may not be burdened, in such cases, with the payment of these expenses. The returns directed to be annually made, both to the county courts and the executive, enabled these bodies to ascertain at any time, when under this 3rd section, a warehouse was to be put down; and the regular way to effect this, was to omit the appointment of inspectors. This would at once give notice to the planters, that there was no longer an inspection at the place, and they would take their tobacco elsewhere. But so long as they found the inspection in full operation, the officers attending and doing business as usual, they

had occasion to look no further, and would never dream of going to the county court to find out whether the receipts of the warehouse paid the expenses. I think, therefore, that wherever the inspection was kept up by the commonwealth, she was bound to pay the planter for any tobacco deposited there, and lost by fire, if it had not been stored more than twelve months.

The question of interest remains to be considered. It has been several times discussed, whether the commonwealth is liable to pay interest on claims against her; but, as a general doctrine, I do not think it has been decided exactly on what footing she stands in this respect. In the 248 *case of *Com. v. Lilley*, interest was refused, not on general grounds, but because of the intrinsic difficulty of the questions, which was thought to excuse the government from the imputation of any wrongful delay in refusing to satisfy the claims, without a judicial decision. As there are only three judges present, I think it safest to pass by the general question for the present, and to decide this point on the particular circumstances of this case. And I am of opinion, that they are such as justified the auditor in referring this matter to the decision of the courts; and, consequently, that no interest ought to be given.

CABELL, J., concurred.

TUCKER, P. Two questions are presented for the consideration of the court in this case: 1. Is the commonwealth responsible for the demand of the petitioners? and if it be so, 2. Is the commonwealth bound to pay interest upon the sum which may be found to be due?

The demand arises under the 67th section of the tobacco inspection law; and the commonwealth's exemption from liability is claimed under the 3rd section of the same law. Upon the agreed state of the facts of the case, I am clearly of opinion, that the commonwealth is liable for the tobacco of the claimants. The provision of the law does not, in my conception, operate ipso facto a discontinuance of the warehouse. It is merely directory to the functionaries of the government. So long as they continued to appoint inspectors of the warehouse, so long were the tobacco planters justified in looking upon the establishment as a public establishment. The discontinuance of the warehouse was to depend upon the state of the accounts; upon a comparison between the disbursements and receipts; a comparison which it was the duty either of the county court or of the executive (both of which were in possession of the returns) to make, before each annual appointment of inspectors. It could not

have been the design of the act, that 249 every tobacco *owner should, before his deposit in a warehouse established by law, go to the records of the county court, or to those of the government in Richmond, and examine into the state of accounts. Such a regulation would have been attended with embarrassments not to be long endured, and the loss, as the owners of tobacco are compelled, nolens volens, to deposit it in some public warehouse, previous to exportation.

The question relating to interest is more

important, and not so clear. It is contended, that the commonwealth engages by the statute, that she will make good the loss of tobacco sustained by the owner; that she discharges the inspectors and assumes their responsibility; and that as the inspectors would have been liable to interest, the commonwealth must be so. But I am of opinion, that, whatever may be the general principle, interest ought not to be allowed in this case.

Decree reversed, as to so much thereof as allowed interest, and affirmed as to the residue.

250

*Newell v. Mayberry.

November, 1831.

[23 Am. Dec. 261.]

(Absent BROOKE, J.)

Pleading and Practice—Variance between Allegations and Proof.—Declaration in assumpsit on a written agreement, takes no notice of a note subjoined to the agreement, limiting its continuance to a day certain: the agreement offered in evidence on the general issue, has such note subjoined thereto: **Held**, this is a fatal variance between the agreement laid in the declaration and the agreement offered in evidence; and the agreement is not admissible evidence, unless it appear that the note was subjoined, without the plaintiff's knowledge or consent, and so was no part of the agreement.

Contracts.—Agreement between M. and N. that if N. can get possession of a runaway slave belonging to M. before a certain day, N. shall have the slave at a stipulated price, and that the agreements shall continue in force only till that day: N. gets possession of the slave, after the appointed day, and continues to hold him: **Held**, M. may maintain an action for the slave, but not for the stipulated price.

Same—Alteration—Effect.—If a written agreement not under seal, be altered by the party claiming under it in a material part: **Held**, he can never recover upon the agreement so altered, nor can he avail himself of the contract in its original and true form: there is no distinction between deeds and other written instruments, in this respect.

Assumpsit by Mayberry against Newell, in the circuit court of Botetourt. The declaration alleged, in substance, that a written agreement was made by and between Mayberry and Newell, and signed by Newell, on the 2d July 1816, whereby it was agreed between the parties, that Newell should give out that he had purchased a slave named Lewis from Mayberry, or had exchanged with him a slave named Reuben for Lewis, and should try by all means in his power to take Lewis; and when taken, Newell was either to keep him, and settle with Shepherd for the price of him, or deliver him to Mayberry, at Newell's option; and if Newell kept him, no deduction was to be made for taking him; but if he delivered him to Mayberry, he was to receive 20 dollars for his trouble: that Mayberry had purchased the slave Lewis of Shepherd, for 621 dollars, and the slave, at the time of the contract, had absconded from May-

***Alteration of Instruments—Effect.**—The alteration of an agreement or any written instrument if made by an obligee in a material matter without the assent of the obligor destroys the agreement. *Yeager v. Musgrave*, 23 W. Va. 111, citing *Newell v. Mayberry*, 3 Leigh 250, also a large number of other cases in other states. To the same effect the principal case is cited in *Dobyns v. Rawley*, 76 Va. 544; *Batchelder v. White*, 80 Va. 107. See monographic note on "Contracts" appended to *Enders v. The Board of Public Works*, 1 Gratt. 364; Art. "Alteration of Instruments" in 2 Am. & Eng. Enc. Law (2d Ed.) 180.

berry's service: that Newell did regain
 251 possession *of the slave Lewis on the
 20th July 1816, and elected to keep
 him, and to pay Shepherd the price of him;
 and had ever since and still claimed, under
 the agreement, and held the slave, as his
 own property, and refused to take 20 dollars
 tendered to him for his trouble, and to re-
 store the property to Mayberry; and yet
 Newell did not, and would not, pay Shepherd
 the above mentioned price of the slave, and
 Mayberry had been compelled to pay the
 same to Shepherd by reason whereof Newell
 became liable to pay Mayberry the said sum
 of 621 dollars, and being so liable, in con-
 sideration thereof assumed to pay the same
 to him. Yet Newell had not paid him the
 same, but the same to pay him hitherto
 always had failed and refused &c. Newell
 pleaded the general issue. Verdict and
 judgment for Mayberry, for 621 dollars,
 with interest from the 10th November
 1816.

There were six bills of exceptions filed to
 opinions of the circuit court in this case:
 it is only necessary to notice three of them,
 the second, fourth and sixth.

The second stated, that Mayberry offered
 in evidence at the trial, the written agree-
 ment mentioned in the declaration, which
 was in these words:

"Memorandum of agreement made this
 2nd day of July A. D. 1816, between T.
 Newell and T. Mayberry. Said Newell is
 to give out that he has purchased negro
 Lewis, or exchanged with him for negro
 Reuben, and to try all means in his power
 to take said Lewis, and when taken said
 Newell is either to keep him and settle with
 Shepherd for the price of him, or to de-
 liver him up to said Mayberry at his op-
 tion, that is, Newell's; if he keeps him,
 no deduction for taking him, and if he de-
 livers him up to Mayberry, then he is to
 receive 20 dollars for his trouble. And the
 said parties bind themselves on their honour,
 that neither of them will ever divulge or
 communicate this agreement to any person
 whatever, either directly or indirectly, ex-
 cept Job Moore—(signed) T. Newell. This
 agreement to be in force until 12th
 July."

252 *Whereupon Newell's counsel ob-
 jected to the reading of this paper in
 evidence, on the ground that it was variant
 from the instrument described in the de-
 claration, in which no mention was made of
 the note at the foot of the agreement limit-
 ing it to the 12th July; and though it was
 therein averred that Newell regained pos-
 session of the slave on the 20th July, yet
 there was no allegation that the agreement
 had been extended afterwards beyond the
 12th July. But the court,—being of opin-
 ion, that the variance was not such as
 should prevent the paper from being given
 in evidence to support this declaration,
 that if Newell had intended to take advan-
 tage of the variance, he ought to have done
 so by way of plea, to which Mayberry
 might have had an opportunity to reply,
 and that Newell could not take advantage
 of the variance by way of objection to the
 evidence,—overruled the objection, and per-
 mitted the paper to be read in evidence to
 the jury.

The fourth bill of exceptions, after set-
 ting out the written agreement again in
 hæc verba, stated, that Newell's counsel
 moved the court to instruct the jury, that,
 as it appeared by that instrument, that
 the agreement was to be in force only until
 the 12th July 1816, if they should find that
 Newell did not get possession of the slave
 till after that day, they ought to find a ver-
 dict for him, in this action; because, in such
 case, Mayberry would have been no wise
 bound to permit Newell to retain the slave
 as his own property, and Mayberry would
 have had an action to recover the slave
 himself or his value, but could not maintain
 an action on this agreement. But the court
 refused to give the instruction.

The sixth bill of instructions, repeating
 the agreement in hæc verba, stated, that
 Newell's counsel moved the court to instruct
 the jury, that if it should find from the
 evidence, that the agreement had been al-
 tered, after it was executed, by Mayberry
 himself, without Newell's consent, whether
 in a material or immaterial part,—or that it
 had been altered by a stranger, without New-
 ell's consent, in a material part,—in either
 case, the jury ought to find for New-
 253 ell. And, *thereupon the court in-
 structed the jury, that if it should
 find from the whole evidence, that the
 agreement had been altered, since the ex-
 ecution of it, in any material part, without
 Newell's knowledge and consent, either by
 Mayberry or any other by his procurement,
 then the agreement ought to be wholly dis-
 regarded by the jury, and it ought to find
 for Newell, unless the contract should be
 substantially proved by other evidence;
 but, if the jury should find, that the agree-
 ment had in fact been altered, whether in
 a material or immaterial part, but had not
 been so altered by Mayberry himself, or
 with his consent, or by his procurement, in
 such case the jury ought to disregard the
 altered parts only, and find accordingly.

To these opinions Newell's counsel ex-
 cepted, and appealed from the judgment to
 this court.

Leigh, for the appellant: Johnson for the
 appellee.

TUCKER, P. I am of opinion, that the
 words, this agreement to be in force until
 the 12th July, if underwritten at the time
 of the contract, or afterwards and before
 that date by the mutual consent of the par-
 ties, did constitute a part of the contract
 between them, and a most material part of
 it, since it limited (as I conceive) the right
 of purchase on the part of Newell, to the
 12th July. Until that date he had a right
 to keep the slave, if he chose to do so,
 under the contract, and pay Shepherd for
 him. But after that date, he had no such
 right. If he detained him, he did not de-
 tain him under the contract, but of his own
 wrong, for which he was responsible in
 another form of action, but not in this. The
 declaration, therefore, having set out the
 contract as indefinite, and the contract be-
 ing in fact limited, the variance was fatal,
 in this action, upon the trial of the general
 issue. If, indeed, Mayberry had offered
 proof, that these words were not subjoined
 by the parties as part of the contract, and
 that they were neither added by himself nor

by any other at his instance or with
254 his connivance, then the *paper should have gone to the jury, with an instruction, that if it believed such evidence it should disregard those words; in which case, the agreement would have corresponded with the declaration. I am, therefore, of opinion that the circuit court erred in the points stated in both the second and fourth exceptions.

The court also erred in the opinion set forth in the sixth exception. The materiality of an alteration is, I take it, matter for the decision of the court; and, moreover, if it had appeared, that the alteration was made by Mayberry, or any other by his procurement, then he could never recover upon this contract, nor could he be permitted to establish it by any other evidence, or even to avail himself of the contract according to its original and true character. For the principle long since established as to bonds, *Pigot's case*, 11 Co. 27, is extended, by recent decisions, to other instruments, upon the principle, that no man shall be permitted to take the chance of gain, by the commission of a fraud, without running the risk of loss in case of detection. *Master v. Miller*, 4 T. R. 320, 1 Anst. 226, 2 H. Black. 11, *S. C.* *Powell v. Divett*, 15 East, 29.

The other judges concurring, judgment reversed, verdict set aside, and the cause remanded for a new trial.

255 *Faulkner v. Faulkner's Ex'ors.

November, 1831.

[23 Am. Dec. 264.]

(Absent BROOKE, J.)

Husband and Wife—Marriage Articles—Failure to Appoint Trustee—Effect Where Husband Uses Wife's Money in Purchase of Chattels—Case at Bar.—By marriage articles, it is agreed, that, during the coverture, husband and wife shall enjoy their respective estates jointly, but that their estates shall be kept separate and distinct from each other, and that the property then belonging to each, shall remain under the control of each, and that the husband shall claim no part of the wife's estate, and the wife no part of the husband's estate, by virtue of the marriage; but no trustee is appointed to hold the wife's estate for her separate use: during the coverture, a sum of money belonging to the wife before the marriage, came to the husband's hands: he laid it out in chattels, which he declared were his wife's property: the husband dies: HELD, the legal estate in the chattels so purchased, vested in the husband, and at his death devolved to his ex'ors, so that they may maintain detinue for them against the widow.

Detinue for sundry chattels, by James and John Faulkner, executors of Jacob Faulkner deceased, against Sarah Faulkner, his widow, in the circuit court of Halifax. Plea, the general issue. Verdict and judgment for the plaintiffs.

At the trial, the defendant filed a bill of exceptions to a direction given by the court to the jury, from which it appeared, That before the marriage of the plaintiff's testator, Jacob Faulkner, with the defendant Sarah, in August 1811, marriage articles

***Husband and Wife—Marriage Articles—Marital Rights.**—The principal case is cited in *foot-note* to *Charles v. Charles*, 8 Gratt. 466, where all the cases that cite the principal case are quoted from. The principal case is also cited in *Findley v. Findley*, 11 Gratt. 487; *Hinkle v. Hinkle*, 34 Va. 154, 11 S. E. Rep. 997. See monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 156.

were entered into between them, whereby it was agreed, that during their joint lives, they should enjoy the estates of each other jointly, but their estates should be kept separate and distinct from each other, and that the property then belonging to each should be under the management and control of the party it belonged to; and, in case the husband should survive, he should not have or claim any part of the wife's estate, real or personal, by virtue of the marriage or otherwise; and, in case the wife should survive, she should not have or claim any part of the husband's estate, real or personal, as his widow or otherwise, nor be entitled to administration of his estate. That, among the property of the wife before the marriage, secured to her by the

articles, was a sum of money, which,
256 *after the marriage, came into the hands of the husband; and part of this money was laid out in the purchase of the chattels demanded in the declaration. That the husband, in his lifetime, admitted and declared, that these chattels so purchased with the wife's money, were her property; but he held possession of them during his life, and died in possession thereof; his wife took possession after his death. That, after the purchase of this property, there was still a balance of the wife's money in the husband's hands, which he held till his death; and by his last will and testament, besides giving her some property of his own, he bequeathed as follows—"I give to my wife Sally every species of property with the increase thereof which I received with her, also my negro girl Celia in lieu of 300 dollars of her money, which I have made use of." And proof of these facts having been laid before the jury, the court, on the motion of the plaintiffs, instructed the jury, that if it should find from the evidence, that the chattels demanded in the declaration, were not the property of the defendant at the time of her marriage with their testator, nor the increase of any property that then belonged to her, nor acquired by her since the testator's death, the plaintiffs, his executors, were entitled to recover the chattels in question, notwithstanding that the testator in his lifetime, admitted and declared them to be the property of his wife, the defendant, and that they were purchased after the marriage, with the money belonging to the wife before the marriage, and secured to her separate use by the marriage articles. The defendant excepted to this opinion, and appealed from the judgment to this court.

Leigh, for the appellant.

Johnson, for the appellees.

TUCKER, P. The judgment of the circuit court in this case, was doubtless founded upon the well established distinctions between the principles of law
257 and equity, in relation *to contracts between husband and wife, and to the attaching of the marital rights upon the property of the wife. Had a trustee been appointed by the marriage contract in this case, and the property been conveyed to him, a court of law, looking only to the legal title, would have pronounced that Faulkner's executors could not recover the property, thus conveyed by the wife before

marriage with the husband's assent. And a court of equity would have sustained the rights of the wife, because that court recognizes the validity of these antenuptial contracts. But, as no trustee is interposed, the legal title was left in the wife; and, in the eye of the law the marital rights attached immediately upon the marriage. In equity, indeed, the interposition of a trustee, is no longer considered necessary for the wife's protection from the operation of the marital rights; and hence it is very possible that the appellant's title may prove best before another forum. These distinctions, however technical, must be preserved in order to prevent uncertainty and confusion. They have always been rigidly maintained; nor do I find a single case in which, at law, a marriage settlement has availed to secure the property of the wife, without the intervention of a trustee. Nor can the contract, however worded, operate a release at law, though it would be a good release in equity; for it is a first principle as to releases, that they cannot operate upon a right not yet acquired; they always suppose a right in being. 10 Co. 48, a. The judgment of the circuit court must be affirmed.

258 *Wallace and Wife v. Dold's Ex'ors and Others.

November, 1831.

Wills—Construction—Gift to Daughter and Children*—Effect.—Testator bequeaths three slaves and \$1000, to trustees; and directs the profits of the slaves and the interest of the money, to be applied to the maintenance and support of his daughter M. and her child (M. being at the time a married woman); and on the death of his daughter, the slaves and money to be given to her child, or children if she shall have more than one; the above advances to be made to his said daughter M. independently of any claim testator might have against her husband: HELD, upon the construction of this clause, compared with context and general scheme of the will, the testator's daughter was entitled to the whole profits during her life, and the daughter's child had no right to demand a share of them for her support and maintenance—dissentiente TUCKER, P.

Philip Dold late of Augusta county, died in 1819, having by his last will and testament,—after devising and bequeathing a tract of land, four slaves and 2000 dollars,

***Wills—Construction—Devise to Wife and Children.**—On this question, see the principal case cited in *Stinson v. Day*, 1 Rob. 443, 447, and *note*; *Nickell v. Handy*, 10 Gratt. 343, 344; *Summers v. Bean*, 13 Gratt. 422; *Craig v. Walthall*, 14 Gratt. 522; *Penn v. Whitehead*, 17 Gratt. 515, and *note*; *Rhett v. Mason*, 18 Gratt. 566 (see *foot-note*); *Foot-note* to *Leake v. Benson*, 20 Gratt. 153; *Bain v. Buff*, 76 Va. 375; *Mauzy v. Mauzy*, 79 Va. 539; *Waller v. Catlett*, 83 Va. 202, 203, 2 S. E. Rep. 280; *Richardson v. Seever*, 84 Va. 270, 4 S. E. Rep. 712; *Seibel v. Rapp*, 85 Va. 80, 6 S. E. Rep. 478; *Mosby v. Paul*, 88 Va. 536, 14 S. E. Rep. 336; *Stace v. Bumgardner*, 89 Va. 421, 16 S. E. Rep. 252; *Fackler v. Berry*, 93 Va. 508, 25 S. E. Rep. 887; *Walke v. Moore*, 95 Va. 733, 30 S. E. Rep. 374; *Vaughan v. Vaughan*, 97 Va. 327, 33 S. E. Rep. 603; *Lindsey v. Eckels*, 99 Va. 670, 40 S. E. Rep. 23; *Tyack v. Berkeley* (Va.), 40 S. E. Rep. 904. See the principal case cited in article in 2 Va. Law Reg. 39, 40, 5 Va. Law Reg. 427, 428, 493. See *monographic note* on "Joint Tenants and Tenants in Common" appended to *Ambler v. Wyld*, Wythe 235. But see, citing the principal case, *Fitzpatrick v. Fitzpatrick*, 100 Va. 552, 42 S. E. Rep. 306, changing the rule in the above case holding that, where testator by his will devised to his "dear wife and our sweet little children all that I possess," it does not create a fee simple in the mother, where that is the only provision in the will, and there is nothing else to show that the mention of the children was but an expression of the motive of the gift. The same case is reported in 8 Va. Law Reg. 437.

to his son Jesse Dold, four slaves and 1000 dollars to his daughter Catharine Lawrence, and three slaves and 1000 dollars to his daughter Nancy Morgan, directly and absolutely,—devised and bequeathed as follows: "I give to my friends W. Miller and A. Stuart," two parcels of land, three slaves by name, and 100 dollars, "which land, slaves and money, I request my said trustees to hold in trust for the following purposes, and none other: the land and negroes to be employed and used, and the money put to interest, and the proceeds of the whole to be annually employed for the support and maintenance of my son William, and for the education of his children; to be employed in such way as best to promote the true interest of such family; and, at the death of my said son William and his wife, I direct my trustees or the survivor of them, to sell my said lands and negroes, and divide the proceeds thereof equally among his children then living, and the families of such as may be dead. I give to my said trustees, my negroes [three by name] and 1000 dollars in cash: the negroes to be kept and used, and also the interest of the money, for the support of my daughter Elizabeth Donaldson, and for the maintenance and education of her children, and for no other *purpose whatever; and at the death of my said daughter, I direct that the said negroes and money be equally divided among her children then living, and the families of such as may be dead, such family to receive the ancestor's part. I also give to my trustees my negroes [three, by name] and 1000 dollars in cash; the profits of these negroes, with the interest of the 1000 dollars, I direct may be applied to the maintenance and support of my daughter Martha M'Dowell and her child; and at the death of my said daughter, I direct that said slaves and money be given to her child, or children if she has more than one, and to the children of such as may be dead, if any there be: the above advances, to be made to my said daughter Martha, independent of any claim I may have against the estate of her husband." "I direct my executors to sell on such terms as they may think best, the land on which Robert M'Dowell now lives, and to make conveyances thereof to the purchasers."—And the testator having directed the residuum of his estate to be divided into six equal parts, and given to his son Jesse, and to his daughters Catharine and Nancy, one sixth part, each,—proceeded: "The other sixth parts I direct my trustees above mentioned to receive and apply one sixth part to the use and benefit of my daughter Elizabeth, one sixth part to the use and benefit of my daughter Martha, and the other sixth part to the use of my son William: these parts are severally to be used for the benefit of my said children during their lives, and at their deaths to be divided as their several money legacies are directed to be divided."

The testator's daughter and legatee, Martha M'Dowell, having as yet only one child, a daughter named Eliza, who intermarried with William Wallace, Wallace and wife exhibited their bill in the superiour court of chancery of Staunton, against

Dold's executors, Miller and Stuart the trustees, and Robert M'Dowell and Martha his wife; setting forth the will of the testator Philip Dold; alleging, that the plaintiff

260 Eliza, about the time of the testator's death, while she *was yet an infant, went to reside with an aunt in Huntsville, Alabama, with whom she lived, and by whom she was maintained, till her marriage with Wallace in 1822, and her aunt had a claim against her for the expense incurred in her maintenance, to the amount of 400 dollars; that the plaintiff Eliza, since as well as before her marriage, was entitled to an equal share of the profits of the property bequeathed by the testator's will to the trustees Miller and Stuart, to be applied to the maintenance and support of his daughter Martha M'Dowell and her child; and that the plaintiff's mother Martha claimed, and had received and enjoyed, the whole profits, before as well as since the plaintiff's marriage: and praying, that the executors and trustees might be ordered to render an account of this subject, and of the profits thereof; and a decree, that such part of the profits already received, as the plaintiffs were entitled to, and their just share of the future profits, should be paid to them.

The answers of the defendants,—after representing that Robert M'Dowell, the husband of the testator's daughter Martha was an imprudent man, careless of his wife's comfort, and destitute of the means of maintaining her, that that was the reason of this provision of his will, that his primary object was to provide a support for his daughter, and that the profits of the fund were barely adequate to that object,—submitted the question, as to the construction and effect of the testator's will, to the court; and alleged, that the plaintiff Eliza had of her own accord left her parents, and gone to her aunt in Huntsville, and that, even before her marriage, she was only entitled to support and maintenance out of the profits of the fund, while she lived with her mother.

The chancellor was of opinion, that the testator's will, truly interpreted, did not sustain the claim set up by the bill; that it appeared on the face of the will, to have been the testator's primary object, to provide the means of support for his daughter Martha, as without such provision, she would, in his apprehension, be in danger of want; that the mention he made of her child, did not vest in the child a
261 *substantive claim to a moiety of the profits of the fund during the life of her mother, that part of the provision of the will being satisfied, by regarding her as an object of expense, to which the testator knew his daughter would be subject, during the time her child should remain with her: therefore, he dismissed the bill with costs, but without prejudice to any claim the female plaintiff might afterwards set up to participate in the profits of the trust fund, in case her condition should afterwards require aid from this fund for her support. From which decree the plaintiffs appealed to this court.

The cause was argued by Johnson for the

appellants: there was no counsel for the appellees.

CARR, J. This case depends upon the construction to be given to that clause of Philip Dold's will, under which the appellants claim. The case is certainly not clear of doubt; but, after the best consideration I can give it, I strongly incline to think the chancellor's understanding of the will is the true one.

There is nothing technical in the will; the simple inquiry is, what this testator meant by the words he has used? In such an inquiry, I do not think we can derive any aid from reported cases. The testator had six children; two sons and four daughters. He seems to have intended to deal upon the principle of equality, between his sons, and his daughters also; giving to the first, land, slaves and money, to the last, slaves and money. The will is sensibly written; and we easily discern the scheme of the testator running through the whole of it. To one of his sons, he gives his portion, directly and absolutely: but he could not trust the other with property; therefore, he gives his portion to trustees, to be held by them in trust, and the proceeds to be annually employed for the support and maintenance of his son, and for the education of his children; and, after

262 the death of the son and his wife, the fund to be equally divided *among the children. Under this devise, it would not be contended, that the children of the son, after they came to full age, or separated from the family, could come in for any of the annual proceeds of the trust fund; for it is to be applied to the maintenance of the son, and education of his children. The testator's four daughters were all married. There is nothing in the will, or in the record, to shew that one was more the object of his bounty or his affection than the others. He seems to have intended to give them about the same portion; to each three or four slaves and 1000 dollars. Two of his daughters, Nancy and Catharine, had married men in whom he had confidence: the other two, Elizabeth and Martha, had not been so fortunate. This circumstance varied the form of the legacies. To the two first, he gives the slaves and money, directly and simply, saying nothing at all about their children, and shewing that the daughters alone were the objects of his bounty. With the two last, he proceeded differently. He gave to the same trustees, three slaves and 1000 dollars in cash: "the negroes to be kept and used, and also the interest of the money, for the support of his daughter Elizabeth, and for the maintenance and education of her children; and at the death of his daughter, the said negroes and money to be equally divided among her children." Do we not perceive in this bequest, equally as in the others, that his daughter was the object of his bounty? He could not give it to her at once; for then the object of the gift would be defeated, as it would go to her husband; but the trustees were to hold the fund and apply the profits to her support, and the maintenance and education of her children. The maintenance and education of her children, was the object most im-

portant to her comfort and happiness; it was a part of the burden she had to bear. If the money had been paid to her at once, her husband might have gotten and diverted it from its destined purpose. The trustees are, therefore, to apply it to the education &c. of the children. But, I presume, nobody would contend, that the children

263 *for any part of these profits, after they were educated and turned out in the world. It is very clear to me, the testator had no such idea: the maintenance and education he contemplated, was during infancy merely, when the mother had to support them. The whole fund was to be theirs at the mother's death. If he had intended, that as each child came of age, he should have his share of the profits paid to him annually, would he not have said so? But such a provision would have defeated his chief object, the support of his daughter during her life. The fund at best was a very small one; not more I should presume than 400 dollars a year. Suppose his daughter had had five or six children, and each was to have his aliquot part; his daughter would starve. Next comes the bequest to his daughter Martha, which I consider precisely like the last, in substance: "I give to my said trustees, my negroes &c. and 1000 in cash: the profits of those negroes, with the interest of the 1000 dollars, I direct may be applied to the maintenance and support of my daughter Martha and her child; and at the death of my daughter, the said slaves and money, to be given to her child or children, if she has more than one &c. the above advances to be made to my said daughter Martha, independent of any claim I may have against her husband." Now, I ask, can we suppose that, under this bequest, the testator intended to vest in the child of his daughter, an equal interest with her mother, in the annual profits of the trust fund? and that when she grew up and married, she would have a right to appropriate this half to herself during her mother's life? I can never believe it. Look at the other provisions of the will. They shew, that it was no part of his scheme to enable the children after they came of age, to claim any part of the profits of the trust fund. His daughter Martha, when he made his will, had but one child, and therefore he mentions the support of her child: suppose she had had, afterwards, four or five children more, did he not mean that they, equally with the one then born, should

264 *for we see, that when he comes to dispose of the fund at her death, it is to her child or children if she should have more than one. He meant the same benefit to all her children, both during her life and at her death; and that benefit was the same sort of support that he had provided for the children of his other daughter and son, who took through the trustees. No matter then, how many children Martha had had, they would have had the same right with the eldest, when they came of age, to have taken, thenceforward, their equal portion of the profits, and thus to have beggared their mother. Could the

testator have meant this? The mother then old and sinking in years; the children young and able to make their way in the world; could he have intended to leave his own daughter thus exposed to want? The voice of nature cries out against it. He knew that she would be solely dependent on what he gave, for her bread: he knew this, for we see that her husband then lived on his land, which in another clause of his will he directs his executors to sell, and that this husband was then indebted to him. With this knowledge, would he, even if he had been sure his daughter would have no other child, have given to the one she had, half of the slender pittance he had left her? I cannot think so. But further: immediately following the bequest to Martha, he says "the above advances, to be made to my daughter Martha, independent of any claim," &c. The above advances; what advances? Why, the profits of the negroes, and the interest of the 1000 dollars; those are the immediate antecedents. These advances were to be made to his daughter Martha, and she is to have the whole of them, without any deduction for what her husband owed him. This, to my mind, is the clear meaning of the whole sentence. Again: in the residuary clause, he directs the residue of his estate of every kind to be divided into six parts; of which he gives one to Jesse; one to Catharine, and one to Nancy; then he adds, "I direct my trustees above mentioned, to receive and apply one sixth part to the use and benefit of

265 my daughter Elizabeth, *one sixth part to the use and benefit of my daughter Martha, and the other sixth part, to the use of my son William—these portions are severally to be used for the benefit of my said children during their lives, and at their deaths to be divided as their money legacies are directed to be divided;" shewing that he meant this residuum to stand precisely in the situation of the other legacies: and here we see, the profits were left to his children for their lives, without any participation of their children with them during that period. Neither, therefore, did he intend any participation in the former case. I am for affirming the decree.

CABELL and BROOKE, J., concurred.

TUCKER, P. This case is certainly not without difficulty, and the very imposing view which has been taken of it by my brother Carr, naturally gives rise to doubts, about the correctness of the opposite opinion which I shall express. That opinion is, that the clause in this will under consideration, does not give to Martha M'Dowell, the right to the profits and interest of the estate, devised to the trustees, exclusive of her daughter.

I think it obvious, that there is not, in the words of that clause, any direct gift to Martha. There is a trust, indeed, created for her benefit, and that of her child; the testator having expressly created two trustees, and manifested by the terms "may be applied," his intention that those trustees were to receive the proceeds or annual profits of the fund, and apply them to the maintenance and support of his daughter and her child. The trust thus created, if words are to govern us, where they are plain

and unequivocal, is a trust not for the support of the daughter only, but of the daughter and her child. Could the trustees have been justified in applying the whole of the profits of the trust fund to the use of the mother, if that mother had unnaturally left her child to suffer, or if they perceived that whatever came to the mother's hands, passed immediately
266 into the father's, *and was wasted by his prodigality, while his family were left unprovided? I think not. Nor can I perceive, how we can get rid of the plain import of the words, unless there is something in the will which shall alter and control them. The case of *Robinson v. Tickell*, 8 Ves. 142, is a good deal like this; and, though I readily agree that cases upon wills very often confuse instead of elucidating, yet I shall advert to it, as shewing, that where words are not so strong as here, they have been considered as excluding the mother from the absolute interest, and raising an interest in the child. There, the testator bequeathed £2000. reduced annuities, to H. to have the interest during her natural life; remainder to his niece Rebecca for her and her children's use: H. died: Rebecca and her husband having sued for the dividends, the chancellor, speaking of the bequest, said, "The bequest is to Mrs. Robinson in the first place; and if it stopped there, it would be absolute to her. But the will goes on to declare a use; which is for her benefit and that of the children." He, however, directed that the payment should be made, in that case, to the mother and her husband, upon the authority of *Cooper v. Thornton*, 3 Bro. C. C. 96, 186. That was a case, where a legacy was given to A. to be divided between himself and his family; and the question was whether the payment to A. was a good payment? It was decided to be good. And so, in *Robinson v. Tickell*, from the relation in which Mrs. Robinson stood to her children, whom the chancellor considered as being cestui que trust as well as their mother, payment was directed to be made to her and her husband. So, in 2 Leon. 221, pl. 280, cited and relied on in *Land v. Otley*, 4 Rand. 221, 234, A. devised that his lands should descend to his son, but he willed that his wife should take the profits until his full age, for his education and bringing up. It was held that nothing was devised to the wife but a confidence, and she was guardian or bailiff for the infant, which determined by his death.

267 *The first of those cases (*Robinson v. Tickell*) is stronger in every respect than this; for there, there was a devise to Rebecca, of the interest and dividends, which she was of course to receive, for the use of herself and children. She was the trustee, and the property was to pass through her hands as the conduit. Here, Miller and Stuart are the trustees, and the profits and interest are to be applied by them (as I understand the will) to the maintenance and support of Martha and her child. In that case, there might be a pretence for considering the bequest as a bequest to the mother absolutely, and the reference to her children, as merely indicating one of the motives which led to it. In

this, there is no bequest to herself, but a bequest to trustees, equally charged with the maintenance and support of her child as of herself.

The case in *Leonard* wants, indeed, the characteristic of a beneficial interest in the mother. But still it was a devise that the mother should take the profits for the education and bringing up of the son; and yet it was not considered as a gift to the mother, but only as a trust for the son.

Let us next see, if there is any thing in the will, which controls the plain meaning of the words. The testator had two daughters married, perhaps, to men in whom he had confidence: to these he bequeaths his bounty, directly and without the intervention of trustees. But as to Elizabeth and Martha, what he bequeathed to them was given to trustees (it is supposed) lest it should be wasted by their husbands. Still, if the mother was the only object of his bounty, the testator had only to provide, that the profits should be paid over to her. Why say any thing of the child? He (or rather the scrivener who drew the will, and who was very probably, the intelligent and learned gentleman who first attested it*) has systematically pursued the same language in this clause, and in the devise to Elizabeth; and has used similar language in the devise to William. Why, in all

these cases, is he provident about the
268 *families or children of the respective legatees? Because, in relation to his son, he feared that if the whole profits were paid over to him, without some provision for his family, they might be left, as too often happens, to suffer by his thriftlessness. And so with the daughters. But for the provision of the will, the whole of the annual proceeds would be paid at once into the hands of the daughter, who might, under the influence of a thriftless husband, pass it into his hands, to be squandered to the injury and suffering of their little family. Is not the will, in this case, just such as might be expected, if the testator was under the influence of the fear of such evils, and desired to guard against them? I think so.

The clause which provides, that the advances made to Martha, were to be independent of any claim he had against her husband, is fully satisfied, by reference to the interest given her in one half of the profits, and does not require that she should be construed to take the whole. And the residuary clause, so studiously different from that which we have been considering, so far from impugning the construction which the appellants contend for, seems to me to sustain it: for it shews, that the testator meant a different bequest here, and that he or his scrivener well knew how to use different expressions, when they intended different limitations.

I am of opinion, therefore, that the daughter is to be considered as entitled to a portion of the profits of the funds created by the clause in question. I am, however, further of opinion, that under this will, although the trustees might in their discretion have declined to pay the whole prof-

*The late Judge STUART.

its to Mrs. M'Dowell, and might have themselves applied a due portion for the maintenance and support of her child, if they found the funds misapplied; yet they were, prima facie justified in the payments to the mother, by the relation in which she stood to her child, and all such payments should be held good, so long as the daughter was unmarried. No account should therefore be directed anterior to that 269 period. *For this opinion, I rely upon the cases before cited, of Robinson v. Tickell and Cooper v. Thornton.

It remains only to inquire, whether, if the child took an interest under the will, that interest ceased upon her attaining to maturity, and marrying and leaving the mother? With respect to the portion or shares, which the parties are to take in these bequests for maintenance and support, we have I think no assistance from precedents. In ordinary cases, these terms would most probably extend only to the maintenance and support of a testator's family, during minority: as where he devises that his family shall be kept together and maintained out of his estate; in such a case, the trust must be executed, not upon the principle of giving equal portions to each, but of providing for the family as a judicious parent, or as the testator himself, had he lived, would have done. Such an execution of the trust, a court of equity should enforce, according to the spirit and intention of the testator's will, although it is obvious, that the wants and necessities of the different members of the family, might be often unequal; and sometimes one, and sometimes another, might require unusual advances. In such a case, too, it would depend upon ulterior provisions, whether the members of the family, as they grew up, and married and left the paternal mansion, with a view to a settlement in life, should or should not receive any portion of the revenues for their aid and support. But, in the present case, the testator having by the express provision of his will, placed his daughter and her child upon the same footing; having directed, that the trustees in whom the estate was vested, should apply it to the maintenance and support of both, by the same words; I can see nothing to limit the rights of the one, more than those of the other. If the application of the fund is to be made to the maintenance of the daughter while she lived, it must be, by the same words, extended to her child, while she lived; or if it is to be limited in the case of the child, it must be limited in the case of the mother.

270 *In short, in the construction of this will, where the words are so plain, I do not see what we can do but follow them. For, I ask, if the testator really did mean, what I think he meant, what plainer words could he have used, to convey that meaning? And if this court decides, that these words shall not convey that meaning, what words shall a testator adopt to convey it? It is an important matter. For if a man provides that his wife shall receive the profits of his whole estate for the support of herself and his children, and these words be construed to convey the

interest to her, to the exclusion of any distinct and independent right in them; then, if she marries again, the whole estate would go into the hands of a second husband; or if she even remained single, either the children must continue to live with her with their families, or they must be turned adrift without patrimony, if they quit their mother's mansion. These are consequences which I apprehend few testators can contemplate, as the result of a provision for the maintenance and support of their widows and children.

I therefore, am of opinion, that the decree should be reversed; but the other judges concurring in the contrary opinion, it is affirmed.

Wainwright and Others v. Harper.

November, 1831.

Judgments by Default.—Errors in Proceedings.—Jeofails.—In cases of judgments by default, the statute of jeofails does not apply to cure errors and defects in the proceedings.
Same.—Variance between Writ and Declaration.—In such cases, the writ is part of the record; and writ being in assumpsit and declaration in covenant, the variance is fatal.

Upon a supersedeas to a judgment recovered in the circuit court of Dinwiddie by Harper the defendant in error, against the plaintiffs in error, Wainwright, Allgood and Grammer, it appeared that the 271 writ was in assumpsit, and *the declaration in covenant; and the judgment was by default, for want of appearance.

Allison, for plaintiffs in error. In cases of judgments by default for want of appearance, the writ, and the indorsement on it, are necessarily part of the record; *Nadenbush v. Lane*, 4 Rand. 413. It is now settled, that the statute of jeofails does not apply to cases of judgment by default; *Payne v. Britton*, 6 Rand. 102. The variance between the writ and the declaration in this case, is fatal; *Ming & al. v. Gwatkin*, Id. 551.

PER CURIAM. The judgment must be reversed.

272 *Watts and Others v. Kinney and Wife.

[23 Am. Dec. 266.]

November, 1831.

Specific Performance.—Contract by Husband to Sell Wife's Land.—Mutuality.—A husband contracts to sell his wife's land: upon a bill in chancery, by the husband and wife against the purchaser, to compel specific execution of the agreement, it seems, specific execution shall not be decreed, because specific execution could not be decreed at the suit of the purchaser, upon a bill against the husband and wife, to compel her to convey her land, and so the remedies are not mutual.

***Judgments.**—See monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 423.
***Pleading.—Variance between Writ and Declaration.**—In *Long v. Campbell*, 37 W. Va. 669, 17 S. E. Rep. 198, it is said: "In *Ming v. Gwatkin*, 6 Rand. (Va.) 561, a variance between writ and declaration as to initial of middle name was held fatal. The case is doubtful. Just the contrary was held in *Dabney v. Knapp*, 2 Gratt. 365, as to difference in names of Samuel P. and Samuel B. Christian. The *Ming* case was cited, but not followed. Besides, the *Ming* case was under a statute which did not cure a defect in judgment by default. *Hatcher v. Lewis*, 4 Rand. (Va.) 152; *Wainwright v. Harper*, 3 Leigh 370.
***Sale of Land.—Specific Performance.—Contract of Husband to Convey Wife's Lands.—Mutuality of Remedy.**—On this question the principal case is cited in *Clarke v. Reins*, 13 Gratt. 109, and *foot-note*; *Shenandoah*

Same—Decree Directing, before Wife Executes Deed—Effect.—And, at any rate, upon such a bill for specific execution of such a contract, preferred by husband and wife against the purchaser, a decree for specific execution against the purchaser, before the wife shall have executed a deed conveying the land, though the decree be suspended till she shall execute such a deed, is erroneous.

Judgment against Principal—No Execution Issued—Payment by Sureties—Subrogation.—A judgment is recovered against a principal and his sureties; the judgment creditor sues out no writ, or other execution, within the year; the sureties discharge the judgment: *Held*, the sureties have a right to be subrogated, in equity, to the benefit of the lien of the creditor's judgment upon the lands of the principal, in preference to a foreign attachment, sued out by another creditor of the principal, after the judgment.

Case Disapproved.—The opinion, in *Tate v. Liggett*, 2 Leigh, 84, that "a creditor at large procuring a mortgage of his debtor's property, cannot claim as a creditor, or in the double character of creditor and purchaser, but only as purchaser," doubted and disapproved.

Foreign Attachment against Land—Debt Payable in

Val. R. Co. v. Dunlop, 86 Va. 350, 10 S. E. Rep. 239; *Hoover v. Calhoun*, 16 Gratt. 112 (see note); *Litterall v. Jackson*, 80 Va. 614; *Cheatham v. Cheatham*, 81 Va. 403; *Chilhowie Iron Co. v. Gardiner*, 79 Va. 311. See *foot-note* to *McCann v. Jones*, 1 Rob. 256; also, monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 159.

Same—Same—Title.—A court of equity will not, in general, decree specific performance of a contract for the sale of land, unless the vendor can make a good title. *Middleton v. Selby*, 19 W. Va. 174, citing *Watts v. Kinney*, 3 Leigh 272. To the same effect the principal case is cited in *foot-note* to *Goddin v. Vaughn*, 14 Gratt. 102; *foot-note* to *Clarke v. Reins*, 12 Gratt. 98; *Linkous v. Cooper*, 2 W. Va. 70. See *foot-note* to *McCann v. Jones*, 1 Rob. 256; also, monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 3 Gratt. 243.

Judgments—Elegit—Effect.—In *Werdenbaugh v. Reid*, 20 W. Va. 591, it is said, the courts declare expressly that the lien created by the issuance of the writ of *elegit* was a legal lien. *Leake v. Ferguson*, 2 Gratt. 420; 1 *Lomax Dig.* 288. And this lien exists as long as the judgment remains in force, and as long as the judgment is susceptible of being revived where revival is necessary. *Watts v. Kinney*, 3 Leigh 272, 293; *Taylor v. Spindle*, 2 Gratt. 44; *Burbridge v. Higgins*, 6 Gratt. 119. The principal case is cited in *foot-notes* to the last named cases. The principal case is also cited to the same effect in a note to *Bank of U. S. v. Winston*, 2 Fed. Cas. 743. See monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

Subrogation—Surety—Judgment.—On the question of the right of the surety to subrogation to the lien of the creditor's judgment against the land of the principal, where such surety has satisfied the judgment, the principal case is cited in *foot-note* to *McClung v. Belrne*, 10 Leigh 394; *foot-note* to *Hill v. Manser*, 11 Gratt. 522; *Buchanan v. Clark*, 10 Gratt. 173, and note; *foot-note* to *Eppes v. Randolph*, 2 Call 125; *Tinsley v. Anderson*, 3 Call 329; *Powell v. White*, 11 Leigh 816, 332 (see note); *Ford v. Thornton*, 8 Leigh 700; *Pace v. Pace*, 95 Va. 800, 30 S. E. Rep. 361; *Johnson v. Young*, 20 W. Va. 661; *Bank of U. S. v. Winston*, 2 Fed. Cas. 743. See monographic note on "Subrogation" appended to *Janney v. Stephen*, 2 Pat. & H. 11.

The principal case is cited in *Fidelity, etc., Co. v. R. R. Co.*, 82 W. Va. 271, 9 S. E. Rep. 190.

For the following proposition, that a court of equity looks to substance not to form: it looks to the debt which is to be paid, not to the hand which may happen to hold it; that the fund charged with its payment, shall be so applied, whosoever may be the person entitled; and it considers a debt as never discharged until it is discharged by payment to the proper person, and by the proper person, the principal case is cited in *Yancey v. Mauck*, 15 Gratt. 310, and note; *Coles v. Withers*, 33 Gratt. 301, and note; *Summers v. Darne*, 31 Gratt. 807; *Gibert v. R. R. Co.*, 38 Gratt. 597; *Frazier v. Hendren*, 80 Va. 270; *Dunlap v. Shanklin*, 10 W. Va. 674.

Case Disapproved.—The principal case disapproves that part of the opinion in *Tate v. Liggett*, 2 Leigh 84, where it is said that a creditor at large procuring a mortgage of his debtor's property, cannot claim as a creditor, or in the double character of creditor and purchaser, but only as purchaser. See what is said in *Runkle v. Runkle*, 98 Va. 666, 37 S. E. Rep. 279, where the principal case is cited. See also, *foot-note* to *Tate v. Liggett*.

Installments—Some Not Due—Decree.—Upon a foreign attachment in chancery, to subject lands of the absent debtor, to a debt claimed by the attaching creditor, payable in installments, some of which have, and others have not fallen due, at the time of the decree: *Held*, the court ought not to direct the sale of the subject, to satisfy more than the installments already due; but should order a sale to satisfy what is due, and hold the creditor's attachment a lien on the subject, for the installments afterwards to fall due.

George Holloway and his sister Elizabeth wife of Nicholas Kinney, being entitled, by devise from an uncle, to a tract of 916 acres of land in Amherst, that is, each to a moiety, and holding the same as tenants in common, a parol contract was made between Kinney and Holloway, whereby Kinney agreed to sell his wife's undivided moiety to Holloway; and, thenceforth, Holloway, who had previously been in possession of the whole tract as one of the tenants in common, continued to hold it as 273 intirely his own. In 1822, *Kinney reduced to writing, the terms of the agreement between him and Holloway, as he understood them, executed it himself, and then left it with L. P. Thompson, in order that he might shew it to Holloway, and that he might also execute it. The agreement, thus written and executed by Kinney, was in these words: "Whereas I, N. Kinney of &c. have heretofore sold to G. Holloway of &c. one moiety of a certain parcel or tract of land lying &c. in Amherst, to which I am entitled in right of my wife, who held the same under the will of H. H. deceased, and the said Holloway and myself having never entered into any written contract as to the terms of said sale, it is hereby declared and understood by the said Kinney and Holloway, that the said Holloway, for the moiety aforesaid, is to pay the said Kinney at the rate of ten dollars per acre, the whole tract containing 916 acres; one moiety of which, at the rate per acre aforesaid, will be equal to the sum of 4580 dollars; which is to be paid in manner following, to wit; the sum of 500 dollars, on or before 1st January next; 1000 dollars on or before the 1st January 1824; 500 dollars, on or before the 1st January 1825; 1000 dollars, on or before the 1st January 1826; 500 dollars, on or before the 1st January 1827; and 1080 dollars, on or before the 1st January 1828. But it is understood, that the said Holloway is at liberty to discharge the installments aforesaid in bonds of good and responsible men residing in the county of Amherst due and bearing interest, none of which bonds in amount to be less than 100 dollars. And it is further understood and agreed, that the said Kinney is to make the said Holloway a good and sufficient title in fee simple, on the said Holloway's securing to him the amount of the purchase money in such manner as shall be deemed safe and secure. If the purchase money aforesaid is paid in bonds, the said Holloway is to assign them in the usual manner, punctually, on or before the time the installments aforesaid, respectively, fall due. For the true performance of the above contract, the parties bind themselves, each

**Attachments.—See monographic note on "Attachments" appended to *Lancaster v. Wilson*, 27 Gratt. 624.

to each other, in the sum of 8000
274 *dollars. In testimony whereof they
have hereunto set their hands and
seals, this 21st August 1822.

Witness, N. Kinney [seal.]
L. P. Thompson, as to N. Kinney."
[seal.]"

This paper being shewn by Thompson to Holloway, he said, that this draft of the agreement conformed with his understanding of the contract, except that it restricted him as to the bonds he was to assign in payment, to bonds for not less than 100 dollars, and to bonds of persons resident in Amherst; whereas in their parol agreement, there was no such restriction. And he addressed a letter to Holloway, dated, Amherst, 7th September 1822, wherein he said—"I consider myself privileged to assign bonds of any amount in discharge of the payments for the land, and I did not expect to be limited to this county for the payment of them. I have informed Mr. Thompson, that with the exception of these two items, the articles of agreement which you delivered to him, correspond with my ideas of the contract."

Holloway was a deputy of John Warwick sheriff of Amherst, for the years 1820-21 and 1821-22; and Henry Watts and eight others were his sureties bound in his bond to Warwick for the faithful discharge of his office of deputy for the first year, and the same Watts and five others were his sureties bound in his official bond for the second year of his service. In April 1823, a judgment was recovered by Warwick upon a motion against Holloway and Watts and the other five sureties in the bond for the second year, for about 5000 dollars, on account of Holloway's defaults in office during that year; and in June 1823, another judgment was recovered by Warwick against Watts and the other eight sureties in the bond for the first year, for 189 dollars, with damages &c. likewise on account of Holloway's defaults in office during the first year.

275 *Before this last mentioned judgment was recovered, Holloway left Virginia, much indebted on account of his official transactions, and otherwise: in consequence of which, Watts and all the other sureties of Holloway in both his official bonds, on the 17th June 1823, sued out of the superiour court of chancery of Lynchburg, a subpoena against Holloway now absent, and several other persons as garnishees, and among them Kinney and wife, the object of which process was to attach any effects of Holloway in the hands of the garnishees, or debts due him from them, for the attaching creditors. This process was not served on Kinney and wife till the winter of 1823-4; and the copy of the process served on them did not indicate that it was a foreign attachment of Holloway's land. Nor was any bill filed in that suit, though it never was dismissed.

One of Holloway's sureties, Watts, went in pursuit of him, in the hope of procuring some indemnity for himself and the others, and found him at New Orleans. And Holloway, by deed dated the 11th December 1823, conveyed to Watts and Kinney one equal undivided moiety of the tract of 916 acres of land

in Amherst, describing it as land then held by Holloway and his sister Mrs. Kinney, as tenants in common, under devise from their uncle; with this declaration of trust signed and sealed by Watts, and subjoined at the foot of the deed—"The above deed is given to us for the purpose of disposing of the land therein described, in such manner as we mutually agree upon, for the benefit of the said Holloway; and after the sale, to appropriate the proceeds to the payment of a debt of 200 dollars to H. Watts; the residue to the discharge of any money which Watts' and Holloway's other sureties in his official bonds, 'have paid or may have to pay for the said Holloway.'" This deed was acknowledged by Holloway before a district court of Louisiana sitting at New Orleans, and his acknowledgment thereof certified by the court under its seal, to the county court of Amherst, which, upon this proof, at March term 1824, ordered it
276 to be recorded. *Though it was denied, that this deed was duly recorded, the execution of it was admitted.

In the meantime, namely, in September 1823, a bill was exhibited in the superiour court of chancery of Staunton, by Kinney and wife against Holloway now absent, and one Stephenson; wherein, as to Holloway (for it is not necessary to notice Stephenson's part of the case) they set forth the agreement between Kinney and Holloway, for the sale by the former to the latter, of Mrs. Kinney's undivided moiety of the tract of 916 acres of land, stating the terms of the agreement according to Kinney's draft thereof of the 21st August 1822, with the modifications suggested in Holloway's letter to Kinney of the 7th September 1822, to which, Kinney said, he signified his assent by letter to Holloway. And they insisted, that they had a lien on Mrs. Kinney's moiety, of which full possession had been given to Holloway, though no conveyance thereof had been made to him, for the purchase money stipulated to be paid for the same; and that Holloway's own moiety was liable to be attached to satisfy his debt to Kinney, for the purchase money of his wife's moiety. Therefore, they prayed a specific execution of the agreement, and (as a consequence of specific execution) a decree for the sale of the whole of this tract of 916 acres of land, and the application of the proceeds thereof to the satisfaction of the debt due from Holloway to Kinney, for the purchase money of the moiety.

Holloway having been regularly called before the court by publication, according to the course prescribed by the statute in the case of absent debtors and defendants; and the court having appointed commissioners to ascertain the then value of the whole tract of land in cash, who reported that it was then worth only five dollars per acre, that is, 4580 dollars;

The chancellor, in December 1823, made an interlocutory decree, wherein,—declaring that, besides the equitable lien which Kinney had on the moiety of 916 acres of land sold by him to Holloway, for the purchase money thereof, *he had a right
277 under the statute [meaning the statute concerning foreign attachments, 1 Rev. Code, ch. 123, § 1, 2, p. 474,] upon comply-

ing with the conditions thereby prescribed, to have the whole of the land sold to satisfy the debt due him from the absent defendant for the purchase money of the moiety—he decreed, that Holloway should pay Kinney the first instalment of 500 dollars with interest from the 1st January 1823, when it fell due, and the other instalments of the purchase money, to be paid in bonds to be assigned before the instalments should respectively fall due, according to the terms of the agreement as manifested by the draft of the 21st August 1822, and if the deferred instalments should not be so paid in bonds assigned before they should fall due, then they should be paid in money; and upon Holloway's default in making the first or any of the subsequent payments, and continuing so in default for six months, he decreed, that the whole of the land should be sold by the marshal of the court, at public auction, for cash as to so much as should suffice to pay costs and charges, and the money with interest that should be due to Kinney at the time of sale, and as to the residue, upon such terms of credit as to make the proceeds meet the future instalments of the debt due from Holloway to Kinney, with special directions as to the security which the marshal should take from the purchaser at his sale. But he ordered this decree to be suspended, until Kinney and his wife should execute, in due and lawful manner, a good and effectual conveyance of Mrs. Kinney's undivided moiety of the land, with general warranty, and should file the same with the clerk of the court, to be disposed of as the court should afterwards direct; and until Kinney should give bond with approved surety, in the penalty of 9160 dollars, being double the value of the land according to the valuation of the commissioners, with condition to abide by and perform such future orders and decrees as the court should make in the cause.

278 *In June 1824, Watts, and all the other sureties of Holloway in his official bonds, exhibited their bill, in the same court, against Holloway and Kinney and wife, setting forth their suretyship for Holloway, his defaults in office, his insolvency, and departure from the country; exhibiting the judgments already obtained against Holloway and them by the high sheriff, on account of Holloway's defaults, and alleging that they had paid off and discharged those judgments, and were still exposed to other demands on the same account; and exhibiting also Holloway's deed of December 1823, procured from him by Watts for their indemnity; referring to the record of the suit and decree in the case of Kinney and wife against Holloway; and declaring, that they were ignorant of the existence of that suit, until after the decree was pronounced. They mentioned the subpoena and foreign attachment they had sued out of the court of chancery of Lynchburg, in June 1823; and charged, that Kinney had full notice of that proceeding, when he filed his bill against Holloway, in September, or at least before he obtained his decree in December following, and was apprised of their claim to a lien on Holloway's land for their indemnity; and yet had willfully abstained

from making them parties. They impeached Kinney's decree, on the ground, that there was no agreement between Holloway and Kinney, binding on Holloway, for the sale and purchase of Mrs. Kinney's undivided moiety of the tract of 916 acres of land, and so there was, in truth, no debt due from Holloway to Kinney; and if that was a debt justly due to Kinney, yet they insisted, they were entitled to satisfaction out of Holloway's own undivided moiety of the land, in preference to Kinney. Therefore, they prayed an injunction to inhibit all proceedings under Kinney's decree of December 1823, and general relief.

The chancellor awarded an injunction until further order.

There was an order of publication against the absent defendant Holloway, and as to him the bill was regularly taken pro confesso.

279 *Kinney put in an answer for himself and his wife, in which he admitted, that the judgments mentioned in the bill had been recovered against Holloway's sureties, as they alleged; and said, he thought it probable they had discharged the judgments, though of this he had no knowledge. He denied the notice imputed to him, of the subpoena and foreign attachment in the court of chancery of Lynchburg. And he insisted, that his decree in his suit against Holloway, of December 1823, was just and right as between him and Holloway, and equally so, as between him and the plaintiffs in this suit: that he was entitled to the debt he claimed of Holloway; entitled, as an attaching creditor, to have the whole land sold to satisfy the debt; and entitled by his attachment, which he had sued out and prosecuted in perfect good faith, without notice of the plaintiff's claims or pretensions, to priority of satisfaction.

There was no proof that Watts and the other sureties had discharged the judgments recovered against them by Warwick.

Upon the hearing of this cause, the chancellor dissolved the injunction he had awarded to stay proceedings on his interlocutory decree in the suit of Kinney and wife against Holloway, and dismissed this bill of Watts and others against Holloway and Kinney and wife, with costs. And from this decree, Watts and others appealed to this court.

The cause was argued here, by Stanard for the appellants, and by Johnson for the appellees.

It being agreed, on all hands, that the appellants, Watts and others, had a right to contest the propriety of the decree of December 1823, in the case of Kinney and wife against Holloway, so far as that decree affected the interest of the appellants—

I. Stanard contended, that supposing there was such an agreement between Kinney and Holloway as Kinney had a right to specific execution of, and that, therefore, there was a debt really due from Holloway to Kinney, for the purchase money of Mrs. Kinney's moiety of the land, for which Kinney might rightly attach Holloway's moiety; yet Kinney's decree against Holloway, of December 1823, was, with respect to Holloway's sureties, Watts

and others, plainly unjust. For, 1st, the appellants having stated their case fully in their bill, made the absent defendant Holloway a party, and prayed general relief, ought, upon this bill, to be considered as attaching creditors: they were the creditors, indeed, who first sued out a foreign attachment, for the subpoena they sued out of the court of chancery of Lynchburg, had the effect of an attachment, though no bill was filed upon it: and considering both the appellants and appellees as attaching creditors, all the creditors are equally entitled to the benefit of the diligence of each, and the court in such cases, ought to let in all creditors, who come in while the fund is within the power of the court, to a fair participation in it. *Lashley v. Hogg*, 11 Ves. 602, *Angell v. Haddon*, 1 Madd. C. R. 529, and *lord Redesdale's* opinion in *Latouche v. Ld. Dunsany*, 1 Sch. & Lef. 156. 2ndly, at any rate, the appellants were entitled to have the surplus of the proceeds of the subject, if any there should be, after satisfying the debt due to Kinney, applied to the satisfaction of their claims; yet the chancellor had not thought it proper to make any provision to give them even that. 3rdly, Kinney could not attach Holloway's property for the instalments of the debt claimed by him, that had not yet fallen due; at least, he was not entitled to a decree for money not due. A foreign attachment and a decree upon it against an absent defendant, were given in place of an action and judgment at law against a resident defendant; but no judgment could be given at law, no action would lie for a debt not due. And, certainly, the court ought not to have decreed a sale to satisfy the instalments yet to come due: the most it could have done, was to decree a sale of so much as would raise enough to pay what was already due. *Campbell v. M'Comb*, 281 4 Johns. Ch. Rep. 534. *4thly, and chiefly, the judgment which Warwick had obtained against Holloway and his sureties, in April 1823, to the amount of 5000 dollars, being prior in date to Kinney's decree, and even to his attachment, constituted a lien on Holloway's land, prior and preferable to the lien which Kinney acquired by his attachment and decree against Holloway. He said, the appellants had paid off and discharged this judgment; but it was immaterial whether they had or not. If the judgments were still unsatisfied, they gave Warwick a lien on Holloway's lands, which his sureties had a right to have enforced for their indemnity. If the sureties had satisfied the judgment, they had a right to be substituted to the benefit of Warwick's judgment against their principal, and to have his lands extended upon it. *Eppes v. Randolph*, 2 Call, 125, 188; *Tinsley v. Anderson*, 3 Call, 285-9; *Wright v. Morley*, 11 Ves. 22; *Hayes v. Ward*, 4 Johns. Ch. Rep. 123; *Lidderdale v. Robinson*, 12 Wheat. 594; *Enders v. Bruen*, 4 Rand. 438.

II. He contended, that the appellants had a right to have the whole debt due to them from Holloway, charged upon his moiety of the land; as well that part of it, which arose out of the judgment against both Holloway and themselves, as that part

which arose out of the judgment against themselves alone, and whatever they should any wise be held to pay as his sureties. He admitted, that Holloway's mortgage of the 11th December 1823, was not duly recorded, because it was not acknowledged before justices of the peace in New Orleans, but before the district court, which was not regular according to the present statute of conveyances, as was decided in *Lockridge v. Carlisle*, 2 Leigh, 186. But, whether recorded or no, it was good as between the parties; good as against every body but purchasers without notice and creditors. Kinney claimed as creditor. But he was not a creditor of Holloway: he had no right to demand specific execution of the alleged agreement between him and Holloway for the sale of his wife's moiety of the land to

Holloway. The agreement was acknowledged, *in the beginning, a parol agreement; and the possession of Holloway was not such a part performance as to take the case out of the statute of frauds; for, in order to constitute possession taken, or acts done, by a vendee of land by parol agreement, such part performance as will take the agreement out of the statute, the possession, or acts done, must have plain and certain reference to the agreement. *Sugd. Law Vend.* 83. Here, Holloway had the possession before the agreement, as tenant in common, and might well have continued to hold possession in the same right. Certainly, his possession was not, necessarily, a possession under the agreement. The agreement never was reduced to writing and signed by Holloway. Kinney prepared a draft of it: Holloway excepted to its terms in two particulars: his letter stated his exceptions: the terms were never definitively agreed, much less reduced to writing. But, if this objection be ill founded, Kinney could not enforce a specific execution of Holloway's agreement to purchase his wife's land of him, because there was no reciprocity in such an agreement; the remedy was not mutual, since Holloway could not have compelled Mrs. Kinney to convey her right. *Id.* 158. At all events, the court could not decree specific execution, before Mrs. Kinney had actually joined in a conveyance binding on her, and irrevocable. If she refused to join in a conveyance; if she died the day after the decree for specific execution, of December 1823, and her rights descended to her infant children; Holloway would not have got the land, and yet the decree gave Kinney a judgment against him for the purchase money. The decree of December 1823, placed Holloway's debt to Kinney, not on any thing that had been done, but on acts to be done in future, which might never be done. Holloway, then, owed no debt to Kinney; and the decree that adjudged the debt to him, ought to be put wholly out of the way of the appellants.

I. Johnson, in his answer to the first set of objections to the decree of December 1823, said, 1st, That as to the 283 *subpoena sued out of the court of chancery of Lynchburg, by the appellants, in June 1822, no notice of that proceeding was brought home to Kinney,

before he had obtained his decree against Holloway; and if he was apprised of it, it was not easy to see how process in another suit, and that a suit never proceeded in, and in fact abandoned, could be connected with this suit, to any purpose whatever. The court could only look to the appellants' bill in this case; and that was not framed as a foreign attachment: the appellants did not seek to attach Holloway's property; they claimed a lien on it, and a right to satisfaction out of it, in preference to Kinney. But, he said, in the proceeding by way of foreign attachment under the statute of Virginia, the attaching creditor was entitled to the whole benefit of his own diligence; for he could only obtain a decree, upon condition of giving bond with surety to abide any future decree of the court, in case the proceedings should be opened at the instance of the absent debtor; and, surely, he could not be held to undertake that burden for any person's benefit but his own. 2ndly, He had no objection to the appellant's claim to the surplus of the fund, after the debt due to Kinney should be satisfied. The decree might be so corrected as to retain the appellants' bill for this purpose. 3rdly, He insisted, that a foreign attachment would lie for a debt payable in future; *Williamson v. Bowie*, 6 Munf. 176. Whether the whole subject attached ought to be so sold as not only to pay the instalments due, but to meet the deferred instalments when they should fall due, was always a question for the discretion of the court. And it were strange if it should be otherwise, seeing that the same statute, which gave the foreign attachment in chancery against absent debtors, gave also a common attachment against absconding debtors, for debts to fall due at a future time, and provided for a sale of the subject, exactly in the manner in which the chancellor directed the sale here. 1 Rev. Code, ch. 123, § 14, p. 478, 9. 4thly, He strenuously contended, that the appellants
284 could claim no benefit "whatever, as against Kinney, from the judgment which Warwick recovered against Holloway and them, as there was no proof that the appellants had discharged that judgment, it must be taken that they had not; and as Warwick had never elected to have execution of Holloway's lands, and as it was quite certain he never would elect to resort to that for satisfaction, the judgment in his hands was not a subsisting lien on the lands. But, if the appellants had discharged the judgment, how was it possible, that this satisfied judgment could be a lien on Holloway's land, when no elegit could ever possibly be sued out upon it? The lien of a judgment on the debtor's lands was only a consequence of the capacity of the creditor to sue out an elegit. If the lien was extinguished in Warwick's hands, it could not be revived for the benefit of Holloway's sureties: they could not be substituted in Warwick's place, for the benefit of a remedy which he himself no longer had. He went into minute examination of the cases, in which a surety paying a debt, has been substituted to the benefit of the remedies which the creditor had against the principal debtor; and he argued, that this

doctrine of subrogation was the creature of equity, and that no such subrogation was ever allowed in equity, where the legal remedy of the creditor was extinct at law, and where, if revived in equity, it would overreach or affect the legal rights of third persons having equal equity. But, he said, the conclusive answer to this claim of the appellants, was, that they were creditors who had obtained a mortgage of the subject for the debt due them; and they could not now claim as creditors in any way, or in the double character of creditors and purchasers, but as purchasers only. *Tate v. Liggat*, 2 Leigh, 84, 104. 5thly, Accordingly, they did claim as purchasers under their mortgage; but the mortgage not being duly recorded was unavailing as against creditors. The deed was executed at New Orleans the 11th December 1823, while Kinney was pursuing his remedy by foreign attachment, and his lien was consummated by the decree of the 20th December
285 1823, *before he could possibly have notice of the deed. The appellants had no just ground to complain, that he did not make them parties to his suit against Holloway.

II. With regard to the other objections, which, if just, shewed that Holloway owed Kinney no debt, and so razed Kinney's claim from the foundation, the first of them rested on the statute of frauds. The contract for the sale and purchase of Mrs. Kinney's moiety of the land, was, at first, a mere parol agreement. If the subsequent transactions with respect to it, did not shew that this agreement was reduced to writing, they shewed, at least, that Holloway claimed under the sale, and that the possession he afterwards held of the land, in intirety, was referrible to the agreement, and not to his tenancy in common. But this was an agreement in writing within the statute: Kinney reduced the agreement to writing, and signed it; Holloway then wrote him a letter, saying that the draft corresponded with his idea of the contract, except in two particulars, which he specified; and Kinney claimed according to the terms of the contract written by him as modified by Holloway's letter. Taking the contract as written by Kinney, and Holloway's letter, together, there was a written agreement, within the words and spirit of the statute. The other objection was, in effect, that a husband cannot make an executory contract for the sale of his wife's land that will be binding on the purchaser, because the wife is not bound to convey in pursuance of her husband's agreement, and so the remedy is not mutual; a principle of very extensive consequence. It had, indeed, been doubted, whether it was right to decree specific execution of a contract of sale by a husband of his wife's land, at the suit of the purchaser against the husband; but it never was questioned, that, where husband and wife unite in a bill demanding a specific execution of a purchaser's contract with the husband, for the purchase of the wife's land, it was right to decree specific execution against the purchaser. To exempt him from the duty of specific performance, in such a case, were to exempt
286 him from an *obligation contracted

by him, with his eyes open to the situation of his vendor, with full knowledge of the necessity of the wife's concurrence, and in the expectation of her concurrence, in the execution of the contract; when the wife is willing to unite with her husband in the execution of it; when the purchaser is exactly in the situation in which he voluntarily placed himself; and when he has no delay, inconvenience or mischief to complain of. It was said, that, at all events, the husband and wife coming to demand specific execution of a contract, should have the wife's conveyance in court, duly executed so as to be irrevocably binding on her, before the court should hold the purchaser to specific execution. But there could be no substantial difference between an interlocutory decree for specific execution against the purchaser, founded on an actual exhibition of such a conveyance, and an interlocutory decree, like the present, suspended in its effect, until the conveyance should be duly executed, and filed in court.

TUCKER, P. If the appellant's case is to be sustained in this court, I am inclined to think it cannot be on the ground of their having presented themselves as attaching creditors in this suit, or as seeking to become parties to the attachment of Kinney, or as entitled to avail themselves of the naked subpoena which they sued out of the court of chancery of Lynchburg. Their bill assumes not at all the shape of an attachment; nor do they ask to participate in the benefits of Kinney's, upon the usual terms of the court; so that we may throw out of the case the various questions which have been suggested upon these views of the subject. And as to the Lynchburg attachment, whether the original indorsement on the subpoena was or was not imperfect or inefficient; whether the lien has been preserved by keeping the cause on the docket, or lost for want of prosecution; certain it is, I think, that we cannot (if I may so speak) splice that case to this, for the purpose of preserving the supposed preference, which the creditors may have obtained, by that process, over Kinney and wife.

287 *But though upon these grounds the creditors have little pretensions to success in this case, yet there are others that present much stronger claims to our attention. I shall consider these in succession.

The first of them which I shall notice, refers itself not so much to the merits of the respective pretensions of the parties, as to a question not vital to their interests. Admitting the superiority of the claim of the appellees, it is yet contended, that as they, after all, had only a right to have that claim satisfied, the bill of the creditors should not have been dismissed, until it had been ascertained by a sale, that there would be no surplus, out of which they could have received payment. Whatever were the comparative merits of the claims of the appellants on the one hand, and of Kinney and wife on the other, the claims of the former against Holloway, have not been seriously contested. If, therefore, the proceeds of sale shall suffice to discharge

the demand, or that portion of the demand, of Kinney and wife, which they may have a right to charge upon the land, and a surplus shall remain, there seems no assignable reason, why payment out of such surplus should be refused to the appellants, who stand, as sureties, in the shoes of a creditor whom they have satisfied, and moreover hold the deed of Holloway for the security of their demand: for, whether as representing Warwick, they could overreach Kinney and wife, or whether Kinney and wife were or were not bound by the unrecorded deed of Holloway, he at least was bound and chargeable to the appellants, on either of those grounds. Nor was it an apology for the dismissal of the bill, that relief was hopeless, as no surplus was to be expected. Hopeless as it might have been, the result should have been awaited. And, indeed, it ought not to have been considered as hopeless. The decree was for the sale of the whole tract, for the satisfaction of the price of but half of it: and, though no calculation, in judicial proceedings, should have been made on the probability, that the ties of kindred would restrain

Kinney from buying in his brother-
288 in-law's estate *at an immense and ruinous sacrifice; yet there was a reasonable ground of hope, that long credits, and a judicious sub-division of the subject, might effect that which the more amiable feelings of our nature might have been appealed to in vain to bring about. Moreover, if it should appear, that the vendor, Kinney, had a right to a decree only for the amount actually due when his decree was rendered, and not for the deferred instalments, then there was every reason for presuming, that that half of the land which was sold by him, would be more than sufficient for that purpose, and would leave the proper land of Holloway for the indemnity of the appellants. I am of opinion, therefore, that in this regard, the decree of dismissal is very clearly erroneous.

It is essential, however, that the court in reversing the decree, should pronounce upon certain other principles in the case, involving the merits of the controversy, in order to its ultimate adjustment. This leads me to consider, and to compare the pretensions of the parties, at least in some important particulars.

The superiority of the claim of the appellants may be considered, either as arising out of the deed from Holloway to Watts and Kinney, for the benefit of his creditors, or as sustained by the supposed right to stand in the shoes of Warwick, and to charge the lands of their debtor, by virtue of the lien of the judgment which they have paid off and discharged.

First, let us consider their claim under the deed to Watts and Kinney. This deed, though not duly recorded, and therefore not valid as to the creditors of Holloway, is nevertheless binding between the parties themselves. It constitutes a lien, of which, as against Holloway, the appellants had a right to avail themselves. And it is not only valid against him, but it is also valid against all persons, except purchasers without notice or creditors of Holloway. It can only be assailed, then, in this case, upon

the ground, that Kinney and wife are either purchasers without notice, or creditors.

The former is not pretended. The latter must *be examined; and it brings us to one of the most litigated points in the case.

I will remark, at once, that I do not conceive Kinney or Kinney and wife to be creditors of Holloway, in this regard. A verbal contract having been entered into between Kinney and Holloway, for the sale of the lands of Mrs. Kinney, the parties separated without having reduced the terms of the contract to writing; but with an understanding (to place the facts in the strongest points of view for the vendors) that Holloway, who was already in possession as jointenant should continue to hold the whole tract, one half in his own right as devisee of his uncle, and the other half as purchaser from Kinney and his sister. Waiving the question, whether this continuance of possession constituted part execution, and waiving also the objection arising out of the difference between the parties as to the terms of the parol contract, it is material to remark, that the written contract never was signed by Holloway, the party to be charged with it. Kinney, therefore, never has had any right of action at law against Holloway. If, indeed, the contract had been signed, and the covenants could have been regarded as independent covenants, Kinney might have then maintained an action for the money, notwithstanding a deed had not yet been made and tendered by himself and wife. But as the contract was not executed, he had no demand whatever at law against Holloway. His demand was only in equity, where the payment of the purchase money never could be enforced until the title was made. Until this was done, he was no creditor in equity: and to this day it has not been done: to this day, for aught we know, the title is in his wife, or, if she is dead, in her heirs; and if she refuses to make a title, or should die without the due execution of one, the contract is annihilated, both at law and in equity; all pretence of specific performance is extinguished; and the parties are thrown back upon those original rights, which they possessed anterior to their treaty. How, then, can that be said to be a debt, which is a debt to-day, and to-morrow is
290 *none? which is a debt, in case a wife shall, voluntarily and without the threats of her husband, convey away her own inheritance, and enable him to pocket the money, and no debt if she should decline to do so? How can he be said to be a creditor, whose demand depends upon a contingency which is beyond human ken, since that contingency, in its turn, depends upon the will, not to say the caprice, of a feme covert? Nay, how can he be said to be a creditor, or his adversary a debtor, when the whim, or caprice, or self interest, of that creditor himself, may make, or may avoid, the contract? Can there be a debt without a contract? Can there be a contract without mutual obligation? Can there be an agreement between two parties, which binds one of them absolutely, and the other only at his pleasure? Yet, here the contract between these parties would be bind-

ing on one, and not upon the other, if Holloway is to be considered as bound. If from an increased value in the land, or from any other cause, it should be the desire of Kinney to recede, what could restrain him? At law, he was not bound, nor is he yet bound for any thing. In equity, he cannot be decreed to pay Holloway damages or the loss of a good bargain, for this is a jurisdiction it does not exercise (*Gwillim v. Stone*, 14 Ves. 128; *Todd v. Gee*, 17 Ves. 277,) unless, indeed, in very special circumstances; and as to compelling the husband to procure a conveyance, the doctrine, never well received, has never been acted upon with us, and seems recently to have been discontinued in England. *Emery v. Wase*, 8 Ves. 505, 1 New Rep. 267. It is true, that in a recent case it has been said, that if the wife assents the husband will not be permitted to recede. *Howell v. George*, 1 Madd. Ch. Rep. 1-7. But so easy is it where family convenience and profit concur, for the influence of the husband to withhold the assent of the wife, that, practically, the doctrine can never be of use. Be this as it may, the wife in this case is the essential contracting party, if indeed she is to be called a contracting party, who is bound or not bound, at her absolute will and pleasure. *Being only thus far bound, the other party cannot have been bound, and cannot therefore have been a debtor.

Upon this ground also it is probable, that no specific performance could properly have been decreed, since the want of mutuality in the contract, is generally a valid objection to the exercise of that jurisdiction. 1 Madd. Ch. Prac. 423, 4. Certain it is, I think, that no decree should have been rendered against the vendee until the vendor had procured and offered in court a deed executed with all proper solemnities to pass the title of the wife; since, otherwise, this solecism is presented, that the decree between the parties is binding or not binding, at the will and pleasure of one of them.

It would be unprofitable to pursue, through all its consequences, this anomalous state of contract. Difficulties and absurdities fasten upon it, whithersoever we turn. Thus, this very decree of dismissal, may have been free from error when it was rendered, upon the supposition that Holloway was a debtor of Kinney, for, in that case, the deed of trust was void as to him; yet, if Mrs. Kinney is since dead, or should now refuse to execute the contract, he is no debtor, and the decree is erroneous; for, in that event, he would certainly not be the debtor of Kinney, and therefore the deed of trust would be good against him. A bill for specific performance will lie for Kinney and wife, if they choose to abide by the contract; but Holloway cannot maintain such a bill. If he becomes a suitor for the benefit of it, he cannot compel, he can do no more than solicit. And his shortest course, instead of being suitor to the court, would be to become a suppliant to the lady.

With these views, I have no doubt, that Kinney was no creditor of Holloway, and that the deed of Holloway, though not recorded, was good against him. This

view of the subject renders it unnecessary to consider, whether as an attaching creditor, Kinney comes in by act of law, so far as to be within the principle, that he, who takes by act of law, steps only into the shoes of his debtor; and "takes his
292 *rights precisely in the same plight and condition, as he possessed them."

"In such cases even though a complete legal title vests in the party, and there is no notice of any equity affecting it, he takes subject to all the equity to which his debtor was liable." This is the doctrine as to assignees of bankrupts, and is broadly stated by sir W. Grant in *Mitford v. Mitford*, 9 Ves. 100, in reference to all persons coming in by act of law. Whether attachment creditors are so to be considered, and whether the lien of an unrecorded deed would bind the estate in the hands of such persons, are questions not now necessary to be decided.

If the superiority of the rights of the appellants, should not seem clear as arising out of the lien created by the deed of trust, let us next consider it in another light, in which it was presented in the argument at the bar.

It is contended for the appellants, that having as the sureties of Holloway, paid off the judgments obtained by Warwick, they have a right, upon the principles of substitution, to the lien of the judgments upon the land, which has been subsequently attached at the suit of the appellees. The payment indeed was denied in the argument, though not absolutely denied in the answer. I shall take it as a fact in the cause, because alleged by the appellants themselves whose case would perhaps present itself yet more strongly, if we suppose the judgments not to have been paid. In that view they would be relieved from the force of the argument, that equity will not revive a satisfied judgment, to the prejudice of an incumbrancer having the legal title; and of the other argument, that the taking the deed of trust changed their character of creditors into the less advantageous character of purchasers; an argument, which rests upon a supposed decision of this court in *Tate v. Liggat*. Moreover, their bill would then be considered, in the light of an application to have the benefit of the judgments assigned them; or as seeking to have the property sold to pay off the judgments, for which they are responsible; a
293 right which is conceded to a surety, wherever the debt is due and *payable for which he is bound, in the cases

of *Campbell v. M'Comb*, 4 Johns. Ch. Rep. 538; *Ranelagh v. Hayes*, 1 Vern. 190.

Taking the sureties, then, to have paid the debt, and to seek by substitution to have the benefit of the creditor's lien, there can be nothing more clear, than their right to this, as a general principle. It imports us only to examine the objections made to its application in the present case. These objections have been presented with great force and ability, by the counsel for the appellees. It is contended, that the lien of the judgment has been lost by lapse of time, no *elegit* or indeed other execution having ever issued; that the lien has been destroyed by the discharge of the

judgment by the sureties; and that it has also been destroyed by the execution of the deed of trust, which has changed the character of the sureties from creditors into purchasers.

I do not understand the counsel for the appellees as contending, that the two first of these objections could prove a barrier to the right of the sureties to proceed against the debtor himself. However long the judgment may have been out of date, there is no doubt, that, if susceptible of being revived at all, the lien upon the land yet in the hands of the debtor, would be revived *eodem flatu*; and there can be as little doubt, that if the principal debtor were to interpose the objection that the surety had discharged the debt, a court of equity would frown upon such a defence in its own forum, and would inhibit it in any other. 2 Call, 136, 7. But it is alleged, that the subsequent creditor has equal equity; and that by the payment or other discharge of the judgment, the legal lien which it gave is extinguished; and it is contended, that that lien should not be revived at the instance of a surety against the second incumbrancer, who has by the fact of the discharge of the first judgment, acquired the better title at law. And the principle is relied on, that where equity is equal the law will prevail.

The principle is unquestionable, but its application may be doubted. It is not true, that the equities of the parties,
294 *in the case supposed, are equal; and if that of the sureties be superior, it must prevail, although their adversary may have the law in his favour. The whole train of authorities on this subject, is founded upon the principle of the superior equity of the sureties, to be paid out of that fund to which their creditor might have resorted, for their relief. The surety in a bond, for the payment of which the principal has bound particular property, has a preference over all other persons, to have the debt charged upon that fund. If the principal dies, and after his death the surety pays off the bond, he has a right to demand the payment of the bond, out of the assets, before the simple contract creditors, and thus to be placed in the shoes of the obligee; because, at the instant of the principal's death, the obligee had a right to demand payment out of the assets, in preference to any simple contract creditor: in good faith, he should have demanded such payment, instead of putting the burden on the innocent surety: in good faith, the executor should have so applied the assets. An adequate portion should have been set apart and appropriated for that debt. No simple contract creditor had, or could have by law, any claim thereto. If the executor were sued by simple contract creditors, he might plead the outstanding bond in bar of the demand. He might fence around an adequate portion of assets against all their assaults. Nor is the state of things changed by payment being forced from the surety, or being voluntarily made by him. If forced from him, a court of equity will give him redress: it will consider him as standing in the shoes of the creditor, who ought to have looked to the estate of

the principal, instead of drawing money from the pocket of the surety: it will consider the executor as holding a certain portion of the assets, as trustee for the payment of this very debt, and hold him to the discharge of the trust in its spirit, when it can no longer be performed to the letter: and it will deny to the simple contract creditor, who had no right to these funds, the application of them to the payment of his debt. And why? If the surety dis-

295 charge *the bond, or a judgment and execution upon it, is he not a simple contract creditor only? and has not any other simple contract creditor a legal right to resort to this fund, as there is now no longer any bond or judgment to be charged upon it? and has he not equal equity? The answer is, no: he not only has not equal equity, but he has no equity whatever to charge a fund which, in equity and justice, belongs to another. He has no equity to demand, that money, which by law ought to have been applied to pay my debt, shall be applied to pay his. The case is the same, if the payment is made voluntarily by the surety. In making that payment, he is governed by the law of this court. Even on entering into his engagement as surety, he looks to its well established principles. He knows, if he pays the debt to the obligee, he will stand in the obligee's shoes. He knows he will be subrogated to all the rights of the obligee, as they subsist at the time he makes his payment. He knows that a court of equity looks not to form but to substance; that it looks to the debt which is to be paid, not to the hand which may happen to hold it; that the fund charged with its payment, shall be so applied, whosoever may be the person entitled; and that it considers a debt as never discharged, until it is discharged by payment to the proper person, and by the proper person. He knows, that that court, which permits no act of a trustee to prejudice the *cestui que trust*, will not permit one who stands in the relation of the creditor or obligee to the surety, to bar him of those rights which the principles of equity have secured to him. He is conscious, that his rights do not depend upon the caprice of the creditor, or the whim of an executor, or the sense of right of other creditors, but rest upon the immutable principles of justice and equity; and, in making his payment, he does it in the confidence, that he will be entitled to be indemnified to the full amount, to which his creditor could have charged the assets of the principal.

The foregoing case, which I have put as an illustration, will sufficiently disclose my idea of the principles of equity,
296 *in relation to this doctrine of substitution; and all the cases, I believe, will sustain the opinion, that the surety's right of subrogation, can never be resisted by any other creditor, on the ground that he has the law in his favour and equal equity. For, in truth, he has no equity at all as against the surety.

It would be unprofitable to go into a minute examination of the various cases which have been decided upon this subject, in some of which it is clearly seen, that the supposed legal advantage of a party will not

protect him from the operation of this subrogation of the surety to the remedies of the creditor. It may, however, not be amiss to refer to two of the cases, with a view to make this matter more clear.

In the case of *Eppes v. Randolph*, Wayles's executors paid off a bond in which their testator was surety for Randolph to Bevins. Chancellor Wythe declared, that they would have a right to stand in his shoes as against the heir, who had been forever discharged at law by the payment of the bond; and that if they had taken an assignment of the bond, and the heir had pleaded payment by the surety, he would have enjoined him from making that defence.

And the court of appeals further declared, that in the administration of the assets of the estate, which were inadequate to the discharge of all the debts, the executors of Wayles, who at law would only have been simple contract creditors, should be considered as bond creditors. The effect of this arrangement was to give them a preference over simple contract creditors, who at law had a right to an equality, and thus to deprive the latter of the legal right to participate in the fund, which they would have enjoyed but for the interference of equity. So in *Tinsley v. Anderson*, it was declared, that, in the distribution of the funds, the sureties should be placed in the shoes of the creditors they had paid; the effect of which arrangement was to exclude from their legal equality, simple contract creditors, who, but for the interference of equity, would have enjoyed a full share of the fund.

297 *Now, in these cases, it is clear, the legal right of the simple contract creditors was invaded. For, if the fund was only sufficient to pay off the bond, they would get nothing; and if it was even more than adequate to pay off the bond, but not enough to pay off the simple contract creditors also, the bond would be discharged in the first place, and they would only get the residuum among them. A more marked disregard of the legal privileges of parties, cannot well be conceived.

As to the position, that by taking the deed of trust, the sureties put off their character of creditors and assumed that of purchasers, I cannot understand that the opinion in *Tate v. Liggat*, referred to, designed to go so far as to say, that a creditor by judgment, who takes a mere collateral security for the payment of his debt, thereby loses intirely the benefit of his judgment lien; and unless the principle be extended thus far, it can have no influence upon this case. Be this as it may, I understand that the principle is not considered as settled by that case. I am of opinion, therefore, that there is no validity in this objection.

In the views I have taken of the sureties' right of subrogation here, I have treated the claim of Kinney, as if it were a real and subsisting debt. But if we regard it otherwise; if, as I have shewn, Holloway was no debtor of Kinney; then the question of subrogation is one between the sureties and their debtor alone, and not between the sureties and another creditor of that debtor. In this point of view, the case is divested

of every difficulty. The existence of a debt from Holloway to Kinney is, indeed, the essential ingredient in every part of this transaction. Without it, the deed of trust to the sureties is unquestionable; without it, their right to subrogation cannot be contested; without it, there is no barrier to an elegit on Warwick's judgment, though it may have run out of date; without it, the attachment of Kinney was illegal; without it, the decree in that case, was irregular; and without it, no decree could have
298 *been properly entered against Holloway in the state of the cause appearing to this court.

I have not deemed it material, or proper, to examine all the objections to Kinney's decree against Holloway, as there is no appeal from that decree. There is one, however, which ought not to be passed in silence, lest this court should seem to have disregarded it. I mean the decree for the sale of the land, not for payment only of the sum due, but for the deferred instalments also. The parties not having contracted for a mortgage, a mortgage could not have been decreed to be executed by Holloway. Yet this decree is, *uno flatu*, both mortgage and foreclosure. The utmost that should have been decreed, was, that Holloway should execute his bonds for the instalments, and that the vendor's lien should be retained for the security of them until payment.

The decree entered by the court, declared, that in the original cause of Kinney and wife against Holloway, no sufficient ground appeared, upon which Kinney and wife could proceed by foreign attachment against the absent defendant, Holloway; no debt appearing to be due by Holloway to Kinney, but his demand depending upon the contingency of the execution of a deed by his wife for her land sold by her husband, which contingency might never happen, and did not appear to have as yet occurred: that, such being the case, whatever decree might have been rendered as between Kinney and Holloway (a matter of which this court had not cognizance, since no appeal from the decree in that cause, was before it), the appellants had a right to arrest the execution of the decree actually pronounced, at least so far as it respected the sale of Holloway's proper moiety of the tract of 916 acres of land, devised by his uncle to him and his sister; and they had moreover a right to decree for the sale of Holloway's moiety (either under Holloway's mortgage thereof for their indemnity, or as standing in the place of Warwick, so far as they had paid off and discharged his judgments, or as entitled to compel
299 *payment thereof out of Holloway's property thereby bound to satisfy them) for any sums which they might have paid, or be liable to pay, for Holloway; of which an account ought to be taken: and that, therefore, the injunction to the execution of Kinney's decree against Holloway, of December 1823, ought to be reinstated and perpetuated, so far as respected the moiety of the tract of 916 acres which belonged to Holloway as devisee of his uncle. Therefore, the chancellor's decree was reversed with costs,

and the cause remanded, to be further proceeded in, according to the principles here declared.

*Kelso v. Blackburn.

December, 1881.

Foreign Attachments.—Nonresidence of Debtor.—Averment.—Proof.—In a bill in chancery, against a debtor as an absent debtor or defendant, and other defendants resident, holding lands by voluntary or fraudulent conveyances from the debtor, to have a decree against the debtor for the debt, and against the home defendants to subject the lands to the debt; the bill, in order to give the court jurisdiction, under the statute concerning attachments and suits against absent defendants, 1 Rev. Code, ch. 128, must distinctly aver the non-residence of the debtor; and, if the home defendants in their answers say that the debtor is a resident, though they do not plead that matter in abatement to the jurisdiction, the plaintiff, to sustain the jurisdiction, must prove the fact of the debtor's residence abroad; and if his non-residence be not distinctly averred in the bill, or, if so denied by the home defendants, be not proved, the court has no jurisdiction, and a decree for the plaintiff will be reversed on that ground.

Fraudulent Conveyances.—Right of Creditor at Large to Impeach.—A creditor at large, not having obtained judgment or decree against his debtor, cannot resort to equity, to set aside a fraudulent conveyance of his debtor.

A bill was exhibited in the superiour court of chancery of Staunton before the commencement of the revised statute of 1819, concerning attachments and suits against absent defendants, by Blackburn against James Kelso, and John, Hugh, Elizabeth and Mary Kelso, sons and daughters of James, setting forth, That James Kelso, 300 the father, *was indebted to him 420 dollars by bond, and about 57 dollars on open account: That the debtor was, at the time the debts were contracted, a resident of the county of Bath, on land he owned there; but since, had very seldom appeared in that county, having married in Louisa or some other of the lower counties of the state; and on very diligent inquiry he could not be found in the county in which he was said to reside: That, at length, he disappeared intirely, and at the time of the commencement of this suit, was said to have left the state and gone to parts unknown, and reported to be an inhabitant of Kentucky; at least, he was said to have been sometimes seen there: And that he had made conveyances of his lands in Bath, on which he had lived, to his

***Foreign Attachments.—Statute.—Construction.**—In *Barksdale v. Hendree*, 2 Pat. & H. 47, the principal case is cited to the point that the statute allowing attachments against absent debtors is an innovation on the common law, and should be carefully watched and strictly confined to the ground covered by the statute. To the same effect the principal case is cited in *Bank of U. S. v. Merchants' Bank of Baltimore*, 1 Rob. 585.

+**Same.—Same.—Nonresidents.**—And in *Long v. Ryan*, 30 Gratt. 721, it is said: "Whatever doubt or ambiguity there may have been in former laws on the subject, it is clear that since the revival of 1849, a party cannot be proceeded against under the foreign attachment law unless he be actually a non-resident of the state at the time. *Kelso v. Blackburn*, 3 Leigh 299; *Daniel on Attachments*, p. 242." See monographic note on "Attachments" appended to *Lancaster v. Wilson*, 27 Gratt. 624.

†**Fraudulent Conveyances.—Creditor at Large.—Right to Impeach.**—On this question the principal case is cited in *foot-note* to *Polndexter v. Green*, 6 Leigh 504; *foot-note* to *McCullough v. Sommerville*, 8 Leigh 415; *Wallace v. Treake*, 27 Gratt. 496; *Zell Guano Co. v. Heatherly*, 88 W. Va. 415, 18 S. E. Rep. 618; *Guggenheimer v. Lockridge*, 39 W. Va. 457, 19 S. E. Rep. 874. See monographic note on "Fraudulent and Voluntary Conveyances" appended to *Cochran v. Paris*, 11 Gratt. 348.

children John, Hugh, Elizabeth and Mary; which conveyances were, at best, merely voluntary; but, in truth, they were fraudulent in fact, being executed with design to defraud his creditors. Therefore, the bill prayed, that the conveyances should be set aside, and that the land be subjected to the payment of the debt due the plaintiff; and general relief.

The defendants, John, Hugh, Elizabeth and Mary Kelso, promptly put in answers to the bill, all insisting, that the conveyances made by their father to them, were fair; that their father had, at the time the conveyances in question were made, and yet had ample means besides the property thereby conveyed, to pay this debt; and that he resided and had resided, for four years next before, in the county of Louisa, Virginia, where he was a housekeeper and farmer.

No steps were taken in the cause, against the defendant James Kelso, as an absent defendant, under the statute giving remedy by bill in chancery against absent defendants. Process was, from time to time issued against him, but it did not appear in the record, to what county it was sent: it was never executed. Two years after the bill was filed, he appeared voluntarily, and, without being held to give security to abide the decree, put in his answer: in which

301 he admitted "the justice of the debt claimed by Blackburn on the bond, but contested the claim upon the open account; and he denied that his conveyances to his children, were fraudulent. He did not deny, that at the time the bill was filed, he was a non-resident.

To this answer, as well as the others, the plaintiff put in a general replication.

There was no plea in abatement, to the jurisdiction of the court, put in by any of the defendants.

It was proved by the depositions of several witnesses, particularly Francisco and Sittlington, that for some time before the bill was filed, James Kelso, the debtor, being much embarrassed with debt, was in the habit of carefully avoiding the officers of justice, in order to prevent the service of process upon him; and Sittlington deposed, that, at the time the bill was filed, it was reported and generally believed, that he had removed to and was living in Kentucky, and never expected to return. And, in a letter which he wrote to Blackburn, some time after he had filed his answer to the bill, (the principal object of which was to effect a compromise for his children), he said, "I was sorry, as the matter has turned out, that you did not serve the common process at law upon me, which was always in your power, only the time I was in the western country; for the debt would have been paid long ago, as there was property enough to have paid three such debts, before and long after you brought the present suit."

There ensued a contest as to the fairness of the conveyances made by the debtor to his children; and the chancellor directed an issue to be made up and tried at the bar of the circuit court of Bath, to ascertain whether they were fraudulent or no. The jury found that they were fraudulent as to the plaintiff Blackburn.

Then, a new contest arose, as to the title

of the lands conveyed by the defendant James to his children, these claiming an interest in the subject paramount to their father.

302 *In the event, the court declared the conveyances fraudulent as to Blackburn; adjudged, that the defendant James Kelso should pay him the bond debt of 420 dollars with interest, and the costs of this suit; and in case he should fail to pay the same within three months, directed the marshal of the court to sell the land so fraudulently conveyed, and apply the proceeds to the payment of the debt, interest and costs.

From this decree the defendant John Kelso appealed to this court.

Johnson, for the appellants, said, The bill did not shew a case proper for relief in equity. It was now settled, that a creditor at large, not having recovered a judgment or decree against his debtor, cannot be entertained in equity to set aside fraudulent conveyances of the debtor. *Tate v. Liggett &c.*, 2 Leigh, 84, 99. The bill stated, indeed, that upon diligent inquiry, James Kelso could not be found in the county of Bath, so that process of law might be served upon him, and that he was said to have left Virginia, and it was reported he was an inhabitant of Kentucky. But, at the time the bill was filed, real estate was not subject to foreign attachment; it was only made so, by an amendment at the revival of 1819. Statute of 1792, Rev. Code of 1794, ch. 78, § 2; Pleasants' edi. p. 115, 1 Rev. Code of 1819, ch. 123, § 1, p. 474. It was expressly stated in the answers of John, Hugh and Elizabeth Kelso, that their father was, and had for years been, a resident of Louisa; and there was no proof that he was or ever had been a nonresident. There was no affidavit accompanying the bill, or afterwards filed, as the statute required, that he was absent, or not to be found: neither was he afterwards, in any respect, proceeded against as an absent defendant: he appeared and put in his answer as a home defendant. Therefore, no ground was laid to sustain the jurisdiction of the court of chancery, under the statutes giving remedy against absent debtors or defendants.

303 *Leigh for the appellee, referred to the provision of the statute concerning proceedings in chancery (which was as old as 1787) that "after answer filed, and no plea in abatement to the jurisdiction of the court, no exception for want of jurisdiction, shall ever afterwards be made, nor shall any court of chancery ever thereafter delay or refuse justice, or reverse the proceedings, for want of jurisdiction, except in cases of controversy respecting lands lying without the jurisdiction of the court, and also of infants and femes covert." 1 Rev. Code, ch. 66, § 86, p. 214. The construction of this statute was well settled—that it has no application to the case of a bill shewing, on its face, a case not proper for relief in equity; but, where the bill shews a case proper for relief, and the objection to the jurisdiction arises from a state of facts extrinsic of and different from that shewn by the bill, and the defendant without pleading in abatement to the jurisdiction, puts in his answer, there, whatever may appear in the sequel, the statute precludes all objections to the jurisdiction,

either in the court of original or of appellate cognizance. *Pollard v. Patterson*, 3 Hen. & Munf. 67; *Hickman v. Stout*, 2 Leigh, 6. And this construction of this statute, which was intended to disembarass the substantial justice of the case of technical objections to the form of remedy, as much as possible, was, he thought, narrow enough in all reason. Then, the question here was, Whether this bill, on its face, shewed a case proper for relief in equity? It was not a foreign attachment: it was a suit against an absent defendant and resident defendants, at once to recover judgment against the absentee for debt he owed, and to have his fraudulent conveyances of his property removed out of the creditor's way; a suit founded on the 5th section of the statute of 1792, retained, unaltered, in the revised statute of 1819, 1 Rev. Code, ch. 123, p. 476. The design of both statutes was to give the remedy in chancery, wherever, in consequence of the defendant's absence from the state, of his being without the reach of legal process, no action at law could be prosecuted

304 against him; and to give *the remedy in all cases, where there is a subject within the jurisdiction of the court, of which it can lay hold, to accomplish the ends of justice. It was true, that the revised statute of 1819 was the first that gave the foreign attachment of real estate belonging to an absent debtor; but the only effect of that amendment was to make the very process of foreign attachment a lien on the land. It never had been doubted, before the statute of 1819, that the courts of chancery might subject the lands of an absent debtor, lying within their jurisdiction, to his debts, at the suit of the creditor; but then, it was not the process of attachment, but the decree of the court, that bound the lands. Then, let this bill be fairly examined. The court would not require all the precision and certainty that would be necessary in special pleading: it would disregard form, and look to substance. The bill alleged, in substance, that the debtor could not be found to serve process upon him; that he was reported, and therefore believed, to have left the state, and to be an inhabitant of Kentucky: and this, indeed, was all that a plaintiff at home could, with strict truth, aver as to an absent party: his absence from the state, his residence in any particular place abroad, could not be positively known. The bill, therefore, on its face, laid a ground for the jurisdiction of the court, under the statute concerning absent debtors and defendants. The debtor defendant did not deny, that he was an absentee when the bill was filed; and he was the person against whom the judgment was asked; the person, therefore, to object to the jurisdiction. If the home defendants might have pleaded in abatement to the jurisdiction, that the debtor defendant was at home and amenable to legal process, they did not plead that matter in abatement; they answered the bill, and contested the claim upon the merits; and no matter how the fact afterwards turned out to be, they could not except to the jurisdiction; and neither the chancellor nor this court could regard exceptions to jurisdiction. The plaintiff's bill placed him *rectus in curia*. There was no necessity for him to accompany his

bill with an affidavit of the debtor's
305 *absence: in common practice, and correct practice too, the affidavit is only required as the foundation of a special order of court to attach the absent defendant's effects, or of an order of publication against him. For proof of this, he remarked, that the strongest process against an absentee, the process of foreign attachment, is only an ordinary subpoena in chancery, with a restraining order indorsed, which may be indorsed by the clerk or the plaintiff's attorney; and this is regular and effectual, provided the attachment turns out, in the progress of the suit, to be just: no one ever heard of an affidavit at that incipient stage of the proceeding. When it was alleged by the home defendants in their answers, that the debtor defendant was at home, within reach of legal process, it was right to forbear farther proceedings against him as an absent defendant, and to send process after him, as was done here. At any rate, he insisted, that this court could not touch the decree as to the debtor defendant James Kelso, who had not appealed from the decree: the judgment for the debt thereby rendered against him must remain in full force, and that would bind his lands. *Tate v. Liggat*, 2 Leigh, 84, 108.

CARR, J. It was contended by the counsel for the appellant, that this case was wrong from the foundation, because the plaintiff, a creditor at large, had filed his bill for the sale of his debtor's land; that this was done upon the pretext, that Kelso was an absent defendant, when in truth he was not; but that if he was, the law as at that day, gave no such remedy against the debtor's land; and if it had, Kelso, in the progress of the suit, having appeared and filed his answer, could not be decreed against as an absent defendant. For the appellee, it was insisted, that the bill made a case clearly within the jurisdiction of the court; that, namely, of an absent defendant having land here, which he had fraudulently conveyed to his children; and as there was no denial of the absence of the debtor when the suit commenced, by plea in abatement to the jurisdiction, his
306 appearance afterwards, could not affect the jurisdiction, or the decree to be rendered.

The proceeding by foreign attachment against absentees, is an innovation upon the common law; a proceeding in rem, founded on the necessity of the case, lest there should be an absolute failure of justice; and, like all *ex parte* proceedings, it is liable to great abuse, unless carefully watched, and strictly confined to the ground covered by the law. It is not under their general jurisdiction, that courts of equity take cognizance of these cases, but under particular statutes; and these, it will be found, have, with special care, marked out the extent, and described the manner, of the proceeding. Our earliest act upon this subject (that I have met with) was passed in 1744, and may be found in 5 Hen. stat. at large, p. 220. It has remained the law ever since, with few alterations, until the revision of 1819; when an important change (to be noticed presently) was made. The preamble to the act of 1744, states, couciously and clearly, the mischief to be remedied. "Whereas creditors have experienced

great difficulties in the recovery of debts due from persons residing without the jurisdiction of this commonwealth, but who have effects here, sufficient to satisfy and pay such debts: for remedy whereof, be it enacted" &c. We see here, that the very foundation of this jurisdiction is the non-residence of the debtor, and his having effects here. The next section shews more particularly, the meaning given to the word effects: it speaks of a suit in equity against a defendant who is out of this country, and others within the same, "having in their hands effects of, or otherwise indebted to, such absent defendant." Thus the law stood from 1744 to 1819. The language here used, plainly evinces, that the remedy did not reach the real estate of the absentee; and the uniform practice under the law, so far as I have seen, proves that such was the understanding. At the revival of 1819, we find the words just quoted as existing in the old law, and immediately following are these, "or

307 *having lands or tenements within the commonwealth." And in an after part of the statute, we find a clause providing with special care, for the mode of proceeding, in order to subject the land of absent defendants to sale. Until this law took effect, it may be safely affirmed, that no land of an absent defendant could be decreed to be sold under a foreign attachment. Let us return to the form in which the suit is to proceed. The law prescribes, that if, "in any such suit, the appearance of the absentee be not entered, and security given, to the satisfaction of the court, for performing the decree; upon affidavit that such defendant is out of the country, or that upon inquiry at his usual place of abode he could not be found, so as to be served with process;" then, the court is to take proper steps for the safety of the debts or effects; then also, it is to appoint some day in the next term, for the absent defendant to enter his appearance, and give security for performing the decree; and this order is to be published. If the absentee shall fail to comply with this order, by appearing and giving security, the court may then proceed to a final decree; subject to be opened within seven years, by the appearance of the absentee &c. and such proceedings are then to be had, as if he had appeared at the first filing of the bill. It will be observed how careful the law has been in these provisions, to guard against abuse: 1. the defendant must have failed to appear to the subpoena; 2. there must be an affidavit that he is out of the country, or that upon inquiry at his usual place of abode, he could not be found, so as to be served with process; 3. there must be a day of appearance given; 4. this must be published, both in the newspapers for two months, and at the door of the courthouse. Without these proceedings, there can be no foreign attachment; no decree against an absentee; no sale of his effects or estate. The affidavit, especially, lies at the very root of the proceeding; without it, the court cannot take a single step. It seems to be the idea of some, that this affidavit comprehends as well him

308 *him who is out of the country; but this appears clearly to me to be a mis-

take. This part of the statute is dealing wholly with persons residing without the jurisdiction of the commonwealth. The legislature knew, that a person indebted, and about to leave the state, would often remove so secretly as to put it beyond the power of his creditor, to prove whither he had gone: in such case, it was considered, that an affidavit, that upon inquiry at his usual place of abode, he could not be found, was sufficient evidence of non-residence, to found and commence the proceeding. That this is the meaning, seems still more clear from the 6th section of the same law, which authorizes a justice of the peace, to issue an attachment against a debtor, who "is removing out of the county or corporation privately, or absconds or conceals himself, so that the ordinary process of law cannot be served on him." This is a proceeding very different from a foreign attachment, and made for the express case of a debtor, who, without leaving the state, keeps out of the way of process.

Let us now briefly examine the case made by the record. The plaintiff, and the defendant James Kelso, had, it seems, for a number of years, resided in the county of Bath. The plaintiff alleges, in his bill, that after the debts due him by Kelso were contracted, and became due, Kelso very seldom appeared in Bath, having married in Louisa, or some of the lower counties of this state; and on very diligent inquiry, he could not be found in the county in which he was said to reside, and at length disappeared intirely, being said to have left the state and gone to parts unknown; that, at the commencement of this suit, he was reported to be an inhabitant of Kentucky, or at least, he was said to have been sometimes seen there. The bill then states several fraudulent conveyances of his land made by Kelso to his children, with intent to defraud his creditors; and prays the court to set aside these conveyances, and subject the lands, or so much of them as shall be found sufficient, to the satisfaction of the plaintiff's claim. Taking this bill simply upon its face, is it

309 *not demurrable? I am clearly of opinion that it is. It is most defectively drawn, and so vague, that it is difficult to decide, whether the draftsman expected by the force of his bond alone, to attack the deed to the children, set it aside, and sell the land, or whether he thought to come to the same results, by treating the defendant as an absconding debtor; or whether the object was to proceed against him as an absent defendant. If he meant the first, we know that no creditor at large, can come into equity to impeach the conveyance of his debtor. To me it is equally clear, that the fact of a debtor's so absconding or concealing himself, that the ordinary process of law cannot be served on him, confers no jurisdiction on a court of equity to sell his land. I think so, not only because I find no law giving such power, but because I find a law giving, in that express case, process of a different kind, against the personal goods, not the land of the debtor; to bring him before a legal not an equitable tribunal. But, even if equity would, under any circumstances, entertain a bill of this kind, against an absconding debtor, such bill must at least be accom-

panied by an affidavit that the debtor was absconding: here there is none such: and for this defect, the bill was demurrable. But the third hypothesis, to wit, that Kelso was an absent defendant, seemed most relied on. Does the bill so state him? I say no. There is no such averment. It says, indeed, (but even this, not sworn to), that at the commencement of the suit, he was reported to be an inhabitant of Kentucky, or at least, to have been sometimes seen there. This surely will not be said to be an averment of any thing: it is the statement of a vague rumour, that Kelso was sometimes seen in Kentucky, which might happen from a transient visit; and this, no one will contend, would justify a proceeding against him as an absent defendant. The bill then was demurrable, for this defect. But, again, at the time this bill was filed, there was no law (as I have already shewn) subjecting the lands of non-residents to sale for debt; and, therefore, if the bill had positively averred that Kelso was an absentee, it would have been demurrable.

310 *The proceeding was wholly irregular in other respects. There was no affidavit, either that the defendant was an absentee, or that on application at his usual place of abode, he could not be found; and this, we have seen, is necessary. There was no day of appearance given him; no publication; in truth no one step, which the law directs to be taken against an absentee; but process after process was issued, and the cause continued from rules to rules as to Kelso, just as it would be against a resident defendant. Again; suppose we consider the allegation that Kelso was an absentee, properly and directly made by the bill, there are the answers of three defendants, put in promptly after the bill was filed, directly contradicting the allegation, and averring that Kelso was and had been living in Louisa, where he was a housekeeper and farmer, for four years; which would make him a resident there, before the commencement of this suit, and one of the defendants denied, that he ever lived in Kentucky. Will it be said that these defendants had no concern with this fact, and that their answers cannot be evidence for the other defendant? The reply is, that they are concerned, and deeply interested, in the fact: for the sole pretence on which this creditor at large, could call them into court, was the non-residence of their father. If they had brought into court, full proof that their father was, at the commencement of the suit, and had been ever since, residing on his farm in Louisa, amenable to process, can any body doubt, that the court, without any appearance or answer of the father, should have dismissed the whole proceeding? And, though they have not brought in this plenary proof, they have, by answers responsive to the bill, disproved the allegation; and that is enough, until the plaintiff countervail it by sufficient proof, which he has not done. But afterwards Kelso himself appeared, and filed his answer: if the plaintiff had considered him still a non-resident, he would, of course, have objected to this appearance, unless he gave bond and security to perform the decree; and, if he had so objected, the court would have

311 *required such bond and security, unless the residence of the defendant had been proved to its satisfaction. But, so far from objecting, the plaintiff assents, by taking at once a replication to the answer. This changed the aspect of the case: the defendant was no longer an absentee, but rectus in curia: the attached property was discharged; and the cause would proceed, like any other, to a hearing. If, on the hearing, the court considered, that the case made by the bill gave it jurisdiction, it would render a personal decree for the debt, which the plaintiff might enforce as he could any other decree or judgment. It is admitted, on all hands, that an appearance discharges the attachment, where the property attached is personal. Surely, the same effect follows where land is attached, both from the reason of the case, and the care with which the land of an absentee is protected from sale, while there is any personal fund in the power of the court. And this very point was decided in *Tiernans v. Schley &c.*, 2 Leigh, 25. In that case, the appearance of the absent defendant was what, in the judgment of this court, changed the nature of the suit, and discharged the land. In the case before us (as I have said) the plaintiff may fairly be taken to have assented, since, without objection, he took a replication to the answer; or, if he did not assent, the court might have had full proof before it, that the defendant had never been an absentee, in which case it ought not to have required security; and, as it might have had such proof, we are bound, until the contrary appears, to presume, that it did have it, if such presumption be necessary to justify its proceedings.

I have been thus particular in my examination of this case, because my experience, especially in the western chancery court, has convinced me, that this process, unless narrowly watched, is liable to great abuse. I think the case wrong from the foundation, and that the decree should be reversed, and the bill dismissed.

312 *CABELL, J. It has been repeatedly decided by this court, that a creditor at large, having no judgment or other lien on the property of his debtor, cannot prosecute a suit in equity, for the purpose of setting aside a fraudulent conveyance of property by the debtor. To this general rule, there is, however, one exception; and that is where the debtor by removal out of the state, or by evading the process of the law, puts it out of the power of the creditor, to obtain a judgment at law. But, in such case, the fact of non-residence, or of evasion of legal process, must be averred in the bill, and proved to the satisfaction of the court. If the fact be not proved, it is the same as if it had not been averred, and then there is no ground to support the jurisdiction of the court as against the fraudulent alienees. In the case before us, the fact of residence beyond the limits of the state, was expressly denied and put in issue by the answers; and there is no proof to support the averment in the bill, except the testimony of a witness, who speaks of a vague report, that the debtor had removed to the state of Kentucky. This testimony cannot prevail against the answers. As to the evasion of the process of the law, there is no evidence whatever, ex-

cept as to the difficulty of serving process in the county of Bath. But the debtor was not an inhabitant of that county, according to the allegation of the bill itself. To justify the interference of a court of equity, on this ground, it is necessary, that it should be proved to the court, that the defendant, upon inquiry at his or her usual place of abode, could not be found. There is no such proof in this case. Nor did the plaintiff proceed, in any respect, as directed by law in the case of absent defendants, or defendants evading the process of the law. He has not, therefore, entitled himself to proceed against the alienees of the debtor's property; and as to them, the bill ought to have been dismissed, whatever decree the plaintiff may have been entitled to as against the debtor himself. But, in truth, he was not entitled to any decree, even as against the debtor; for even according to the bill, the claim was
313 purely of a legal nature. A general demurrer to the bill, as between the plaintiff and the debtor, would have been sustained. Therefore, I am of opinion, that the decree should be reversed, and the bill dismissed.

BROOKE, J., concurred in the opinion of judge Cabell.

TUCKER, P., dissented. He said, I am satisfied in this case, that the appellee had a right to consider the defendant, James Kelso, as within the provisions of the statute prescribing the mode of proceeding against absent debtors. That statute authorizes a proceeding by foreign attachment, where it appears that the defendant is not a resident of the commonwealth, or that, upon inquiry at his or her usual place of abode, he could not be found so as to be served with process. Here, the bill sufficiently alleges, I think, that the defendant was believed to be non-resident, and at any rate, to use its language, that he could not be found. It is too late, in this stage of the cause, to bring this matter into question, after an appearance and answer by James Kelso, without putting the matter fairly in issue. But if it were not, I think enough appears to sustain the bill. Sittlington deposes, that it was generally believed, that he had removed to, and was living in, Kentucky, about the time the suit was brought; and he himself, in a letter, alludes to the fact that he had been in Kentucky after the right of action accrued. Moreover, Sittlington and Francisco, with several other witnesses, conspire to fix the fact that he systematically kept out of the way of the process of the law; and the record shews, that process after process issued against him in this suit, unavailingly, for several years. He was, then, precisely such a defendant, as is permitted to be sued in equity upon a law demand, because he cannot be arrested upon legal process. In equity, he was liable to be proceeded against by order of publication, and after decree, by such order as the court might think proper. Had he never appeared, the decree against him would have been

314 erroneous, without an order of publication duly executed. But, as he appeared and answered, that measure was not necessary, and, indeed, would not have been proper. Had he, upon appearing, pleaded in abatement, to the jurisdiction, that he had not absconded, and was not a non-resident,

and that fact had appeared, the bill must have been dismissed. But it was essential that that matter should be so pleaded, according to the statute, 1 Rev. Code, ch. 66, § 86, which applies in all cases, where the objection to the jurisdiction depends upon circumstances extrinsic. After answer filed, and no plea in abatement to the jurisdiction, the exception to jurisdiction, founded on a state of facts different from that alleged in the bill, cannot be heard. For this, there are sound reasons; 1. to prevent the plaintiff, when he comes to hearing upon the merits, from being surprised by an objection which he could not anticipate; and 2. to prevent the gross abuse (as in this case) of awaiting the last stage of a controversy, before an objection is presented, which, without touching the merits, turns the plaintiff round to a new course of litigation. This is, in my opinion, a gross abuse. The objection would seem to be made, for the first time, in this court; and to allow it, would be to repeal a most wise and salutary statute; a statute whose provisions, instead of being narrowed and confined, deserved to have been construed with the greatest liberality.

The court then, was, in my opinion, properly possessed of the cause. Kelso submitted himself to the jurisdiction without objection, and filed an answer to the merits. That did not oust the jurisdiction. The filing of the answer, whether with or without security, and resting upon the merits, has no other effect than to discharge the attachment. It does not abate the suit. The only effect of the answer is, to make up an issue on the merits, and present the case to the court for its decision; for, as its jurisdiction well attached at first, it must proceed to settle the matter between the parties. This is too plain to be contested. If A. attaches B.'s goods in the hands of C. for a bond
315 debt, *and B. enters his appearance, answers, and gives security; the attachment is discharged, indeed, but the chancellor proceeds to decree the amount of the bond, though it is obviously a legal demand. For, in truth, though the proceeding is had in equity, the question between the debtor and creditor, in these cases, is, generally, a legal demand, to which the defendant may plead such matter as would have been good in a court of law. *Wilson v. Koontz*, 7 Cranch, 202.

The court thus having jurisdiction of the case regularly, at least as to James Kelso, proceeded to a decree, which is not assailed upon the merits: so far from it, James Kelso has acquiesced in it. He took no appeal. John Kelso is the only appellant.

By the decree thus rendered, and which is in its character definitive, if not technically final, the plaintiff's demand is decreed him. And it cannot be denied, that that decree would have bound the lands of James Kelso, and indeed does bind the lands of James Kelso, as he did not appeal from it. The instant this lien on his lands attached, the right to assail the fraudulent deeds sprung into existence, according to the strictest principles. That right now unquestionably exists, I presume, under this decree; and although this court should reverse the whole proceedings as to the fraudulent grantees, yet the plaintiff may commence against

them de novo, on the foot of this decree, and demand the rescission of their deeds. The utmost, then, to be effected is, that the parties will be turned around to a new race of litigation, to try again a question already settled by the verdict of a jury; and settled, too, to their satisfaction, for no new trial has been solicited. If this oppressive and vexatious course is indeed required by the rules of the court, we must, I acknowledge, acquiesce in it. But, while on the one hand, I think no direct authority can be produced in its favour, it is not difficult to shew that, in equity, parties may be brought before the court, along with the debtor of the plaintiff, with a view to charge them, when

316 *the demand shall have been first established, against the principal defendant. Thus, although it is admitted that, as a general rule, an executor and his sureties could not, without a previous suit establishing a devastavit, be sued in equity for the purpose of subjecting them; yet, if the executor is out of the state, or is dead, leaving no representative, such suit will be entertained. *Spotswood v. Dandridge*, 4 Munf. 298. In such case, as the law formerly stood, they would only have been liable at law, after a judgment should have been recovered against him. And yet equity held the innocent surety in court, until it could pronounce that judgment; and, in the same instant, decreed also against them. How much more reasonable, in this case of a fraudulent and absconding debtor, to bring him and his accomplices before the court together, the court having full jurisdiction as to him, and to hold them in court until it could pronounce judgment against him? If, indeed, the creditor was without this remedy against an absent defendant and his fraudulent donees, then it is obvious, that nothing more was wanting to consummate a fraud, before the statute authorizing lands to be attached, than that the fraudulent donor should hasten to quit the state, before a suit at law could be prosecuted against him. In that event, as no judgment could be rendered, no lien could be obtained. The creditor must have been without remedy; and the perpetrators of the fraud would have been protected by this nicety, in the enjoyment of their nefarious gains. I cannot readily accede to propositions, which would lead to such consequences.

If it be said, that a demurrer to the bill by the fraudulent donees, would have been sustained, I answer, it would not lie with more propriety, than a demurrer by the sureties of the executor, in the case above cited. The same answer would be given to the sureties who are privies in contract, and to the donees who are privies in fraud; namely, that the establishment of the plaintiff's demand against their principal, would, in the same instant, justify a decree against

317 *themselves. Having connected themselves with him, they are joined with him in action, to abide his fate.

Upon the whole, I am of opinion, that the court had jurisdiction of this case, and that the decree is correct, except in one particular. A sale of the land is decreed, which should not have been directed, unless it had appeared that the rents and profits would not keep down the interest; and moreover,

the sale of the whole is decreed, instead of a moiety, which upon principle, and on the authority of *Stileman v. Ashdown*, 2 Atk. 608, is all that the plaintiff had a right to charge. The fraud does not add to the extent of his power to charge the land. Nor will this court add to it. It only removes the fraudulent deed out of his way, and leaves him to the effect of his elegit, which is to charge the moiety only; with this difference, that a sale, instead of an extent of that moiety, will be directed, where it has been ascertained that the rents and profits will not keep down the interest. The court, therefore, should have decreed the debt to the plaintiff; and, upon that foundation, should have further decreed the deeds to be void. They being removed out of the way of the plaintiff, he might then have been at liberty to sue out his elegit on the decree; and, had it appeared, that the rents and profits would not keep down the interest, then and not till then, a sale should have been decreed of the moiety.

Decree reversed, and bill dismissed.

318 **Stokes & Smith v. The Upper Appomattox Company.*

December, 1831.

Mills—Failure to Establish According to Law—Right as against Public Navigation Company—Case at Bar.

—W. being the owner of an island situate in the falls of the Appomattox, a navigable river, applies to the county court for leave to erect a mill on his island, and to condemn an acre of land on the main, belonging to T. for an abutment for his mill dam: the acre of land is condemned, and leave is given to W. to build his mill on his island: W. abuts his dam against the condemned acre, but does not build his mill on his island, but builds it on the mainland belonging to T. below the condemned acre, on a canal conducted from a point above the dam, through T.'s land; and he cuts his canal through, and builds his mill on, T.'s land, with T.'s consent: HELD, this mill is not established according to law, so as to entitle W. and those claiming the mill rights under him, and T.'s land under him, to take the water from the river to work the mill, as against the public right of navigation, and a company incorporated by law to improve the navigation.

Easement by Twenty Years' Use—Must Be Adverse. —The use of the water of a river, or other easement, claimed on the ground of twenty years possession and enjoyment: HELD, such possession and enjoyment, to give the right claimed, must be adversary.

This was an action on the case, brought in the circuit court of Dinwiddie (whence it was removed by consent to the circuit

***Mills—Ownership of Land.**—The principal case is cited in foot-note to *Wood v. Boughan*, 1 Call 329. See monographic note on "Mills and Milldams" appended to *Cahoun v. Palmer*, 3 Gratt. 86. **Upper Appomattox Company—Power Granted to.**—In *C. & O. R. Co. v. Rison*, 99 Va. 30, 37 S. E. Rep. 320, it is said, the act incorporating the Upper Appomattox Company did not expressly grant the water, yet this court, in *Stokes v. Upper Appomattox Co.*, 3 Leigh 318, construed it as a grant of the water.

Eminent Domain.—See what is said in *The Tuckahoe C. Co. v. The T. & J. R. Co.*, 11 Leigh 74, where the principal case is cited. See monographic note on "Eminent Domain" appended to *James River & Kan. Co. v. Thompson & Teays*, 3 Gratt. 370.

Presumption—Twenty Years' Adverse Use of Water of a Stream.—For the proposition that, the adverse use of the water of a stream, which use has continued for a period of twenty years, is sufficient ground for presuming a grant, the principal case is cited and approved in *Corbett v. Rhudy*, 80 Va. 714. To the same effect the principal case is cited in *Boyd v. Woolwine*, 40 W. Va. 230, 21 S. E. Rep. 1022, citing also *Rogerson v. Shephard*, 33 W. Va. 307, 10 S. E. Rep. 632; *Coalter v. Hunter*, 4 Rand. 58. See monographic note on "Adversary Possession" appended to *Nowlin v. Reynolds*, 26 Gratt. 137.

court of Henrico) by Stokes & Smith, merchant millers and partners, against The trustees of the Upper Appomatox company, (a company incorporated by law for improving the navigation of the river Appomatox) for unlawfully diverting the water of the river from the plaintiffs' mills thereon situated.

There were two counts in the declaration. The first alleged, that the plaintiffs were the owners of a manufacturing mill, grist mill and saw mill, situate in the county of Chesterfield, near the lower end of the falls of the Appomatox, and that they were of right entitled to the use and benefit of the water of the river, as it flowed in its natural channel, for working the machinery of their mills; and charged, generally, that the Upper Appomatox company, by means of a dam erected across the river, above the falls

thereof, diverted into a canal cut by the company, a large quantity of the water of the river from its natural channel, and from the plaintiffs' mills, and to which the water ought of right to have flowed, and so prevented a sufficient supply of the water of the river for working the machinery of the mills, from flowing to the same. The second count,—after setting out (in like manner as in the first) the plaintiffs' ownership of the mills, and their right to the use and benefit of the water of the river, as it flowed in its natural channel, for working the same,—charged, that the company, being incorporated to improve the navigation of the river, and authorized to take and turn into a canal, only so much of the water of the river as should be necessary and sufficient for the purposes of the navigation, did lawfully cut their canal, and did, at first, divert into the canal as much water as was necessary and sufficient for all purposes of navigation, leaving the remainder of the stream, which was abundantly sufficient for the plaintiffs' mills, to flow in the natural channel of the river, as of right it ought to have flowed, to their mills; and then, the company unlawfully diverted into their canal a large quantity of the remainder of the stream, and more than enough for the purposes of navigation, and so prevented a sufficient quantity of the water to work the plaintiffs' mills, from flowing in the natural channel of the river to the same, as of right it ought to have flowed; by reason whereof, there was not now a sufficient supply of water to work the mills, left flowing in the natural channel of the river.

The company pleaded, 1. the general issue: 2. that it had, as lawfully it might and ought, diverted into its canal, only so much of the water of the river from its natural channel, as was necessary for the purposes of the navigation: and 3. that the plaintiffs' mill and mill dam were not authorized and established according to law, being erected without any order of court, at the place where their mill and dam were erected, and so the plaintiffs were no wise entitled by law to the use of the water of the river for their mills. And upon these pleas issues were made up.

At the trial of these issues, the plaintiffs filed two bills of exceptions to instructions given by the court to the jury.

I. The first stated, that several acts of assembly, relative to the navigation of the Appomatox, were given in evidence, viz:

1st. The act of 1762, ch. 16, § 4-10; 7 Hen. stat. at large, p. 591-4, providing, that every owner of a mill then erected on this river, above Atkinson's mill (a mill situated on the falls, between the scite of the plaintiffs' mills, and the head of the company's canal) should place such locks in their mill dams for the passage of boats, as the trustees therein named should direct, and that any persons, who should afterwards build mills, on the river, either above or below Atkinson's mill, as the river should from time to time be cleared and made navigable, should, in like manner, place locks in their dams, under heavy penalties for failing to do so; appointing trustees for clearing the river for navigation; authorizing them to receive and collect subscriptions for the purpose; and empowering them to remove all stops and hedges, except such mills and mill dams as were thereby permitted and allowed to be built.

2nd. The act of 1787, ch. 53, 2 Old Rev. Code, Pleasants' edi. append. 3, ch. 1, p. 34, appointing trustees for clearing and improving the navigation of the Appomatox, from Banister's mill (a mill situated on the falls, below Atkinson's, and above the plaintiffs' mills) to the highest point practicable, provided they should begin the work as near Banister's mill as circumstances would admit; empowering them to cut canals where necessary for the purpose of navigation; authorizing them to receive and collect subscriptions for the work; vesting all canals and other works in the trustees and their successors, for the use of the subscribers, with power to collect tolls, to compensate them for the improvement; and providing, that all

owners of mills on the river above Banister's, should place locks in their dams, or on canals cut round them, for the passage of boats; and if they failed to do so, declaring their mills and dams nuisances, which might and should be abated.

3rd. The act of 1792, ch. 60, Id. ch. 5, p. 40, to "explain and amend" the act of 1787; whereby,—after reciting that doubts had arisen, whether the trustees would have a right, under that act, to lease or sell any part of the land they might acquire, and any of the water passing through their canals, for water mills and other useful works,—the trustees were expressly authorized [§ 2], to sell or lease any part of the lands they might acquire, and so much of the water passing through their canals, as might be necessary for such mills or other useful works, and as, in their opinion, might be disposed of without prejudice to the navigation. And, reciting that doubts had arisen under the act of 1787, whether the trustees had a right to open the navigation below Banister's mill, they were authorized [§ 4], to open the navigation as near to that mill, either above or below the same, at such places, and in such manner, as in their opinion would be most for the benefit of the navigation. But it was provided [§ 6], that nothing therein contained should be construed to allow the trustees to make sale of any mill seat, except between Atkinson's and Banister's mills.

4th. The act of 1795, ch. 35, Id. ch. 6, p. 42, entitled, "an act to amend and reduce into one the several acts for opening and extending the navigation of Appomatox river," by which the present company was incorporated (for nothing had been done under the former acts) by the name of The trustees of the Upper Appomatox company. This act appointed trustees; incorporated them into a company, for clearing, improving and extending, the navigation of the river from Banister's mill as far up as practicable, so as to have a sufficient depth and width of water for the navigation of boats carrying eight hogsheads of tobacco; gave the company the usual corporate powers, with

322 authority to receive and collect subscriptions for the work, and to demand *and receive tolls as compensation for the improvement; empowered it [§ 6], to purchase lands by contract through which to cut their canals where necessary, or to have them valued and condemned by a jury, in like manner as was provided by the act for opening and extending the navigation of Potowmac river; and vested the lands so purchased, and the lands so to be condemned, upon payment of the valuation assessed by the jury, in the company, in fee. And the profits arising from the tolls [§ 10], were vested in the company, to enable it to keep its canals, locks and other works, in repair, and the overplus for the use and benefit of the stockholders. This act also again enacted [§ 12], that owners of mills on the river, above Banister's mill, should make locks through their dams, or on canals cut around them, and keep the same in repair, with persons to attend them, to let boats pass at all times; declaring all mill dams in case the owners should fail to make such locks &c. nuisances, which might and should be abated at the owners' expence.

5th. The act of 1796, ch. 26, Id. ch. 7, p. 46, entitled, "an act to amend" the act of incorporation of 1795; whereby power was given to the company, to clear, improve and extend, the navigation of the river from Banister's mills to tide water, or as near thereto as it should deem advisable and necessary; and to enable the company thus to extend the navigation, the same powers, under the same regulations, as were given by the act of 1795, were in the company.

And 6th, the act of 1802, ch. 26, Id. ch. 13, p. 54, providing, that no court should thereafter grant leave to any person whatever, to build a mill or dam on that part of Appomatox river, which lies between Planters Town [the highest point of the navigation] and the head of the canal cut by the company (meaning the canal cut round the great falls to Petersburg).

And the company adduced evidence to prove, that the canal it had in fact cut, was, according to the original plan, intended to be 3 feet deep and 16 feet wide, 323 such being proper *dimensions for a canal for boats carrying eight hogsheads of tobacco: that the water of the river was turned into the canal at its head, above the great falls, by means of a dam run across the river for the purpose: that the body of water so turned from the river into the canal, was, at its head, only 3 feet deep and 16 feet wide: that

the bed of the canal was so graduated through its whole course, as to have a regular gradual fall of twelve inches to the mile, and it is thus conducted to Indian-town creek, about 3 miles 122 poles below the head of the canal: that, at Indian-town creek, the company had constructed four locks, to let the water down from the canal above, to a proper level for the canal below, which was graduated in like manner, and was conducted from the locks, by an aqueduct over the creek, and thence, 1 mile 260 poles, to an artificial basin, 120 feet square, constructed at the upper end of the town of Petersburg, for the purpose of receiving boats, and affording a convenient landing for their cargoes; at which basin the upper navigation of the river at present ends: that, just below the head of the canal, there was a large waste, so constructed as to discharge back into the river, all the water received into the canal at its head, beyond what was necessary to keep the water in it three feet deep: that, between that large waste and the waste at the locks at Indian-town creek, there were three other smaller wastes, the last of which was one and a half miles above the waste at the locks; and these three wastes were so contrived as to discharge back into the river, far above the plaintiffs' mills, all the water diverted into the canal, beyond what was necessary to keep the water therein three feet deep: that, at the said locks at Indian-town creek, there was another waste, so contrived as to discharge all the water in the canal immediately above those locks, beyond what was necessary to keep three feet depth of water in the canal there; but the water discharged by this waste at the locks, was not returned to the river, but was conducted round the locks, into the canal below them;

324 such being the method adopted to feed *the canal from the locks to the basin at Petersburg: that the waste at the locks was about 14 feet wide, and the water running over it, in ordinary seasons, about two inches deep on the waste: that there was another waste at the basin, to let off the water from the basin to the river; which waste was 25 feet wide, and the water running over it, in ordinary seasons, only one inch deep on the waste: that, in dry seasons, the water running over the wastes, was not half so deep on the wastes, as at ordinary seasons: that the water discharged by the waste at the basin, passed over a stripe of land, owned by the company down to the river, into which it fell about 100 yards below the plaintiffs' mills; and on this stripe of land, were situated the mill seat and the mill, let to tenants by the company, of which, and of the lease of water for working the same, the plaintiffs complained in this action, as injurious to their property; and that, at dry seasons, there was a great dearth of water discharged over the waste at the basin, for working the company's mill there situate.

And the plaintiffs adduced evidence to support the issues on their part, and in opposition to that adduced by the company; evidence to prove, inter alia, that the fall or graduation of the canal, of twelve inches in the mile, was greater than was necessary or convenient for the purposes of navigation, and the company thereby acquired. and was

enabled to apply to mill power, a much greater quantity of water than was necessary for navigation, or for any other purpose except mill power: and that the surplus of water might be conveniently discharged at a waste, which was placed at a short distance below the locks at Indian-town creek, which would discharge the water above Banister's, as well as the plaintiffs' mills; but the waste last mentioned, has been so constructed by the company as to prevent the passage over it, of much of the surplus water in dry seasons, and to throw all or the greater part thereof over the waste at the basin, whence it was used and applied by the company for mill power.

325 *And it was proved, that the supply of water for the plaintiffs' mills, was drawn from the river at a point below Banister's mills, and below all the wastes of the company's canals, except that at the basin: that, at dry seasons, namely, for a considerable time between the 1st August and the 1st October, in ordinary years, there was a scarcity of water for the mills on the river, including the plaintiffs' mills: and that, during this time, the water discharged over the company's waste at the basin, was used by it, or under its authority, for mill power, and discharged into the river below the plaintiffs' mills.

Whereupon, the counsel for the company prayed the court to charge and instruct the jury as to the law of the case; and the court gave the following charge and instruction to the jury—

That a grant of running water to a company, and a grant of a right to carry that water through a navigable canal, from one point of a river to a lower point, for the purpose of improving the navigation, conveyed an absolute right to the use of all the water which might be necessary for that purpose. That the right to carry the water through a canal, given to such company, gave no right to stagnate it, so as to injure the health of the people dwelling in the neighbourhood. That, unless vessels were perpetually passing such a canal, there must be always a surplus of water, over and above what was necessary for navigation, and it was the duty of the company to carry off such surplus water, and its right, to carry it off, at the lower end of its canal, unless it was restricted by law as to the point at which it was to be carried off. That this company had a right to sell or lease the surplus water to others, for the purpose of working mills and the like; in other words, that this mill power (as it had been called) so far as it could be given by the surplus water, was a necessary incident to the grant of running water, and of the right to convey it by a canal, as aforesaid. That this incidental power was so understood by the legislature, when it granted

326 the charters of the James and Potowmac *river navigation companies; for it there recognized it; but fearing lest the companies might abuse their power, by trespassing upon the lands of adjacent proprietors, or by condemning their lands for mill seats, under pretext of carrying their canals through them, it restrained them from using their water for mill power, ex-

cept with the consent of those proprietors.* That the act of 1787, ch. 53, granted to The trustees of the Appomatox company, the right to sell or dispose of all the surplus water, which might be in their canal, over and above what was necessary for navigation, for mill purposes, and was so understood by the legislature. That, by that act, the trustees could not let off this water below Banister's mill; and by the act of 1792, though they were allowed to open the navigation below Banister's mill, yet they were restrained from selling a mill seat below it. That the act of 1795, ch. 35, incorporating the present company, gave it the same powers as the old company had by the act of 1787, but did not allow the new company to open the navigation below Banister's mill: therefore, the power to do so, conferred by the 4th section of the act of 1792, ch. 60, was repealed, by the act of 1795, as coming within its purview; and with the 4th section, the proviso contained in the 6th section, restraining the trustees from selling any mill seats except between Atkinson's and Banister's mills, was also repealed. That, by the act of 1796, ch. 26, express power was given to the company to extend the navigation from Banister's mills to tide water; and that, the former restriction as to selling mill seats not being renewed, the incidental power of carrying off the surplus water of the canal from the lower end thereof, and selling that surplus water to other purposes, for working mills, and the like, accompanies the power so to extend the navigation. That, for the purpose of improving the navigation of Appomatox river, a just and sound discretion was vested in the present company, by its

327 *canal, and the proper mode of cutting and graduating it; in the exercise of which discretion, it was bound strictly to keep in view the object for which it was authorized to cut the canal: if it had exercised this authority mala fide, for the purpose of taking from the river, more water than was convenient and sufficient for the commodious navigation of boats carrying eight hogsheads of tobacco, and had, by the graduation of the canal, increased the quantity of the surplus water therein beyond what was necessary for such commodious navigation, so as to increase its own mill power to a greater degree than it would have by a canal judiciously made, then it was liable to an action for damages, by any owner of a mill on the river, whose quantity of water was reduced by such injudicious act: but, if it had exercised its authority soundly, having regard to the nature of the ground, the expense to which it was subject, the distance of the two points between which the canal was to be cut, and the health of the neighbourhood, then no injury was done to any of the proprietors of the mills on the river, for which an action could be maintained. That it was the duty of the jury to decide, whether or not this discretion on the part of the company, had been exercised soundly. That the company had a right to apply the surplus

*See charters of those companies. 1 old Rev. Code, Pleasants' edl. append. ch. 2, § 13. ch. 4, § 13, pp. 444, 461.

water of the canal to mill power, on its own account, or on account of such persons to whom it might lease or sell the same, so as not to trespass on the lands of other persons, in the use of the water, or letting it off, and a right to let off the surplus water at the basin terminating the canal in Petersburg; and was not restricted, by any of the acts of assembly referred to, from establishing mill seats, on any part of the river or canal, except between Atkinson's and Banister's mills. And that the plaintiffs had no right to claim redress in this action, for any injury to the navigation of the canal, between the basin and the locks at Indian-town creek, by the use of the water from the basin.

The plaintiffs, by their counsel, excepted to so much of the above opinion and charge, as affirmed the right of the
328 *company to use water from their canal for mill power, and to discharge the same below their mills, thereby lessening their supply of water, or to discharge any more water from the basin at the end of the canal, to a part of the river below the plaintiffs' mills, than was necessary to keep the water in the canal and basin, from stagnating and injuring the health of the neighbourhood, provided the surplus water, or the excess thereof beyond the purposes last mentioned, could be conveniently discharged above Banister's mills; and also, to so much of the said opinion and charge, as affirmed the right of the company to make sale of any mill seat on any part of the river or canal, except between Atkinson's and Banister's mills.

II. The second bill of exceptions set out the evidence adduced by the plaintiffs, to shew that their mills were established according to law.

It being admitted, that the whole bed of the Appomatox, in that part, is in the county of Chesterfield, the southern water line of the river being the boundary between that county and Dinwiddie; the plaintiffs exhibited the record of a proceeding in the county court of Chesterfield, whereby it appeared, that Luke Wheeler, in April 1791, being the owner of an island in the river, not far above the termination of the falls and the head of the tide water, applied to that court, for leave to erect a water grist mill on the island, and prayed that an acre of land on the main, on the northern shore, belonging to John Tabb, should be laid off and condemned as an abutment for his mill dam. Whereupon the county court issued the usual writ of ad quod damnum; in pursuance whereof an acre of Tabb's land was laid off for the abutment, which the jury valued at £20. and found, that the building a mill, at the place set forth in Wheeler's petition, would not damage any mansion house or offices, curtilages or gardens, thereto belonging, nor would any orchards be overflowed, nor would fish of passage or ordinary navigation be in any manner ob-
329 structed thereby. The inquisition *being returned, and Wheeler producing Tabb's receipt for the £20. the court, at May term 1791, with Tabb's consent, made an order, declaring that there appeared no legal impediment or reason why the leave asked by Wheeler should not be granted, condemn-

ing the acre of land for the abutment of the dam, and giving Wheeler leave to erect the mill on his island.

The plaintiffs then proved that Wheeler proceeded, without delay, to erect his mill, not however upon his island, but on Tabb's land on the main, taking the water from the river above the dam and abutment allowed by the order of the county court, and conducting it by a canal to his mill, which was built some distance below the abutment. And they offered evidence to prove, that the canal was dug through, and the mill built on, Tabb's land, with his assent and approbation; that the plaintiffs had acquired the title of both Wheeler and Tabb; and that they, and those under whom they claimed, had been in quiet and undisturbed occupation of the mills, for more than twenty years before this action was instituted.

The plaintiffs also exhibited the record of another proceeding in the county court of Chesterfield, whereby it appeared, that in 1816, they applied by petition to that court, representing that they were now the owners of the land on the main on the northern shore of the river, and that, for the purpose of raising the head of water for their mills already established, they wished to make a dam from the main across an arm of the river, to an island therein belonging to S. Turner, and thence across another very small gut to another island in the river, which was the northern abutment of Mackenzie & Christian's mill dam (whose mill was situate on the southern shore, on the main); and praying leave to erect such dam from the main to Turner's island, and the condemnation of land on Turner's island for the abutment. The court issued a writ of ad quod damnum; an inquisition was taken and returned; the whole of Turner's island (about 3-4ths
of an acre) was, with his consent,
330 condemned *for the abutment; and leave was given to the plaintiffs, to make the dam from the main to Turner's island, according to the prayer of the petition. The continuation of the dam, from Turner's island to the island which was the abutment of Mackenzie & Christian's dam, was made by them and the plaintiffs, uniting in the work for their mutual advantage.

It appeared, by a map laid before the jury, that this new dam was some distance above the dam made by Wheeler, and that the water drawn from the river for the use of the mills at present, was taken out above the new dam, and thence conducted by a canal to the mills.

Whereupon, the court, on the motion of the counsel for the company, instructed the jury, that, under the order and proceedings of the county court of Chesterfield first above stated, Wheeler had no right to build his mill where he did build it, on the land of Tabb, or on any other land but his own, and no right to take water from the river for the mill he built on Tabb's land; that no consent or act of Tabb could authorize Wheeler, under the order of the county court, to build his mill and cut his canal on Tabb's land, and to take water from the river for the use of the mill so there built; that, therefore, the mill was not established according to law, so as to entitle Wheeler, or any claiming under him, to draw water from the river, by means of his dam, for the use of the mill;

and that, upon the pleadings in this case, the plaintiffs could not recover damages for any injury done by the company, in diverting the water of the river, by means of its canal and works connected with it, from the plaintiffs' mills thus built without any authority of law. To which opinion and instruction the plaintiffs excepted.

There was a verdict for the defendants, and judgment accordingly; to which this court, upon application of the plaintiffs, allowed them a supersedeas.

I. Johnson, for plaintiffs in error, upon the points presented by the first bill of exceptions, contended, that the

331 *charter of The Upper Appomatox company, did not, and could not, give the company a right to divert the waters of the river from their natural channel, even for the purposes of the navigation, to the injury of the owners of mills upon the river, whose rights to the use of the stream, for working their mills, had been previously acquired from the commonwealth, under the general law of the land: that though the public had a right to the use of the Appomatox, as of all other rivers, for the purposes of navigation, yet the plaintiffs in this case, under the order of the county court of Chesterfield of May 1791 (supposing that order and the proceedings under it regular) acquired a right to the use of the stream for their mill, paramount to the public right to the river for the purposes of navigation, and paramount, of course, to the rights granted to this company, to improve the navigation, since this company claimed its charter under the act of 1795: for, that the general statute of 1785, ch. 82, 12 Hen. stat. at large, p. 187, concerning mill dams and other obstructions of water courses, and all the subsequent statutes on the same subject, delegated to the county courts, full authority to grant leave to individuals to build dams across any stream, navigable or innavigable, for the purpose of raising a head of water to work mills; and empowered the county court to ascertain and determine, whether or no ordinary navigation would be thereby obstructed, and if it would, to lay the party under such conditions for preventing such obstruction, as to the courts should seem right; and these statutes proceeded on the principle, that the grantees of the mill rights, erecting mills which were of public use and convenience, performed a meritorious service to the public, which was a valuable consideration for the grant to them of the privilege to use the water. For these propositions, he cited *Crenshaws v. The Slate river company*, 6 Rand. 245, which, he insisted, was directly in point. In the present case, the county court of Chesterfield did ascertain and decide, that the building Wheeler's dam would not in any manner obstruct ordinary navigation, and granted him the privilege without any condition.

332 *Stanard and Leigh, for defendants in error, said, there was an obvious distinction between *Crenshaws v. The Slate river company*, and this case: *Slate river* had never been declared a navigable stream, and the legislature had never passed any act to assert the public right to that stream, for the purposes of navigation, much more any act expressly declaring and providing, that

all mill rights should be subordinate to the public right of navigation, until long after the mills of the *Crenshaws* had been established according to law; whereas, with respect to the Appomatox the legislature had, expressly and repeatedly, asserted the public right to the stream for the purpose of navigation, and had provided that all mill rights granted to individuals, should be held in subordination thereto, before any leave was granted by the county court to Wheeler, under whom the plaintiffs claim, to build any mill and dam upon the river. This distinction between *Slate river* and the *James and Appomatox*, was carefully stated by Green, J., in his opinion in *The Slate river company's case*, Id. 268. Besides the several acts stated in the bill of exceptions, they referred to the act of 1745, ch. 18, 5 Hen. stat. at large, p. 375, and 1752, ch. 40, 6 Id. p. 291, to shew, that even thus early, the grant of any mill rights, that could at all interfere with the navigation of this river, or the improvement thereof, was inhibited. These early acts on the subject, indeed, were not set out in the bill of exceptions; but they were public statutes, of which the court would take judicial notice; for they were statutes concerning all persons generally, though in respect of a particular thing. 6 Gwill. Bac. Abr. Statute F. p. 374; *Stribling v. Bank of the Valley*, 5 Rand. 138, 148, 169, 188. Then, putting the authority of *The Slate river company's case* out of the way, it was impossible to find an objection to the charge given by the circuit court to the jury, stated in the first exceptions.

II. The general question presented by the second exceptions, was, Whether the mill that was in fact built by Wheeler
333 *on the main upon Tabb's land, with his consent, under colour of the order of the county court of Chesterfield of May 1791, granting him leave to build a mill on his own land in the island, was a mill established according to law, for the use of which he acquired, by that order of court, a right to draw water from this navigable river, the bed and the stream whereof belonged to the commonwealth? And this question led to a minute examination of the provisions, the principles and the policy, of the various statutes concerning mills and mill dams, which are referred to in a note upon the title of the revised statute of 1819, 2 Rev. Code, ch. 235, p. 225.

But Johnson contended, that the plaintiffs' legal right to their mills, and to the use of the water of the river for the same, could not be inquired into, in the collateral way, in which it was attempted to be drawn in question here. And if it might, and if their right was originally imperfect, yet they and those under whom they claimed, having enjoyed the use of the water for their mills, without interruption and without question, before the charter to *The Upper Appomatox company*, and for more than twenty years since the date of the charter, and before the commencement of this suit, such possession of itself sufficed to give them a right to the use of the water as an easement.

To this it was answered, 1. that the twenty years uninterrupted enjoyment of the water by the owners of these mills, was not stated in the bill of exceptions: it was only stated

there, that they had been in quiet and undisturbed occupation of the mills for more than twenty years before the commencement of this suit, not before the company completed its canal, basin and waste at the basin, which was an interruption of the use of the water by the plaintiffs for their mills, and the very interruption they were now complaining of.

2. That the possession of such an easement, in order to give title to it, must be an adversary one; *Coalter v. Hunter*, 4 Rand. 58. Here, the use of the water for Stokes & Smith's mills, never became adversary

334 to the rights of the *company or of the public, till the company's use of the water became adversary to their's; that is, not till the company had completed its canal, basin, and waste there. Neither was it conceivable how any use of the water below the head of the company's canal, by which it drew its supply of water from the river, could be adversary to the company's use of the water. And 3. That mill rights of this kind, being only acquirable in Virginia by order of court, and the precise title of Stokes & Smith appearing by matter of record, there could be no room to presume a grant to them from any length of possession and enjoyment. There was no attempt to inquire into the plaintiffs' mill rights in a collateral way; they were directly put in issue by the pleadings.

CARR, J. If the instruction given by the circuit court to the jury, stated in the second bill of exceptions, was correct, that is decisive of the case. Was it correct?

Two preliminary objections were taken to it; 1. that the plaintiffs, and those under whom they claim, had been in quiet possession of the mill for more than twenty years; and 2. that the legality of the erection, could not be questioned in this collateral way. To the first, two answers present themselves: 1. that this is a public right; *Crenshaws v. The Slate river company*: 2. that the twenty years possession must be adverse; *Coalter v. Hunter*. The occupation of these mills on the stream below, could in no way affect the Appomatox company in their use of the water taken into their canal far above. As to the other objection, that we cannot inquire here, whether the order of court authorized the building the plaintiffs' mill; it must be recollected, that this case stands on ground very different from that of *The Slateriver company*. The Appomatox had long been declared by law a public highway, and the rights of the riparian possessors, with respect to building mills &c. modified and restricted. For the particulars on this point,

I refer to my brother Green's remarks

335 in *The Slate river *company's case*, 6 Rand. 267-9. The Appomatox company, under a public law, had erected their works, dug their canal, and taken out the water: for this, the plaintiffs, as millers, bring this action for an injury done to their mills: the defendants plead the very fact, that the order of court did not authorize the erection of this mill, and that therefore it is no legal mill; the plaintiffs take issue on this plea. Could it be wrong under this state of the pleadings, for the defendants to ask, or the court to give, instructions, as to the law of the subject?

But were those instructions right? Wheeler, owning the island, moved for leave to build a mill on it, and not owning the opposite shore, moved to condemn an acre for an abutment for his dam: he got this acre condemned, and leave to erect his mill on his island. Did this authorize him to build the mill on the opposite acre, condemned for his abutment? or on a canal taken out on the north side of the river, and away below that acre? I say, clearly no. The words have a distinct and definite meaning, and to that they must be confined. Suppose Wheeler, owning the island, had moved the court to condemn an acre on the opposite side, to build his mill on, meaning to abut his dam on his island; could the court have done it? where is the authority? The law expressly says, that the party applying to build a mill, must own the lands on which he means to build it. *Wood v. Boughan*, 1 Call, 329; *Wilkinson v. Mayo*, 3 Hef. & Munf. 565. A mill is a great public benefit,—a mill seat a valuable property; and to him who owns this, the law has given power to have an acre on the opposite shore condemned, to enable him by means of his mill to subserve the public interest. The very words of the law are "any person desiring to build a water grist mill, or other machine, or engine useful to the public;" and, indeed, nothing but the public interest could justify the strong handed measure of taking from a citizen his own property, whether he will or no. But if one own the land where the mill is to be built, he owns the mill seat; and it is his privilege to

336 *condemn the acre opposite, not the privilege of the opposite owner, to condemn his mill seat. The county court, therefore, in this case, neither meant to give, nor had power to give, or to sell, to Wheeler, an acre of Tabb's land, to build his mill on. If, then, under this order, Wheeler had built his mill on the condemned acre; I should have said he had no authority to do so. But it is worse than this: under the order to build on his island, he has taken water out, on the north side, by a canal cut through the land of Tabb, for some distance below (we are not told, whether a quarter or a half mile, or a mile) and has built his mill on this canal. If this is justified by the order, there is no locality at all about it. There is the dam to be sure, where the order designates; but the race may be as long, and the mill as far off, as you please. It must be observed that the inquest says, a mill built at the place set forth in the petition, will not damage any house, overflow any offices, or cause any of the other mischiefs which the law guards against, but says nothing of the effect upon the property or health of the citizens, of carrying this water through the canal to the mill where it was actually erected. We all know how often lands are injured by carrying water through them, and how often a canal affects the health of those living near it. Do not these considerations alone shew, that a scite which was never viewed, and a canal that was never contemplated, by the jury of inquest, cannot be authorized by its report? I say, then, that the proceedings of the county court, did not authorize the digging this canal, and building this mill where it stands; and that the instruction of the

circuit court on this point, was correct. I think the judgment should be affirmed.

CABELL, J., concurred.

BROOKE, J. The merits of this case depend on the pleadings, and the several instructions given by the circuit court to the jury, at the trial. The two material issues joined involve *the inquiries, 337 1st, Whether The Upper Appomatox company, under the acts of 1795 and 1796 incorporating it, and the several acts referred to in the first bill of exceptions, was authorized to take the water of the river for the purpose of navigation, and also to use the surplus water incidental to the use of it for navigation, for milling purposes? and 2ndly, Whether Wheeler, under whom the plaintiffs claim, built and established his dam and mill, in pursuance of the order of Chesterfield court?

The Appomatox, it must be premised, had, before the order of Chesterfield court authorizing Wheeler to build his mill, been declared a navigable river by law. This feature of the case takes it out of the decision of this court in the case of Crenshaws v. The Slate river company. I think the instruction of the judge to the jury, which belongs to the first inquiry, was perfectly correct. It was, in substance, that the rights of this company, under the several acts referred to, were paramount to the rights of the plaintiffs under the order of Chesterfield court. The *jus publicum* in the navigation of the river, expressly granted by those acts to the company, for the legitimate purpose of facilitating its navigation, gave to the company, for that object, all the water of the river necessary for the purpose, and also all the surplus water incidental to the use of it for navigation, for milling purposes. Though our institutions and laws are justly tenacious of private rights, yet the ruling principle of them is, that, when private rights come in conflict with public, the former must yield to the latter; in which event the legislature alone is competent to make compensation. The public right to the navigation of the rivers of the commonwealth, cannot be weaker, than the public right to a highway on the land; and it will be found, on an examination of our legislation on that subject, that the right of way on the land, has uniformly been asserted, notwithstanding the grant of the land, in the broadest terms, and that without compensation to the proprietor, until a very late period, when by statute the writ of *ad quod damnum* was provided 338 in that *case. Nor should I think it material, but for The Slate river company's case, whether a river has or has not been declared navigable by law. The common law on the subject, as understood in England, mixed up, as it is, with the prerogative of the crown, is not to be so understood here. Its peculiar beauty is, that it adapts itself to the rights of parties, under every change of circumstances. So far as it recognizes the prerogative of the crown, it was abolished by the revolution; and, even where that is not the case, it is not always applicable to the same objects here, as in England; as was said by some of the judges of this court, in the case of *Lightfoot v. Colgin*, 5 *Munf.* 42; *Findlay v. Smith*, 6

Munf. 134. Therefore, even the grants of the crown before the revolution, are not now to be interpreted, as before, when the prerogative was in full force here. The public right to a way on the water, or the land, is a trust to be administered by the government for the community at large; never to be destroyed, but to be so administered as to facilitate the enjoyment of it by the public; as it was administered by the charter incorporating this Appomatox company. It cannot, in its nature, be the subject of a grant to an individual or corporation but for that object, since it cannot be enjoyed as private property in any other mode. I know, that there are rivers and streams in England, in which individuals have a property by grants from the crown, as to which the public right to a highway on them, has ceased to exist. Lord Hale, in his tract *de jure maris*, p. 8, 9, is not very precise, when he says, there be some streams and rivers that are private, not only in propriety and ownership, but in use, as little streams or rivers that are not a common passage for the king's subjects. He does not tell us, how these little streams or rivers became private property. We can only infer, that they became so by force of grants from the crown; especially, as he tells us also, that there be other rivers, as well fresh as salt, that are of common or public use for carriage of boats and lighters, and these, whether they are fresh or salt, whether they flow and reflow or not, 339 *are, *prima facie*, *publici juris*. How-

ever this may be by the common law in England, I think the doctrine which gives private property in rivers, has no application here, for the reasons before stated. In considering this point, I can perceive nothing in the grants under our legislation, that authorizes the distinction, taken by Hale, as to the streams and rivers of this commonwealth; nor do I think the broadest of our grants can be so construed. Even the patents under the act of 1705, in which the form of grant is given, and in which rivers, waters, marshes &c. are specified, ought not to be so construed as to deprive the people of this commonwealth of the *jus publicum* in the navigation of our rivers. In 3 Kent's commentaries, p. 333, it is said the doctrine was asserted in the state of Jersey, that the soil of its navigable rivers, and the waters also, was private and not public property, that passed in fee simple from the original proprietors under royal patents to the present occupiers and grantees; that the title was originally in the king, by right of discovery, according to the public law of Europe; and, upon that foundation, that the proprietors of land on rivers and waters, navigable and innavigable, have, immemorably, exercised the right to the soil, and to several fisheries; but this claim was decided to be subject to the *jus publicum* in the navigation, and also to the regulations of the legislature for the protection and passage of fish. And this too, under a grant to the duke of York from the crown, as comprehensive in its terms as it could well be, even broader than the grants under our land law of 1705, the form of which has been since changed by statute. But, in the present

case, we have no such grant before us. And how it can be inferred, from the several statutes concerning mills, that the public right in the navigation of the rivers and streams, on which mills are by those statutes authorized to be erected, passed to the mill owners, I cannot perceive. One of the earliest of those statutes, the act of 1734, ch. 2, 4 Hen. stat. at large, p. 53, 4, expressly and carefully guard the right of way over mill dams. I think, there is nothing in

340 *the statutes authorizing the county courts, upon application to them, to grant leave to erect dams, and to build mills; on the contrary, the charge prescribed by them to be given to the jury, who are to estimate damages &c. requires, that they are to inquire, whether navigation will be obstructed, or the passage of fish; and provides the remedy in such cases, by directing slopes &c. And, though mills are a great public convenience, yet as that convenience, is of an intirely different character from the jus publicum in a highway, the latter, on the construction of the statutes, ought not to be made to yield to the former.

On the second head of inquiry, I concur with judge Carr. I think the defendants had a right to question the authority of the plaintiffs, or of Wheeler, under whom they claimed, to erect their dam or mill under the order of Chesterfield court; the more especially, as the defendants had a right to dispose of the surplus water for milling purposes, which would be materially affected in value, by the mill of the plaintiffs. I think the judgment must be affirmed.

TUCKER, P. I am of opinion, that the instruction given by the circuit court upon the trial of this cause, as set forth in the second bill of exceptions, was erroneous. That instruction was vital to the plaintiffs' action, though it determined but a single insulated question, not affected by the various interesting matters; which have been evolved in the discussion here, and very probably, were fairly before the circuit court.

The action was brought by the plaintiffs in error, to recover damages for a diversion of the water of the Appomattox from their mill, by the defendants. To support the allegation in their declaration, they produced the record of proceedings in the county court, giving leave to build the mill in question, and to erect their dam for its use. It was proved, that the mill was forthwith erected, and has been quietly occupied for twenty years, by the plaintiffs and those under whom they claim. But the plaintiffs, or those un-

341 der *whom they claim, having built the mill house and dug a mill race to it, on the lands of Tabb, on the main land opposite to Wheeler's island, instead of on Wheeler's island, as authorized by the order of the county court, the circuit court, on the motion of the defendants, instructed the jury, that, under the order of the county court, Wheeler had no right to build his mill on any other land than his own, and to take water from the river for such mill; that the mill in question, was, therefore, not legally established, and so the plaintiffs were not entitled to recover.

Although I think it clear, that an order to

build a mill on a particular scite, does not authorize the erection of the mill house at a spot so essentially variant as neither to possess the advantages, nor to avoid the mischiefs, which the county court may have had in contemplation, in authorizing the establishment; yet, upon mature reflection, I very much doubt, whether that question can be collaterally inquired into in this case; and, even if it may be, I am of opinion, that the defendants should have shewn, that the departure from the strict interpretation of the order of court, was so material a departure as to deprive the plaintiffs of the use of the privilege which had been granted them. No such evidence was adduced; on the contrary, the acquiescence of twenty years very strongly evinces, that the change of scite of the mill house, was not considered as material, or as injurious to any one, or inconvenient to the neighbourhood. The question would have been very different, had it appeared, that the dam was not erected where the county court authorized it, or that it had been abandoned, or that a new and unauthorized dam had been erected elsewhere. For the location of the dam is, indeed, required by law to be ascertained, but not the scite of the mill house. The dam is not only, as to this matter, the principal, and the mill house the accessory, but it is, moreover, as far as appears in this case, the only matter with which the defendants had any thing to do. Had their canal been so located, as to have

required the removal of the house, then 342 it might have *become a question whether the plaintiffs had had a right to build a mill house there. But, in the case as it appears in this record, the location of the mill house was not a matter in which they had any concern. The question between the parties, is, merely, whether the plaintiffs had a right to have the water running to their dam? If they had, and the defendants had diverted it, without lawful authority or superior right, they are responsible.

Nor is the instruction supported by the pleadings. The plea is that the mill and dam were not erected according to the order, and the essential part of the plea, in reference to this contest, is that the dam was not so erected. If that had been proved, then indeed the court might have instructed the jury, that the plaintiffs were not entitled to their action; but the mere proof as to the mill house, did not sustain the plea, and the instruction was therefore improper.

If I am right in this opinion upon the second bill of exceptions, it is unnecessary to go into an examination of the various questions submitted by the other. For, although it is true, that this court will affirm a judgment notwithstanding an erroneous instruction, against the plaintiff, provided it appears that upon the whole matter the plaintiff is not entitled to recover, yet I do not think the facts are sufficiently stated to enable this court to pronounce definitively upon the rights of the parties. I am, therefore, of opinion, that the judgment should be reversed and the cause sent back for a new trial.

Judgment affirmed.

343

*Ex Parte Richardson.

December, 1831.

Mandamus—When Issued to Compel Chancery Court to Hear Cause.—The statute of 1825-6, ch. 15, was intended to prevent unreasonable and causeless delays in suits in chancery; and, with that view, the 14th section authorizes the court of appeals to award a mandamus to the courts of chancery, to compel them to hear causes at the first term at which they are prepared for hearing, when no special cause appears for the refusal of the court to hear them; but the statute does not authorize a mandamus to compel a hearing of a cause, which the court of chancery, in its discretion, for reasons satisfactory to it, thinks proper to continue.

William Richardson and Judith Richardson, being the maker and indorser of a note for 1700 dollars, discounted at the Farmers' bank of Virginia, for the accommodation of Thomas Richardson, he, by deed, conveyed and assigned to J. G. Williams, a life estate which he owned in a parcel of land in Hanover, two slaves, a horse, two cows, some furniture, and two debts due to him, in trust, to sell the specific property, if necessary, for the purpose of indemnifying William and Judith Richardson from loss by reason of their engagements for his accommodation. Williams, the trustee, was called upon by William and Judith Richardson the cestuis que trust, to sell the trust subject, in pursuance of the deed, and to apply the proceeds to their indemnification; and he gave notice to Thomas Richardson, of his intention to make the sale, unless he should satisfy the claim, of the cestuis que trust.

Whereupon Thomas Richardson exhibited his bill against the trustee and cestuis que trust, in the superiour court of chancery of Richmond, alleging, that the whole of the debt due to the Farmers' bank, on the accommodation note, had been paid and satisfied, out of his Thomas's own funds; and praying an injunction to restrain the trustee from proceeding to sell the trust subject. The injunction was awarded, at first, upon condition, that the plaintiff should give an injunction bond with surety, in the penalty of 200 dollars, to abide and perform the decree, in case the injunction should be dissolved (a bond required only as security for the costs) but this condition
344 was afterwards dispensed *with by order of the court, and the injunction awarded, without any security being required.

The defendant, William Richardson, answered, and denied that the debt due to the Farmers' bank, on the accommodation note, had been fully paid off and discharged out of Thomas's funds; and insisted, that there was a sum of money still due and chargeable on the trust subject, for which it ought to be sold.

At January term 1831, William Richardson moved the court to dissolve the injunction. The chancellor overruled the motion, and ordered an account, to ascertain whether any, and if any, what balance remained of the debt properly chargeable on the trust subject.

The bill was then regularly taken pro confesso as to Judith Richardson and the trustee Williams; and the cause, having been transferred to the circuit superiour court of law and chancery of Henrico, stood

on the docket of that court, ready for hearing, at October term 1831.

The cause was called in its turn, on the 10th November. The plaintiff demanded a hearing. But the courts, on the motion of the defendant William Richardson, made an order, that the injunction should stand dissolved, unless the plaintiff should within twenty days after he should be served with a copy of the order, enter into bond with sufficient surety, in the clerk's office, in the penalty of 1200 dollars, with condition to pay the defendant all such damages, as he might sustain by the depreciation of the value, or the elignment of, or termination of the plaintiff's title in, the trust subject, whereof the sale was enjoined, in case the injunction should be dissolved in whole or in part.

The plaintiff's counsel insisted, that notwithstanding that order, the cause should be heard and disposed of during the term; because it was regularly prepared and set for hearing, and no cause was shewn against the hearing, except the order requiring bond with surety to be given by the plaintiff, and that order constituted no objection to the hearing of the cause; for he insisted, that, as the plaintiff would be entitled to a hearing of his cause, if
345 the time for giving the *bond had expired, and the injunction stood absolutely dissolved, so he was entitled to a hearing presently, when the injunction was only conditionally dissolved. The defendant's counsel objected to a hearing of the cause, until the bond with surety should be given, as required by the order; because, if it was heard before that order should be complied with, the benefit of it would be lost to the defendant, whatever might be the decree of the court: if the court, on the hearing, should dissolve the injunction and dismiss the bill, the plaintiff might appeal, on giving security for costs only: if the court should perpetuate the injunction, and the defendants should appeal, they would be intirely without security pending the appeal; and the termination of the plaintiff's title in the land mortgaged, by his death, and the removal of the personal part of the trust subject, pending the appeal, would deprive the cestuis que trust of any benefit from a decree of the court of appeals in their favour.

The circuit court refused to hear the cause at that term, unless the plaintiff should comply with its order requiring bond with surety.

And now, during the term of the circuit court, Robinson, for the plaintiff, moved this court for a rule upon the judge of the circuit court, to shew cause, why a mandamus should not be awarded, to compel him to proceed to hear and determine the cause, upon the proofs therein, as they now existed.

He founded the motion on the statute, "to alter and reform the mode of proceeding in the courts of chancery," passed at the session of 1825-6, ch. 15, § 14, Sess. Acts, p. 18.*

*This statute provides. "That all causes, which shall be prepared for a hearing agreeably to the provisions of this act, shall be docketed, called and disposed of, at the term to which they shall be so

The rule was made.

346 *The judge of the circuit court returned and shewed for cause why the mandamus should not be awarded, that the hearing and determining the cause at the then term of the court, would frustrate the order therein made on the 10th November, requiring the plaintiff to give bond with surety &c. and that there was no other reason for his refusal to hear the cause.

Robinson argued, that the refusal of the court to hear the cause, under the circumstances of the case, amounted, in effect, to this: that the plaintiff should not be permitted, before a sale was made of his property, to shew that such sale ought not to be made; but after the sale, he might shew, that it ought not to have been made: that he should not be permitted, at the present term of the circuit court, to shew that he was entitled to retain his property; but at the next term, after it had been taken from him and sold, he might shew, that he was entitled to the proceeds, and upon shewing this, have a decree against the defendant for the proceeds of sale, and recover them of him, if he should be solvent. Neither, he said, could he perceive the force of the reasons against a present hearing, assigned by the defendant's counsel in the circuit court. If it were true, that the consequences he complained of would ensue, the inconvenience was imputable to the defendant's own fault in not earlier asking, or to the fault of the court in not sooner requiring, the security required by the order of the 10th November: the plaintiff ought not to suffer for their neglect, nor ought the hearing of this cause to be longer delayed on account of it. It seemed to him impossible, that the plaintiff could, with justice, be placed in a worse situation now, than he would have been in if the defendant had asked, and the court had required, the security lately ordered, when the injunction was first awarded: if the security had then been required, and not given, the

347 plaintiff would, indeed, *have lost the benefit of the injunction, but his cause would, nevertheless, have been proceeded in, and would have been prepared for hearing at the present term: and if in such a state of the case, he would have been entitled to a hearing now, he could see no reason why he should not be entitled to it, in the actual circumstances of the case.

CARR, J., delivered the unanimous resolution of the court, to discharge the rule for the mandamus. He said—We think we should restrict this provision of the statute, as nearly as possible to the class of cases for which it seems to have been made. A contrary course would bring before us every cause, which the chancellor might, upon reasons deemed sufficient by him, continue. This, surely, could never have been intended, nor could it be endured. We think,

prepared; and if the court shall refuse to try any such cause, or continue it, without good cause shewn, the party asking for a trial, may have his application spread upon the record, with a true statement of the facts relative thereto. Upon such statement, it shall be lawful for the court of appeals, upon the application of the party injured, to award a mandamus, and compel a trial of the cause, upon the proofs as they existed at the time when it was erroneously continued, or the trial was improperly refused.—Note in Original Edition.

that by taking this 14th section in connexion with those which precede it, in the statute, we may find ground for this narrow construction. The purpose of the statute was to quicken the slow and cumbrous march of equity; to bring cases more speedily, and with less expense, to hearing: to these ends, all its provisions are directed. It takes away the necessity of serving a decree nisi; and enables the plaintiff to have the cause set for hearing, unless the defendant, within four months after service of the subpoena, shall appear and plead, answer or demur. After several other provisions, comes this 14th section, which gives the mandamus. We think we may fairly say, that the provision was meant to provide against any attempt of the judge to thwart the object of the statute, by refusing to try the causes prepared for hearing, at the first term: and not, in all causes depending, to give an immediate application for a mandamus, whenever the court should, in its discretion, continue a cause. The provision is sufficiently anomalous in this restricted form; but taken in the larger sense, it would be monstrous. We think it best to place our decision on this general ground alone.

Rule discharged.

348 *Burwell's Ex'ors v. Anderson, Adm'r &c.

December, 1831.

Wills—Construction—Estate Given for Life with Power of Disposal—Effect*—Case at Bar.—Testator, after directing the sale of certain property to raise a fund to pay debts, and after giving all the residue of his estate to his wife for life, directs, that at her death, all his estate, real and personal, shall be turned into money, to be distributed as follows—first, he desires, that his wife, by will or otherwise, may have the absolute disposal of £500.—then, he bequeaths to his nephew W. P. £200.—and, after deducting these two sums, he bequeaths 2-3rds of the balance, to his niece A. S. and the other 1-3rd to his sister A. C.: and he directs, that if the fund provided for debts prove inadequate, the sum to make up the deficiency shall be deducted in equal proportions from the sums bequeathed to his wife, his nephew, his niece and his sister: **Held**, the wife took by the will, the absolute property in the £500, bequeathed to her, and not a mere power to dispose of that sum.

Legacies—Payment—Presumption from Mere Lapse of Time.—Payment of a legacy by an ex'or, cannot be presumed from mere lapse of time, during which there is no representative of the legatee entitled to demand and receive it; especially, where, though there have been dealings between the ex'or and the distributee of the legatee, yet the ex'or, in settling his accounts, has not claimed credit for payment of the legacy.

Executors—Settling Account—Bill to Surcharge and Falsify—Lapse of Time.—An ex'or qualifies in hustings court of W. in 1791: he settles his account of administration, before commissioners of hustings court ex parte, in 1810, the distributee of a deceased legatee, whose legacy has never been paid.

***Wills—Estate for Life with Power of Disposal—Effect.**—On this question, see discussion in *foot-note* to May v. Joynes, 20 Gratt. 692, where the principal case is cited. The principal case is also cited in *foot-note* to Elcan v. Lancasterian School, 3 Pat. & H. 53: Randolph v. Wright, 81 Va. 617; Johns v. Johns, 86 Va. 336, 10 S. E. Rep. 2; Hall v. Palmer, 87 Va. 358, 12 S. E. Rep. 618; Milhollen v. Rice, 18 W. Va. 519, 526, 531, 533, 537, 539, 540, 543; note to Farish v. Wayman, 1 Va. Law. Reg. 220. See monographic note on "Wills."

†**Executors—Settling Accounts—Lapse of Time.**—The principal case is cited in Carr v. Chapman, 5 Leigh 178 (see also, note); *foot-note* to Harrison v. Gibson, 23 Gratt. 212; Campbell v. White, 14 W. Va. 143; Bruce v. Brickerton, 18 W. Va. 367.

Same—Same—Interest.—See the principal case cited in *foot-note* to Handly v. Snodgrass, 9 Leigh 484; *foot-note* to Anderson v. Burwell, 6 Gratt. 405;

living in the town of W. at the time of settling the account: the distributee of the legatee, dies in 1816; then the ex'or dies; no one takes administration of the legatee's estate till 1823; then, the ex'or of her distributee, takes the administration; and then, the adm'r of the legatee, and ex'or of her distributee, files a bill against the ex'ors of the ex'or, to surcharge and falsify his account, settled in 1810: HELD, the lapse of time is no objection to such a bill.

Same—Balance in Hand—Interest—Ex Parte Settlement by Commissioner.—Though there may be circumstances, which ought to exempt an ex'or from being charged with interest on balances in his hands, yet, in general, an ex'or is chargeable with interest on such balances: and where, in an ex parte settlement by commissioners, of an ex'or's accounts, the commissioners improperly omit to state an interest account, and charge the ex'or with interest, that is cause for surcharging and falsifying the account.

Same—Mode of Stating and Charging Interest—Case Explained.—The rule of *Granberry v. Granberry*, 1 Wash. 249, as to mode of stating and charging interest in ex'ors' accounts, examined, explained and settled.

Upon an appeal from a decree of the superiour court of chancery of Williamsburg, in a suit between Robert Anderson, administrator of Elizabeth Pasteur and executor of Mary Stith deceased, and the executors of Nathaniel Burwell deceased, who was the executor of William Pasteur
349 *deceased, a great many questions of fact, and several points of law arose, and were discussed. The points of law, and the state of facts on which they arose, were as follows:

I. Dr. William Pasteur of Williamsburg, who died in March 1791, by his will,—after empowering his executors to sell his lands in Goochland, and all the personal property at and upon the same, excepting slaves, and directing them to apply the proceeds of sale in the first place to the payment of his debts, and after some specific bequest of particular slaves,—devised and bequeathed as follows: "I desire that my wife Elizabeth Pasteur may have and possess, during her life, all the rest and residue of my estate, whether real or personal. And, after her death, my will and desire is, that all my estate, both real and personal, shall be turned into money, by the most advantageous sale which my executors can make of it, and the amount thereof distributed in manner following, viz: I desire my wife, by her will or otherwise as she pleases, may have the absolute disposal of £500. thereof. I give my nephew William Pasteur, to be paid him when he attains to the age of twenty-one years the sum of £200. sterling other part thereof. And it is my will and desire, after deducting the two last mentioned sums, that two thirds of the residue be paid to my niece Anne Smith for her own use, and the remaining third to my friend Nathaniel Burwell, for the use and benefit of my sister Ann Craig, to be always at her disposal, in such manner that her husband Thomas Craig and his creditors may have no power over it. I give to my wife the absolute property in my chariot. It is my will and desire, that, if

the estate hereby before directed to be sold for the payment of my debts, should not prove sufficient for that purpose, whatever sum my other estate shall be called upon to make up, shall be deducted in equal proportions according to the sums devised in money, to my wife, to my nephew, to my niece and to my sister as aforesaid."

350 The testator's *widow, Mrs. Pasteur, died in the year 1792, intestate, and without having made any disposition, by any act in her lifetime of the £500. mentioned in her husband's will; and her sister, Mary Stith, was her sole distributee.

And the question was, Whether the bequest as to the £500. contained in the will, was a legacy and gift of that sum to Mrs. Pasteur, or only gave her a power of appointment of so much, and that power having been no wise executed by her, this money fell into the residuum of the estate, for the benefit of the other legatees?

II. Dr. Pasteur, as has been mentioned, died in March 1791, and Mrs. Pasteur in 1792. Nathaniel Burwell, one of the executors named in Dr. P.'s will, proved it, and qualified as executor, in the hustings court of Williamsburg, at July term 1791. Shortly after he took upon him the administration of the estate, moneys to a large amount came into his hands, and remained in his hands for several years; the greater part of the debts of his testator being british debts, as to which there was, at first, a doubt whether or no they were recoverable, and then they were to be ascertained and liquidated. In October 1810, the hustings court of Williamsburg appointed commissioners, to audit, state and settle, his accounts of administration of his testator's estate; and, in stating the accounts, the commissioners did not charge the executor with interest on the balances annually appearing to have been in his hands, and to have remained for several years applied to the debts of his testator, which debts were, however, paid in the sequel, with the interest that had accumulated upon them. The accounts so settled, shewed a balance due the executor. The commissioners reported their settlement of the accounts to the hustings court, and the court, at November 1810, ordered it to be recorded. At the time the accounts were thus audited, reported and recorded, no person had ever taken administration of Mrs. Pasteur's estate. But her sister and sole distributee, Mary Stith, was
351 living, and *living at Williamsburg.

Mary Stith died in 1816, having made a will, in which Anderson was appointed her executor, who qualified as such in the same year. Anderson, as the executor of Mary Stith, exhibited his original bill in this cause, against the executors of Burwell, who was the executor of Dr. Pasteur, in the year 1818; and the case stated in that bill, shewed, that he was, in that character, entitled to demand a resettlement of Burwell's accounts of administration of Dr. Pasteur's estate, if the accounts stated and reported by the commissioners of the hustings court, were unjust; and he alleged matters to falsify and surcharge them, and, in particular, objected to the omission of all charge against the executor, for inter-

Lyon v. Magagnos, 7 Gratt. 379; Sharpe v. Rockwood, 78 Va. 35; Anderson v. Piercy, 20 W. Va. 526; Kester v. Lyon, 40 W. Va. 161, 20 S. E. Rep. 984.

*Same—Same—Correction.—The principal case is cited in foot-note to Corbin v. Mills, 19 Gratt. 438. See also, citing the principal case, Coltrane v. Worrell, 20 Gratt. 447. See generally, monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

est. In 1822, Anderson took administration of Mrs. Pasteur's estate, which till then had remained wholly unrepresented; and then, in this character, he exhibited another bill against the executors of Burwell, who was the executor of Dr. Pasteur, claiming among other things, the £500. bequeathed to his intestate Mrs. Pasteur, by Dr. Pasteur's will, which he alleged had never been paid, and which, certainly, was not charged in Burwell's accounts of administration, settled and reported by the commissioners of the hustings court, as having been paid; and again surcharging and falsifying the account so settled, and objecting to the omission of all charge against the executor, for interest. It appeared, that there had been several dealings, from time to time, between Burwell, the executor, and Mary Stith, during her life: she had contracted a debt to him, and given her bond to him for it, which remained unpaid at her death. And upon this part of the case, several questions were raised.

* 1. Whether it might be presumed, that Burwell had made payment to Mrs. Pasteur in her lifetime, or after her death to Mary Stith, her distributee, during her life, or otherwise made satisfaction to either of them, of the legacy of £500. bequeathed by the will of his testator Dr. Pasteur, to his wife Mrs. Pasteur?

352 *2. Whether, as Mary Stith had never, during her life, set up any claim on this account against Burwell the executor, and had never complained of the accounts settled and reported to the hustings court in 1810, Anderson, as the representative of Mary Stith and of Mrs. Pasteur, ought to have been entertained to open, surcharge and falsify those accounts, at the time he exhibited his bills, in either character, for that purpose?

3. Whether an executor's account, settled and reported by commissioners of the court of probat, returned to the court, approved and recorded, can, in any case where no fraud appears, be afterwards surcharged by bill in chancery, on the ground that the commissioners have omitted to charge the executor with interest?

And 4. Whether such an objection could properly be made to the executor's accounts in this particular case? in other words, Whether an interest account ought to have been stated against this executor, under all the circumstances of the case?

III. The chancellor having referred Burwell's accounts to a commissioner, to be reformed and restated, the commissioner raised an interest account against the executor, and he brought the interest accrued on the balances of former years, found due from the executor to the estate, into the account of the succeeding years, whenever the amount of disbursements exceeded that of the receipts during such succeeding years, and applied the excess of disbursements above the receipts of any year to the extinguishment of the interest charged on the former balances, so as to extinguish such interest before applying any part of the disbursements to extinguish the principal of such former balances, leaving those balances still bearing interest.

The question was, Whether this was a just and correct mode of stating the interest account, in settling an executor's accounts of administration?

353 *And this was a question of very general interest and importance. For, though all the courts of chancery, ever since the decision of Granberry's ex'or v. Granberry, 1 Wash. 246, have professed to be governed by the principles there laid down, as to the manner of charging interest in the adjustment of such accounts; yet, in the application of those principles in practice, various methods of stating the interest account, have been adopted by the several courts, some more and others less onerous to the executor.

This last point, particularly, was very earnestly discussed in this cause, together with the other questions above stated, and some others peculiar to the case and of no general interest, by Scott and Johnson for the appellants, and Stanard for the appellee.

TUCKER, P. The questions presented for decision in this case are numerous and important. The appellants rely upon the presumptions arising from length of time, as having an important influence, not only on the general question of the appellee's right to rip up this ancient transaction, but on several particular items of the appellee's demand. They call in question also the rights of Mrs. Pasteur to the legacy of £500. They loudly complain of the manner in which the accounts have been adjusted by the commissioner in the court below. And they urge besides, many minor objections.

The death of Dr. Pasteur having occurred in 1791, and of his wife in the year following, and the accounts of his executor having been settled by commissioners of the hustings court of Williamsburg, in 1810, it is conceived by the appellants, that they should be protected by the lapse of time from a further investigation of the subject. No one feels more strongly than I, the salutary influence upon the peace and repose of society, of the principle which forbids us to encourage stale claims, or to unravel long settled accounts. Nor is there any among all the subjects of con-

354 troversy arising *in courts of justice, to which this principle should be more liberally applied, than to that of executors' accounts. No man's estate would be safe, if no lapse of time could be permitted to close the door forever against inquiry. No man could die in peace, who had ever been an executor, if he knew that when he should be gone, and the memory of transactions lost, his representatives would be called to a new and rigorous scrutiny of matters buried in oblivion. No man would be executor under such circumstances; and thus, one of the charities of life, the preservation and administration of dead men's estates, would be committed altogether to careless officers of the law, instead of being discharged with fidelity and zeal, by some friend of the deceased. Courts, therefore, have wisely discountenanced these antiquated claims, and even where the length of time does not operate to shut them out altogether, throws the burden of proof upon those who are thus disturbing the ashes of

the dead. Nor is the presumption of which I speak, confined in its operation, I apprehend, to the exclusion of any inquiry as to the truth and fairness of the items charged in a settled account. The frame and structure and principles of that account, ought also to be considered as exempted from criticism, after a great lapse of time, and this for the preservation of the repose of society. Doubtless, there are many accounts settled in the last century, upon principles now reprobated by the courts: but who would disturb what has been so long at rest, for the purpose of subjecting it to modern improvements in the adjustment of executors' accounts? This remark very peculiarly applies to objections to an ancient account, on the ground that the executor has not been charged with interest. For, as that charge depends (as we are told in *Granberry v. Granberry*) upon the circumstances of each case, it cannot fairly be a subject of examination, when those circumstances may be presumed to be buried in oblivion. I should, therefore, unhesitatingly, repel an attempt to unravel and

new model a very old account, because
355 that interest had not *been charged to the executor. But, in all these cases, the lapse of time must be considerable, to justify the court in closing the door upon all inquiry. In the present case, the account was settled in 1910. There was then no administration of Mrs. Pasteur, although the distributee entitled to her estate, was alive. That distributee died in 1816; too short a time to give rise to the presumption. The bill was filed by her administrator in 1818, there being no representative of Mrs. Pasteur until 1822, when the bill demanding a full settlement of these accounts was filed by the appellee in that character. I do not think he is barred by the length of time, from an examination of the accounts, and from objecting to their frame and structure, or to the omission to charge the executor with interest.

Neither can the presumption of payment of the legacy in this case arise. The length of time is sufficient, indeed, if it stood alone. But this presumption, like every other, may be repelled; and it is successfully repelled as to Mrs. Pasteur herself, by the fact that it was not payable till after her death; and as to all others, by the facts, that there was no one to receive, that the executor kept up the funds for the payment of debts, and that he has not pretended in his accounts to allege the payment.

We come next to inquire into the subject of the legacy of £500. It was contended, that the testator did not design a gift of £500, but only gave his wife a power of appointment, which, not having been exercised, the legacy falls into the residuum for the benefit of the residuaries. The will, in other words, was said to give power only, not property.

From the earliest time, it has been among the received doctrines of the common law, that an absolute and unqualified power of disposing, conferred by will, and not controlled or explained by any other provision, should be construed as a gift of the absolute property. In this the law but corresponds with the dictates of common reason. Every

man of ordinary capacity would understand a power to dispose *of a thing as he pleased, as a gift of the thing itself; and hence, every one who uses the phrase without qualification, is understood by the law as intending a gift. The power of absolute disposition is, indeed, the eminent quality of absolute property. He who has the absolute property, has, inseparably, the absolute power over it; and he to whom is given the absolute power over an estate, acquires thereby the absolute property; unless there is something in the gift which negatives and overthrows this otherwise irresistible implication. Thus, a devise to A. to dispose at his will and pleasure, gives a fee; and devises to dispose of for payment of debts, or to give, sell or do therewith at pleasure, are all held to give an absolute estate, even in lands. 4 Com. Dig. 161. So, a devise to be at the discretion of a person, without any express disposition to him, otherwise than to declare that the lands are to be at his discretion, gives a fee. So, that a person (tenant in tail under another devise) shall have power to dispose at his will and pleasure: so, too, that the executor shall sell or levy a fine, or make a feoffment, or grant a rent in fee. 2 Preston on estates, 74, 5. So, though a devise to a wife for life, and after her decease, she to give the same to whom she will, passes but an estate for life with a power; yet, if an express estate for life had not been devised to the wife, an estate in fee would have passed by the other words. 8 Vin. Abr. Devise, 4 W. a., pl. 4, p. 234. Where, indeed, such an inconsistent life estate is given, the fee does not pass; for this whole matter rests upon intention. The estate being the testator's to give, his will is the law of the subject, unless that will be against the law of the land. Where, therefore, there is an absolute power of disposition, without any other bequest to the party, except what those words themselves imply, they operate to convey property, and not power only. And where an interest is given, generally, and without limitation, that gift is not converted into a mere power, by annexing thereto a general power of disposition. As, a devise to A. with power to dispose at pleasure, is considered
357 as *conveying property, not as conferring power; for the words of power will not be permitted to take away what without them is expressly given. 2 Preston on est. 81, 2, 13 Ves. 453. But where there is an express and inconsistent estate for life given, the construction of the instrument is altogether different. For the express estate for life, negatives the intention to give the absolute property, and converts these words into words of mere power, which, standing alone, would have been construed to convey an interest. This appears to me to be very clearly established, by the cases that were cited at the bar; which further lay it down, that where an interest and not a mere power is conferred, the absolute property is vested without any act on the part of the legatee; but where a power only is given, that power must be executed or it will fail. What will amount to an execution of it, has been a matter of discussion; but, upon the principle that a

defective execution, however imperfect, will be aided in equity, the recent cases have considered even the assertion of the right of property by suit, as a sufficient execution. *Bull v. Vardy*, 1 Ves. jr. 270; *Shermer v. Shermer's ex'ors*, 1 Wash. 266; *Goodtitle v. Otway*, 2 Wils. 67; *Barford v. Street*, 16 Ves. 135; *Irwin v. Farrer*, 19 Ves. 86. Looking at this case upon those principles, I cannot doubt, that this will conveyed, not a mere power, but an interest also. A life interest had, indeed, been given to some estate in specie; but that interest is altogether severed from the subsequent appropriation of the proceeds of sale, by the power to the executor to sell and distribute. This was very forcibly demonstrated by the counsel for the appellee himself. So that as to the £500. it is a devise "to be at the absolute disposal of the wife by will or otherwise as she pleased," without any other disposition to her by name, than what is implied by those words: there is no life estate in the £500. to control their operation: and, therefore, they have the established effect of passing an absolute right. And, if I could have

358 doubted this construction, after reading this clause, and comparing *it with the authorities, I could not hesitate as to the testator's intention, when explained by other clauses. Thus he provides, that after deducting this and one other sum, Anne Smith and Anne Craig are to have the residue. The absolute deduction of this sum is thus clearly in the mind of the testator. They are only to have what remains after taking this sum out. And in the next clause, he further manifests his understanding of his own will, by providing for the deduction (in case debts require it) in equal proportions, "according to the sums devised in money to his wife, nephew, niece and sister." Here he considers the money as devised; and moreover draws no distinction, in terms between this bequest and the others. He considered all as upon the same footing; all as equally legacies. That the others are so, cannot be denied. Therefore, this too must be considered so.

I shall proceed next to consider the question as to the propriety of raising an interest account against the executor, and the yet more important question of the manner of stating that account.

That interest is not to be charged under all circumstances is admitted. It is so decided in the case of *Granberry v. Granberry*, which has furnished the law of the subject, for the court, and for the country, for nearly half a century. But the general rule is unquestionable, that an executor shall be charged with interest upon the balances in his hands, from the expiration of the year. This case furnishes no circumstances, on which to found an exemption of the executor from the operation of the rule. On the contrary, it is a strong case for its application. Very large sums came to his hands recently after he assumed his office of executor. The principal debts of the estate were British debts. If the question of the propriety of paying them, was doubtful, the money should have been invested till that doubt was settled. If it was not doubtful, if the obligation to pay

was clear, the debts should have been paid in order to prevent the accumulation of interest, which has consumed 359 *the estate. I am, therefore, clearly of opinion that an interest account should be raised.

But how raised? I answer upon the principle of *Granberry v. Granberry*, so often recognized by the court. It is, and (as I have said) has been for thirty-seven years, the established rule for the courts and for the country. Executors, and the inferior tribunals who have settled their accounts, have governed themselves by it, until a new rule was adopted by the court of chancery of Richmond about the year 1813. I am not disposed to disturb it. Some rule must be established for the government and direction of these fiduciaries. It is a matter which daily comes home to the business of every man in society. Who is there that is not, in some mode or other, concerned with the settlement of executorial transactions? It is important, therefore, to have some fixed and settled rule for this every day business; and it is most important, that that rule should not be lightly changed. That which was laid down by our predecessors, is founded, I think, in practical good sense, and a knowledge of affairs; and its wisdom has been sanctioned by their successors, and the general acquiescence of the community.

The account in this case is supposed to be stated upon principles at variance with those laid down in *Granberry v. Granberry*. It is necessary, therefore, to examine that case, and to extract from it its essential principles, which will probably be found applicable to every supposable case.

The question as to the mode of settling executor's accounts, arose out of the establishment of a rule for the settlement of the accounts of debtor and creditor, different from (what I will call) the ordinary mercantile rule. The effect of the mercantile rule was, to give interest upon the payments as well as upon the debt. The operation of this system is, in many cases, so obviously injurious to the creditor, that it was justly rejected, and a new rule was established by chancellor Wythe, in the case of *Ross v. Pleasants &c.* which may be called the court rule. It is that,

360 *which now universally prevails in calculating the balance due upon a bond, where partial payments have been made, and it is that to which the court had reference in *Granberry v. Granberry*. In that case, upon exceptions to a commissioner's report, it was decided, "that in the settlement of executor's accounts, the accounts ought to be closed at the end of each year; and interest allowed upon the different balances, up to the time when the transaction closed. Such interest ought not to be carried to the account of the succeeding years, in order to deduct the same from the payments made in succeeding years. This, though done in the common cases of debtors, is too strict as to trustees." From this decision, I deduce these rules or principles:

1. The various items of receipts on the one hand, and disbursements on the other, in each current year, are not to be treated

as distinct items of account, but are to be added together and considered as constituting a single item.

2. Interest upon these balances, is not to be carried to the succeeding year, so as to be set-off against the disbursements in such succeeding year; for

3. The important principle of the rule, is, that the payments or disbursements shall always be first applied to discharge the principal, so long as any principal remains unpaid, and shall never go to discharge interest until the principal has been altogether paid off. Hence results the direction,

4. That, instead of calculating interest upon the balances of the year, and carrying it to the succeeding year (which is expressly forbidden) interest upon the respective balances are to be calculated up to the close of the transaction, and then, and not till then, brought into the general account with the principal.

A case however may occur, and frequently does occur, where a partial, or perhaps only an apparent, variance from the rule of *Granberry v. Granberry*, may seem essential. It will be found, however, not to be a departure in principle, but in form merely. And, as it is of much importance, that the rule, with its real or apparent exceptions, should be properly understood, I shall exemplify the supposed case by a statement.

Suppose that, on the 1st January 1801, the balance against an executor, is £100. principal, and £100. interest. In 1802, he pays £100. which is set off against the principal sum of £100. leaving no balance of principal. In 1803, he pays another sum of £100. and in that year, there are no receipts. The question here is, shall the £100. thus paid carry interest, because there are no receipts of the year against which to set it off, or shall it be applied to the discharge of the £100. which remains due for interest? Unquestionably the latter; for, as there is no principal to the reduction of which it can be applied, the rule in *Granberry v. Granberry* is not invaded, by applying it in payment of the interest; and it would be grossly unjust, that the executor's £100. should be an interest bearing sum for a long course of years, while the testator's £100. would be a dead capital. The effect would be, that in sixteen years the testator's £100. would be paid off by interest on the executor's £100. which would then remain an unimpaired demand against the estate.

But suppose another transaction: that on the 1st January 1801, the balance against the executor is £1000. principal, and £500. interest. In 1802, he pays £100. which is set off against the principal, leaving due at the end of the year, £900. of principal, and the £500. of interest. In 1803, he pays £500. and receives nothing. Shall this £500. be applied to the payment of the £500. interest, or to reduce the £900. principal? Unquestionably, the latter. The spirit and essence of the rule is, that while there is any principal to reduce, the disbursements shall go to reduce it. And in this case, though there are no receipts in that year, against which to set off the dis-

bursements, there is a large arrear of the principal of former years, to which it should be applied. Shall it be said, that, by the case of *Granberry v. Granberry*, the balances of one year shall not be carried to the transactions of the next? This indeed is true; *and the account in *Granberry v. Granberry*, as we shall see, was so settled, accordingly. But if we vary the form of the account by carrying forward balances at all, we must pursue the overruling and all pervading principle, that while there is any principal remaining, the disbursements shall be applied to reduce that principal and not to reduce the interest. To carry on the balances of interest and thus to apply the disbursements to interest, where there is a large unpaid balance of principal of former years, is to violate the rule, both in its letter and in its spirit. For it is not only forbidden in terms, to carry the interest into the account of succeeding years, but it was also the design of the framers of the rule, that while a principal sum remains to be discharged, the disbursements shall not go to liquidate the interest.

After this exposition, it is hardly necessary to add, that the account, in this case, is in my conception utterly erroneous. It violates the rule in *Granberry v. Granberry* most decidedly, in carrying the interest of the account into succeeding years, whenever the receipts of those years were less than the disbursements; and applies the disbursements to the discharge of that interest, merely because there happened to be no receipts in those years, though there was an arrear of principal of many thousand dollars of former years. If the commissioner was entitled to carry the interest of a former year into the account of a succeeding year, why could he not also carry the arrear of principal into that year? Had he done so, there would have been ample sums of principal, at all times, to absorb the disbursements.

In coming to the resolution to conform, as far as possible, to the rule laid down in *Granberry v. Granberry*, the court has very naturally turned its attention to that case, to see how it was practically applied, and have found the accounts finally closed, in strict conformity with the language of the court, in the passages I have extracted from its opinion.*

363 *It is material to remark that after the former account, which had been disapproved, was thus remodelled, the chancellor confirmed the report, and his decision was affirmed by the court of appeals, thus giving a double sanction to its principles and the best evidence that they had been rightly understood.

However, where the mode of stating the executor's account, which was correctly pursued in the case of *Granberry v. Granberry*, is strictly pursued, it operates unjustly, where the balances shift; as, where the disbursements of a year are more than sufficient to discharge the whole principal, there the excess should be applied to pay

*See statement A. at the end of the volume, which shows how the account in *Granberry v. Granberry*, was in fact settled, in pursuance of the opinion of this court in 1 Wash. 249.

interest. We therefore feel at liberty, thus far to explain the rule of *Granberry v. Granberry*: that where, in any year, there are disbursements but no receipts, or where the disbursements exceed the receipts of such year, such disbursement, or excess of disbursement, shall be applied to the payment of the balance of principal of the next preceding year or years, in which there may have been a balance. But if there be no principal remaining due to the estate, then, and not till then, the disbursements shall be applied to the payment of any interest which may be due. And if there be neither principal nor interest remaining due, interest shall then be allowed upon such disbursement, unless it be absorbed by subsequent receipts. And where the balance of principal of any preceding year, shall be thus extinguished, the interest on such balance shall then cease.

Many of the commissioners of the courts of chancery, do not follow strictly the formula of *Granberry v. Granberry*. It is possible, that the formula pursued by the commissioner in the present case, amounts to the same thing with the formula in *Granberry v. Granberry*, as modified above. But as, perhaps, it will be better to adhere to a particular formula, that the mode of statement may become familiar to parties, to counsel, and to the court, who are often perplexed by complicated modes of statement, far more than they would be by executing the task of commissioner

364 *themselves, I have prepared a very simple one.* I think this court should never undertake to recast accounts which come before it; and though I am strongly inclined to think that the plaintiffs' intestate has received, in this case, more than the avails of the estate justified, and that his bill will eventually be dismissed, yet I cannot enter into that investigation. An error, not in principle, but in mere calculation, or in statement, if committed by us, cannot be corrected. If committed by a commissioner, it is open to correction. Moreover, neither the time nor the capacity of this court, will enable it to recast the various accounts which come before it. That is the business of thorough bred accountants. It is for us only to settle the principles upon which such settlements shall be made.

It is proper to observe, that in adopting as a general rule, the rule of *Granberry v. Granberry*, as I have modified it, I do not mean to declare it inflexible. There may be strong cases, in which it would work gross injustice, and in which, as our predecessors admit, it must bend. Such would be the case, if a very large sum was received in the last month of one year, and paid away again in the first month of the succeeding year, or vice versa. In such a case it would be unreasonable to burden the executor, on the one hand, or the estate on the other, with a full year's interest on such sum; and in such case, therefore, I should deem it proper, that interest should

only be charged until the reimbursement.

The other judges concurred in the opinion of the president, on all the points; and a decree was entered accordingly, reversing the chancellor's decree, declaring the principles on which the interest account of the executor should be stated, correcting the accounts also as to various matters of detail, and remanding the cause &c.

365 *Dowse v. Buchanan's Ex'ors.

December, 1831.

[23 Am. Dec. 280.]

(Absent TUCKER, P., and BROOKE, J.)

Deed of Bargain and Sale—Equitable Title without Warranty—After-Acquired Title—Effect*—Case at Bar.—H. having only an equitable estate in land, conveys the land by deed of bargain and sale, without any warranty to M. and F. in trust to secure a debt to B. and this deed of trust is duly recorded; afterwards, H. acquires the legal title; and then he sells the land to D. and conveys it to him with warranty: **Held,**

1. **Same—Same—Same—Same.**—That as the deed of trust executed by H. to M. and F. to secure the debt to B. was executed when H. had not the legal estate, and as that deed contained no clause of warranty, the legal estate subsequently acquired by H. did not enure to the trustees M. and F. to secure the debt to B. so that B. had only a lien on the equitable estate.
2. **Same—Recordation—When Not Notice to Subsequent Purchaser.**—That the recording of the deed mortgaging H.'s equitable estate to secure the debt to B. was not constructive notice of that deed to D. the subsequent purchaser from H. For.
3. **Same—Same—Same.**—The statute requiring deeds to be recorded, makes them void, as to subsequent purchasers without notice, if not recorded, but gives them no additional validity if recorded.

***Conveyances—After-Acquired Title—Estoppel.**—The principal case holds that where one having an equitable estate in land conveys such land by deed of bargain and sale *without warranty* to secure a debt, and afterwards acquires the legal title in the land; such legal estate subsequently acquired does not enure to the benefit of the grantees. **JUDGE CARR**, in his opinion, says, a deed of bargain and sale, like a release, passes no title which the bargainor had not at the time, yet if there be a warranty annexed, it will bar.

In *Raines v. Walker*, 77 Va. 96, it is said, if a person conveys land with *general warranty*, and does not own it at the time, but afterwards acquires the same land, such acquisition enures to the benefit of the grantee. Citing opinion of **STAPLES, J.**, in *Burners v. Keran*, 24 Gratt. 47 (which case and *note* cite the principal case), and opinion of **CARR, J.**, in *Dowse v. Buchanan*, 3 Leigh 365; Gregory v. Peoples, 80 Va. 102; Cox v. McMullin, 14 Gratt. 90; Gregory v. Peoples, 80 Va. 357.

And in *Reynolds v. Cook*, 83 Va. 821, 3 S. E. Rep. 710, it is said, the general rule undoubtedly is, that where land is conveyed without warranty a grantor is not estopped from setting up an after-acquired title. On the other hand, a covenant of warranty works an estoppel and the reason usually given is that the estoppel prevents circuity of action. *Dowse v. Buchanan*, 3 Leigh 365; Gregory v. Peoples, 80 Va. 355. But this is not the only ground upon which the estoppel arises. The rule is well established that where the deed recites or affirms, expressly or impliedly that the grantor is seized of a particular estate which the deed purports to convey, and upon the faith of which the bargain was made, he will be thereafter estopped to deny that such an estate was passed to his vendee, although the deed contains no covenant of warranty at all. This rule accords with common honesty and fair dealing. Citing for this last proposition *Van Rensselaer v. Kearney*, 11 How. 297; *French v. Spencer*, 21 How. 228. See also, *Nye v. Lovitt*, 92 Va. 717, 24 S. E. Rep. 345, citing the principal case.

†Deeds—Recordation—Notice.—In the principal case it is held that the recordation of a deed mortgaging an equitable estate is not constructive notice to a subsequent purchaser of the legal title. And in *Harvey v. Fox*, 5 Leigh 452, it is said: "It is not the recording of such deeds according to all the requisites of the law, to be deemed constructive notice, so as to be binding on subsequent creditors, in the

*See statement B. at the end of the volume, which exemplifies the rule of *Granberry v. Granberry*, as expounded and modified by the court in the present case.—Note in Original Edition.

4. **Bona Fide Purchaser—When Complete.**—To sustain a plea of purchaser without notice, the party must be complete purchaser before notice; that is, must have obtained a conveyance and paid the whole purchase money.

The late general Thomas Nelson, by deed dated the 30th December 1788, conveyed a tract of 1500 acres of land called Bullfield in Hanover, to Nathaniel Burwell and three other trustees, upon trust to sell the same for certain purposes therein mentioned. General Nelson was in possession of the whole tract at the time of this conveyance; but he had purchased a part of it (it did not appear what part) from James Harris, who never made any conveyance thereof to him: in this part, therefore, he had only an equitable title: in the residue, his title was complete. He died in January 1789. In December 1789, the trustees, in execution of the trust, sold the whole of Bullfield, at auction, to John Lyons; and they put him into possession of it, but made him no conveyance, retaining the title (it seemed) as a security for the purchase money. Lyons, after continuing in possession of the land, for some time, sold it to John Hopkins, and put him in possession; Hopkins undertaking *to pay that part of the purchase money, which yet remained due and unpaid by Lyons to Nelson's trustees.

Some years afterwards, Hopkins and Lyons brought a suit in the superiour court of chancery of Richmond, against Burwell, now the only survivor of the trustees who

same manner, and to the same extent, as if they had actual notice of the execution of the deeds? and if so, are such deeds to be held fraudulent as to them, although they may be clearly so as to prior creditors? I have referred to the opinions of JUDGE GREEN, in *Land v. Jeffries*, 5 Rand. 258, and of JUDGES CARR and CABELL, in *Doswell v. Buchanan*, 3 Leigh 366, and the law does not seem to be conclusively settled on the subject. I forbear, however, to say anything on it.

But see § 2465, Code of 1887. The principal case is cited in *Donnell v. King*, 7 Leigh 399; *Pillow v. Southwest, etc.*, 1mp. Co., 92 Va. 152, 23 S. E. Rep. 32.

Equal Equities—Priority.—It may be laid down as a general rule, that between mere equities, equal in all other respects, the elder will prevail. If, however, the junior claimant shall have an advantage at law, or superior equity, such party shall prevail. *Cox v. Romine*, 9 Gratt. 29, citing *Moore v. Holcombe*, 3 Leigh 597, and opinion of JUDGE CABELL in *Doswell v. Buchanan*, 3 Leigh 365.

***Bona Fide Purchaser—What Constitutes.**—The proposition laid down in the principal case, that to sustain the plea of purchaser without notice, a party must be a complete purchaser before the notice; that is, must have obtained a conveyance and paid the whole purchase money, is criticised in *Preston v. Nash*, 76 Va. 354, which case holds that a complete purchaser is one who has paid the purchase money, and who, though he has not received a conveyance of the legal title, is entitled to call for it. CHRISTIAN, J., in his opinion, saying in effect that the other judges, GREEN and CABELL did not adopt the statement made by CARR, J. in *Doswell v. Buchanan*, that a complete purchaser must have paid the purchase money and obtained a conveyance of the title. See also, citing the principal case, the following cases which approve the rule laid down in *Preston v. Nash*, *supra*: *Preston v. Nash*, 76 Va. 6, 7, 8; *Lamar v. Hale*, 79 Va. 156; *foot-note* to *Briscoe v. Ashby*, 24 Gratt. 454. But in *McCormack v. James*, 36 Fed. Rep. 18, the rule in the principal case seems to be approved. See *foot-note* to *Mutual Assurance Society v. Stone*, 3 Leigh 218.

Statutes—Construction—Effect Where Foreign Statute Is Adopted.—When the construction of a foreign statute has been settled by a number of decisions and the legislature enacts that statute in the same words, it must be presumed that the construction based upon statute was adopted along with it. *Norfolk & Western R. Co. v. Old Dominion Bag. Co.*, 90 Va. 115, 37 S. E. Rep. 784, citing *Doswell v. Buchanan*, 3 Leigh 364.

had made the sale to Lyons, under general Nelson's deed of trust of December 1788, and the heirs of Harris, to compel those defendants to convey the legal title of the whole tract to Hopkins; and the chancellor, by a decree in that cause, made the 1st September 1808, directed, that Burwell, the surviving trustee, and the heirs of Harris, should, with the assent of Lyons, execute deeds of conveyance of Bullfield to Hopkins, he defraying the expenses of such conveyances. A deed was accordingly prepared, purporting to be a deed between Burwell the surviving trustee and Mrs. Nelson the general's widow, and Lyons and wife, of the one part, and Hopkins of the other, conveying the land in pursuance of the decree. This deed was dated, and executed by Burwell and Mrs. Nelson on the 2nd December 1810, and, as to them, was duly recorded in the county court of Hanover in June 1811; but Lyons and wife, who had been made parties to the deed, in order to signify Lyons's assent to the conveyance as required by the decree, never executed it till 1814, Lyons having till then remained exposed to a claim of Nelson's trustees for a balance of the purchase money he had contracted to pay them, and which Hopkins had thus long failed to pay. In 1814, the deed was duly executed by Lyons and wife, and recorded in the same court as to them. No conveyance was ever executed, in pursuance of the decree, by the heirs of Harris.

Meantime, and while Hopkins yet held only the equitable title of Bullfield, he borrowed 5000 dollars of John Buchanan; and by indenture of bargain and sale dated the 7th May 1808, Hopkins conveyed 800 acres parcel of Bullfield, to Thomas Marshall and George Fisher, in trust to secure the debt to Buchanan. But this deed contained no covenant of warranty, or covenant of

367 any kind for assurance *of the title. It was duly recorded in the general court, at June term 1808.

After the deed of December 1810 was executed by Burwell and Mrs. Nelson to Hopkins, and recorded, but before it was executed by Lyons and wife, namely, on the 31st July 1811, Hopkins, by articles between him and James Doswell, of the last mentioned date, covenanted to sell and convey the whole of Bullfield to Doswell, for 22,000 dollars, payable in four instalments, the last of which was to be paid the 1st January 1814. And by deed dated the 16th December 1811, Hopkins made a conveyance of the land to Doswell, with general warranty.

In 1822, Buchanan exhibited a bill against Hopkins, Doswell, and Marshall and Fisher, (the trustees), in the superiour court of chancery of Richmond, in which he insisted and prayed that the trust declared in Hopkins's deed of May 1808, should be executed, and the 800 acres parcel of Bullfield, thereby mortgaged to secure the debt of 5000 dollars due by Hopkins to him, subjected to the debt, and the interest thereof in arrear.

Before the defendants put in their answers, Buchanan died, and the suit was revived and prosecuted by his executors, one of whom was Fisher, the trustee named

in the deed of May 1808, under which Buchanan claimed.

Doswell, in his answer,—after objecting that Hopkins, at the time of the execution of the deed of May 1808, had no legal estate in the land, and so no legal estate passed by that deed to the trustees therein named,—averred, that he himself was a fair purchaser of the whole of Bullfield from Hopkins, after Hopkins had acquired the legal title thereof from Nelson's trustees, and that he had procured a conveyance of the legal estate from Hopkins, and paid the whole of the purchase money which he contracted to pay Hopkins, before he had any notice of the deed of May 1808, under which Buchanan claimed; and so holding the legal estate, and having equal equity with Buchanan, he insisted, he was entitled to be protected against Buchanan's claim.

368 *Pending the suit, Doswell died, having by his will devised Bullfield to his son Thomas; and Hopkins also died, utterly insolvent: and the suit was revived against Doswell's executors, and his son, Thomas Doswell, to whom he had devised the land, and (pro forma) against Hopkins's heirs and distributees.

The only controverted question of fact was, Whether Doswell had completed the payment of all the purchase money he contracted to pay Hopkins for the land in question, and obtained a regular conveyance of it, before he had any actual notice of the existence of the deed of May 1808, under which Buchanan claimed? Upon the proofs in the cause touching this point, it was probable he had, yet there was room for doubt whether he had or no.

The chancellor, having directed a commissioner to ascertain the balance of the debt due to Buchanan's executors, who reported that it was 6560 dollars with interest on 5000 dollars, part thereof, from the 10th May 1826,—decreed, that, unless the defendants or some of them should pay the same within six months, the marshal of the court should sell the 800 acres of land mortgaged by the deed of May 1808, defray the charges of sale out of the proceeds, and bring the residue into court, to be disposed of by future order.

This court, upon the petition of Thomas Doswell, allowed him an appeal from the decree.

The attorney general and Johnson, for the appellant. 1. As Hopkins had not any legal estate but only an equity in the land, at the time he executed the deed of bargain and sale of May 1808, therefore no legal estate passed by that deed to the trustees therein named; the deed conveyed only the equitable estate and the possession, which the grantor then had, for the security of the debt due to Buchanan. Hopkins's subsequent acquisition of the legal title did not enure to the trustees, so as to unite the legal to the equitable estate conveyed to them by the deed; for the deed

369 *could act on the subsequently acquired legal estate of the bargainor, and have the effect of vesting the legal estate in the bargainees, only by way of estoppel or rebutter; but, as there was no covenant of warranty in the deed, there was no estoppel or rebutter. Harg. Co. Litt.

§ 446, fo. 265, a. b. note 214; Jackson v. Wright, 14 Johns. Rep. 193. And, if in a suit between Buchanan's trustees and Hopkins, Hopkins would have been estopped by his deed, from claiming the legal estate, yet, in this case, between those trustees and Doswell (a bona fide alienee of Hopkins for valuable consideration) the deed can have no effect by way of estoppel to vest in them Hopkins's after purchased legal estate. The only doubt, whether a deed of bargain and sale without warranty can operate by way of estoppel to vest in the bargainee the bargainor's after acquired estate, has arisen in contests between parties or privies. Rawlins's case, 4 Co. 53. See also Pollexf. 67, 8; Palmer v. Ekins, 2 Ld. Raym. 1550. And many acts which estop a party shall not estop a stranger. Palmer v. Stanage, 1 Lev. 43; T. Raym. 21, S. C. What is said on this subject, in Trevivan v. Lawrence, 1 Salk. 27b, is a mere dictum. Besides, there can be no estoppel, where an interest passes; Co. Litt. 45, a. 47, b. And here an interest did pass from Hopkins to the trustees Marshall and Fisher; namely, the equitable estate, and the right of possession.

2. If Doswell can be held to have had notice, actual or constructive, of the deed of May 1808, under which Buchanan claimed, before he received his conveyance, and paid the purchase money to Hopkins, we admit Buchanan's executors must prevail in equity. As to actual notice, we submit, upon the proofs in the cause, that Doswell was a complete purchaser without any actual notice of that deed. And the recording of the deed was not constructive notice to Doswell. Our statute of conveyances requiring the recording of deeds, is, in all essential particulars, like the english register acts concerning conveyances in

York and Middlesex, 2 and 3 Ann. ch. 370 4, 5 Ann. ch. 18, 6 Ann. ch. *35, 7 Ann. ch. 20, 8 Geo. 2, ch. 6. See them, 4 Cruise's Dig. title 32; Deed, ch. 28, § 2-10, pp. 357-542; 2 Cay's Abr. Register, p. 31. Now, under the english statutes, it has been uniformly held, that the registry of a conveyance is not constructive notice to a subsequent purchaser; for, that, although the statute avoids deeds not registered as against purchasers, it gives no greater efficacy to deeds that are registered, than they had before. Bedford v. Backhouse, 2 Eq. ca. abr. 615, pl. 12; Le Neve v. Le Neve, 3 Atk. 646; Morecock v. Dickens, Amb. 678; Williams v. Sorrell, 4 Ves. 389; Bushell v. Bushell, 1 Scho. & Lef. 90.

Leigh for the appellees. As to the last point, it is material to consider, that though Hopkins had only an equity in the land and the possession, at the time of his conveyance of May 1808, to secure the debt to Buchanan, yet he acquired the legal title from Nelson's trustees by their deed of December 1810, duly recorded in June 1811, before the date of his conveyance to Doswell, and even before that of the articles by which he covenanted to sell the land to him. He could sell Doswell no better right than he himself had; his assignee must stand in his shoes; it is impossible to withhold the legal estate from Buchanan's trustees, in favour of Doswell, upon any prin-

ciple, which would not equally withhold it from them in favour of Hopkins himself. Now, as between Buchanan's trustees and Hopkins, the legal estate acquired by the latter enured to them: he could never claim the legal estate against his own deed to them, though that deed contained no warranty. Whether the deed might have operated strictly and technically as an estoppel, is immaterial; he was concluded by it. And Doswell, who purchased from him afterwards, was equally concluded. Jackson v. Bull, 1 Johns. Ca. 90, 91; Jackson v. Murray, 12 Johns. Rep. 201; Stevens v. Stevens, 13 Johns. Rep. 316; Trevivan v. Lawrence, 1 Salk. 276; 2nd Res.; Vick v. Edwards, 3 P. Wms. 382; Smith v. Low, 1 Atk. 490, 10 Vin. ab. Estoppel, 2 pl. 10, p. 471. In Jackson v. Wright, 371 *14 Johns. Rep. 193, the point was probably very little considered, since it was no wise necessary to the decision of the case. Littleton, § 446, and Coke's commentary, fo. 265, a, cited and mainly relied on for the appellant, relates to the case of a disseisin, and a release to the disseisor by the son of the disseisee, without warranty, in the disseisee's lifetime, and the right at the disseisee's death afterwards descending to the releasor; a case, in which the court would be most astute to avoid the effect of the release. The present case is a conveyance for valuable consideration, by one having the possession, with an equitable estate, and (it seems) the right to call for the legal estate. Hopkins, in May 1808, was, in a common law point of view, the tenant at sufferance of Nelson's trustees; and by the conveyance in fee to secure the debt to Buchanan, he disseised them; he assumed the legal estate, and it was his intent to convey it. What Coke says in Co. Litt. 47, b, concludes against the argument of the appellant's counsel—"If the lease be made by deed indented, then both parties are concluded; but if it be by deed poll, the lessee is not estopped to say that the lessor had nothing at the time of the lease made. A. lessee for the life of B. makes a lease for years by deed indented, and after purchases the reversion in fee; B. dieth; A. shall avoid his own lease, for he may confess and avoid the lease, which took effect in point of interest, and determined by the death of B." (Holt, C. J., explains the reason in Gilman v. Hoare, 1 Salk. 275.) "But, if A. had nothing in the land, and made a lease for years by deed indented, and after purchased the land, the lessor is as well concluded as the lessee, to say that the lessor had nothing in the land; and here it worketh only upon the conclusion, and the lessor cannot confess and avoid as in the other case." "Et videtur, that by purchase of the land, that is turned into a lease in interest, which before was purely an estoppel. Vide tamen P. 3; Car. C. B.; Crook n. 2; Isham and Morris; Hale's MSS. See Cro. Carr. 109." Harg. note 11, 47, b. The whole doctrine is, merely and in the last degree, technical.

372 *2. Doswell certainly had not completed the payment of the purchase money of the land to Hopkins before Lyons joined in the deed of Nelson's trustees to

Hopkins; that is, not till 1814. Whether his purchase was completed by the payment of the whole purchase money to Hopkins, before he got notice of Buchanan's mortgage, is a question of fact to be determined by the evidence. Was the recording of Buchanan's mortgage, supposing it to be, in its effect, a mortgage only of the equitable estate which Hopkins then held, constructive notice to Doswell and all the world? The point is of general consequence, and of the utmost importance. I admit that the general course of decisions in England, upon the register acts, which are the law of only two counties, is, that the registry there is not constructive notice; though in Hine v. Dodd, 2 Atk. 275, lord Hardwicke said, that the register act "is notice to the parties, and notice to every body; and the meaning of this statute was, to prevent parol proofs of notice or no notice." Those decisions seem to me so contrary to the spirit of the statutes, that I cannot but impute them to the inclination of the courts to keep the law of the two register counties, as nearly conformable with the general law of the land, as the statutes would allow. We have not the reasoning on which the leading case of Bedford v. Backhouse was decided. In Morecock v. Dickins, Amb. 678, lord Camden disapproved the doctrine, and yielded to it only out of regard to the authority of Bedford v. Backhouse, and the course of decision following that case, and from apprehension of the mischiefs that might result in practice, from changing the rule; good reasons to determine his judgment, but not for this court. Cruise disapproves the doctrine, as contrary to the intention of the statutes; Digest, 4 vol. title 32, Deed, ch. 28, § 16, p. 544. Sugden, too, doubts the propriety of the decisions; nay, more, he thinks lord Camden erred in applying the doctrine of Bedford v. Backhouse to Morecock v. Dickins. Law of vend. p. 509. In that case,

Wilson being indebted to Morecock, 373 and having taken a *new lease of lands, it was agreed by deed that the lease should stand as security for the debt due to Morecock; and this deed containing the agreement, was registered: afterwards, Wilson mortgaged the premises to Dickins, and delivered him the lease, Dickins having at the time no actual notice of Morecock's security: Morecock (like Buchanan, in our case) acquired only an equity; and Dickins (like Doswell) had a conveyance of legal estate. Lord Camden reluctantly gave the preference to Dickins; and Sugden says (with good reason) the case would not, perhaps, be deemed authority. And this reluctant and questionable decision is the only authority directly in point, that has been, or perhaps can be, cited for the appellant. If our legislature had taken the policy of its enactments on the subject, from the english register acts, or copied the language of them, it might be reasonable that our courts should look to the settled and known judicial exposition of the english statutes, as a guide in the construction of our own: but as we did not borrow the policy from England, so we never adopted the language of the english statutes. The first act of the colonial legislature on

the subject, was passed in the 14th year of Charles II. and the second, in the year 1705, which was the 4th of Anne. 2 Hen. stat. at large, 168, 3 Id. 318. The next act, that of 1734, ch. 6, 4 Id. 397, which explained the act of 1705, and placed the registry of deeds on the principle on which it now stands, was certainly not all copied after the model of the english register acts. The same remark applies to the act of 1748, ch. 1, 5 Id. 408, and to all our subsequent legislation. Let the language of those early statutes, let the language of the revised statute of 1792 (which was the law in force when the mortgage to Buchanan, and the conveyance to Doswell, were executed) be compared with the english register acts; and let both be compared with the register acts of New York: it will be seen, that the language of all our statutes, is very different, certainly as different as that of

374 the New *York statutes, from the words of the english statutes.* Now, chancellor Kent, in *Parkist v. Alexander*, 1 Johns. Ch. Rep. 389, after quoting the language of the New York statute, said—

375 "If it does not mean, that a mortgage duly registered shall be preferred to a subsequent bona fide deed *without notice, it is senseless and idle, and worse than idle; it is delusive, and a snare

*The english statute 2 Ann. ch. 4, § 1, provides "that a memorial of all deeds and conveyances, which shall be made of or concerning, and whereby any honours, manors, lands, tenements or hereditaments, in the west riding of the county of York, may be in any manner affected, in law or equity, may, at the election of the party or parties concerned, be registered—and that every such deed or conveyance shall be adjudged fraudulent and void, against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial thereof shall be registered as by this act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim." The subsequent statutes extend the same provisions to the east and north ridings of Yorkshire, the town of Kingston-upon-Hull, and to Middlesex exclusive of the city of London. 4 Cruise's Dig. tit. 32. Deed, ch. 28.

The words of one of the New York register acts, as quoted by CHANCELLOR KENT, in 2 Johns. Ch. Rep. 389, are, "No mortgage, nor any deed, conveyance or writing in the nature of a mortgage, shall defeat or prejudice the title or interest of any bona fide purchaser &c. unless the same shall have been duly registered."

The Virginia statute of conveyances of 1792, ch. 90, Rev. Code of 1794, Pleasants' ed. p. 156, provides, § 1, "That no estate of inheritance or freehold, or for a term of more than five years, in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing sealed and delivered; nor shall any such conveyance be good against a purchaser for valuable consideration, not having notice thereof, or any creditor, unless the same be acknowledged by the party or parties who shall have sealed and delivered it, or be proved by three witnesses, to be his, her or their act, before the general court, or court of that district, county, city or corporation, in which the land conveyed or some part thereof lieth, or in the manner herein after directed, within eight months after the time of sealing and delivering, and be lodged with the clerk of such court to be there recorded."—§ 4. All bargains, sales, and other conveyances whatsoever of any lands, tenements or hereditaments, whether they be made for passing any estate of freehold or inheritance, or for term of years, and all deeds of settlement upon marriage, wherein either lands, slaves, money or other personal thing shall be settled or covenanted to be left or paid at the death of the party or otherwise, and all deeds of trust and mortgages whatsoever, shall be void as to all creditors and subsequent purchasers, unless they shall be acknowledged or proved and recorded according to the directions of this act; but the same as between the parties and their heirs, shall nevertheless be valid and binding."—Note in Original Edition.

to the unwary. No decision of the english courts upon the english register acts, in which there is a variation in the language of the provision, could induce me to change my opinion on the construction of our statute. I had occasion, lately, in the case of *Frost v. Beekman*, (Id. 288,) to express the same opinion; and with me the point is absolutely at rest." And in both those cases, he held that the registry of a mortgage was constructive notice to all the world. The court of errors of New York, indeed, had already decided the same point in *Johnson v. Stagg*, 2 Johns. Rep. 510, 524, where Kent said, "The provision in the act that no mortgage, unless duly registered, shall defeat the title of a bona fide purchaser, shews the intent to be, that subsequent purchasers must take notice, at their peril, of all registered mortgages. 'This has been the received construction, and probably, the universal understanding on the subject.' It 'has been the received construction, and probably, the universal understanding' of the law of Virginia, likewise. It certainly was the understanding of the legislature that enacted the revised statute of conveyances of 1819, as is evinced beyond doubt by the new provision then introduced, that 'every title bond, or other written contract, in relation to land may be proved, certified or acknowledged, and recorded, in the same manner as deeds for conveyance of land; and such proof, acknowledgment or certificate, and the delivery of such bond or contract to the clerk of the court to be recorded, shall be taken and held as notice to subsequent purchasers, of the existence of such bond or contract. 1 Rev. Code, ch. 99, § 13, p. 365. When the legislature made the registry of an executory contract to convey land, notice to subsequent purchasers, it surely entertained no doubt, and supposed there could be no doubt, that an actual conveyance or mortgage of the equitable estate of land, duly recorded, was notice to subsequent purchasers. Is no man to be safe in taking the mortgage of an equitable

376 estate, while the naked legal title *is outstanding? What more can a prior purchaser or mortgagee do, to warn subsequent purchasers, than to record his deed? How can he give actual notice to every citizen of the state? How can he know who is in treaty with his vendor or mortgagor, for the purchase of the subject? On the other hand, it is the business of every purchaser to search the records. In the present case, Doswell had only to look into the order books and deed books of the courts in which a conveyance of this land might be recorded, under the name of Hopkins, and the incumbrance would have appeared. He was bound to search for incumbrances, from the time Hopkins's possession commenced; for he was bound to know that Hopkins's equitable estate was mortgageable.

Harris's heirs have never yet executed any conveyance in pursuance of the decree of the court of chancery of October 1808, for the part of Bullfield which general Nelson bought of Harris. What part it was, or how much, does not appear. As to it, Doswell can claim only an equitable title;

and if it was included in Buchanan's mortgage, the prior incumbrancer must have the preference as to so much.

In answer to the last remark as to the part of the subject purchased by general Nelson of Harris, it was said, the act of limitations perfected the title as against his heirs.

CARR, J. The counsel for the appellees insisted, in the argument, that though Hopkins had no title when he conveyed to Buchanan's trustees, yet, as he afterwards obtained it, he and his alienee were estopped from contradicting the deed. With respect to this, I shall only remark, that this technicality is met and neutralized by another, namely, that the deed contains no clause of warranty, and therefore works no estoppel. A deed of bargain and sale, like a release, passes no title which the bargainor had not at the time, yet if there be a warranty annexed, it will bar. "For albeit (as Coke says, Co. Litt. 265, b.) the release cannot bar the right &c. yet 377 the warranty may rebut, and *bar him and his heirs of a future right that was not in him at the time; and the reason wherefore a warranty, which is a covenant real, should bar a future right is, for avoiding a circuity of action."

Let us next inquire, whether Doswell is a purchaser with notice of Buchanan's equitable lien, and the legal estate in his hands subject to the satisfaction of the debt due to Buchanan's executors? Is the recording of a deed of trust, which gives a lien on the equitable title, such notice to a subsequent purchaser of the legal title, as will bind him? I think not. The enrolment and registry acts of England, and our recording acts, are expressly declared to be made for the benefit of subsequent purchasers; to protect them from secret conveyances. These acts, then, ought not to be turned to the injury of those, for whose benefit they were made, unless it be in obedience to some express provision contained in them. But there is none such. They declare, that all deeds &c. shall be void as to subsequent purchasers, unless duly recorded; but they no where declare, that such recording shall charge the subsequent purchaser with notice of the deed. If not recorded, the deed is void as to him; if recorded, it is only so far valid, that it passes to the bargainee the title it purports to convey, provided the bargainor had that title; if he had it not, the deed cannot pass it, though recorded; nor will the putting it on record affect the conscience of a subsequent purchaser of the legal title, nor, of course, charge that title with the equity which the deed raised between the bargainor and bargainee. The laws had no such intention, nor will their words bear such construction. That this is settled doctrine in England, there are many cases to shew. *Ld. Forbes v. Deniston*, 4 Bro. P. C. 189; *Cheval v. Nichols*, 2 Eq. ca. abr. 63, 4, pl. 7; 1 *Str.* 664. S. C. *Beatniff v. Smith*, 1 Eq. ca. abr. 357, pl. 11; *Wrightson v. Hudson*, 2 *Id.* 609, pl. 7; *Bedford v. Backhouse*, *Id.* 615, pl. 12, cited *Amb.* 680; *Hine v. Dodd*, 2 *Atk.* 275; *Le Neve v. Le Neve*, 3 *Atk.* 646; *Sheldon v. Cox*, *Amb.* 624; *Morecock v. Dickins*, *Id.* 680; *Bushell*

378 *v. *Bushell*, 1 *Scho. & Lef.* 90, in which last case, lord Redesdale reviews all the authorities with his usual ability. In *Wrightson v. Hudson*, sir J. Jekyll had decided, that the register act did not create constructive notice by the registry; that it avoided only prior charges not registered; and that though *Wrightson* might have searched the registry, he was not bound to do so. Upon this lord Redesdale remarks, "Sir J. Jekyll's opinion that the act did not create constructive notice by the registry, appears to be sound. I know of nothing that compels a man to search the registry, more than to search the records of a court of any description." And he concludes his review by saying, "The effect of all these decisions is, that the registry cannot be considered as notice, with all the consequences that would attach upon it as notice; and if it were so considered, it would lead to very mischievous consequences." If we say, that the recording of a deed is constructive notice, it is on the sole ground that it is the duty of every purchaser to search the records, and that if he did so, he must see the deed. Now, suppose a deed put upon the record, without the proof and authentication required by law? We know that this court has, in several cases, declared such deed to be, to all intents and purposes an unrecorded deed; *Turner v. Stith*, 1 *Wash.* 319; *Currie v. Donald*, 2 *Wash.* 59, 64. Yet it is upon the record, and if the purchaser searched, he would see it, just as certainly as if it had been recorded upon the fullest proof; and to be consistent, we must say, that he purchases with notice of such deed, and therefore is as much bound by it as the parties, between whom we know it is good though not recorded, because this deed, in violation of law, was put upon record. Thus, we dispense at once with a positive provision of the law, pronouncing such deed void as to the subsequent purchaser. This idea is clearly expressed by lord Redesdale, in *Latouche v. Dunsany*, 1 *Scho. & Lef.* 157. Speaking of the registry act, he says, "If it be notice, it must be notice, whether the deed be duly registered or not; 379 it may be unduly registered, *and if it be so, the act does not give it a preference; and thus this construction would avoid all the provisions in the act for complying with its requisites." Again in *Underwood v. Ld. Coutown*, 2 *Scho. & Lef.* 64, he says, "It seems to me, that nothing would be more mischievous than to hold, that putting any thing on the registry, is notice, within the meaning of the word notice as applied to courts of equity in such cases." In the next page, he says, "There is an important difference between actual notice and the operation of the register act. Actual notice might bind the conscience of the parties; the operation of the act may bind their title, but not their conscience." From these cases, it appears that, for more than a century past, it has been settled law in England, that the mere putting a deed upon the registry, is not notice. Nor has the doubt (it is a mere doubt) thrown out by lord Camden, in *Morecock v. Dickins*, in 1768, nor the distinction attempted by Sugden, p. 509, tended at all to shake this doctrine.

It is admitted, that where the construction of an english statute has been settled by a series of decisions, and our legislature enacts that statute in totidem verbis, the construction must be considered as adopted along with the statute. To me it seems that this principle applies strongly to the case before us. Our statute is not a literal copy, but surely it must be admitted to have been substantially taken from the english statute 2 Ann. ch. 4, commonly called the register act; which after describing the kind of conveyances to which it extends, and saying that memorials of them shall be registered in the manner directed, adds, "that every such deed or conveyance &c. shall be adjudged fraudulent and void, against any subsequent purchaser or mortgagee for a valuable consideration, unless such memorial thereof be registered, as by this act is directed, before the registering of the subsequent deed or conveyance." Our statute of conveyances, after directing the mode of recording &c. provided, that "all deeds of bargain and sale and other conveyances whatsoever of lands &c. and all deeds of trust and mortgages, which shall hereafter *be made and executed, shall be void as to all creditors and subsequent purchasers, unless they shall be acknowledged or proved, and recorded, according to the directions of this act." It is impossible to look at these acts, without seeing their exact similarity, as to recording and registering deeds. Our legislature (we must, in decency, suppose) knew that under the english law, the registering a deed had been settled not to create notice: if it had meant, that under our law it should, how easy to have added, that the recording of every such deed, according to the directions of this act, shall be full notice to all subsequent purchasers. It was insisted, however, that the legislature of 1819 believed, that the recording a deed did give notice to all the world; and this was said to be evinced by the 13th section of the revised statute of conveyances, which was added to our law at the late revisal. It directs title bonds and contracts in relation to land, to be recorded; and adds, that such recording shall be taken and held as notice to all subsequent purchasers, of the existence of such bond or contract. If this section proves any thing, it seems to me to prove, that the legislature did not suppose that bare recording (at least of bonds and contracts) would operate a notice; else why add, that such recording should be taken and held as notice? It must have thought these words necessary to give to recording that effect; and if necessary as to bonds and contracts, equally so, assuredly, as to deeds, for there can be nothing in the nature of the instrument, to make a difference. Why it chose to leave the law with respect to recording deeds &c. just as they found it in the former statutes, and to add, in the new section, that recording should be notice as to bonds and contracts, it is not for me to say. We must construe each section according to its actual words. From this review of the statutes, and the cases settling the construction of them, it is clear to me, that there is nothing in them, that imposes on the purchaser

the duty of searching the records. Let us look at analogous cases. A private act of parliament, is not notice to a purchaser; Sudd. *law vend. 535, 2 Ves. sr. 480, 3 Bos. & Pul. 578. Decrees of courts of equity are not notice to a purchaser; Sudd. 538. Judgments are not notice, nor is the docketing of judgments of itself notice, to a purchaser; Id. 539.

But, even if it were admitted to have been the duty of Doswell to search the records, how far ought that search to be carried? Assuredly, not beyond the period at which the legal title vested in the vendor. Suppose him to take the advice of counsel; he would call for the chain of title; he would examine the decree of September 1808, directing the title to be made to Hopkins, and the deed made in virtue of this decree of the 2nd December 1810; and seeing that the title of Nelson was by this deed conveyed to Hopkins, he would look from this date down to the time of consultation, to see whether there were any incumbrances. This is all that could, with any shew of reason, be required of him: but this would never lead him to the deed of trust of May 1808, made by Hopkins to Buchanan, and purporting to convey the legal estate, when Hopkins had no such estate in him; and to impute to him a notice of this, because it was put on record, seems to me wholly inconsistent with equitable principles generally, or the particular ground of favour, on which a fair purchaser stands in that forum.

But though we should decide, that the recording the deed of trust, was no notice, it still remains to inquire, whether Doswell has shewn himself a complete purchaser for value before notice. To constitute him such, I consider that the deed must be executed, and the money all paid, before notice. Sugden, p. 530, lays it down broadly, that "notice before actual payment of all the money, although it be secured, and the conveyance actually executed, or before the execution of the conveyance, notwithstanding that the money be paid, is equivalent to notice before the contract." And these positions seem fully supported by the cases (which I have carefully examined). *Tourville v. Naish*, 3 P. Wms. 307; *Story v. Ld. Windsor*, 2 Atk. 630; *Moore v. Mayhow*, 2 Freem. 175; *Jones v. Stanley*, 3 Eq. ca. abr. 685, *pl. 9; *Wigg v. Wigg*, 1 Atk. 384. We know, that the plea of purchaser for value without notice, if sustained, is a perfect defence; and that against such purchaser, equity will not take the slightest step, not even to perpetuate evidence against him, or to take from him any advantage the law gives him; *Jerrard v. Saunders*, 2 Ves. jr. 454. But it is equally clear, that this plea is a complete defence, or no defence at all. "It must aver a conveyance, and not articles merely—it must aver the consideration, and actual payment of it; a consideration secured to be paid, is not sufficient." Mitf. plead. 215, 16. It must also deny notice of the plaintiff's title to a claim, previous to the execution of the deeds, and payment of the consideration. *Hardingham v. Nicholls*, 3 Atk. 304. A plea averring that the money was paid or bona fide se-

cured to be paid, was overruled. In 2 Newland's equity, 145, and also in Beame's pleas in equity, 347, we have forms of the plea of purchaser without notice, at full length; and they set out the purchase, the sum to be given, the estate purchased &c. and positively aver, that the deed was executed, and the whole sum paid, before notice of the plaintiff's claim. If they fail to do this, the plea is overruled as insufficient; for in pleading, there is the same strictness in equity as at law. If the plea is found to be good in law, issue is taken on its truth, and the defendant must prove the facts, which he has been held to allege; which if he does, the plea is a complete bar; but if he does not, he loses all benefit of the plea. Under this view of the case, I cannot see how a defendant can, in the character of purchaser without notice, avail himself of payment of a part of the purchase money, though paid before notice, and have a decree of the court, that such payment should constitute a lien on the land: it is not at all within the issue: it does not make him a purchaser without notice: and without this, he cannot interfere with the prior lien. Suppose, instead of part, he had paid the whole of the purchase money, but got notice before he had a deed; he would, surely, have as much right to have the whole, as a
 383 *part, made a lien on the land; and this being the full value of the land, would wholly disappoint the prior incumbrancer. I am clearly of opinion, therefore, that Doswell must shew, that he had paid the whole consideration before notice, in order to protect his purchase. This I do not think has been so clearly proved as to authorize a dismissal of the bill. And I am finally of opinion, that the decree should be reversed, and the cause sent back to be referred to a commissioner or a jury, to inquire, whether Doswell had paid all the purchase money, before notice of Buchanan's mortgage; the final decree to be governed by the principles laid down.

GREEN, J. If the defence made by Doswell, that he was a bona fide purchaser from Hopkins, without notice of Buchanan's lien, and that he had fully paid the purchase money before he received actual notice of that lien, had been supported by clear proof, I should have thought the decree should be reversed, and the bill dismissed. In that case, it is not necessary to prove that the purchaser has actually procured a perfect legal title, in order to protect himself against any relief against him in a court of equity, whose maxim is, that it will act in no way against a bona fide purchaser without notice, to expose even his want or defect of title, and, in short, will not permit any inquiry to be there prosecuted in respect to the particulars or lawfulness of his title.

I think it clear, that a recorded deed is no notice to a subsequent purchaser, which can affect his conscience in a court of equity, both upon the authorities cited, and the plain import of our statute. For it adds nothing to the strength of any deed, that it is recorded; but it only takes away the force which a deed would have had, but for the provision of the statute requir-

ing deeds to be recorded, if they be not recorded as required.

If Doswell's defence had been fully supported by proof, it would have protected him completely against the action
 384 *of a court of equity, until the trustees for Buchanan had actually recovered the land conveyed by Hopkins to them, in an action at law; in which case, the impediment to the sale by the decree of the court of equity, would be removed. But the evidence leaves it in some degree of doubt, whether Doswell had paid the full amount of his purchase money, before he received notice of Buchanan's claim. My impression is that he had; but the proofs are not sufficient to justify a judicial decision that he had. And this fact, I think, should be inquired into by a reference to a commissioner before a final decree, and if found to be as alleged by Doswell, the bill dismissed; if not, relief given to the plaintiffs, according to the result of that inquiry.

CABELL, J. I shall not inquire, whether the deed from Hopkins to Doswell, passed the legal estate of the whole of Bullfield to him; I shall proceed upon the admission that it did so. And, then, this case presents the question, never before directly submitted to this court, Whether, as the law was before the late revisal, a person purchasing without notice, and obtaining the legal title, shall be prejudiced by a prior deed of trust or mortgage of the equitable estate, which was duly recorded previously to his purchase? It is admitted, on all hands, that actual notice of a prior deed of trust or mortgage, will bind a subsequent purchaser; and there is, certainly, no difference between actual and constructive notice, in its consequences; Sugd. law vend. 532. The question, therefore, is narrowed down to this: Is the due recording of an equitable deed of trust or mortgage, of itself, constructive notice of that deed, to a subsequent purchaser? After much reflection, I have come to the opinion that it is. Constructive notice, or (as it is sometimes called) notice by construction of law, is defined to be, no more than evidence of notice, the presumptions of which are so violent, that the court will not even allow of its being controverted; per Eyre C. B. in *Plumb v. Fluitt*, 2 Anstr. 438; Sugd. 533. Thus, notice to an
 385 agent, is notice to the *principal.

But there is one kind of constructive notice, which has a very extensive operation: it is, "where the law imputes that notice, which, from the nature of the transaction, every person of ordinary prudence must necessarily have;" and the reason of it is forcibly expressed, "that the titles of other men ought not to be shaken, by creating a title veiled in a third person through his own folly;" per lord Erskine, in *Hiern v. Mill*, 13 Ves. 120, 121. This principle has been repeatedly recognized, and acted upon. I refer to *Ferrars v. Cherry*, 2 Vern. 384; *Taylor v. Stibbert*, 2 Ves. jr. 437; *Hill v. Simpson*, 7 Ves. 152. I think this principle applies to our statute requiring deeds of trust and mortgages to be recorded, and should guide us in the construction of it. The great object of the

statute, is the benefit of creditors and subsequent purchasers, by enabling them to know whom to trust, and from whom to purchase. Every man is presumed to know the law; particularly a law made for his special benefit. "Every man of ordinary prudence," about to purchase from another, searches the record, to see whether the property has been previously conveyed or incumbered. It is gross negligence not to do so. He who fails to do it, wilfully shuts his eyes against the truth, and ought not to be permitted to avail himself of his ignorance. So far from having equal equity, with a former bona fide incumbrancer, whose deed is duly recorded, he has no equity at all. In the language of lord Erskine, "the titles of other men ought not to be shaken by creating a title vested in him, through his own folly." I shall only add, that a contrary decision would tend greatly to encourage perjury; for a man may actually have searched the register, and then deny it, without danger of its being proved upon him.

I am well aware, that this principle has not been applied to the register acts in England, and that the registry of a deed there is not held to be constructive notice. I admit also, that I do not perceive any substantial difference between the english

386 register acts and our statute requiring *deeds of trust and mortgages to be recorded; though it is manifest, their phraseology is widely different. Neither the english statute nor our's says any thing, in express terms, as to the effect of registering or recording deeds, while they do declare, in express terms, what shall be the effect of a failure or omission to register or to record. But the question necessarily arises, what is, on general principles, the effect of putting a deed on the register in England, or on the record here? It has been decided in England, as I have just said, that it does not operate as constructive notice. Does it follow, that we must give the same construction to our statute? I humbly think not. We have, it is true, adopted the common law of England, as the law of this country; and there is nothing which I should consider more authoritative evidence of what that law is, than the decisions of the english judges, upright and eminently learned as they unquestionably are. I should also pay the highest respect to their construction of english statutes, which were in force prior to the 4th year of James I. and which were adopted by the convention of 1776, along with the common law. I will go farther, and say, that, when english statutes of a subsequent date, having been expounded by the english judges, in a long course of uniform opinion and adjudication, have afterwards been adopted into our code, in the very words in which they were originally enacted, I should think it wrong in our courts, to give them a different interpretation; because it ought to be inferred, that the legislature, in adopting the very words of an english statute, intended to adopt the interpretation that had been given to them in the country from which it was copied. But that is not the case in the present instance. These statutes are of modern date;

they have not been copied by our legislature; and the correctness of the interpretation given, in England, to the english statutes, has been more than doubted by some of their profoundest judges, and ablest writers. We find that lord Camden, in *Morecock v. Dickins*, adhered to the former interpretation, in opposition to his own opinion, merely because *it had been so decided, and because it would be mischievous to disturb it, since it had given occasion to a thousand neglects to search the register. It is clear that, in his opinion, the registry of a deed, ought, on general principles of equity, to be constructive notice, notwithstanding the statutes had not, in terms, said so. The reasons assigned by him, were abundantly sufficient to justify, and even to require him, to disregard his own opinions, and to adhere to the interpretation given by preceding decisions. But no such reasons exist here: no former decisions on our statute, have produced neglect in purchasers: no former decisions trammel us in the exercise of our judgments. We may, without injury to any body, pursue general principles to whatever just result they may conduct us. For, the construction of our statute is now directly submitted, for the first time. My opinion upon it, has been stated. I cannot say what has been the general understanding, in Virginia, upon this subject. But I think it manifest, that the legislature at the late revisal, entertained the same opinion that I have expressed, as to the effect of recording deeds of trust and mortgages, under the former law upon that subject: for it adopted the former law as to the recording of such deeds, without saying any thing as to what should be the effect of their being recorded: but, when it introduced the new provision, declaring "that title bonds or other written contracts in relation to land may be proved, certified or acknowledged, and recorded, in the same manner as deeds for the conveyance of land;" it went on to add, that "such proof, acknowledgment or certificate, and the delivery of such bond or contract to the clerk of the proper court to be recorded, shall be taken and held as notice to all subsequent purchasers, of the existence of such bond or contract." Now, it is obvious, that this section was not intended by the legislature to embrace the case of mortgages and deeds of trust, for they had been acted on in the former parts of the act: it related to contracts, not to conveyances, such as mortgages and deeds of trust. This section shews, and in-
388 deed expressly *declares, that the recording of a mere contract concerning land, shall be notice of its existence. Yet, when we advert to the sections concerning the recording of mortgages and deeds of trust, we find no provision as to what shall but the effect of their being recorded. Whence this omission? Surely, not because their being recorded ought not to be notice, equally with the recording a mere contract, but solely because the legislature entertained no doubt, that the law was always so, in relation to deeds of trust and mortgages. If it had entertained doubt about it, it would, when speaking of recording mortgages and deeds of trust, have taken

care to remove that doubt by declaring in express terms, (as it did in relation to title bonds and contracts), that their being admitted to record, should be notice of their existence, to all subsequent purchasers.

I am of opinion to affirm the decree.

If, however, I had concurred with the other judges, as to the effect of recording the deed of trust, I should then have been of opinion, that Doswell ought to be protected, not only in case of his having paid the whole of the purchase money, before he received actual notice of the existence of the deed, but, in case he had made only partial payments before such notice, that he should be protected to the extent of such payment.

I have only to add, that I regret that a case involving a principle of such vast importance, should have come before a bare court, and that the division of the court should leave the community in doubt, as to what the law is on this interesting subject.

Decree reversed.

389 *Collins's Adm'x &c. v. Janey and Another.

December, 1881.

(Absent TUCKER, P.)

Deed—Assignment of Debts Now Due—Effect—Case at Bar.—T. C. by his will dated 17th May, gives one third of his whole estate to wife for his life, remainder to his two children T. and E. and the other two thirds to T. and E. presently; then, by deed dated 26th May, he assigns "all debts now due to him" to a trustee for his son T.—HELD, this deed assigns all debts due and payable to the donor at the date of the deed, but not such debts as tho' contracted had not become payable at the date of the deed.

Same—Will—Election.—And, it seems, T. may elect to claim, either under the will, or under the deed; he cannot claim the subject given by the deed, and then claim his moiety of two thirds of the estate as the legatee or devisee under the will.

Thomas Collins late of King & Queen deceased, made his last will and testament on the 17th May 1826, whereby he devised and bequeathed one third of his estate to his wife Virginia for life, remainder to his two children Elizabeth and Thomas, to be equally divided between them; and the other two thirds to the two children, to be equally divided between them, with some executory limitations in case either or both of the children should die before attainment to full age or marriage. And the same T. Collins afterwards, by deed dated the 26th of the same month,—reciting, that the deed was made for the purpose of advancing his son Thomas with certain gifts, which it should not be in his power to revoke,—transferred and assigned to Joseph Janey, "all the debts now due to the said T. Collins" [the father] "whether the same be due to him by bond, bill, note, judgment, account or otherwise," "the amount of which debts will appear by a schedule hereto annexed," upon trust to allow T. Collins, the father, to collect the debts and enjoy the interest of the money during his life, and after his death, if T. Collins, the son, should survive him, to hold such money as should have been previously collected, and to collect and hold the residue, and to apply the same to the support, main-

tenance and education of T. Collins, the son, during his minority, and to pay him whatever "should remain unexpended, if any should remain, so soon as he should attain to full age; and if the son should attain to full age before the father's death, then to pay the whole amount to him at the father's death; with executory limitations to the grantor's daughter Elizabeth, in case the son should die before his father without issue, or after his father, under age and without issue &c. There was no schedule of the debts annexed to the deed. T. Collins, the father, died not long after the execution of the deed. His will was proved and recorded in the county court of King & Queen, at August term 1826; and administration with the will annexed, was granted to his widow Virginia Collins.

Upon a bill exhibited in the superiour court of chancery of Richmond, by Virginia, the administratrix with the will annexed, against Janey, the trustee named in the deed of the 26th May 1826, and T. Collins, the cestui que trust, two questions arose; 1. Whether T. Collins, the son, could claim the subject assigned to the trustee for his use by the deed, and at the same time claim under his father's will, one third of his other estate? and 2. Whether he was entitled under the deed, to all debts which had been contracted to his father at its date, as well those which had then become payable, as those which were to become payable at a future time, or only such debts as had not only been contracted but had become payable before and at the date of the deed? in other words, what was the import of the words in the deed, all the debts now due?

It appeared, by accounts taken by order of the court, that there were debts which had been contracted and become payable to T. Collins, the father, before and at the date of the deed of the 26th May 1826, to the amount of about 5000 dollars; that there were debts contracted to him before and at that date, but which had not then become payable, to the amount of about 200 dollars; and that his whole property, real and personal, including debts of both descriptions, was, at the date of his will and of the deed, of the value of about 13500 dollars.

391 *The chancellor was of opinion, and accordingly decreed, that T. Collins, the son, could not claim both under the deed of the 26th May 1826, and under the will of his father; and that, if he should elect to claim under the deed, he was entitled under it, to all the debts which had been contracted to his father before and at its date, as well such as became payable afterwards, as those which were then payable. From this decree, Mrs. Collins, the administratrix, appealed to this court.

Johnson, for the appellant.

Michie, for the appellees.

BROOKE, J., delivered the opinion of the court. The question as to the correctness of this decree, depends on the construction of the words in the deed of the 26th May 1826, describing the subject thereby assigned by Collins to Janey, in trust for his son—"all the debts now due to the said T. Collins" &c. The chancellor

*See monographic note on "Deeds" appended to Flott v. Com. 12 Gratt. 564.

thought, that this description in the deed, included all his debts, those then contracted but payable in future, as well as the debts then payable. The words of the sentence are perfectly intelligible. They contain no latent ambiguity, so that a resort to the will, or to any thing else extrinsic of the deed, to explain them, would be improper. If there would be a doubt, whether the words all my debts due would include debts not payable though contracted, debita in presenti solvenda in futuro, the donor has guarded against that doubt, by inserting the word now. All his debts now due, in common parlance, must be understood to mean, debts then payable, not debts payable at a future day. The word now could not have been inserted, to exclude debts that might be afterwards contracted, debts not then in existence, because they would not be subjects of transfer, and could not have been in the mind of the grantor. If he had meant to speak in technical language, he would have omitted the word now. *And even if he had omitted it, there are many examples in which both judges and legislators have interpreted and used the words debts due, in the limited sense of debts payable, not in the broader technical sense, including all debts contracted whether payable or not. Without deciding any thing more in the cause, this court reverses the decree, on this point.

Turnbull, Ex'or &c. v. Claibornes.

December, 1881.

(Absent TUCKER, P.)

Executions—Levy after Death of Plaintiff—Validity—

Case at Bar.—Robertson ex'or of Cole recovers judgment against Claiborne. and sues out execution thereon: before the execution is delivered to the sheriff, Robertson dies: the execution being then delivered to the sheriff, he levies it on property of defendant, and takes a forthcoming bond payable to Robertson ex'or of Cole: HELD, the execution was properly levied, though Robertson was dead before it was delivered, and the forthcoming bond was rightly taken to Robertson as ex'or, and was a good bond.

Forthcoming Bond—Motion on—Case at Bar.—A motion for award of execution on the forthcoming bond was made by Turnbull ex'or of Robertson who was ex'or of Cole: HELD, the forthcoming bond belonged to Cole's estate, and Turnbull was entitled to the motion, and to award of execution on the bond as the representative of Cole, not as the representative of Robertson.

Robertson executor of Cole recovered judgment against P. Claiborne administrator with the will annexed of R. Claiborne, in the circuit court of Dinwiddie, and sued out a writ of fieri facias thereon, and delivered the process to the sheriff. The sheriff levied the execution on property belonging to the estate of R. Claiborne, in the hands of the defendant, his administrator; who gave a forthcoming bond with surety, payable to Robertson executor of Cole, for the delivery of the property to the sheriff, at the day and place appointed for the sale thereof to satisfy the execution.

The bond was returned "forfeited."

393 The plaintiff Robertson *died after

the execution was delivered to the sheriff, but before it was levied, and, consequently, before the forthcoming bond was executed. Turnbull, being the executor of Robertson who was executor of Cole, made a motion in the circuit court, for award of execution on the forthcoming bond; but, the fact of Robertson's death before the levying of the fieri facias and the execution of the bond being proved, the court not only refused to award execution on the bond, but quashed both the bond and the fieri facias. Turnbull applied to this court for a super-deas to the judgment, which was allowed.

Allison and Leigh for plaintiff in error. Johnson for defendants.

CABELL, J. The first question is, whether the sheriff could properly proceed to levy the execution after the death of the plaintiff Robertson? In *Clerk v. Withers*, 2 Ld. Raym. 1072, 1 Salk. 322, 6 Mod. 290, it was decided, that a sheriff having levied an execution might go on to sell, notwithstanding the subsequent death of the plaintiff. The principles on which that case was decided, have been uniformly considered as authorizing the sheriff to levy, after the plaintiff's death, an execution which had issued before. At common law, a fieri facias bound the goods from its teste; and though a subsequent statute declared, that it should bind only from the time it was delivered to the sheriff, yet it was held, that that was for the benefit of purchasers for valuable consideration, and did not change the rights of the parties. The plaintiff, therefore, so far as the defendant was concerned, acquired a lien on the property, from the date of the execution; and as the sheriff derived his authority from the writ, and as the execution is an intire thing, the sheriff might proceed to levy and sell, notwithstanding the death of either party. 2 Bac. Abr. Execution, C. 4, p. 716; Tidd's prac. 916; 1 Archb. prac. 260.

394 *If the sheriff was right in levying the execution, he was, of course, bound to receive the forthcoming bond. And I conceive it perfectly clear, that if he is to take the bond, he ought to take it payable to the plaintiff, although he may be dead. To whom else could it be taken? for no person may have qualified as his executor or administrator. Besides, if it be not taken to him, it will not conform either with the execution or the judgment. If there could, formerly, have been any question as to the validity of a bond thus taken, all doubts are removed by the statute of 1819-20, ch. 28, § 2, *Seas. Acts*, p. 24, which, after mentioning particular bonds, declares that "all other bonds and obligations, given for a good and valuable consideration, shall be as good and available in law, though the obligee, or obligees, or part of the obligees therein mentioned, be dead at the time of the execution thereof, as if such obligee, or obligees had then been in full life."

The only remaining question is, as to the person who is entitled to move for judgment on the forthcoming bond; whether it be the personal representative of Robertson the obligee, or the personal representative of the estate of Cole of whom Robertson was the executor. The statute (*Tate's Dig.*

*Executions.—See monographic note on "Executions" appended to *Paine v. Tutwiler*, 27 Gratt. 440.

†Forthcoming Bond.—The principal case is cited in *Van Winkle v. Blackford*, 28 W. Va. 660. See monographic note on "Statutory Bonds" appended to *Goolsby v. Strother*, 21 Gratt. 107.

Executions, p. 225, 6), provides, that motions on forthcoming bonds, are to be made, "in behalf of the obligee or obligees, their executors or administrators." A literal construction of this act might, probably, require the motion, in this case, to be made by Turnbull in his character of representative of Robertson, and not in his character of representative of Cole. But the court is of opinion, that the law ought not to receive that construction. The judgment in this case, was in favour of Cole's estate; and if no execution had issued, the judgment could have been revived by no person but the personal representative of Cole's estate. Now, the forthcoming bond adds nothing to the force of the former judgment. It has itself only the force of a judgment, and is not an administration of the assets.

This bond, then, is still the property
395 of Cole's estate: that estate *ought to be considered the obligee in the bond, and it ought to be proceeded on by the person entitled to the assets; namely, the representative of Cole's estate. That has been done in this case; for the motion was made by Turnbull as representing Cole's estate.

The judgment is to be reversed, and judgment entered for the plaintiffs in error, awarding execution on the forthcoming bond.

Allen and Others &c. v. Cunningham and Others.

December, 1831.

Executors and Administrators—Bond—Right of Administrator d. b. n. to Bring Action on—Case at Bar.—M. H. adm'r of R. H. recovers a judgment against E. B. adm'r of R. B. for debt due plaintiff's intestate, and sues out a *fi. fa.* thereon, which is returned *nulla bona*: then, M. H. the plaintiff, dies; and administration de bonis non of R. H.'s estate is granted to A.—**Held**, the action of debt on the administration bond of E. B. against her and her sureties, lies at the relation of A. the adm'r de bonis non of R. H. and not at the relation of the representative of M. H. the first adm'r of R. H. upon the construction of the statute of 1813-14, ch. 13, § 2; 1 Rev. Code, ch. 104, § 63.

Same—Same—Same—Necessity for Sci. Fa.—And the adm'r de bonis non need not, in order to entitle himself to put the administration bond in suit, bring *sci. fa.* or action of debt on the judgment recovered by the first adm'r.

Same—Same—Same—Statutes—Retrospective Effect.—The *fi. fa.* sued out by M. H. the first adm'r, was sued out and returned before the statute of 1813-14 was passed; yet **Held**, the statute applies and gives the action in such case, being retrospective as to the issuing and return of the execution, as well as the recovery of judgment.

Judgment—Return of "No Effects"—Sufficiency.—A *fi. fa.* on judgment against an adm'r, is returned "no

unadministered or unincumbered effects found" &c. **Held**, this is a return of *nulla bona*, to entitle the plaintiff to an action on the administrator's bond.

Debt, in the circuit court of Buckingham, by Allen and others, justices of the county court of Buckingham, at the relation of Anderson administrator de bonis non of Hill, against Cunningham and others, sureties of E. Burton administratrix of R. Burton deceased, upon the administration bond given by her to the justices of the county court, with condition (in the form prescribed by law) for her due administration of her intestate's estate.

396 *The declaration, after alleging the execution of the bond, and setting out the condition in *hæc verba*, assigned the breach thereof, in substance, thus—that Robert Hill, in his lifetime, brought an action of debt against E. Burton administratrix of R. Burton, upon a bond of her intestate to him, but died pending the action, and Moncrief Hill, his first administrator, revived it, prosecuted it to judgment, and sued out a writ of *feri facias*; on which the sheriff made return, that he could find no unadministered or unincumbered effects to levy it on (which execution was so sued out and returned in the year 1813); and Moncrief Hill, who, as the administrator of Robert, had recovered the judgment and sued out the execution thereon, having since died, administration de bonis non of Robert's estate, was committed to Anderson, the relator, the judgment remaining still in full force and wholly unsatisfied; yet there came to the hands of the administratrix, assets of her intestate's estate sufficient to satisfy the debt, which she wasted; by reason whereof, and of the statute in such case made and provided, action accrued to the plaintiffs, the justices, at the relation of Anderson the administrator de bonis non, to demand the penalty of the bond &c. Upon general demurrer to the declaration, the circuit court held, that the law was for the defendants, and gave them judgment accordingly. From this judgment the relator took an appeal, in the name of the justices, to this court.

Michie, for the appellant. The circuit court sustained the demurrer, probably, because it thought the action did not lie at the relation of Anderson the administrator de bonis non of Robert Hill, but only at the relation of the representative of Moncrief Hill, the first administrator of Robert, who recovered the judgment against Burton's administratrix. But the debt was due to Robert Hill's estate, not to Moncrief's; for, though the judgment for it was recovered by the first administrator,

thought, that it was by virtue of that statute. He says: "Where a new person, who was not a party to the judgment, derives a benefit by, or becomes chargeable to, the execution upon it, there must be a *scire facias* to make him a party to the judgment." 2 Wm. Saund. 6, note 1, 72 e. note 8. At common law no *scire facias* would issue on a judgment except in real actions. In all personal actions, where the lapse of time or the change of parties had been such as to prevent the taking out execution, the party entitled to the judgment was obliged to bring an action of debt on it, 2 Inst. 260. To remedy this inconvenience the statute of Westminster 2, 1 Ed. I. ch. 45, gave a *scire facias* in personal actions."

See monographic note on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

***Executors and Administrators—Bonds—Action.**—In State v. Hall, 40 W. Va. 463, 21 S. E. Rep. 792, it is said: "Barton, in his Law Practice (volume 1, p. 166), in speaking of fiduciary bonds, says: 'The action of debt may be maintained upon bonds executed by fiduciaries, such as executors, administrators, guardians, committees, trustees, and receivers, which are made payable to the commonwealth, and conditioned for the faithful performance of their several duties by the various officers who execute them. The suit is brought in the name of the commonwealth at the relation of the claimant; but the relator must be the party having the legal right to the debt.'—citing *Allen v. Cunningham*, 3 Leigh 395." See monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6; also, monographic note on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

Judgments—Execution—Revival.—In Holt v. Lynch, 18 W. Va. 572, it is said: "It seems at one time to have been much doubted, whether this right to a *scire facias* in such case was a right at common law or by virtue of the statute Westminster 2. In *Allen v. Cunningham*, 3 Leigh 401, JUDGE CARR seems to have

yet, having been no wise satisfied in his time, the judgment, and the money
 397 due upon it, remained *assets of his intestate, unadministered and unconverted by him, which, therefore, devolved to the administrator de bonis non. The scire facias to revive the judgment, or the action upon it, lay for the administrator de bonis non. He was the person injured by the devastavit committed by the administratrix of Burton's estate; in other words, by the breach of the condition of her administration bond. Therefore, he had the right to put the bond in suit; he was the only proper relator. 1 Rev. Code, ch. 104, § 21, 63, p. 380, 390; Dykes v. Woodhouse, 3 Rand. 287; Wernick's adm'r v. M'Murdo, 5 Rand. 51; Turnbull, ex'or v. Claiborne, just decided (ante, p. 392).

The attorney general, contra. The action upon the bond of an executor or administrator, is given by the statute; therefore, it lies only at the relation of the party to whom the statute gives it. It had been decided, that no action lay on such a bond, to charge the sureties, till after the executor or administrator had been convicted of devastavit, by judgment in an action against him, and an execution and return of nulla bona; Braxton v. Spotsylvania justices, 1 Wash. 31; Gordon's adm'r's v. Frederick justices, 1 Munf. 1; King William justices v. Carter's ex'ors, 2 Munf. 24; Hairston v. Hughes &c. justices of Henry, 3 Munf. 568; Spotswood v. Dandridge, 4 Munf. 289. The decisions on this point, gave occasion to the statute of 1814, acts of 1813-14, ch. 13, § 2; 1 Rev. Code, ch. 104, § 63.*

398 *Now, 1. to whomsoever the debt belongs, this statute clearly gives the action to the person who recovers the judgment and his representatives: if the judgment has been recovered by an administrator for his intestate's estate, against the executor or administrator of the debtor, and the plaintiff dies before the judgment is satisfied, and the judgment and the money due upon it belongs to the administrator de bonis non, yet the remedy upon the administration bond, is given only to the representative of the first administrator, the person who recovered the judgment; and, if the administrator de bonis non may pursue this remedy, he must at least do so, in the name of the representative of the first administrator. The language of the statute is explicit; there is no ambiguity,

*This statute provides, that "when any person or persons shall have heretofore recovered or shall hereafter recover, any judgment against executors or administrators, in their representative character; and, upon execution issued upon such judgment, it shall be returned, that there are not found, in the possession of the said executors, or administrators, sufficient assets of the testator or intestate, to pay and satisfy the whole or any part of such judgment (costs excepted): such person or persons recovering such judgment, his, her or their executors or administrators, may, upon such return of the execution as aforesaid, immediately commence and prosecute his, her or their action against such executors or administrators, and their sureties, or against either of them, or the executors or administrators of either of them, upon the bond given by them, for the performance of the duties of such executors or administrators: in which action, the defendants may plead any plea or pleas, and in support thereof, offer any evidence, which would be legally admissible, in any action against executors or administrators suggesting a devastavit."—Note in Original Edition.

no room for construction. 2. The provision of the statute, is prospective: it gives the action on the bond, in cases of such devastavit as shall be ascertained after the enactment; in cases, where the execution against the executor or administrator, which fixes the devastavit, "shall be returned" nulla bona. But here, the execution against Burton's administratrix, was returned in 1813, before the statute was passed. 3. Here, there was no such return of nulla bona on the execution against the administratrix, as the statute requires, to found the action on her bond. The return was, that the sheriff could find no unadministered or unincumbered effects on which to levy the execution. Now, there might have been effects unadministered, though incumbered; assets, which though incumbered, might yet be sufficient to pay the debt; assets incumbered for debts far short of their value.

Michie, in reply. The statute first speaks of judgments theretofore recovered or thereafter to be recovered, and then proceeds,—if execution on such judgments, shall be returned *nulla bona &c. The future tense as to the returning of the execution, has relation to the fact of the judgment having been recovered, not to the date of the statute. The return upon the execution was a substantial return of nulla bona. If there were effects incumbered, yet sufficient to satisfy the debt, they could not be taken in execution; for they could only be incumbered by pawn or gage; which divested the administratrix of the legal estate; and, then, no execution could be levied on them. 2 Wils. Gwill. Bac. Abr. Execution, C. 4, p. 715, and the cases there cited. The statute in question is a remedial one, and ought not to be strictly construed so as to embarrass the remedy, but liberally, so as to advance the remedy for the party injured.

CARR, J. Besides the points made by the attorney general, to sustain the judgment of the circuit court, another occurred to us in conference; namely, whether this suit can be maintained at the relation of Anderson the administrator de bonis non, without his having first made himself a party to the record of the proceedings of the first administrator by scire facias? I shall first dispose of the attorney general's objections to the action.

His first objection was, that the statute does not give the action at the relation of the administrator de bonis non. In the construction of states, it is the meaning of the legislature we must seek for: this constitutes the essence of the law: its words are our main guide, but we must not shut our eyes to every thing else, and stick exclusively to the letter. The context, and the subject matter must be looked to; the mischief and the remedy. This court by a series of decisions, had settled it as the law, that, before an action could be brought on the bond of an executor or administrator to charge his sureties, there must have been, 1. a suit against the representative to establish the demand, and 2. a suit to fix the devastavit. The legislature, thinking this intermediate suit unnecessary, passed a statute in 1814, dispensing with

it: this statute, in the revision of 400 1819, forms *the 63rd section of the statute of wills, 1 Rev. Code, ch. 104, p. 390. It is seen, at a glance, that the sole object of that statute was to take away the necessity of the second action. The legislature never dreamed of changing, or even of explaining the existing law, as to the person who might sue on the bond; whether, in a case like this before us, the representative of the administrator who recovered the judgment, or the representative of the intestate: it merely intended to declare, that the person entitled to the action, might, immediately on the return of nulla bona, sue on the bond. This court has determined after much deliberation, that the person thus entitled, in a case like the present, is the administrator de bonis non. The reasons of that decision, and the mischiefs of a contrary one, may be seen at large in *Dykes v. Woodhouse* and *Wernick v. M'Murdo*, and will not be repeated here.

The attorney general's second objection is founded on the following words of the statute—"Where any person shall have heretofore recovered, or shall hereafter recover, any judgment &c. and upon execution issued &c. it shall be returned, that there are not found" &c. He insisted, that these words are wholly prospective, and that, whenever the judgment was obtained, an execution must issue after the passing of the statute, in order to authorize the action it gives. I cannot see the force of this objection. The object of the statute was to give the action on the bond of the executor or administrator, immediately on the return of nulla bona. It clearly takes in judgments obtained before the enactment: why not the issuing and return of the execution also, which are mere ministerial acts? When its object was to prevent delay and expense, can it be supposed, that it would put the parties to the useless delay and expense of issuing another execution, when one had already been returned nulla bona? Besides, to make such issue of a second execution, a pre-requisite to the action on the bond, would, in all cases where the plaintiff in the first execution had died since, be a denial of the action, without an intermediate

401 *proceeding by scire facias; whereas the law says, the suit may be brought immediately on the bond. In the case before us, for instance, the first administrator who obtained the judgment and issued the execution, died; no second execution could issue in his name. Nor do I think the words shall issue, must of necessity be taken to mean shall issue after the passing of the statute, but shall issue after obtaining the judgment. I cannot think there is any weight in this objection.

The objection, which I have mentioned as having occurred in conference, was founded on the general rule, that where a new person, who was not a party to the judgment, derives a benefit by, or becomes chargeable to the execution upon it, there must be a scire facias to make him a party to the judgment. 2 Wms. Saund. 6, note 1, 72, e, note 3. At common law, no scire facias could issue on a judgment, except in real actions: in all personal actions, where

the lapse of time, or the change of parties, had been such as to prevent the taking out execution, the party entitled to the judgment, was obliged to bring an action of debt on it; 2 Inst. 269. To remedy this inconvenience, the statute of Westm. 2, 1 Ed. 1, ch. 45, gave a scire facias in personal actions: but "this statute (as my lord Coke says, 2 Inst. 472), is in the affirmative, and therefore it restraineth not the common law, but the party may waive the benefit of the scire facias given by this act, and take his original action of debt by common law." In *Proctor v. Johnson*, 1 Ld. Raym. 669, 670; 2 Salk. 600, S. C., which was a scire facias on a judgment in ejectment; and demurrer, upon the ground, that a scire facias lay not on a judgment in ejectment, for, at common law, it lay only in real actions, and the statute gives it only in personal; and 2 Inst. 469, was cited and relied on: lord Holt said, "that Coke's meaning was, that a scire facias would not lie, at common law, for debt or damages, but here it sounded in the reality:" he said further, "it is absolutely necessary, that a scire facias should lie in this case,

402 because there is no other means, to execute *the judgment, if the parties die or are changed; but, in judgments for debt or damages, the judgment might have been executed at common law, by action of debt on the judgment." It is clear, then, that the action of debt on the judgment existing at common law, was not taken away by the statute; and, I presume, that, in the case before us, even without the aid of our statute, the administrator de bonis non could resort to it. In truth, it differs but little in its nature from the scire facias, as the declaration gives a history of the case, and shews how the plaintiff is connected with it.

I think the judgment must be reversed.

CABELL, J., concurred.

BROOKE, J. I see no difficulty in the construction of the statute of 1814, now the 63rd section of the statute of wills, 1 Rev. Code, p. 390. The legislature cannot enumerate all the cases, to which the principle intended to be established will apply; it is enough, if it gives an example of its application: the court must follow it out, by applying it to cases of a like nature. The object of this statute was to dispense with a second suit against an executor or administrator, in order to establish a waste of the assets, before a suit could be maintained on the administration bond against the sureties, to charge them. In words, it only provides for the case in which a person or persons recover a judgment, in his or their own right; but the remedy it prescribes is equally applicable to a case, in which the judgment is obtained by an executor or administrator, in right of his testator or intestate. The same mischief is to be prevented: the second suit to establish the waste of the defendant executor or administrator, before any suit could be brought to charge his sureties, was as much intended to be dispensed with, in such case, as in the case in which the first judgment was obtained by any person in his own right. In the last case, the party obtaining the judgment, is authorized,

403 *upon such return of the execution as is prescribed by the statute, immediately to commence a suit against the executor or administrator and his sureties, or either of them, to establish the waste of the assets; and, if the party entitled to the fruits of the judgment, in such case, is entitled to bring the suit, then, unless we disregard the decisions in *Dykes v. Woodhouse*, and several others in this court, the administrator *de bonis non* of the intestate for whose estate the judgment was recovered (in the case before us) is the proper party relator, to bring this action.

I think the attorney general's criticism too nice,—that though the statute is retrospective as to the judgment, it is prospective as to the execution issued upon it. The language, on examination, seems clearly to comprehend any execution issued on such judgments as were previously mentioned in the section.

As to the doubt which has been suggested, whether the administrator *de bonis non* must not make himself a party to the judgment, by an action of debt on it, or by *scire facias*, before he can sue on the administration bond; *cui bono* should he bring debt, or sue a *scire facias* on the judgment? He could have no new execution on the judgment he would obtain in either case, after the return of *nulla bona* on the execution, or the return equivalent to it, in the case before us. At common law, he might have the *scire fieri* inquiry, directing the sheriff to inquire by a jury, whether waste of the assets had been committed by the executor or administrator; and, on the return that waste had been committed, he would have an execution *de bonis propriis*, to the extent of the waste found by the inquest: but the action of debt suggesting the waste, was found to be a more efficient mode of ascertaining the devastavit, and has in fact, superseded the *scire fieri* inquiry, and rendered it obsolete. That action is now dispensed with by our statute: and to compel the administrator *de bonis non*, or any other representative, to resort to the *scire fieri* inquiry, would produce all the delay intended to be avoided by the statute;

404 *and still greater delay, if he must first make himself a party to the judgment by an action of debt, or a *scire facias*, before he could have the *scire fieri* inquiry, or the action of debt suggesting the devastavit, and thereby convict the executor or administrator of waste, before he can commence his action on the administration bond, to charge the sureties. In England, where the assets of the deceased person were administered under the eyes of the ordinary, no bond with surety was required of executors or administrators; and the *scire fieri* inquiry, on the return of the execution *nulla bona*, or the action of debt suggesting the waste, gave all the relief that could be required. But here, it was thought necessary to lay the foundation of the suit on the bond to charge the sureties, by bringing the action of debt suggesting the devastavit, before resort was had to the suit on the bond. That is now dispensed with by the statute in question; and a suit on the bond, is given against the executor or

administrator, and his sureties, or either of them; in which as broad a defence may be made against the charge of waste committed by the executor or administrator, as before, on the action of debt suggesting the waste.

TUCKER, P. In deciding this case, I shall take the case of *Dykes v. Woodhouse* to be unquestionable. Certainly, it ought not to be questioned except by a full court; and I should regret to see it disturbed, because it is better that the question of practice should be considered as settled, particularly, as the decision is in perfect conformity with the rights of parties and the convenience of suitors. By that decision it is declared, that an administrator *de bonis non* with the will annexed, may maintain an action of debt on a judgment obtained by the executor of his testator; which accords with the doctrine of *Brudenel's case*, 5 Co. 9, that the executor of an administrator who recovers a judgment, is not entitled to have execution of that judgment: and the converse of the proposition is equally true, as to the administrator of an executor. Now, in this

405 case, *the original judgment having been obtained by Moncrief Hill administrator of Robert Hill, his executor or administrator could not enforce the judgment. This, I think, is conceded by all the authorities. For, anterior to the statute of 17 Car. 2, ch. 9, § 2, though it was decided, that the administrator *de bonis non* could not enforce the judgment, yet it was admitted, that the debt belonged to him, and not to the executor in whose name it was obtained, and that he might begin *de novo*, and recover it. Hence it was that the defendant in the judgment, was, in that state of things, entitled to his *audita querela* to be discharged from the execution of the administrator of the deceased executor. From these positions it is clear, that, in this case, the executor or administrator of Moncrief Hill the first administrator, could not enforce this judgment, or bring debt upon it. He, of course, could not have brought an action of debt suggesting a devastavit, against the administratrix. But our statute which gave the action on the administration bond at once, without the necessity of the intervention of an action of devastavit, was obviously designed merely to substitute the former for the latter. It is very certain, that it did not design to give the action on the administration bond to one who was not entitled to bring debt for the devastavit. And I think it equally clear, that it designed to give this action on the bond to all, who had a right to bring debt suggesting a devastavit on the original judgment. If it were not so, then, while the administrator of the executor was proceeding on the bond according to the construction of the statute contended for, the administrator *de bonis non* would be proceeding in debt for the devastavit, according to the decision of *Dykes v. Woodhouse*. Thus, two suits for the same demand would be in a course of prosecution by different persons. This, it seems to me, is a complete *reductio ad absurdum*; and compels us to abandon *Dykes v. Woodhouse*, or to give an equitable construction

to the statute. The latter is, certainly, to be preferred; since the legislature can scarcely be presumed to have intended
 406 to *refuse the remedy to him who had the right, and to give it to him who had it not. It is admitted, indeed, that the executor or administrator of Moncrief Hill is expressly within the words of the act; "the executor or administrator of the person who recovered the judgment;" and, on the other hand, the administrator de bonis non is not so. But as the statute obviously meant to give the remedy to the executor or administrator of the person entitled to the judgment, it is doing no great violence to its language (when we further its intention) to refuse the remedy to the person not entitled to the judgment, and to give it to him who is. Therefore, I am of opinion, that there was no error in the institution of the action at the relation of the administrator de bonis non.

Nor do I think the objection valid, that the issue and return of the execution was anterior to the enactment of the statute. The statute is clearly retrospective as to the judgment, as well as prospective. I see no reason for any difference, in this regard, as to the execution; and I do not perceive any absolute necessity for construing the words prospectively only. The construction of the statute concerning citizens (in *Barzizas v. Hopkins*, 2 Rand. 276,) shews, that the present term are, shall be interpreted may be, so as to embrace future cases. But a like freedom is not necessary here: for the words, "and upon execution issued it shall be returned" seem to me to refer rather to the fact of the existence of such return, than to the time when it may have been made.

The last objection must also be overruled. The sheriff returned that he could find "no unadministered or unincumbered effects." He could find neither one nor the other. How then from this negation as to both, can we infer the affirmative as to either? If we cannot; then the return is equivalent to a general return nulla bona.

Judgment reversed.

407 *Garrett Ex'or of Allen v. Carr and Wife and Another.

February, 1832.

(Absent CARR, J. *)

Executors—Settling Accounts—Interest—Case at Bar.—Testator devises, that his lands shall be sold, and the proceeds invested in bank stock, or in such other property as his ex'ors shall think most advantageous to his children; the ex'ors sell the land, but do not invest the proceeds in bank stock, and afterwards account for the proceeds in money: HELD, they ought to be charged with interest on the balances in their hands annually, and their

*He was related to one of the parties.

†**Executors—Settling Accounts—Interest.**—In *Handly v. Snodgrass*, 9 Leigh 490, and *note*. It is said, by TUCKER, P. in the discussion of the question of charging the executor interest: "As to the charge of interest upon interest from 1827. If this charge were wrong, still it is obvious that had the account been properly settled, the balance against the executor would exceed the sum now reported to be due. *Carter v. Cutting and Wife*, 5 Munf. 238; *Burnley v. Duke*, etc., 1 Rand. 108. For by the will the estate was directed to be put out at interest, and according to the decision in *Garrett, etc., v. Carr, etc.*, if the executor did not choose to do so, he is to be considered as a borrower, and should be annually charged with interest, and the interest and

disbursements for the maintenance of the children, and on all other accounts, ought to be defrayed out of the interest accruing on the balances.

Same—Accounts—Bill to Surcharge and Falsify.—Presence of Legatees at Settlement No Objection to Bill.—Ex'ors' accounts are audited before commissioners of the county court, the legatees being present at such settlement thereof; these accounts are returned to the court, approved and recorded: HELD, the presence of the legatees at the settlement, is no objection to a bill in chancery to surcharge and falsify the accounts so settled.

Same—Same—Specification of Items—When Not Necessary.—Upon a bill to surcharge and falsify an ex'or's account, though plaintiff is held to specification of items of surcharge and falsification, yet it is always competent to him to shew that the account is erroneous upon its face, and (without controverting the items themselves) to shew, that they have been so arranged as to produce results injurious to him.

Appellate Practice—Bill against Two Executors—Decree against One—Correction of Error in Both Accounts.—Upon a bill and supplemental bill against two ex'ors there is a decree against one of them, on one of the grounds of complaint in the original bill, and the original bill as to all things else dismissed, and the supplemental bill reserved for future consideration: the ex'or against whom the decree is, appeals: the plaintiff does not appeal from the residue of the decree dismissing the other ex'or from the court as to the matters in the original bill: the court of appeals, finding errors in the decree, injurious to the appellee, both as to the ex'or who appealed, and as to the ex'or as to whom the original bill was dismissed, and that the transactions of the two ex'ors are indissolubly blended with each other, will correct the errors as to both ex'ors, especially as the decree is interlocutory.

Richard Allen, late of Albemarle, died in 1805, and by his last will and testament directed, That all his land and other property, except slaves, should be sold at auction, on twelve months credit, and the proceeds of sales laid out in stock of the bank of Virginia, or in such other property
 408 *as his executors should think most advantageous to his children; that as his children should marry or come of age, such of them as should marry or come of age, should, at that time, have his or her part allotted off, until which his estate should be kept together; and that his debts

not the principal should be applied to the disbursements. A settlement upon this principle, even without holding him to strict account for his large profits made by usury, would have made the balance much larger; and moreover, that balance would have been principal, as the interest and not the principal would have been absorbed by the disbursements. Moreover, the transactions of the estate were closed in 1827, at latest. They should have been considered as closed soon after the testator's death. According to the case of *Garrett, etc., v. Carr, etc.*, the balance should have been struck after a reasonable time allowed for payment of the debts. The balance should then have been charged against him as a borrower; and from that time until the distribution, the account should have been adjusted as an account between ordinary debtor and creditor."

Also on the question of the settlement of the accounts of executors, the principal case is cited in *Anderson v. Thompson*, 11 Leigh 458; *Garrett v. Carr*, 1 Rob. 196, and *note*; *Strother v. Hull*, 23 Gratt. 663; *Martin v. Fielder*, 83 Va. 460, 4 S. E. Rep. 603; *Anderson v. Piercy*, 20 W. Va. 301, 327.

‡**Same—Accounts—Bill to Surcharge and Falsify.**—For the proposition that, in a bill to surcharge and falsify an executor's account, though the plaintiff is held to the specification of items of surcharge and falsification, yet he may show that the account is erroneous on its face, and without controverting the items themselves, show that they are so arranged as to be injurious to him, the principal case is cited in *Seabright v. Seabright*, 28 W. Va. 438. Also on this question, the principal case is cited in *Radford v. Fowlkes*, 85 Va. 846, 8 S. E. Rep. 817; *Green v. Thompson*, 84 Va. 594, 5 S. E. Rep. 507; *note* to *Backhouse v. Jett*, 2 Fed. Cas. 823.

See monographic *note* on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

should be paid out of the proceeds of the sales. He appointed three executors; two of whom Dabney Minor and Alexander Garrett proved the will in the county court of Albemarle, and took upon them the execution thereof. The testator left two children Mary and James, both in early infancy: Mary afterwards married James Carr; and after the marriage, Carr (it seemed) was appointed guardian for James, who was still an infant. It appeared, that no guardian had been before appointed for either of them, but the executor Minor had acted as guardian for both.

The executors made sale of the testator's estate in pursuance of his will. But they did not invest the proceeds of the sales in stock of the bank of Virginia, because (as they said) they thought such an investment injudicious: they collected part of them, as they fell due, and part they suffered to remain in the hands of the purchasers, upon interest, for several years, and finally accounted for the whole of the proceeds in money.

After the marriage of the testator's daughter Mary with Carr, and after the appointment of Carr guardian for the son James, the executor's respective accounts of administration were audited and settled by commissioners appointed by the county court for the purpose. Carr and his ward James were both present during the settlement of the accounts by the commissioners, and were repeatedly desired to state any objections that occurred to them, to any part of the accounts, but they made none: however, neither of them was present when the accounts were closed, and the results ascertained and stated. The accounts of both executors, thus audited and settled severally, were reported to the county court; and, no exception being taken to them, were approved and ordered by the court to be recorded.

409 *It appeared by these accounts, that the testator owed only one debt. In the account of the executor Garrett, he was credited with the sum of 2000 dollars paid to Carr after his marriage, the justice of which credit was afterwards contested, but the controversy in respect to it, depended on the peculiar circumstances of the transaction, and involved no question of law. In the accounts of both the executors, balances were struck on the 31st December in every year; each executor was debited with the funds of the estate that came to his hands during each year, and credited with the disbursements of the same year for the expenses of administration, against the principal by him accounted for. In the account of the executor Minor, who (as has been said) acted as guardian of the infant legatees, the disbursements made by him for their maintenance and education, during each year, were in like manner credited to him against the principal by him accounted for. So that, in the accounts of both the executors, the annual balances due from them, respectively, (and they were considerable), were balances of principal. And at the close of the transactions, interest accounts were stated, in which the executors were charged with interest on the annual balances found due from them, re-

spectively. In the course of the transactions, it appeared, that the executor Garrett sometimes transferred moneys of the estate, which had come to his hands, to his co-executor Minor; which of course were debited to Minor, and credited to Garrett: One of the sums thus transferred by Garrett to Minor was 2000 dollars; and this sum was credited to Garrett, as having been so transferred to Minor, on the 31st December 1810, so as to reduce the balance due from Garrett at the end of that year, by that amount; but the same sum was debited to Minor on the 2nd January 1811, and so compose part of the balance struck against Minor at the end of the year 1811; from which last date, Minor was charged with interest on the balance then struck: the consequence was, that one year's interest of this sum of 2000 dollars was lost to the estate. It did

410 not appear whether *Garrett was credited for this transfer to Minor too early, or Minor charged with it too late: Garrett insisted, that the credit was given to him at the proper date: Minor said, he did not recollect the date, and could not explain the inconsistency between the account of his co-executor and his own.

About six months after the executors' accounts settled by the commissioners of the county court, had been returned, approved and recorded by that court, Carr and wife and James Allen (who was now of full age) exhibited their bill against the executors Minor and Garrett, in the superior court of chancery of Staunton, to surcharge and falsify the accounts settled by the commissioners, and to have them corrected. In this bill, they complained of the neglect of the executors to invest the proceeds of the sales made by them, in bank stock; whereby, they said, considerable loss had been sustained, which, they insisted, the executors ought to make good. They alleged, that the accounts of the executor Minor were incorrect in several particulars; over charges, improper charges, and omissions of just credits to the estate: and they complained, especially, of the loss of one year's interest of the 2000 dollars transferred by Garrett to Minor, in consequence of the credit therefor being given to Garrett at the end of the year 1810, and of the sum not being brought to Minor's debit till the beginning of 1811. And, as to Garrett's accounts, they complained, that the credit allowed him for the 2000 dollars paid to Carr after his marriage, was unjust (and this, indeed, was the main point of the controversy). They made no objection to the general principles on which the accounts were settled by the commissioners of the county court, to the manner in which the interest account was stated, and interest brought to the debit of the executors at the close of the transactions, or to the application of the executors' disbursements to the principal of the moneys by them received respectively and accounted for.

411 *The plaintiffs afterwards filed a supplemental bill, touching matters not mentioned in the original bill, and not necessary to be further noticed here, since they were not a subject of inquiry in this court.

The executors answered severally, each

setting up such matters of defence as appertained to his own part of the case.

And upon the hearing, the chancellor was of opinion, that the plaintiffs had no just ground of complaint against the executors, for their failure to invest the proceeds of their sales in bank stock; that the plaintiffs had failed to establish any of the errors they complained of, in the executors' accounts settled by the commissioners of the county court, excepting the credit allowed to Garrett for the payment of 2000 dollars to Carr; that that credit ought not to have been allowed Garrett: therefore, he decreed that Garrett should pay the plaintiffs, the 2000 dollars with interest, and all their costs of suit, and he dismissed the original bill as to all other matters therein alleged; but he retained the supplemental bill for future consideration, so that this decree was interlocutory.

Garrett appealed from the decree to this court; but the plaintiffs did not appeal from so much of the decree as dismissed their bill as to Minor.

Johnson and Leigh, for the appellant.

Stanard, for the appellees.

TUCKER, P., after examining the question, upon the evidence, as to the credit claimed by Garrett for the 2000 dollars paid by him to Carr, and shewing the reasons why this court held the chancellor's decree clearly erroneous, in disallowing that credit and adjudging that Garrett should pay that sum to the legatees, proceeded—

With respect to the other part of the case, I think there is yet less doubt, that the decree is erroneous. The bill was filed by the children of Richard Allen against 412 his executors, *for the purpose of scrutinizing before the court of chancery, one of those ex parte accounts, which, instead of settling disputes among the members of a family, most generally prove the proximate cause of discord and litigation. It charged the accounts with incorrectness, and surcharged and falsified them, in several particulars. It was not a stale and antiquated transaction, raked from oblivion by some speculating busy body and maintainer of suits, but an appeal for redress of their supposed wrongs, by two young people but recently arrived at maturity, and within six months after the recording of that account, which they assailed as derogatory from their rights. They were then entitled to be heard, if they could shew any just ground of complaint. It is proved, indeed, that Carr, the husband of one and the guardian of the other infant, attended the settlements, and was repeatedly invited to object to what he thought amiss. In answer to this, it is sufficient to say, that that attendance, if it had continued during the whole of the settlement, would not have been conclusive of the rights of the parties. But it may be added, that neither of the distributees nor the plaintiff Carr were present during the whole time, and particularly at the last meeting which was most important, and presented the results of the examinations of the commissioners; and moreover, though present, if they were without counsel, this court would not necessarily infer, that they were competent to the detection of the errors, which,

in the settlement of an executor's account, may escape even the most practised eye.

The question before the chancellor as to this matter, was, Whether the proceedings in the cause presented a case for the reference of the accounts to a commissioner for settlement, upon the ground, that they were surcharged or falsified, by the bill and the evidence adduced by the plaintiff. The chancellor thought not. Let us inquire into it.

Passing by the small items for managing the estate, and for board, in which the plaintiffs have not succeeded, there is one item in the account obviously mis- 413 stated, besides the *2000 dollars for which Garrett claimed credit which was rejected (improperly as I have already shewn) by the chancellor. I speak of the 2000 dollars paid over by Garrett to Minor in December 1810, and not credited by Minor until January 1811. By this means one year's interest was lost, as interest was not calculated upon that sum but from December 1811. For this interest the executors are beyond question liable: but who can say upon which of them the burden ought to fall? To the plaintiffs, indeed, it is immaterial, provided they get their right; but the chancellor has not given it to them, although the falsification was distinctly set forth in the bill, and palpable upon the accounts of the parties. This error so undeniable, and yet so inexplicable that Minor frankly says he cannot explain it, of itself demanded that the accounts should be remodeled. Occurring as early as 1811, it affected the results of the subsequent transactions, and moreover it was a matter which ought to have been settled before the bill was dismissed as to Minor.

But the account was not only erroneous in this glaring particular, but it was grossly erroneous upon its face, in its principles and its details. In examining it, it must be observed we exercise no other than our legitimate appellate jurisdiction. The chancellor has said no new account was necessary. In reviewing this opinion, we must place ourselves in his situation, and do what he should have done. Now, I take it, wherever a case is presented before a court of chancery to surcharge and falsify an executor's account, though the plaintiff is held to a specification of items of surcharge or falsification, yet it is always competent to him, or to his counsel, to shew to the chancellor, that upon its face the account is erroneous; that it is stated upon principles in conflict with the rules of the court, and subversive of the rights of the parties. Not controverting the items themselves, he may shew that they have been so arranged, as to produce by the magic of figures, results the most fatal to his rights. In this case, I think,

414 we find an instance of *such an operation. But to understand the injury done to the plaintiffs in its full extent, we must advert first to the will of the testator.

Richard Allen by his will directed his lands and other property, except slaves, to be sold, and the amount of sales to be laid out in Virginia bank stock, or in such other property as his executors should think most advantageous to his children. Admitting

the discretion here vested in the executors, in its largest scope, and admitting (what, by the way, the evidence decidedly negated) that the investment in bank stock as directed, would not have been judicious, the question recurs as to the course the executors ought to have pursued. Their great and avowed anxiety to meet the wishes of the testator, to do what they think he would have done, was highly meritorious. They have speculated, in their answers, on the different modes of employing the capital in their hands, but have not succeeded in shewing what, besides the bank investment, the testator probably wished. But though it may be difficult to devise what he did wish, except so far as that wish is evinced by directing a bank investment, there can be no difficulty in saying what he did not wish. He could not have wished, to sell his lands and other property, the natural fund for the support and education of his children, and to invest the proceeds in such a way that the maintenance and support of those children should, like a consuming moth, eat up the principal of his estate, and leave the interest, during a long minority, a barren fund in the hands of his executors, producing no profit and meeting no expenditure. He could not have wished to pursue a system, the inevitable effect of which was to sink a great part of an estate, the annual profits whereof would have amply met all demands for maintenance and education, and left an accumulating balance. Why did he sell the land, in the stability of which he might safely have confided? Because he confided not less in the faithful promotion of his views by his executors; and because those views were to convert a sluggish into
415 an active *capital. Hence he directs an investment into bank stock, the dividends of which would be applied, with the hires of his slaves, to the maintenance and education of his children, and the balances to reinvestments. The effect of this operation would have been, to have accumulated, at this day, no trifling sum, instead of that which they have received. But the executors, in the exercise of their discretion, have declined taking bank stock, and the chancellor has considered them as justified in that course. If, however, they did not choose to pursue the direction of the testator, it was proper that they should come as near to it as might be, and that the court at least should take care, that, in the exercise of their discretion, the testator's views and intentions shall not be utterly frustrated. They might have vested the funds as they were received (and it was the natural course of things) in loans to good borrowers, securing the payment of interest regularly, to meet the expenses of the children, and to be reinvested as occasion might serve. They have not done this, except as respects that portion of the funds which were permitted to remain in the hands of Watson (the purchaser of the lands) who sometimes paid the interest, which was then converted into principal. A similar course as to the residue of the estate, would have produced very different results from those now exhibited. Indeed, it would seem by Garrett's answer, that

they deemed it best, that the money should lie in the hands of responsible and punctual men upon simple interest. If this, then, was the course to be pursued, it should appear that the money was so let out upon loan; unless we are to understand them as meaning, that it was safer for them to retain the money themselves. If they did so, then they must be considered as retaining it as borrowers; and not holding it as executors merely, chargeable with interest upon the principles applicable to such fiduciaries. In this view, they should, in this account, have been annually charged with interest, for such would have been the effect had the money been lent to others; and that interest should have been
416 applied to the *disbursement of expenses, and the excess reinvested in an interest bearing capital. For, in this case, the ordinary principles which govern the accounts of executors, do not apply. Quoad this matter, they are not to be treated as executors. They are ordinary debtors—borrowers of this money—which they admit should have been put out and improved at interest in the hands of punctual men. The case of *Granberry v. Granberry*, 1 Wash. 246, does not govern their case. The court, there, forbade a certain mode of stating executors' accounts, because it said, "though right in the ordinary case of debtor and creditor, it would be hard in the case of an executor." Here, the executors substituting themselves as borrowers, the ordinary principles of debtor and creditor, have strict application.

But it is not for these reasons only that the account should be otherwise stated. In this case the estate owed but a single small debt. Did that justify the protraction of the executorial account from 1805 to 1824? By no means. Executorial accounts should always be brought to a close as soon as the debts are paid, and the transactions permit. Payments to legatees, and advances to children or other distributees, should never enter into the general account, both to prevent confusion, and because the accounts with them are not to be adjusted upon the principle of the general account. For, after the balance of the general account is struck, and the portions of the several legatees or distributees ascertained, the account between them and the executor is strictly an account between debtor and creditor. When such balance is struck, the portion of each should be carried to a separate account with him individually. The executors in this case, indeed, would still have held the funds in their hands by virtue of the will, until the marriage or maturity of the children. But the accounts of the fund so held by them, would not have been adjusted on the principle of an executor's account. They would have been treated rather as guardians, who are never permitted to pay the infants' expenses out of the principal
417 of their estate. *One of the parties seems to have been the actual, though not indeed the legal guardian of the children; and he who so acts, ought to be charged as such. Whoever enters upon an infant's estate, is treated as his bailiff or guardian, and charged accordingly. *Bennet v. Whitehead*, 2 P. Wms. 644; *Dormer*

v. Fortescue, 2 Atk. 288; 3 Id. 124, S. C. Much more, where an executor undertakes to fulfil the duties of guardian, instead of having a guardian appointed according to law, he must be treated as such, in his transactions with the infant. Indeed, even were it otherwise, it is absurd to suppose, that he can be justified in doing that which ever the legal guardian cannot do. It is absurd to suppose, that he can lawfully waste the principal of the infants' estate, when the lawful guardian would not be permitted to do it. Nay, it is for his own benefit to consider him as sustained in his acts, as quasi guardian. If he be not, then all these payments and disbursements for the wards would be in his own wrong. Hence, in tenderness to him, and because he has only done that which benevolence required for an unprotected child, he is justified in doing what the guardian might do; but upon no principle is he justified in doing more. His disbursements, therefore, must be charged to the interest, and not to the principal, of the wards' estate. And herein this account is wrong *ab ovo usque ad mala*.

If the executors were themselves fairly borrowers of the funds, in the execution of their trust, I do not know that the distributees could complain of any profit they may have made. If they were borrowers of the funds, substituting themselves for, and to account as, other borrowers would, if they held the funds as debtors of the estate, and were accountable as ordinary debtors, then they had a right to make what profit they could from those funds.

It is unnecessary to pursue this subject farther. I will only add, as to the dismissal of the bill, that the original bill was dismissed as to both the parties, in relation to all matters except the sum of 2000 418 dollars decreed against Garrett. *Garrett having appealed from the decree for the 2000 dollars, and the decree as to that being reversed, and the court perceiving also error in the record against the appellee, is bound, according to its rules, to consider the whole record, and to correct that error also, as if the appellee had appealed. It struck me, at first, that as Minor was out of court by the dismissal of the bill, this court could only correct errors as against Garrett. But one of the errors is the dismissal of the bill as to all other matters except the 2000 dollars. This dismissal, therefore, as to Garrett, must be set aside. But as the order of dismissal was intire, embracing both,—the reversal of that order must be a reversal as to both. Indeed, the two executors are so connected in the transactions, that this seems inevitable: and the case thus comes within the distinction, as I understand it, taken by the court in Tate v. Liggett, 2 Leigh, 107, 8.

The other judges concurring, the decree was reversed, and the cause remanded, in order that the executors' accounts might be remodeled and corrected, according to the principles indicated in the opinion of the president.

419

*Pratt v. Taliaferro.

February, 1832.

(Absent BROOKE,* J.)

Husband and Wife—Personal Property of Wife—Right of Husband to.—Testatrix devises land to be sold by her ex'ors. and the proceeds of sale to be equally divided between her daughter F. A. and her grand daughter L. T. H. but if her daughter, when of age or married, shall choose, she may take the land in fee, on paying half the value thereof to the grand daughter, according to valuation to be made by two of the ex'ors on oath: F. A. the daughter, marries while yet an infant: at the instance of her husband two of the ex'ors value the land; the husband pays half the value to the grand daughter, takes the land, and sells it as his own; the daughter never exercises, or attempts to exercise, the right of election given her by the will, and dies leaving her husband her surviving, and issue:

HOLD. The character of money was impressed upon the subject by the will, and the husband was entitled to it as personality of his wife. *jure mariti*.

Lucy Alexander died in the year 1781, and by her last will and testament, devised and bequeathed as follows: "I give and devise the land and plantation whereon I now dwell, consisting of 800 acres more or less, to my executors hereafter mentioned, that they my executors, or the survivors or survivor of them, may sell and convey the same for the best price that can be got—and my will and desire is, that the produce of the sale be equally divided between my daughter Frances Alexander and my grand daughter Lucy Thornton Hooe—but if my daughter Frances, when married or of age, should choose, she may take the land in fee, on paying half the value of the said land to my grand daughter Lucy Hooe, such valuation to be ascertained by the executors, or any two, on oath." (The land which was the subject of this devise, was called Dunn's.) The testatrix named George Thornton, Seymour Hooe, Joseph Jones, Alexander Rose and John Taliaferro, her executors; the last of whom, Taliaferro, alone qualified, and took upon him the execution of the will. Her daughter Frances married Lawrence Brocke, in 1782; and he, soon after his marriage, called 420 on *Jones and Rose, though these had not qualified as executors of Mrs. Alexander, to make a valuation of the land, in order that he might determine, whether he would take the land at valuation, and pay one half the estimated value to Miss Hooe, or require a sale thereof to be

*He was nearly related to the appellees.

Husband and Wife—Land Directed to Be Sold and Proceeds Given to Wife—Effect.—Where land is directed to be sold and the proceeds given to a married woman she takes it as personality, which passes to her husband *jure mariti*. For this proposition, the principal case is cited in *Overton v. Maben*, 10 Leigh 614. And during the coverture, the wife, where the option is left to her to take the property as land, has not power to make an election. *McClanachan v. Siter*, 2 Gratt. 296, citing the principal case. To the same effect, the principal case is cited in *Shanks v. Edmondson*, 28 Gratt. 811, 813, and note. But see ch. 108, Code 1887; also, monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 159.

Equitable Conversion.—On this question the principal case is cited in *Harcum v. Hudnall*, 14 Gratt. 374, and foot-note; foot-note to *McClanachan v. Siter*, 2 Gratt. 250; *Eminger v. Hall*, 81 Va. 107; *Phillips v. Ferguson*, 85 Va. 511, 8 S. E. Rep. 241; *Carr v. Branch*, 85 Va. 602, 604, 8 S. E. Rep. 476; *Zane v. Sawtell*, 11 W. Va. 48; *Brown v. Miller*, 45 W. Va. 212, 31 S. E. Rep. 967. See monographic note on "Conversion and Reconversion" appended to *Vaughan v. Jones*, 23 Gratt. 444.

made, according to the will. They estimated the land, on oath, at 20 dollars per acre; upon which Brooke elected to take the land, and to pay one half of the value thus ascertained, to Miss Hooe, and he afterwards paid the same to her. It appeared, that Mrs. Brooke was no wise party to this election made by her husband; and that she herself never, in any way, during her life, exercised, or attempted to exercise, any election on the subject. Brooke afterwards made an exchange of this land for other lands, with John Taliaferro the elder, the only acting executor of Mrs. Alexander. Taliaferro was also the guardian of the legatee Lucy T. Hooe; and he had been a witness to the valuation made by Jones and Rose. Brooke made a conveyance of this land to Taliaferro, but his wife did not join in the conveyance; and Taliaferro conveyed to Brooke, the lands he had agreed to give him in exchange. Subsequently to this transaction, Mrs. Brooke died, leaving four daughters, her heirs at law, and her husband surviving. Brooke sold and conveyed the lands he had received from Taliaferro, in exchange for the land in question, to John Pratt and George Hamilton; and then, as was alleged, died insolvent.

In a suit in the superiour court of chancery of Fredericksburg, between John Taliaferro the younger, and Pratt, Hamilton and the heirs of Mrs. Brooke, the title which Brooke acquired in the tract of 800 acres of land, called Dunn's, devised by Mrs. Alexander's will to be sold by her executors &c. became a material subject of examination and inquiry, all the other questions in the cause, depending on the resolution of the question in respect to it. The chancellor was of opinion, that Brooke had title to only a life estate in one moiety of this land; that his election to take it at the valuation, whether made with or
421 without the "concurrence of his wife, operated to vest the title thereof in the wife; and that, as Mrs. Brooke did not join in the conveyance to Taliaferro the elder, and as no sale of the land was ever made by the executors of Mrs. Alexander under her will, and as Mrs. Brooke never made any election to take the subject as money, it remained land, and descended to her heirs at law. And he made an interlocutory decree founded on this opinion as to the nature of Brooke's title: from which Pratt appealed to this court.

Stanard, for the appellant.

Harrison and Johnson, for the appellees.

CARR, J. The first question in this cause, and that on which every other question depends, is, Whether the disposition contained in Mrs. Alexander's will, of this land called Dunn's, is to be construed as a bequest of personality to her daughter Frances, or as a devise of land? Has the testatrix impressed on this land the character of money, or is it still land? In *Fletcher v. Ashburner*, 1 Bro. C. C. 497, the master of the rolls says, "Nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property, into which they

are to be converted; and this in whatever manner the direction is given. The owner of the fund, or the contracting parties, may make land money, or money land. The cases establish this rule universally." Seeing then, that the testatrix had the perfect power, we are to inquire what has she done? She devises the land, to her executors, that they may sell and convey it, and her will is, that the produce of the sale be equally divided between her daughter and grand daughter. Here is a complete sentence; a perfect disposition of the subject; the land devised to the executors to sell and convey, the proceeds bequeathed to the

legatees: thus, clearly and defini-
422 tively, "impressing upon it the character of money. No body could have doubted this for a moment, if the will had stopped here. Is there any thing which changes this purpose so plainly declared? any thing which, if the daughter Frances had died an infant, would have made this a devise of land? The testatrix proceeds: "but if my daughter Frances when married, or of age, should choose, she may take the land in fee, on paying half the value of it, to my grand daughter." Here are three conditions precedent? three events which must happen before she can take the land: 1. she must come of age or marry: 2. she must, on either of these events, choose; she can't do it before: 3. on paying half the value, after age or marriage, she may take the land. How can this bare power, thus clogged with three conditions precedent, operate to change the disposition so clearly and absolutely expressed in the sentence immediately preceding? In wills, the meaning of the testator, we are told, is the polar star. Can any body believe, that the testatrix here intended by the second sentence to change the nature and effect of the first? Such an interpretation, it seems to me, would violate common sense, as well as grammatical construction. Her settled intention, undoubtedly, was, that the land should be sold, and the money divided: but as her daughter would not need this money till she came of age or married, and as possibly she might then prefer to take the land, and pay half the value, she gave her the power, by making this election and paying the money, to change her money legacy into land; but, surely, until this change happened, until these acts were done, it remained, to all intents and purposes, a money legacy. This was the character decisively impressed upon it; and in *Ashby v. Palmer*, 1 Meriv. 300, the judge tells us in so many words, that "land once impressed with the character of money, must remain so impressed until some person elects to take it in its original character as land." All would agree, I repeat, that this was a money legacy, if the power had not been superadded of
423 taking the land; and *yet, what is this, more than the law itself gives? But *expressio eorum quæ tacite insunt nihil operatur*. Suppose land directed to be sold, and the money given to A. he may elect to take the land, and no body can say him nay; but if he do not elect, it remains money; the character impressed upon it, is not affected by the right of election,

unless that right be exercised. In our case, the testatrix gave the land to her executors to sell, and the proceeds to the legatees. Suppose she had stopped here: both the legatees would have had the power to elect to take the land; and if they had exercised it, the whole land, which was directed to be sold, would have remained in specie; but it was not the less a money legacy. So here, the daughter, by electing to take the whole, and paying half the value, might have land instead of money; but until she performed these conditions precedent, it remained a money legacy.

Many cases were relied on in the argument, to shew, that the character of money was not definitively and imperatively impressed upon this property; but, in my mind, they are clearly distinguishable. Thus, where it was uncertain in what manner the owner intended the property to descend, or where a conversion was directed for a special purpose; or out and out, but the produce to be applied to a particular purpose; when the purpose fails, the intention fails, and equity regards the owner as not having directed a conversion. Thus, in the case of lands directed to be sold to pay the debts of the testator, if the debts are paid without a sale, it remains land; or if sold, as nothing but the payment of debts was intended, all beyond will remain real estate. All the cases cited may be referred to one or other of these principles; or else, to that doctrine of lord Roslyn, in *Walker v. Denne*, 2 Ves. jr. 170, 176, that the property shall be taken as it happened to be at the death of the party from whom the representative claims; a doctrine, which has been clearly overruled by many later cases; I refer among many others to *Wheldale v. Partridge*, 8 Ves. 235; *Thornton v. Hawley*, 10 Ves. 129; *Biddulph v. Biddulph*, 12 Ves. 424 *161; *Kirkman v. Miles*, 13 Ves. 338; *Ashby v. Palmer*, 1 Meriv. 296; *Craig v. Lesslie*, 3 Wheat. 563, 583. In *Ashby v. Palmer*, the daughter, for whose benefit the land was devised to be sold, became a lunatic before she attained to full age, and continued so till her death many years after: no part of the real estates was sold under the trusts in the will: and the question was, whether the land was converted by the will into personal estate, or remained real? The master of the rolls said, that "when the daughter arrived at twenty one, the land being unsold, she might, if she had been competent, have elected to take it as land; or, if she had kept it unsold, being competent to elect, she might have been presumed to have so made her election; but here, she was manifestly incompetent to make any; and it is, as if she had died before the time arrived at which she could have elected." Upon the most careful view I have been able to take of the subject, I am of opinion, that Mrs. Alexander's will impressed upon the land in question, the character of money, which must remain until the daughter complied with the conditions on which alone she could take the land.

Has she ever done this? She was married, we are told, before she attained to full age: could she after she was a feme covert make

the election? I doubt it, exceedingly. If a simple act of election had been all that was necessary, perhaps equity, notwithstanding the husband's marital rights, might have aided her. But here, she was not only to choose to take the land, but she could only take it on paying the value of the half of it. How was a married woman to do this? She has no funds, no money; can she make the choice, and thereby not only prevent her share of the legacy from going to her husband as personalty, but also saddle him with a large debt for land, the fee of which would go to her and her heirs? Surely, no court of equity would aid her in such an enterprise. But if she could elect, she never did. It is said, her husband has elected for her, by taking the land at valuation, and paying the half

425 value. *It is clear that he has taken the land, and paid for it; but by no means so clear, that he has done this for his wife. On the contrary, I think the whole *res gestæ* shew, that he took, and held, and dealt with the land, as his own exclusive property. To be sure he calls it, in some recitals, the land he and his wife held under Mrs. Alexander's will, and the land he got by his wife; but these are loose expressions, and rather used to describe the manner in which he acquired the land, than the nature of the title by which it was held. But in all the essentials denoting property, he and those with whom he dealt, unquestionably, acted as if they considered him the fee simple owner. He conveyed it to Taliaferro in fee; and Taliaferro, intimately acquainted with the whole transaction, the acting executor of Mrs. Alexander's will, the guardian of Lucy T. Hooe the co-legatee, the witness of the valuation and election, seemed perfectly content with Brooke's conveyance. Indeed, we never hear a hint of any defect, till the original bill was filed in this cause. If Brooke had thought he was selling his wife's land, why did he not take the conveyance of the lands he took in exchange for it, to her? It was said, that under the will, unless the land was taken by the daughter, it was to be sold by the executors, and if taken by her, to be valued by two executors; and that Brooke's having it so valued, shewed he meant to take for his wife. We are told, however, that the valuation was merely to ascertain, whether he should elect to take land at all; that is, that he might ascertain the money value of the subject. Now, if he could elect he must *ex vi termini*, have the power of deciding whether he would take the money or the land. Having this power, can we hesitate to conclude, that he would say, "I prefer taking this as money, whereby I gain half the value to myself, *jure mariti*, to taking it as land, whereby I lose, not only the moiety I should have gained, but also the other moiety, which I shall have to pay, making a difference with me of the whole value?" If he concluded to take it as money,

426 still the land being valued by the executors, and its price *settled, might he not very probably argue thus—"I own half of this price: I will pay the other half to Lucy T. Hooe, and take the whole land?" If he had a right to choose to take

money, no body could object to this but Miss Hooe, so far as it might affect her legacy; and we hear of no complaint from that quarter. True, this would not be following the will, and Brooke may not have gotten the legal title; but it is clear to me, that it was never in his wife, nor in her heirs, nor could they ever get it. They could never have disturbed Taliaferro in his possession of Dunn's, or justified the filing this bill.

My opinion on this part of the case, striking at the root of the plaintiff's claim, renders it unnecessary to discuss at large the other points in the cause. The decree should be reversed, and the bill dismissed.

CABELL, J., concurred.

TUCKER, P. The question which lies at the foundation of this case, is, Whether Brooke had a good title to the tract of land called Dunn's, sold by him to John Taliaferro the elder in 1789? a question, which depends upon the construction and effect of Mrs. Alexander's will, and what has been done, and omitted to be done, under it. Brooke married Frances the daughter of the testatrix. There is no evidence of any election made by Mrs. Brooke herself, under the will of her mother, though it is contended, that her husband elected for her, to take the land, and pay the value of one half to her niece, and that she was thus invested with the fee simple estate, which he could not pass without her concurrence, by deed duly executed according to the ceremonies prescribed for conveyances of femes covert. It is also contended, that, even if his act or election could not bind her, or enure to her advantage, yet, if there was no election, the land continued to be real estate. and as such vested in her, and could not be conveyed by him to Taliaferro, without her deed executed with the solemnities of a *privy examination. On

the other hand, it is said, that the character of personality was imperatively fixed upon the property; that the transactions of Brooke detailed in the proceedings, were for his own benefit; and, as the right to the money vested in him as husband, he had a right to elect, and do elect, to take the estate to himself, which he afterwards conveyed to Taliaferro, as he had a right to do.

This view of the contest between the parties, presents, at once, the necessity of adverting to the doctrines of equity on the subject of the conversion of land into money, and money into land. The rule is, perhaps, as clearly stated by the master of the rolls in the case of *Fletcher v. Ashburner*, 1 Bro. C. C. 499, as in any other authority. He observed, "that nothing was better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property, into which they are directed to be converted, and this in whatever manner the direction is given; whether by will, by way of contract, marriage articles, settlement or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund may

make land money or money land. The cases establish this rule universally. If any difficulty has arisen in any case, it has been from special circumstances."

It is indeed most true, that however well the rule is established, difficulties have arisen in many cases, and have much perplexed the judges. Of this a most conspicuous instance is afforded in the opinion of lord Eldon, in the case of *Wheldale v. Partridge*, 8 Ves. 233. These difficulties have arisen, sometimes, from failing to distinguish cases falling within the principles above mentioned, from cases where a sale of land has been directed, and some part of the disposition failing, a trust has resulted to the heir. But I think they have sprung mainly, from following too closely the phraseology of the judges in the 428 different cases, instead of *bringing each case to the test of the principles out of which the rule has grown. These principles are,

1. That the owner of the fund may make land money or money land; 1 Bro. C. C. 499; 1 Meriv. 300. Cujus est dare, ejus est disponere. The will of a testator, if not in collision with the law of the land, is the law of his property. He has an absolute right to say what shall be done with it; and if he directs trustees to sell it and turn it into money, and pay it over to the legatee, that direction must be obeyed. If literally and strictly obeyed, the legatee can only receive personality, and will not receive realty; and if he dies before the conversion, it will go to his personal representative as money, since he himself would have taken money; for,

2. Equity looks upon things which ought to have been done, as done; and if the trustee ought to have made the conversion, and has failed to do it, the property will pass to those who would have had the beneficial interest in it, had he pursued the directions of the trust.

3. The rule, is however, modified by this principle, that where money is directed to be turned into land, or vice versa, the person entitled may elect in which way he will take, whether as money or land; and very slight evidence by acts done, will be sufficient. 5 Munf. 122; Amb. 229, 242; 2 Ves. jr. 176; 1 Bro. C. C. 500. But this right of election is of itself modified or subject to exceptions. For an infant cannot elect, 2 Bro. C. C. 56, though a court of equity may elect for him, 2 Rand. 404. Nor can an alien elect; 5 Munf. 127. And where land is directed to be sold, and the money divided among several, all must unite in an election to take the property in its original condition, or the conversion must be made; 1 Bro. C. C. 500. For the rule, which admits of this election, we are truly told, is "a rule of equity not affecting the nature of the estate, but founded in the convenience of the parties. Why encounter the expense and trouble of a sale, and oblige the cestui que trust, if he wishes to hold the land, to purchase it in? It is to avoid this circuitry, that courts of equity permit him at once *to elect to hold the land." But where the party cannot elect, or if he does, his election is void, the property must then pass "as

land or money, according to the stamp which was placed upon it by the will. It remains personal, in this case, until the time of election. If the legatee dies intestate the day after the testator, leaving a husband, and a child, the husband as her personal representative would take the bequest as personality; but having thus acquired a right to the money, he comes in, and elects to pay debts &c. and keep the land"—"it then, and not till then, becomes real estate, and that after having passed, in the first instance, as personality." Per Coalter, J., 5 Munf. 127, 8. Such is the clear and forcible language in which a former eminent judge of this court has stated the doctrines of the courts, in reference to these principles. It remains to observe upon this head, that a feme covert can only make a valid election under a commission from the court of chancery, directing her privy examination separate and apart from her husband; by analogy to the solemnities attending the levy of a fine in England, or the privy examination of a feme covert in Virginia. 1 Ves. jr. 512; 2 Ves. sen. 174. This subject however must be hereafter more closely examined, in its connexion with this case.

Such are the general principles of the rule in question. They are to be traced back to a respect for the will of the donor or testator, who has imposed upon his own property, in the distribution of his bounty, the character which seemed to him fit. Whatever that be which he has stamped upon it, that it must bear, until it is changed by the election of a party invested with the right, and capable of exercising the power, of election. To use the language of the cases, whatever character he has imperatively fixed upon it, that it must bear until changed. It was, indeed, at one time, decided, that there was no equity as between the heir and personal representative of the legatee, to change it after his death, from its actual state at that time; Walker v. Depne, 2 Ves. jr. 170, 176.

But that case was soon questioned, 430 *and has been since repeatedly overruled. And it is now distinctly understood, that where the character is imperatively fixed by the will, that character it must retain, unless some party having a right to elect, either expressly or by his acts, evinces a design to hold it in its original state.

Where, indeed, the change is not imperatively required, the property is permitted to retain that character which it actually has at the legatee's death. Thus, if lands are directed to be sold and the proceeds laid out in personality or in other lands, the conversion into personality is not imperative, and the discretion vested in the trustee preserves the estate (until an actual sale has been made) in its original character of real estate.

After these views of the principles which are invoked as governing the case at bar, let us proceed to consider this case more particularly.

I am of opinion, that the will of Mrs. Alexander contains such an imperative direction to her trustees to sell the tract called Dunn's, as fixed imperatively upon

that property, in the event that has happened (the failure of Mrs. Brooke to make the choice given her by the will) the character of personality. What did the will direct? That the land should be sold, and the money divided; but that if her daughter when married or of age, should choose, she might take the land in fee. If then, her daughter did not choose to take the land, the direction of the will, and the design of the testatrix, required that the conversion should be made. She commands it to be done, unless the daughter should elect otherwise. If she did not elect, it was the trustee's duty to sell, and particularly, if (as I think) her right of election was determined by her marriage. Upon what principle of equity, could their delay to fulfil the trust by selling the land, and paying over the money to the husband and niece, divest the former of his rights, and make that land, which they ought to have converted into money? There was none; on the contrary, the principles of equity assure to the party his rights, notwithstanding the breach of *trust, by treating the property, though retaining its original form of land, as personal estate.

Such appears to me to be clearly the state of the case, unless Mrs. Brooke did, by herself or her husband, make the election, which by the will she was impowered to make. That she did not elect, at any time, in her own person, is obvious. The contrary is not pretended. Whether her husband could elect for her, and did elect for her, are, therefore, the important questions to be examined.

He could not elect for her—1st, Because, according to the true construction of the will, the election was to have been made by her, at the time of her marriage. I concur with the appellant's counsel, that the terms when married, designate the time when the election should be made, and not the situation in which she might be. There was nothing in the situation of coverture, that was peculiarly calculated to fit her for election; since her will would then be under the influence of another, and she could not without the concurrence of that other, make an election, which would fix upon her, and by consequence upon him, a heavy charge. The election after marriage, would, in effect, have been a contract by which she would have assumed a personal responsibility (and he would of course have been also bound) for one half the valuation, however extravagant, to Lucy T. Hooe; and Brooke, by this act of his wife, would not only have been deprived of his wife's fortune in one half of the land, but have been charged with Miss Hooe's fortune in the other half. Moreover, if the words when married, do not designate the time, but the condition, then she had time during the coverture to decide; and, in the interval, Miss Hooe's interest in the estate would have been suspended, except as to the receipt of a portion of the rents; which never could have been designed, since her interest, at least, was explicitly made personal in every event. On the other hand, it was very natural that the mother, while providing that her daughter

ter's estate should be converted into money, as best suited for the fortune of a female, should allow her the privilege of judging for herself, when of a proper age, and of taking the land, if she preferred it. What period was it natural to fix upon? Maturity or full age, in the first place; but, as her young and richly provided child might marry before that period, prudence also required, that she should have power at her marriage, to make an election changing her interest from money, which would go into the pocket of her husband, into lands which would be secure to herself, an election, which if demanded by prudence, it might confidently be supposed, her friends would urge upon her, before the right should be terminated forever by her marriage. 2ndly, If we suppose that the right to his wife's interest in this property, did not vest in Brooke, immediately upon the marriage, by virtue of his marital rights, and that her right of election continued in her after marriage, that right could not have been exercised by him for her, but must have been exercised by herself under a commission from the court of chancery. 1 Ves. jr. 512; 2 Ves. sen. 174. A husband cannot elect to make the property of his wife, real or personal at his pleasure. If, for instance, money is directed to be laid out in land for the wife, the husband cannot elect to take the money, though she may do it under a commission, as has been already remarked. It seems to be supposed, indeed, that he might elect to take the interest as laid, since that would be for her benefit. But, as has been well said, "it is no power of election, if he could elect but one way." Election implies choice; choice supposes more than a single object, either of which may be chosen. It is absurd to attribute to the husband a right of election in behalf of his wife, between two things, if he is only permitted to take one of them. He must have a right to take which he pleases, or he has no right of election at all. But he has no right, as has been decided, to make her property real or personal at pleasure, and therefore he has clearly, in her behalf, no right of election at all. 3rdly, Even though, in ordinary cases, this right existed in the husband, of electing for his wife, it might well be questioned *here. For, by this election, while he would take for her the fee simple in the land, he would, eodem flatu, have charged it with a heavy incumbrance, which, according to a very ordinary course of events, might have swallowed up the whole. This, I apprehend, cannot be pretended to have been within his power.

In the view I have taken of the subject, it is quite unnecessary to grope through the equivocal testimony in the cause, to discover, whether he acted for his wife or for himself, in the transaction with the executors. The taking the conveyance of the lands which Taliaferro gave him in exchange, to himself, proves his intention to act for himself, when that conveyance was made. Be this as it may, if the right was in her, no election by him could affect it, if it was in him, no mistake of his right could forfeit it. It remains only to see,

what was the effect of Mrs. Brooke's failure to make an election.

1. By the will, the legal title was devised to the executors in fee, subject to be divested by her election to take the land, upon which the legal title would have immediately shifted and been vested in her in fee. One only of the executors, John Taliaferro the elder, qualified as such; and in him all the rights and duties given by the will to the executors, were concentrated, by the operation of the statute 21 Hen. 8, ch. 4, which continued in force till January 1787, when our own statute of 1785, which superseded the english statute, took effect. 1 Rev. Code, ch. 104, § 52, p. 388.

2. Mrs. Brooke having failed to elect to take the land at the time of her marriage, I am of opinion, that the election given by the will, expired upon the marriage. From that moment, the direction to sell and convert the land into money, was imperative and unconditional, and irreversible by her. The character of money was given to her interest. It was personalty, and devolved on her husband, as a portion of his marital rights. And, though by the english law, if he had found it necessary to resort to equity to enforce the execution of the trust in his favour, he might have been compelled to make a settlement, yet that could only have been required upon the supposition that it was personalty, 1 Eq. ca. abr. 64, pl. 3, and in compliance with a rule which never has yet been acted on in Virginia, and about which I do not wish to be considered as giving an opinion. 1 Rand. 372, 385. By the marriage, then, without an election by Mrs. Brooke to take the land, the right vested absolutely in her husband.

3. Brooke being thus invested with the right to the proceeds of one half the land, and having paid to Miss Hooe her portion, being the value of the other half, had a clear equity to the whole proceeds of sale, and, by consequence, a right to elect to take the land itself, in which he had thus acquired the intire interest, instead of having it sold, and being compelled to encounter the expense and trouble of a sale, and upon that sale to buy it in." He did so. Whatever may have been the views and opinions of those who managed the transaction, it is sufficiently clear, that he, with the full possession of the equitable title, has, by an arrangement the fairness of which is not impeached, passed over that equitable title to the person having the command of the legal estate, and thus, by uniting the two, has vested in him a complete and valid title to the land.

To test this, let us see whether Brooke's children have title, either legal or equitable. Their title is not legal, for I have shewn that the legal title could only vest in their mother, upon her election to take the land, which election was never made. Nor have they any equity; for the right to the money passed to their father, as a marital right, which they can never question. And this consequence would equally follow, it would seem, even though Mrs. Brooke's right of election was only determined by her death. For, in that case, as she made no election

in her lifetime, her interest, upon her death, would have devolved upon her husband as personality, and his children would have had no title to demand it. The form of an administration might in 435 deed *have been necessary to consummate his legal rights, but, in substance, he would have been entitled to this interest as part of the personality of his wife; and, at this late day, this court would not disturb the title for want of an adherence to such form.

Having thus arrived at the conclusion, that there is no valid objection to the title of Taliaferro under Brooke, to the Dunn's tract of land, it is I think sufficiently obvious that an examination of the other questions made in the cause, can in no wise be necessary.

The decree is to be reversed, and the bill dismissed.

436

***Dudleys v. Dudleys.**

February, 1832.

Wills—Acknowledgment—Sufficiency*—Case at Bar.—Testator's will is written for him by R. P. who testifies, that he also signed testator's name thereto, in the presence and at the request of the testator, and then subscribed his own name as a witness in the testator's presence; and another witness, B. H. testifies, that some years afterwards, the witness being at testator's house, it was suggested to testator, that that was a favourable time to have that will witnessed; testator assented; the paper in question was produced; witness took it near to testator and inquired whether he acknowledged it; testator said he did; upon which, this witness subscribed as a witness in testator's presence: **Held**, the acknowledgment of the paper by testator to the second witness, was a recognition of the signature thereto as his own, and evidence from which a court of probat may well infer, that the testator's signature to the will was written by his authority; and so here are two witnesses to the execution of the will, as required by the statute; **dissentiente BROOKE, J.**

Case Doubtful.—The authority of Burwell v. Corbin, 1 Rand. 181, doubted.

Appellate Practice—Credibility of Witnesses.—Upon a question of probat of a will, the testimony of one of the attesting witnesses is directly contradicted by that of another; the county and circuit courts both give credit to the witness for the will; on appeal from the sentence of probat, **Held**, that the court of appeals, on a mere question of credibility of witnesses, will always presume, that the

***Wills—Acknowledgment—Sufficiency.**—On this question the principal case is cited in *foot-note* to Rosser v. Franklin, 6 Gratt. 1; Cheatham v. Hatcher, 30 Gratt. 58, and *note*; Clarke v. Dunnivant, 10 Leigh 27, 29, 34; Sturdivant v. Birchett, 10 Gratt. 78; Nock v. Nock, 10 Gratt. 118; Parramore v. Taylor, 11 Gratt. 248.

Same—Probat Court—Province.—The principal case is cited in *note* to Clarke v. Dunnivant, 10 Leigh 18; Sturdivant v. Birchett, 10 Gratt. 80, 103; Nock v. Nock, 10 Gratt. 112. See monographic *note* on "Wills."

***Appellate Practice—Credibility of Witnesses.**—The court of appeals, on a mere question of credibility of witnesses, will always presume, that the inferior courts, which saw and heard the witnesses examined, decided correctly. For this proposition the principal case is cited and approved in the following: *Foot-note* to Jesse v. Parker, 6 Gratt. 57; Nock v. Nock, 10 Gratt. 111; Parramore v. Taylor, 11 Gratt. 240; Wickham v. Lewis Martin & Co., 13 Gratt. 451; Mitchell v. Baratta, 17 Gratt. 452, 455, and *note*; Young v. Barner, 37 Gratt. 105; Lamberts v. Cooper, 29 Gratt. 68; Pairo v. Bethell, 75 Va. 823; Hartman v. Strickler, 82 Va. 238; Webb v. Dye, 18 W. Va. 385; Coffman v. Hedrick, 32 W. Va. 129, 9 S. E. Rep. 69; State v. Barnett, 34 W. Va. 78, 11 S. E. Rep. 736; State v. Workman, 36 W. Va. 374, 14 S. E. Rep. 12; State v. Hunter, 37 W. Va. 745, 17 S. E. Rep. 308; State v. Hull, 45 W. Va. 779, 22 S. E. Rep. 245.

See also, Akers v. DeWitt, 41 W. Va. 229, 23 S. E. Rep. 609, and monographic *note* on "Appeal and Error" appended to Hill v. Salem, etc., Turnpike Co., 1 Rob. 263.

inferiour courts, which saw and heard the witnesses examined, decided correctly.

A paper purporting to be the last will and testament of Gwin Dudley, late of Franklin, was offered for probat in the county court of Franklin, by Lewis and Gwin Dudley, and the probat was contested by Thomas and Levi Dudley. The county court was of opinion, that the paper was the true last will and testament of the deceased, and ordered it to be recorded, generally; that is, as a will both of real and personal estate. Thomas and Levi Dudley appealed from the sentence, to the circuit court of Franklin, which affirmed it; and then they appealed to this court.

At the hearing in the circuit court, the court, at the instance of the appellants, ordered the whole of the evidence to be reduced to writing, and made part of the record; which was as follows:

The will in question, bore date the 6th January 1818. There were four subscribing witnesses to it; namely, 437 Robert *Pasley, Bernard Hendrick, Phoebe Maxey and Sally Pasley; and it appeared by the attestation, that the first two wrote their names themselves, and the other two made their marks, their names being written for them by some other person.

1. Robert Pasley testified, that he wrote the will, and signed the testator's name thereto, in the presence and at the request of the testator, and that he subscribed his name as a witness, in the testator's presence. That the testator was of sound mind at the time. That, after the will was written, the testator was apprehensive he had not secured a slave in the will mentioned, to one of his daughters and her children, and asked the witness if the will could be altered so as to effect that end; the witness told him it could, and altered the will, by erasing a part and inserting the alteration; but the witness could not say when the alteration was made.* That he wrote Phoebe Maxley's name as a witness to the will, in her presence; he did not recollect, whether she made her mark or he made it for her; but she was present, and he would not have put her name to the paper, unless she had been present, and in the presence of the testator.

2. Bernard Hendrick testified, that he being at the testator's house in the spring of the year 1825, one of the appellees remarked loud enough to be heard by the testator, "that that was a favourable time to have that will witnessed;" the testator assented; and a paper was produced, which was the will in question. That the witness took it near to the testator, and inquired whether he acknowledged it; the testator said he did; and the witness subscribed the paper in the testator's presence. The testator was, at the time, of sound disposing mind and memory; he was above eighty years old.

3. Phoebe Maxey testified, that she could not write; her name might have been put to the will, but she did not make her mark,

*What this alteration was, did not distinctly appear. The will in question contains no devise of real estate to any of the testator's daughters.—*Note in Original Edition.*

and had no recollection that she requested Pasley *to write her name.

That the testator's wife came to the kitchen where she was, and said she wanted her to go to the house, and witness a will; that she (Mrs. Dudley) would talk for her. That the witness went in, but objected to witnessing the will, unless it was read to her; Pasley refused to read it. That the testator told the witness, afterwards, that she must go to court, and testify that it was not his will, and she promised him she would never bear witness in support of it. That the testator said, that when he executed the will he was out of his senses: he always said, that it was not his will, that his wife had won the victory, and that his household was managed "not by whom it should be." That the witness Pasley, altered the will in the testator's absence, during the summer after the execution of it. And that Pasley had threatened, that if she came to court, he would have her ears cropped, but if she did not go, he would protect and befriend her.

The other subscribing witness, Salley Pasley, was not examined; why, did not appear.

4. There were two witnesses, who testified, that the witness Robert Pasley told the witness Maxey, he had heard, that she charged him "with writing on Dudley's will," and that she denied she was a witness to the will; she avowed both; upon which Pasley told her, that if she said that on oath, she would swear to a lie, and would be put in the stocks, and have her ears cut off, or, that he would have her ears cut off.

5. There were three witnesses who testified, that the witness Pasley was esteemed a man of truth and respectability.

6. One witness testified, that, about the year 1823, in conversation with the testator, the witness asked him whether he had a will? and he answered, that his wife had a will for him, but he did not intend to die and leave that will; that the law made a good will, and he intended the law should make his will.

Johnson for appellants. 1. The testimony of the subscribing witness Pasley, is directly contradicted and impugned 439 *by that of another subscribing witness, Maxey. It cannot be doubted that the testimony of Pasley is essential to the due proof of this will. Whether a will ought to be established upon the strength of testimony thus contradicted and impugned, is submitted to the court. But even Pasley does not say, that, after he wrote the will, it was read to the testator before it was executed. 2. Supposing credit given to Pasley, there is but a single witness to the will. Hendrick does not prove the execution of it as a will of real estate. He says, the testator acknowledged the paper, and he attested in the testator's presence; but the testator's signature was put to it by Pasley; and Hendrick does not say, that the testator declared that he had authorized Pasley to sign it for him; nor is it proved, that Pasley signed the testator's name by his direction and in his presence, as the statute requires, by any evidence but that of Pasley

alone. His signing for the testator by his direction and in his presence, is an essential requisite to the due execution; and every fact essential to the due execution of a will of lands, every material requisite of the statute, must be proved by two witnesses. *Burwell v. Corbin*, 1 Rand. 131, is directly in point to this case. And two witnesses are necessary also, to prove a will of personal estate. *Redford's adm'r v. Peggy*, 6 Rand. 316.

Leigh for the appellees. 1. The first question is, simply, which shall be believed, Pasley or Maxey? They were examined in open court, both in the county and in the circuit court; and the justices of the county court (who probably knew them), and the judge of the circuit court, concurred in giving credit to Pasley. This court, reviewing the sentence of those courts, upon the written depositions of the witnesses, will, as it always has done in such case, give intire confidence to the concurring opinions of the county and circuit courts. 2. If it were necessary, I should ask the court to reconsider the points decided both in

Burwell v. Corbin and *Redford's adm'r v. Peggy*. But **Burwell v.*

Corbin came before the court on a special verdict; the court could infer nothing, intend nothing. In this case, the court is sitting as a court of probat; its province is, like a jury, to draw the natural, fair and just inferences of fact from the evidence. The distinction was taken in *Smith v. Jones*, 6 Rand. 33, and approved in the recent case of *Boyd v. Vass*, ante, 32. This will had been signed for the testator, long before Hendrick attested it; and to Hendrick, the testator acknowledged the will so signed. He thus acknowledged the signature to be his; and no matter when or by whom it was put to the will, the clear inference from the testator's acknowledgment, was, that it was duly put there. There are, then, two witnesses to the due execution of this will in all respects.

CARR, J. This is a question of probat. There is a direct clashing of evidence in two of the subscribing witnesses to the will: both cannot have sworn truly. The county and circuit courts, having these witnesses before them, have given credit to the witness in favour of the will. Taking him to have spoken the truth, I think his evidence, with that of Hendrick, establishes this as a good will of lands. It was said, in the argument, that the point in this case, is decided by *Burwell v. Corbin*; that the distinction taken in *Smith v. Jones*, between a court of probat acting upon evidence, and a court of chancery, acting on a special verdict found on an issue of *devisavit vel non*, would not reconcile the cases; and that we must overrule *Burwell v. Corbin*, if we sustained the will here. For myself, I must say, I think that case went too far. Yet there is, surely, a sound distinction between a court of probat acting upon evidence, and a court deciding the law upon the facts found by a special verdict. Upon this distinction, the court, in *Smith v. Jones*, meant to leave *Burwell v. Corbin* undisturbed: and I am not disposed, at present, to inquire, whether, on the strict and narrow ground of a special verdict,

it may not stand: but, certainly, I can never consent that it shall govern a
 441 *court of probat, in deciding upon evidence. I am for affirming the sentence.

CABELL, J. This is a controversy as to the probat of the will of Gwin Dudley, as a will of lands. It was established by the concurrent sentences of the county and circuit courts of Franklin; and the evidence for and against the will, having been spread upon the record, the case now comes before this court, on an appeal from the sentence of the circuit court, upon that evidence. There are four subscribing witnesses to the will. One was not examined at all. Another, Phoebe Maxey, so far from supporting the will, deposes to facts, which, if true, would invalidate it, and would shew that R. Pasley the first subscribing witness is totally unworthy of credit. This would leave but a single witness in support of the will. But it is manifest that both the courts below disbelieved Maxey, and gave full credit to Pasley. There is nothing in this record sufficient to destroy the credit of either of these witnesses, except it be the testimony of the other. The credibility of witnesses depends on a variety of circumstances, which may be seen and known by those who are present at their viva voce examination, but which cannot be transmitted through their written testimony, to an appellate court. On a mere question of credibility, therefore, when there is nothing in the record to throw light on the subject, this court will always presume, that the inferior court, that saw and heard the witnesses examined, has decided correctly.

This will, then, depends on the sufficiency of the testimony of R. Pasley and Hendrick.

I shall first inquire as to the sufficiency of Hendrick's testimony. In the case of Smith v. Jones, judge Carr, speaking for the court, draws a distinction between a case where the court is deciding upon a special verdict, as in the case of Burwell v. Corbin, and a case like the present,

where the court has to decide, as a
 442 court of probat, on the *evidence given for or against a will: in the former case, we are limited to the facts as stated; we can deduce no inference from them: in the latter, we may infer every thing from the evidence, that a jury might fairly infer. I sat in Burwell v. Corbin. It is due to candor to admit, that I did not proceed on any such distinction as that taken in Smith v. Jones. My opinion would not have been different, at that time, had the case stood on a statement of the evidence, and not on a special verdict. But I have had occasion to reconsider, with great attention, the case of Burwell v. Corbin, and I have come to the conclusion, that the decision can be justified, only on the ground that it was on a special verdict; and that, even in that aspect of the case, it ought to have been sent back for a more perfect finding of the facts.

Proceeding then on the principle, that it is competent to this court, to infer from the evidence, whatever a jury might fairly infer from it, let us see what is proved by the

testimony of Hendrick. I will premise, however, that the only requisites to a will of lands, are, that it shall be in writing, and signed by the testator, or by some other person in his presence and by his direction; and, if not wholly written by the testator, that it shall be attested by two or more credible witnesses, in his presence. But the statute does not prescribe the kind or degree of proof, by which the fact of signing, whether by the testator or some person for him, shall be established. It is not necessary, that the witnesses shall see the signing. Proof of an acknowledgment of the signature by the testator, is as sufficient to prove the signature, as proof by the witnesses that they saw the act of signing. Grayson v. Atkinson, 2 Ves. sr. 454; Ellis v. Smith, 1 Ves. jr. 11. In like manner, an acknowledgment, that a writing to which a man's name is signed, is "his will," is proof that he signed the will. Westbeeck v. Kennedy, 1 Ves. & Beam. 362. Now, the writing in controversy, purports to be the will of Gwin Dudley, and his name is signed to it as the testator; and Hendrick deposes, that this very paper was acknowledged by Dudley, and that

443 he subscribed *his name, as a witness, in his presence. It is true, he does not expressly say, that Dudley's name was or was not signed to the will, at the time it was acknowledged. But it is not usual for men to acknowledge papers, either as deeds or wills, and to call on others to attest them, before they are signed. Such a thing may happen; and when it is proved to have happened, the acknowledgment and attestation will be disregarded. But, in the absence of all proof to the contrary, the acknowledgment and attestation give rise to an irresistible inference, that the instrument had been previously signed. A contrary course would defeat a vast number of deeds and wills; for it may often happen, and frequently does happen, that a witness, not only does not remember to have seen the signature, but he does not remember the acknowledgment or the attestation; but when he sees his name subscribed by himself, as a witness, and knows that he would not have witnessed a blank or unacknowledged paper, he feels no more doubt of the due execution of the paper, than if he distinctly recollected all the circumstances. We must take it, therefore, that this will was signed, when it was acknowledged before the witness Hendrick. That acknowledgment is proof, prima facie, that it was signed by the testator himself. But if the signature was, in fact, by some other person, then the acknowledgment is a ratification of the signature; and from that ratification we may fairly infer, that the signature was made in his presence, and by his direction. Therefore, I am of opinion, that the testimony of Hendrick is full and ample.

As to the testimony of Pasley, he says, that he wrote the will, and signed the testator's name, in his presence, and at his request, and that he subscribed his name as a witness in the presence of the testator. This testimony was objected to by the counsel for the appellants, because it did not state that the will, after having been

written, was read to or by the testator. But I think we may fairly infer from the testimony, as it now stands, that the will was written according to instructions given by the testator, and that as it was
444 written *in his presence, he was sufficiently acquainted with its contents.

I think this sentence should be affirmed.

BROOKE, J. The case for Burwell v. Corbin (which has been much commented on, and, in my opinion, not correctly understood) was a case of an anomalous character; but the principle decided by it, was, I think, intirely correct. It was an issue of devisavit vel non out of chancery; and, by the acquiescence of the parties, if not by their express consent, the jury which tried it, was permitted to find such evidence as it gave credit to. The verdict was not found as a special verdict; if it had been, it would have been sent back, that the facts and not the evidence of facts, might be found. It, therefore, left the inquiry as to the validity of the will, as open as if the case had stood on an appeal from the sentence of a court of probat. And the case was so treated here, as may be seen by a reference to the opinions of all the judges. The material inquiry in the case, was, whether the factum of signing the will, by the authority of the testator, must be proved by two witnesses under our statute? In examining the testimony found by the jury on that point, the first question was, whether, one witness having proved the signing of the will by Corbin, at the request of the testator, his acknowledgment to a second witness, who did not see the signing, that the paper produced was his will, was proof to witnesses, that it was signed by Corbin, by the testator's direction, at his request and in his presence. I said, that the question, whether the factum of signing must not be proved by all the witnesses, had been much discussed by the judges in England, from the case of Lemayne v. Stanley, down to the case of Grayson v. Atkinson, and (I might have said) to the case of Westbeech v. Kennedy. In Grayson v. Atkinson, lord Hardwicke calls the acknowledgment of the testator, that it was his signature, proof of the factum of signing by him, in some sense; and explains what he meant, by the
445 example *he put of the obligor of a bond acknowledging to the witness that it was his signature. In this case, then, the acknowledgment by the testator, that the signature was his, was deemed equivalent to proof, that the witness saw him sign the will, as seems to have been before required, and was much stronger evidence of the factum of signing the will by the testator, than the bare acknowledgment by the testator that it was his will. And in Westbeech v. Kennedy, it is very clear, that the bare acknowledgment by the testator, that the writing was his will, was not held to be equivalent to proof of the factum of signing by the testator. There, two witnesses having proved the will according to the statute, the question turned on the evidence of the third witness, Henry Boys: his testimony may be seen by turning to the case. The testator did more than acknowledge to the

witness, that it was his will: he also sealed the will in his presence; which was said by the counsel, sir S. Romilly and Mr. Parker, to be a recognition by the testator of his signature; but it was not said or pretended, that the bare acknowledgment that it was his will, or the publication of it as his will, to the witness, in the absence of the fact that he had sealed it in his presence, was a recognition of his signature. And I have seen no case, in which the bare acknowledgment of the will to a witness, in the absence of all proof that it was signed at the time by the testator, or by some one for him by his direction, was held to be a recognition of his signature, equivalent to proof of the factum of signing by him or some one for him. As to the latter, in the case of Ellis v. Smith, the acknowledgment of the signature by the testator, was held to be sufficient proof of the signing by him: but lord Hardwicke said, "it has been hinted, that this decision would lead the way to farther deviations from the statute, and, by consequence, would allow a testator's declarations, that another signed for him, to be good: but authority given by a testator, is a collateral thing, and a thing that ought to be proved; consequence is not to be built on con-
446 sequence:" he does not say *how proved: but can it be doubted, that he meant proved according to the statute, or by some equivalent proof, which the acknowledgment of the testator was not? This of itself would justify the decision in Burwell v. Corbin. But it is said, that, in that case, we had the testimony of Scrimger, the first witness, that Corbin had signed the will for Burrell, by his direction &c. and we should have taken it to have been signed, when Burwell acknowledged it to be his will, to Braddick, the second witness. In Westbeech v. Kennedy, there were two witnesses who had proved the signature of the testator, before Henry Boys, the third witness, was called; yet the acknowledgment of the testator, that it was his will, would not have been held a recognition of his signature, if he had not sealed the will in his presence; an act which naturally follows, and does not precede, the act of signing, and was of itself a recognition of the signature. It must be admitted, that a paper attested before it is signed, is not a will under the statute; that the statute requires the attestation of two witnesses, after it is a perfect will. If all the witnesses die, or are out of the jurisdiction of the court, then, of necessity, proof is admitted of their handwriting, and is all that can be required to identify the paper attested by them. But if they are present, all must identify the paper attested by them. In such case, the statute requires that two witnesses shall prove the factum of signing by the testator. Suppose he acknowledge the will only, before both of them, and before it is signed, as was the case in Burwell v. Corbin, 1 Rand. 131, as to one of the witnesses; would such an acknowledgment be a compliance with the statute? The witnesses, in such case, by looking at their signatures, might identify the paper they attested; but they could not say, that it was a will executed by the

testator by signing his name to it. This would open the door to fraud: a paper not signed by the testator, but afterwards by another, might be palmed upon a court for a will. I have seen no case, in which the acknowledgment of the testator, that the paper was his will, in the absence of
447 all proof that it *was signed by him at the time the acknowledgment was made, has been held a recognition by the testator of his signature.

In *Smith v. Jones*, the point in *Burwell v. Corbin* was not involved. The ground we went on, was, that one witness having proved the signature, and it not appearing that Pendergast, the other witness, was dead or out of the power of the court, we would not, as in case of his death or being out of the jurisdiction of the court, admit proof of his handwriting; and we reversed the judgment, and sent the cause back, that his testimony, if to be had, might be adduced. What was said by the judge who reported the opinion of the court, of the case of *Burwell v. Corbin*, was certainly not relied on, as making any part of the opinion of the court in the case, as it was unnecessary to the judgment pronounced.

I shall not repeat the evidence in the case now before us. I am inclined to think that it is insufficient to establish the will, and, therefore, that the sentence ought to be reversed.

TUCKER, P. The county and circuit courts having coincided, in this case, in giving credit to the witnesses in support of the will, though contradicted by a witness against it, we are bound, by reason and authority, to follow their judgment in this regard.

Taking then for true, as I shall do, the testimony of Pasley and Hendrick, I cannot hesitate in affirming the sentence. The former explicitly states, that he wrote the will, and subscribed it as a witness, at the request and in the presence of the testator. It was objected, indeed, that it is not proved that it was dictated by, or read over to, the testator. But if, as the witness says, it was written by the request and in the presence of the testator, we might fairly presume, that the testator did dictate the will which was written. But the proof of that fact has never been deemed necessary, where the testator has duly executed the
448 *will by signing and acknowledgment.

Innumerable wills, written by third persons and signed by testators, are attested without any evidence whatever of the circumstances under which they were drawn. The recognition of them by execution, is sufficient. It can never be fairly presumed, that a testator performs so solemn an act, without having dictated or understood it. Where, indeed, in the case of personal property, the will is not executed, it must be shewn, that it was written as dictated by the testator, or was approved after having been read. In this case, if the execution be regular, according to the statute, we must take it, that the testator was aware of the contents of the paper, before he executed it; and the rather as it bears date so many years before his death; as his fears of having pretermitted a daughter evinces a general knowledge of

its contents; and as the witnesses against the will, if they are to be believed, themselves establish the fact of his having spoken of the will he had made with disapprobation, which could not well have been if he was ignorant of its contents.

The execution of the will seems to me to have been sufficient. Pasley proves the signing it by himself at the request of the testator, and attesting it in his presence. Here, then, is one complete witness to the will. Hendrick also proves, that the testator acknowledged the will in his presence, and he attested it accordingly. It is objected, that this acknowledgment is not sufficient, according to the statute, and the authority of *Burwell v. Corbin*. That case is not exactly in point; and though I shall certainly not disregard its authority where it is so, yet I am sustained by the case of *Smith v. Jones*, in saying that it affords no binding precedent in this case. The case of *Burwell v. Corbin* was decided on a special verdict rendered upon an issue *devisavit vel non*. This case is before a court of probat. In that, the court was, perhaps, tied down to the facts as found; in this, it discharges the functions, not only of judges,

but of jurors; having the power to
449 infer a fact from the evidence *before it. In this case, therefore, I think myself entitled to infer, that when the testator acknowledged the will produced to Hendrick, as his will, he did acknowledge thereby the signature also. For Hendrick says the paper produced at the trial was that which was acknowledged, and we must therefore presume, it was signed as we see it, in the absence of proof to the contrary. Although, therefore, I do not contest the necessity of two witnesses to the recognition of the signature, since the case of *Burwell v. Corbin* demands them, yet I think that recognition may fairly be inferred here.

If these views are right, then the will was duly executed in its original form, to pass real estate. What then was the effect of the alteration?

1. What was the alteration? It was to provide, for a daughter, and upon the face of the will not a particle of real property is given to a daughter. We may, therefore, fairly infer, that no part of the will devising real estate was then inserted; and, indeed, that no such part was erased, though even this would not have affected the residue. The will, then, is unimpaired as a will of realty.

2. How as to the personalty? The alteration having been made, and reduced to writing, in the testator's presence, and by his direction, I think the reasons very strong for sustaining it without Hendrick's testimony. But it is clear, that the alteration and his attestation were made about the same time. To suppose that the alteration was first made, will account for the desire to have a new witness to the will, seven years after it was first executed. To suppose the contrary, would leave that matter very obscure. If the alteration was first made, and then the will was acknowledged before Hendrick, there can be no doubt it is good as to the personalty in toto.

I am, therefore, of opinion, that the sentence should be affirmed: to which opinion I incline more readily, as the parties may, (if they please to pursue this matter further) prosecute their objections to the will, by bill in equity, and "have its validity determined by an issue devisavit vel non; whereas if we, as a court of probat, decide against the will, the decision may, perhaps, be conclusive on the rights of the parties.

Sentence affirmed.

**Gallego's Ex'ors v. The Attorney General.
Same v. Lambert and Wife and Others.**

February, 1832.

[24 Am. Dec. 650.]

(Absent BROOKE, J.)

Charitable Trusts—Validity—Case at Bar.—Testator directs his ex'ors to lay by \$2000, to be distributed among needy, poor and respectable widows; and, in case the roman catholic chapel shall be continued at the time of his death, to pay \$1000 towards its support; and, if the roman catholic congregation shall come to a determination to build a chapel at Richmond, to pay \$3000 towards its accomplishment; and he devises a lot in Richmond, to four trustees in fee, upon trust to permit all and every person belonging to the roman catholic church, as members thereof, or professing that religion, and residing in Richmond at the time of his death, to build a church on the lot, for the use of themselves and all others of that religion who may hereafter reside in Richmond: Upon information filed by the attorney general, in chancery, to enforce the charitable bequests and devise, **HOLD**, that the bequests and devise are uncertain as to the beneficiaries, and therefore void.

***Charitable Trusts—Validity.**—The rule laid down in the principal case in regard to vague and indefinite charities (which is the first and leading case on this subject) is approved in *Seaburn v. Seaburn*, 15 Gratt. 425, where it is said that the English doctrine in regard to indefinite charities does not prevail in this state; it was founded mainly upon the statute of 43 Elizabeth, called the statute of charitable uses which if it ever was in force here, was repealed by the general repealing act of 1792.

The principal case is also cited at pp. 426, 430, 433. To the same effect, see, citing the principal case, *Roy v. Rowzie*, 25 Gratt. 608.

In *Hill v. Bowman*, 7 Leigh 657, **TUCKER, P.**, says, it is agreed on all hands that the words "any other person or persons who may be in distress," are too vague and uncertain, and that the declaration of trust as to such persons is altogether inoperative and void, citing *Gallego v. Attorney General*, 3 Leigh 450. To the same effect, see, citing the principal case, *Brooke v. Shacklett*, 13 Gratt. 310; *Com. v. Levy*, 23 Gratt. 40.

In *Stonestreet v. Doyle*, 75 Va. 364, it is held that, a devise of land to certain persons as trustees to build a school house for the purpose of a free school, the testator not contemplating that a charter shall be obtained for it, is null and void at law on the grounds of the uncertainty of the beneficiaries intended, citing *Gallego v. Attorney General*, 3 Leigh 450. To the same effect, the principal case is cited in *foot-note* to *Kinnaird v. Miller*, 25 Gratt. 107; *Kelly v. Love*, 20 Gratt. 130. And in *Literary Fund v. Dawson*, 1 Rob. 418, it is said the seminaries of learning which the testator sought to endow by the provisions of the 16th clause of his will were not in existence and could only be created by an act of incorporation, therefore a devise to or for them was inoperative and void upon the principles decided by the supreme court of the United States in *Baptist Association v. Hart*, 4 Wheat. 1, and by this court in *Gallego v. Attorney General*, 3 Leigh 450. See *Literary Fund v. Dawson*, 10 Leigh 147, and *note*. But a devise of a charitable trust to a corporation thereafter to be created, may be enforced as an executory devise. *Literary Fund v. Dawson*, 10 Leigh 147; *Kinnaird v. Miller*, 25 Gratt. 107; *Stonestreet v. Doyle*, 75 Va. 364.

And a bequest to a corporation capable to take is, and always was, valid as a charitable gift. *Wilson v. Perry*, 29 W. Va. 188, 1 S. E. Rep. 316, citing *Gallego v. Attorney General*, 3 Leigh 450.

In *Brooke v. Shacklett*, 13 Gratt. 309, 318, the principal case is cited as holding that the courts of

Same—Statute of 43 Elizabeth—Repeal of.—The english statute of charitable uses (43 Eliz.) having been repealed in Virginia, the courts of chancery have no jurisdiction to decree charities, where the objects are indefinite and uncertain.

Wills—Case at Bar.—Testator, having by his will, bequeathed legacies to amount of \$60,000, directs, the whole residue of his estate, real and personal, shall be sold by his ex'ors, and out of the proceeds of such residue, he bequeaths 26 pecuniary legacies to 26 legatees, amounting to \$114,000; and he charges on the same funds, such other legacies as he shall bequeath by any codicil; and gives the residue of the fund to residuary legatees; then, by codicils, he bequeaths other pecuniary legacies to amount of \$47,550; as to one of the legatees mentioned in the will, he directs the legacy "to be paid as soon as possible, knowing the legatee is in need," and as to another, that it be paid, "if possible as soon as it may be convenient for the legatee to receive it;" by one codicil he "leaves it to the judgment of his ex'ors to begin paying the legacies to those legatees they "may think most in need;" and by another codicil, "he

desires his ex'ors to use their best judgment in making sales of his real estate (on which the legacies are charged) without hurrying the sales, which might cause sacrifices, and be to the detriment of his residuary legatees, he thinking the

chancery have no jurisdiction to enforce devises and bequests to religious societies and congregations. To the same effect, the principal case is cited in *Carskadon v. Torreyson*, 17 W. Va. 83. But in *Protestant Episcopal E. Soc. v. Churchman*, 80 Va. 763, it is said, no decision in this state has gone to the unreasonable extent of holding that a charity for religious uses is for that reason void; even *Gallego v. Attorney General*, 3 Leigh 450, stops far short of deciding that. An examination of all the Virginia cases will show that whenever a charitable trust, though for religious uses, has been declared void, it has not been because religious in its character, but because it was too indefinite to be executed by the courts.

And in *Protestant Episcopal E. Soc. v. Churchman*, 80 Va. 718, the principal case is discussed on pp. 767, 769, 774, 776, 777, 780, and overruled, and the court approving the decision in *Vidal v. Girard*, 2 How. 127, holds that, at common law, courts of chancery had jurisdiction to enforce bequests for charitable uses, and the statute of 43 Elizabeth did not confer such jurisdiction, but only created an auxiliary remedy. Such statute was local, and never enforced here, but if it was general in its operation in some respects, it was not repealed by the act of 1792, but in those respects it was preserved by the saving clause of that act. In any event ch. 77, Code of 1873, clearly validates and makes enforceable all gifts for such purposes, subject to certain restrictions therein contained. Also, in *Trustees v. Guthrie*, 86 Va. 126, 10 S. E. Rep. 318, the principal case is discussed at pp. 144, 145, 146, 147, 148, 149, 150, 151, 152, and overruled, and the *Churchman* case followed. But in *Fifield v. Van Wycke*, 3 Va. Law Reg. 209, 94 Va. 657, the two preceding cases are overruled and *Gallego v. Attorney General* followed. In this case (*Fifield v. Van Wycke*) it is said, so much of the opinions in *Episcopal Education Soc. v. Churchman*, and *Trustee v. Guthrie*, as discussed the jurisdiction of courts of chancery over charities at common law, how far, if at all, 43 Elizabeth was in force in this state, and the decision of *Gallego v. Attorney General*, and the cases which followed it are recognized, and reiterated the principles of that case as to indefinite charities, except so far as they have been changed by the legislature, were wholly unnecessary to the decisions of those cases, and therefore must be regarded as mere *obiter dicta* and not binding upon the court, which is unwilling to hold that a line of decisions running back over a period of more than fifty years was thus overturned. If further changes are necessary or desirable upon the subject, the legislature, and not the courts, should make them.

In West Virginia the rule laid down in the principal case and those cases which follow it has been followed as will be seen from *Bible Soc. v. Pendleton*, 7 W. Va. 87, where it is held that, these indefinite charities, however it may be in other states, have in Virginia been held invalid at common law and since the repeal of the statute of 43 Elizabeth been held incapable of execution. The want of clearly recognized grantees or beneficiaries constitutes the indefinite character of these charities and renders them void at common law. This doctrine is clearly set forth by **JUDGE TUCKER** in *Gallego v. Attorney General*, 3 Leigh 450. To the same effect the principal case is cited in *Knox v. Knox*, 9 W. Va. 120, 142, 144, 145, 147, 149; *Carskadon v. Torreyson*, 17 W.

time unfavorable:" owing to depreciation of the property, the fund proves inadequate to pay the amount of the legacies charged thereon, without any fault of the ex'ors; the ex'ors, before any deficiency of the fund was apprehended, paid some of the legatees, whom they thought most in need, the whole amount of their legacies: **Held.**

1. The legacies bequeathed by the codicils stand on the same foot with those bequeathed by the will:

2. **Legacies—Abatement.**—All the legacies shall abate in proportion:

3. **Legacies—Unpaid—To Whom They May Look for Payment.**—The unpaid legatees have a right to look to the ex'ors for their rateable proportions of the fund, and are not bound to have recourse to the legatees who have been fully paid, to compel them to refund the excess by them received above their just proportions; nor.

4. **Same—Same—Right to Call on Paid Legatee to Refund.**—The ex'ors being quite solvent, have the unpaid legatees any right to call upon the other legatees to refund:

5. **Executors—Right to Make Fully Paid Legatees Refund—Quære.**—Whether the ex'ors have a right to require the legatees whose legacies they have fully paid, to refund? It seems, they have: per TUCKER, P.

Joseph Gallego, late of the city of Richmond, died in July 1818, seized and possessed of a large estate, real and personal: and by his last will and testament,—after bequeathing 50,000 dollars to his executors, John Richard and Peter J. Chevallie, in trust for certain relations in Spain; and devising and bequeathing to P. J. Chevallie a merchant manufacturing mill with its appurtenances, a lot in Richmond, all his slaves not otherwise disposed of, and 15,000 dollars, and after emancipating his slaves Rachel, Elsey and her daughter Cora, Nancy and her three children, and David, James, Aaron and Joe, and bequeathing to Rachel 2000 dollars, to Elsey, Nancy, Cora and Mary, 500 dollars, each, and to David, James, Aaron and Joe, 150 dollars each,—

Va. 84, 85, 107; Wilson v. Perry, 29 W. Va. 169, 1 S. E. Rep. 316, 317, 318, 320, 321, 322; Wilmoth v. Wilmoth, 24 W. Va. 456, 1 S. E. Rep. 734; Pack v. Shanklin, 43 W. Va. 314, 317, 318, 27 S. E. Rep. 364, 365.

In Morris v. Morris, 48 W. Va. 430, 37 S. E. Rep. 573, it is said, "I know that in the creation of a trust by will or deed the beneficiary must be a definite, certain, ascertainable person, natural or corporate; else the trust is not enforceable. Brown v. Caldwell, 23 W. Va. 187, 193; Association v. Hart, 4 Wheat. 1, 4 L. Ed. 499, cited in Pack v. Shanklin, 43 W. Va. 304, 27 S. E. Rep. 369; Gallego's Ex'rs v. Attorney General, 3 Leigh 455; Carskadon v. Torreyson, 17 W. Va. 43. But it does seem to me, as this bequest is not to the congregation, but to trustees appointed by the will, and the pastor of the Methodist Protestant Church at Morgantown is a church officer placed in charge and pastorate of a definite church by the legitimate authority of that church, such trustees could have no difficulty in ascertaining the beneficiary, because he is no other person than the incumbent of the position of pastor of that church." See 3 Va. Law Reg. 537.

Same—How Enforced.—To the point that the attorney general or one of the trustees may exhibit a bill asking the aid of a court of equity to compel the due execution of a trust, whether charitable or otherwise, the principal case is cited in Clark v. Oliver, 91 Va. 427, 22 S. E. Rep. 175. See monographic note on "Charities" appended to Kelly v. Love, 30 Gratt. 124.

Churches—Incorporation.—In Powell v. Dawson, 45 W. Va. 783, 32 S. E. Rep. 216, the principal case is cited to the point that the incorporation of churches is contrary to the constitution of Virginia.

See generally, monographic note on "Church Property" appended to Brooke v. Shacklett, 13 Gratt. 301.

Legatees—Overpayment—Refunding.—Of this question the principal case is cited in Davis v. Newman, 2 Rob. 666, 669, and note; Hurst v. Morgan, 81 W. Va. 531, 8 S. E. Rep. 291; Willocks v. Phillips, 29 Fed. Cas. 1201; foot-note to Burnley v. Lambert, 1 Wash. 308. See monographic notes on "Legacies and Devises" appended to Early v. Early, Gilim. 124; "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

he devised and bequeathed all the residue of his estate, real and personal, not specifically disposed of by the will or any codicil thereto (this residue comprised far the greater part of the testator's estate, and consisted, chiefly, of real property in the city of Richmond) to his executors

Richard and Chevallie, upon trust to take possession of the moneys, to collect the debts due him, to sell the visible property of all kinds, and to apply the whole, as follows: To pay funeral expenses, and to pay themselves a commission of 6 per cent. for their trouble; and then to pay, 1. to Mrs. C. Currie, 2. to Mrs. M. A. Lambert, 3. to Mrs. J. M'Kenzie, 4. to Mrs. S. Gray, 5. to Mrs. C. Thornton, and 6. to Mrs. H. Reubell, a legacy of 8000 dollars, each; 7. to Mrs. S. Hancock, 8. to Miss J. Pascault, 9. to Miss E. E. Robert, 10. to Miss E. Lindaay, 11. to Miss Susan Duval, 12. to Mrs. M. C. Gilliat, and 13. to M. B. Poitiaux, 4000 dollars, each; 14. to Miss E. O'Donal, and 15. to Andrew Sweeny, 1000 dollars, each; 16. to J. R. G. Scott, 3000 dollars; 17. to Mrs. Fisher, 5000 dollars, "to be paid as soon as possible knowing she is in need;" 18. to Miss E. Gibbon, 19. to Miss M. Gibbon, 20. to Miss M. Pickett, 21. to Miss E. Pickett, 22. to Miss V. Pickett, 23. to Miss R. Dixon, and 24. to W. M'Kenzie for Rosalie Poe, 2000 dollars, each; 25. to the children of W. Conyers, 4000 dollars; 26. to the testator's brother Francisco, 10,000 dollars, to be paid him, "if possible, as soon as it may be convenient for him to receive the amount;" 27. to pay any legacies which should by any codicil be directed to be paid out of the residuary estate; and 28. to divide the residuum into six equal parts, and to pay one sixth part thereof to each of the five children (naming them) of the testator's sister Antonia, and the other sixth part to the two first born children of his brother Emanuel's daughter. And he added, "I am sorry it has not been in my power to be as generous to my friends mentioned in my will, as I should have wished, and to shew my regard and good wishes towards some others, as I had done in some former wills; but the distressed situation into which my relations in Spain have fallen of late, and a probability of a fall in the price of property, which will of course reduce the amount that my estate would have produced, compels me to refrain from doing more than what I have done, at least for the present—and should circumstances alter, and become more favourable, I shall not forget them."

453 *The will was dated the 13th May 1818, and the testator added eleven codicils to it, the last of which was dated the 28th June following.

1. By the first, he directed his executors, out of the general residue of his estate (on which the twenty-six pecuniary legacies bequeathed by the will, to Mrs. Currie and others, were charged), to pay his nephew Henry Grivegne, 10,000 dollars; which should not affect his rights as one of the residuary legatees. (This legatee was one of the children of the testator's sister Antonia.) And he added, "With respect to the legacies left by my foregoing will, or

part of my residuary estate, I leave to the judgment of my executors, to begin paying those that they may think are more in need."

2. By the second codicil, he bequeathed (out of the same general residue of his estate) to P. J. Chevallie, 5000 dollars—to Mrs. Currie, Mrs. Lambert, Mrs. M'Kenzie, Mrs. Gray, Mrs. Thornton, Mrs. Reubell, and J. R. G. Scott, 2000 dollars, each—and Mrs. Hancock, Miss Pascault, Miss Robert, Miss Lindsay, Miss Duval, Mrs. Gilliat, and M. B. Poitiaux, 1000 dollars, each,—in addition to the legacies bequeathed to those legatees, respectively, by the will. He bequeathed, to Miss F. and Miss A. Leiper, 2000 dollars, each; and to J. Royle, 1500 dollars. And he directed his executors, "if the roman catholic chapel should be continued at the time of his death, to pay 1000 dollars towards its support; and if the roman catholic congregation should come to the determination to build a chapel in Richmond, to pay 3000 dollars towards its accomplishment."

3. By the third codicil, he desired his executors to pay Paul 50 dollars.

4. The fourth was in these words: "I desire my executors to use their best judgment in making the sales of my real estate, without hurrying the sales, which might create sacrifices, and be to the detriment of my residuary legatees—I think the time is unfavourable."

454 *5. By the fifth codicil, he bequeathed to his freed-woman Rachel, in addition to what he had given her by his will, 50 dollars per annum.

6. By the eighth, he emancipated his slave Jack, and bequeathed to him an annuity of 150 dollars for life.

7. By the tenth, he directed his executors to lay by 2000 dollars, to be distributed among needy, poor and respectable widows.

8. The eleventh codicil was in these words: "I direct that my lot of land in Richmond, number 630, shall be divided by an east and west line into two equal moieties; and I give and devise one of the said moieties to J. Richard, P. J. Chevallie, M. B. Poitiaux, and A. Lemosy, their heirs and assigns forever, (directing that they shall have choice of the said two moieties of the said lot of land); upon trust to permit all and every person and persons belonging to the roman catholic church as members thereof, or professing the roman catholic religion, and residing in the said city of Richmond at the time of my death, to build a church on the said moiety of the said lot of land, for the use of themselves, and of every other person and persons of that religion who may hereafter reside in the said city of Richmond."

The sixth, seventh and ninth codicils were specific bequests of wines, plate, furniture &c. to the testator's friends.

The preferred pecuniary legacies, bequeathed by the will, amounted to 69,600 dollars. The pecuniary legacies bequeathed by the will, and charged on the general residue of the estate, amounted to 114,000 dollars; and the legacies bequeathed by the codicils, charged on the same fund, amounted to 47,550 dollars, besides the annuities of 50 dollars bequeathed to the freed-woman Rachel, and of 150 dollars be-

queathed to the freed-man Jack: so that the amount of the legacies charged on the general residue, exceeded 161,550 dollars.

455 *The attorney general exhibited a bill and information, against the executors, Richard and Chevallie, in the superiour court of chancery of Richmond, setting forth the bequests, contained in the second codicil, of 1000 dollars to the roman catholic chapel existing at the testator's death, and of 3000 dollars to aid the roman catholic congregation to build a chapel in Richmond—the devise contained in the eleventh codicil, of a moiety of the lot number 630, to Richard, Chevallie, Poitiaux and Lemosy, to hold in trust for the roman catholics residing in Richmond, to build a church on—and the bequest contained in the tenth codicil directing the executors to lay by 2000 dollars, to be distributed among needy and respectable widows: that the roman catholic congregation had determined to build a chapel in Richmond; and that he (the attorney general) had been applied to and requested by the president and trustees appointed by the roman catholic congregation in Richmond, to assert their claims to the benefit of the bequests and devise to their church: and praying a decree, declaring and enforcing the execution of the trust of the moiety of the lot number 630; directing the executors to pay the two legacies of 1000 and 3000 dollars to the president and trustees of the roman catholic congregation, or to such other trustees as the court should appoint, to be applied to the charitable uses to which the money was destined by the testator; directing the executors to pay to trustees to be appointed by the court, the 2000 dollars bequeathed to be distributed among needy and respectable widows; and directing the administration of this charity, according to the benevolent intentions of the testator,—and general relief.

And William Lambert and Mary Anne his wife, James Currie and Caroline his wife, M. W. Hancock and Sophia his wife, and Elizabeth Gibbon, also exhibited a bill against the executors, in the same court; praying that the executors should be compelled to render accounts of their testator's estate, and of their administration thereof; and a decree for the legacies bequeathed to Mrs. Lambert, Mrs. Currie, Mrs. Hancock and Miss E. Gibbon, respectively.

456 *The executors, in their answers to these bills, submitted the questions to the court, whether the roman catholic congregation, or the president and trustees it had appointed, or the attorney general for them, were entitled to demand and receive the legacies they claimed, and the execution of the trust as to the moiety of the lot number 630? and whether the bequest of 2000 dollars to be distributed among needy and respectable widows, could be enforced, and if so, to whom it should be paid, and how applied and administered? And they said, that they had paid such of the testator's debts as had been made known to them: and that, soon after the testator's death, believing (erroneously as they now feared) that his estate would

be more than sufficient to satisfy not only all the preferred legacies amounting to 69,600 dollars, but all the pecuniary legacies charged by the will and codicils on the general residue, amounting in all to above 161,550 dollars,—they had proceeded to pay some of the legatees of the second class, the whole amount of their respective legacies, under circumstances that rendered it proper, in their opinion, that they should do so; but they now found, that the proceeds of the estate would fall far short of the amount of the pecuniary legacies of the second class; and they insisted, that the legatees whose legacies they had paid off in full, should be made parties defendants, in order that they might respectively be compelled to refund to the unsatisfied legatees, so much as had been paid them over and above their just rateable dividend. That their testator having cautioned them to use their best judgment in making sales of his real estate, without hurrying the sales, which might lead to sacrifices, and be detrimental to his residuary legatees, and real property having begun to depreciate about the time of his death (as he was aware) and still continuing to depreciate, they had forbore to make sale of the greater part of the property at the low prices of the times, hoping a more favourable period would arrive, and had applied the rents and profits as they accrued, to debts and legacies.

And that they still thought, that, if sales of the *subject should be precipitated, it would result in great loss to all the legatees.

In the progress of these suits, the executors, under orders of the court, rendered accounts, from time to time, before one of its commissioners, of all their transactions, and of the funds that came to their hands; and they proceeded, with all convenient despatch, to make sales of the real estate, the proceeds of which, as they were collected, were brought to the credit of the estate; and the accounts were reported to the court. It turned out, in the event, that the whole proceeds of the estate, after discharging the amount of the preferred legacies (69,600 dollars) sufficed to pay the legatees of the second class (those whose legacies were charged on the general residue by the will and codicil, amounting to 161,550 dollars) only a rateable dividend of fifty three cents eight mills in the dollar. It appeared, that the executors had paid to the following legatees, the full amount of their respective legacies; namely, Mrs. Fisher, Miss M. Gibbon, Miss Robert, W. M'Kenzie for Rosalie Poe, Miss Duval, Miss Pascault, Mrs. Reubell, and A. Sweeny. But the commissioner, without regard to the payments to these legatees of the full amount of their legacies, charged the executors, in account with the unsatisfied legatees, respectively, with the rateable dividends of the whole fund, 53 cents 8 mills in the dollar; placing the legacies to the charities on the same foot with the rest, that is, making them abate in proportion, and allowing them their rateable dividends; and ranking all the pecuniary legacies bequeathed by the codicils, with the second class of pecuniary legacies bequeathed by the will.

The executors excepted to the report, 1. Because the commissioner had not given them credit for the full amount of their payments to Mrs. Fisher, Miss M. Gibbon, Miss Robert, Miss Poe, Miss Duval, Miss Pascault, Mrs. Reubell, and A. Sweeny; since, by the express terms of the will, the legacy to Mrs. Fisher was to be paid immediately, and it was the duty of the 458 executors to pay it, so soon as *funds sufficient came to their hands; as to the payment to Mrs. Reubell, it was effected by the application thereto of a debt due the estate, so doubtful, that perhaps, it could no otherwise have been made an available fund, and, in this instance, the executors took a refunding bond; and as to the others, the will gave the executors authority to judge of priority among the legatees; and the deficiency of the estate, which, at the time these payments were made, was thought equal to the payment of all the pecuniary legacies, having arisen from causes not foreseen, without any fault in the executors, who were instructed by the will not to hurry the sales, they ought not to bear the loss which the other legatees have sustained, but these should have recourse against the other legatees whose legacies had been satisfied in full, to compel them to refund what they had received over and above their just proportion. And 2. Because the legacies bequeathed by the codicils, were ranked with the legacies of the second class bequeathed by the will; whereas, they insisted those bequeathed by the will, were entitled to preference, and those given by the codicils could only rank on the surplus; for the legacies bequeathed by the codicils, were given by the testator, only because he supposed there would be a surplus after satisfying those given by the will, sufficient to pay them.

It was agreed, on all hands, that the testator, at the time of making his will and the codicils to it, supposed, and had good reason to suppose, that the general residue of his estate, upon which he charged the pecuniary legacies of the second class bequeathed by the will and codicils, was much more than sufficient to pay all those legacies, and that a large surplus would be left for his nephews and nieces, the residuary legatees; that, though the real estate in Richmond, had begun to depreciate before the testator's death, and afterwards continued to depreciate, yet the executors, when they paid Mrs. Fisher and the other seven legatees their legacies in full, supposed, and had good reason to suppose, that the fund would prove more than equal

459 to the payment *of all the legacies: that the depreciation, however, was greater, and continued longer, than any body anticipated, or could have foreseen: that the executors, in forbearing as they did, to make early sales of the real property, and waiting for a change in the state of the market, acted with perfect good faith, and though it turned out unfortunately, not imprudently; in short, that their conduct throughout, was faithful, just and blameless; and that the executors were entirely solvent, and able to make the amounts due, according to the commissioner's report, to all the legatees.

The chancellor declared, 1. That the bequests to the charities were good, but that they should abate in proportion, like the other pecuniary legacies of the second class; and that the devise of the moiety of the lot number 630, to trustees for the use of the roman catholic congregation, was also a good devise. 2. That the twenty-six pecuniary legacies of the second class, bequeathed by the will, and all the pecuniary legacies bequeathed by the codicils, stood on the same foot, and ranked equally on the fund on which they were charged, and, in the case which had occurred, of a deficiency in the fund, should all abate proportionably. 3. That there was nothing in the will to justify the executors in paying the whole of any of these legacies to any of the legatees, to the prejudice of the others. And 4. that, the fund having eventually proved insufficient to pay all, the unpaid legatees were entitled to look to the executors themselves, for their rateable proportions of the fund, and could not be turned round to demand of the satisfied legatees, that they should refund the excess they had received above their just proportion. And made an interlocutory decree accordingly. The executors appealed to this court.

The cause was argued here, by Stanard and Johnson, for the executors, by Daniel and Nicholas for the charities, and by Taylor and Leigh for the unsatisfied legatees.

The points debated, were—

460 *1. Whether the bequests of 1000 dollars for the support of the roman catholic chapel existing at the testator's death, of 3000 dollars to aid in building a chapel for the roman catholic congregation in Richmond, and of 2000 dollars to be distributed among needy and respectable widows, or either of them, were good and valid bequests? and whether the devise of the moiety of the lot number 630 to trustees for the use of the roman catholics, as a scite for a church, was a good devise?

The counsel for the executors, and for the individual legatees of the second class, cited and relied on *Baptist Association v. Hart's ex'ors*, 4 Wheat. 1, and the reasoning of chief justice Marshall there.

The counsel for the charities, cited *Beatty & al. v. Kurtz & al.*, 2 Peters, 566; *Ingليس v. The Trustees of Sailor's snug harbour*, 3 Peters, 99; *Story's opinion in Baptist Association v. Hart's ex'ors*, Id. append. 481; *Attorney General v. Matthews*, 2 Lev. 167; *Same v. Syderfen*, 1 Vern. 224; *Ld. Falkland v. Bertie*, 2 Vern. 342; *Rex v. Portington*, 1 Salk. 162; *Eyre v. Shaftesbury*, 2 P. Wms. 119; *White v. White*, 1 Bro. C. C. 12, 15; *Moggridge v. Thackwell*, 7 Ves. 35; *Cary v. Abbot*, Id. 490; *Attorney General v. Fowler*, 15 Ves. 85; *Attorney General v. Price*, 17 Ves. 371; *Mills v. Palmer*, 1 Meriv. 54.

II. Whether the legacies bequeathed by the will were preferable to those bequeathed by the codicil? if not, Whether the executors were warranted by the will, in paying any of the pecuniary legacies of the second class bequeathed by the will and codicils, in preference to the others? Whether they were not warranted at least in paying the legacy bequeathed to Mrs. Fisher, in full, as

soon as sufficient funds came to their hands? Whether, under all the circumstances of the case, the unsatisfied legatees could have recourse against those whose legacies had been paid in full, to compel them to refund the excess paid them above their just proportion? And if they could, whether they ought not to have recourse and exhaust their remedy against 461 them, before they *could call upon the innocent executors to make good the loss?

The authorities cited for the executors, were *Lewin v. Lewin*, 2 Ves. sr. 415; *Attorney General v. Robins*, 2 P. Wms. 23; *Crofts v. Lindsey*, 11 Vin. Abr. Executors, B. c. pl. 11, p. 430; *Holt v. Holt*, Id. pl. 16; 1 Chan. Ca. 190; *Miller's ex'or v. Rice*, 1 Rand. 438.

On the other side were cited 1 *Roper* on Leg. ch. 9; *Tilsy v. Throckmorton*, 2 Cn. Ca. 132; *Coppin v. Coppin*, 2 P. Wms. 292-6; *Orr v. Kaimes*, 2 Ves. sen. 194; *Blower v. Morret*, Id. 420; *Walcott v. Hall*, 2 Bro. C. C. 305; *Noel v. Robinson*, 1 Vern. 92, 460; *Newman v. Barton*, 2 Vern. 205; *Keylinge's case*, 1 Eq. ca. abr. 239, pl. 25; *Brisbane v. Dacres*, 5 Taunt. 214; *Skyring v. Greenwood*, 4 Barn. & Cres. 281; 1 Com. Law Rep. 43, 6; 10 Id. 335, 8, same cases; *Lawraon v. Davenport*, 2 Call, 95; *Ruth & al. v. Owens*, 2 Rand. 507.

CARR, J. This case involves several very important questions, which I shall consider in the order they were discussed at the bar.

First, then, as to the charities. The attorney general filed an information and bill, to have them applied to the objects for which they were bequeathed, and to enforce the execution of the trusts in respect to them; and the chancellor considering them good and valid, decreed them. It was contended in the argument that this decree was erroneous, because the devise and bequests were vague and indefinite, and therefore void. Let us examine this. The pecuniary legacies of 4000 dollars are, in effect, given to the roman catholic congregation, but for the building and support of a chapel; and the ground is given to trustees to permit the roman catholics to build a church on, for the use of themselves, and all persons of that religion, residing in Richmond. The bare statement seems sufficient to shew, that under the general rule, as applicable to ordinary legacies, these would be void. Who are the 462 beneficiaries? the *roman catholic congregation residing in Richmond. And who are they? Suppose you name them to-day: are those the same persons who constituted the congregation yesterday? Or who will constitute it to-morrow? Will none remove from, or come to Richmond, to reside? Will none be converted to or from the roman catholic religion? For it is to the roman catholic congregation for the time being, that the legacies are given. This however is a point which need not be pressed; for it was not pretended, that they could be supported, as legacies to individual persons. But it was strongly insisted, that as charitable legacies they were entitled to the aid and protection of a court of equity; and the practice of the english courts, in

similar cases, was referred to in proof of the position. The course of decisions in England was admitted on the other side, but it was contended, that they rested intirely on the statute of charitable uses, 43 Eliz. and did not at all belong to the ordinary powers of a court of equity. This was the only serious question. I certainly shall not discuss it; for I find 'this completely done to my hand, by chief justice Marshall, in the case of The Baptist Association v. Hart's ex'ors. The cases cited and examined, and the reasons given by him, prove, conclusively to my mind, that in England, charitable bequests, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, cannot be established by a court of equity, either exercising its ordinary jurisdiction, or enforcing the prerogative of the king as *parens patriæ*, independently of the statute 43 Elizabeth; and as that statute, if ever in force here, was repealed in 1792, I conclude that charitable bequests stand on the same footing with us, as all others, and will alike be sustained, or rejected, by courts of equity. I think the bill of the attorney general must be dismissed.

We come now to the other questions arising between some of the legatees and the executors. There can be no doubt; that the specific legacies are first to be delivered. 463 *Next in order, are the legacies of 50,000 dollars to the testator's spanish relations, 15,000 dollars to P. J. Chevallie, and the legacies given to the slaves emancipated by the will. The legacies of this class amount to 69,600 dollars. The testator, then, after directing all the residue of his estate to be converted into money, directs his executors to pay, out of it, his funeral expenses, and their own commission; then, twenty six legacies to as many legatees, amounting to 114,000 dollars, and all legacies which he should bequeath by codicil; and lastly, he creates another residuum, which he bequeaths to residuary legatees. Then come eleven codicils, giving pecuniary legacies to an amount exceeding 47,550 dollars. I think the twenty six legacies bequeathed by the will, out of the first general residue, and the pecuniary legacies bequeathed by the codicils, stand all on the same footing. From the passage directing that Mrs. Fisher should be paid her legacy as soon as possible, knowing she was in need, and another in the first codicil, saying that as to the payment of the legacies left by his will, he directs his executors to begin to pay those that they think most in need, and a similar direction as to his brother Francisco's legacy, it was contended, that the testator meant to place Mrs. Fisher, and those who should be thought by the executors most needy, on higher ground than the other legatees, and to authorize the executors to pay them in preference to the others, in case of a deficiency: and this was said to be rendered more clear, by that clause in the fourth codicil, by which he "desires his executors to use their best judgment in making the sales of his real estate, and not to hurry them, as it might create sacrifices." But I do not think that the

testator ever intended such preference, or dreamed of such deficiency. He believed that the fund would be abundant for all the legacies; and only feared, that to hurry the sales at an unfavourable time might injure his spanish relations, who were to have the residuum. He wished this residuum as large as possible, and therefore cautioned the executors; but he never thought about exclusive

464 *preferences among the second class of legatees. The executors however have gone on to pay some of the legatees intirely, others partially; and it is now discovered, that the fund will fall far short of paying all the claims upon it. In this state of things, the unsatisfied legatees insist, that the executors are liable to them, for their fair and equal proportion, of the whole fund; while the executors contend, that they must be credited by the full amount of all legacies, or parts of legacies paid, leaving the unpaid legatees to make those who have been overpaid, account to them for the excess. I have the fullest confidence, that the executors have proceeded honestly in this business; but, assuredly, most incautiously. They had the fund in their hands; the will for their guide; and the best counsel at their call: they could have secured themselves, either by paying *pari passu*, or by taking bonds to refund, or by bringing the whole affair under the control of the chancellor. The legatees could do nothing to prevent improper disbursements: their claim was against the executors alone; and they have made it by suit. Would it not now be most cruel injustice to tell them, the executors, to be sure, ought to have paid you your proportion of the fund; but they have, by mistake, paid it to other legatees; and your only remedy, now, is to seek them over the face of the earth, and call them to account? I can never agree to tell them so. I think it but simple justice to give them a decree against the executors for their fair proportion of the whole fund, and let the executors if they can (a question which I pass by, as it is not before us) recover from the over-paid legatees. It was also contended, that the defect of assets resulting from the general and rapid fall in the value of property, presents a case, where equity will relieve executors from the effects of what the law would call a *devastavit*: and the cases from 11 Vin. abr. 430, and 1 Chan. Ca. 190, are cited. In one, the property was consumed by the great fire in London; in the other, it was taken away by the restoration: these were cases in which no vigilance or prudence of 465 the executor *could have protected him. But the case before us is different; safety was perfectly in the executors' power.

CABELL, J. I concur in the opinion just delivered, and in the decree which is to be entered; but, so far as it charges the executors, I own, with much reluctance. For I am quite sure, that they have acted with the utmost good faith, and that they were betrayed into the excess of payments to some of the legatees, over and above their just proportion, by a delusion as to the value of the subject on which the lega-

cies were charged, not peculiar to themselves, but as universal at the time, as it has proved to have been great.

TUCKER, P. It cannot be denied, that the principal question in this case, is one of the deepest interest and importance. It is worthy of the diligent research and great ability which have been devoted to the discussion of it, and will justify the enlarged view which may be found necessary in the decision: I mean the question as to the charities. *

It is contended, on the one hand, that these several bequests are void and ineffectual, for uncertainty as to the beneficiaries who are to take under them: and, on the other, that they are good as bequests to charitable purposes, which the law will support, and which the court of chancery, upon the general principles of its equitable jurisdiction, will enforce at the instance of the attorney general.

There is no principle supposed to be more perfectly settled in reference to conveyances, than that every deed must have sufficient certainty as to the grantee who is to take under it. If there be such uncertainty as to the grantee, that it cannot be known distinctly who is to take by the grant, it is ipso facto void, for that uncertainty. This, it would seem to me, was not merely a principle of common law, but the dictate of common sense; and hence this defect is equally fatal, whoever may be the grantor; for it is a defect, not of power in him, but growing out of the utter impossibility of

effectuating the grant, by reason of
466 the undefined *character of the grantee. The absurdity of such a grant cannot be better exposed, than by an attention to its operation in this very case, if it could be supposed to be valid. It is obvious, that the bequest here, though for building a church, is a bequest to the roman catholic congregation in Richmond; and it is equally obvious that the testator designed no individual benefit to the members of that congregation: yet, as the society or congregation is not incorporated, it may well be asked, who are to be regarded as the beneficiaries entitled to the advantage of this bequest? Who can present himself as a claimant of this aid designed for the roman catholic religion? If membership of the congregation is to be the test of right, then the title will be in a continual state of flux. What belongs to A. today, will by his removal from Richmond, or apostasy from the church, cease to be his tomorrow; whereas B. by removal to the city, or conversion to the church, might, by the converse of the principle, acquire tomorrow, a right which he has not today. Moreover, who would be the legally constituted triers of the fact of conversion or apostasy, whereby one man is to gain, or another is to lose, the interest in the property? Who, indeed, constitute the society? Whom does the law recognize, or the testator designate, as having the power to decide this essential question? Are all who have been baptized in the church, within the operation of the will? or those only who are received as partakers of its most solemn ordinances? These, and a multitude of like difficulties, present themselves to the

notion of any grant or conveyance to a religious society, or to trustees for their use. For, in the eye of the law, the intervention of a trustee does not remove a single difficulty. There is not more necessity for a properly defined grantee, in a deed, than for a cestui que trust capable of taking, and so defined and pointed out, that the trust will not be void for uncertainty. In short, there cannot be a trust without a cestui que trust; and if it cannot be ascertained who the cestui que trust is, it is the same thing as if there was none.

467 *These principles, it is confidently believed, are the general principles of the common law upon this subject. If there are exceptions to these principles, those exceptions may without doubt be shewn. A diligent search has led me to the conviction, that there was no case at common law, in which a bequest or a trust of this indefinite character, could be supported; and the learned counsel on both sides, have acknowledged, that they have been unable to discover any case anterior to the statute 43 Elizabeth, in which the validity of such bequests or trusts has been distinctly recognized by the courts. It ought, therefore, perhaps, to suffice to rest the argument here; since, if under the general principle the bequest would be void, it is incumbent upon those who claim to be protected by an exception, to establish that exception. Accordingly, it is contended, that gifts for charitable uses, furnish an exception: and when it is answered, that indefinite charities received their whole force and efficacy from the statute 43 Elizabeth, it is confidently replied, that charities existed, and were recognized by law, anterior to that statute; that the statute itself affords evidence of the fact; that it ought not to be regarded as an enabling statute, or as creative of an original power not before existing, but as affording new and additional facilities for the administration of charities of a particular description. It is, indeed, further contended, that, by the common law, the king, as *parens patriæ*, had the general superintendence of all charities, which he exercised by the keeper of his conscience the lord chancellor; that, whenever it was necessary, the attorney general, at the relation of some informant,* filed an information in the court of chancery, to have the charity established; that the exercise of this jurisdiction by that court, was by virtue of its general judicial functions, and of its extraordinary equitable jurisdiction, which has been transferred to the courts of equity in Virginia; that this authority,
468 *of the king, as *parens patriæ*, is inherent in all governments, and therefore vested in this; that it embraces the protection of infants, lunatics and idiots, and the execution of charities; and that this inherent authority is devolved upon the courts of chancery in Virginia, the nature of whose jurisdiction and powers are peculiarly adapted to its judicious and faithful exercise. In this general, and, I own, very imperfect view of the outlines

*There is, in fact, no relator in this case. This is always held essential in England, that there may be some one liable for costs. Note by the judge.

of the argument for the charities, it is sufficiently obvious that there are many grave and important questions involved. A hasty review of some of them, however, must suffice here.

That charitable gifts were known and recognized by the law anterior to the statute of Elizabeth, it is not necessary to deny. It is not doubted, that many charitable gifts were so known and recognized. Charitable gifts for meritorious purposes, not within the statutes of mortmain, were doubtless held good and enforced, where the beneficiary or grantee was a person, whether natural or artificial, capable to take. Thus, a bequest to a corporation capable to take, is and always was valid as a charitable gift. So, in England, a bequest to the church of such a parish, was a good bequest to the parson and his successors; because the parson is a corporation sole, capable to take. But it behoves those who contend for the existence of an exception to the general rule, which reprobates indefinite bequests, to shew, that indefinite charities as well as those where the beneficiary was certain and defined, were sustained anterior to the statute 43 Elizabeth. To do this, resort is had to the language of the statute itself. From that language I draw the opposite inference; the grounds of which I shall presently state. At present, I will remark, that various dicta have been quoted, in which very conflicting opinions have been expressed, as to the existence of recognized charities of this description, anterior to the statute of charitable uses. Among these dicta, stands, I think, pre-eminent, the opinion of chief justice Marshall, in the case of *The Baptist association v. Hart's ex'ors.* That opinion is 469 entitled to no less weight *than the great authorities of lord keeper Henley and lord Macclesfield, if we look to the intelligence of the source from which it flowed; and to much greater, when it is remarked, that their opinions were incidentally expressed, upon a matter of no consequence in the english tribunals, but vital to the question which was so ably investigated by the chief justice. No opinion can be more entitled to the respect and consideration of this court. It is not indeed authoritative, whether it was strictly upon the point on which that case ultimately turned, or not. And even though it were extrajudicial, yet it was so carefully weighed, and so cautiously made up, as to entitle it to much more consideration than many a decision hastily pronounced upon the very matter in question. I do not, however, consider it as extrajudicial. The question discussed fairly arose, and was properly decided, after having been laboriously examined; and the case is conclusive of this, so far as any decision of that tribunal can influence a decision here. The devise was not more indefinite than this devise; it was, like this, for religious purposes; and it was pronounced void for its uncertainty. I refer to it, therefore, as presenting a much stronger argument than any I can offer, in support of the position, that these indefinite bequests for charitable purposes, could only be sustained under the statute 43 Elizabeth. Let us, however, look

to the language of that statute ourselves, and see what inference is fairly to be deduced from it.

It recites, that "Whereas lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money, have been heretofore given, limited, appointed, and assigned, as well by the queen's most excellent majesty, and her most noble progenitors, as by sundry other well disposed persons; some for relief of aged, impotent and poor people; some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; some for repair of bridges, ports, havens, causeways, churches, sea banks, and highways; some *for education and preferment of orphans; some for or towards relief, stock or maintenance, for houses of correction; some for marriages of poor maids; some for supportation, aid and helps of young tradesmen, handicraftsmen, and persons decayed; and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants, concerning payments of fifteens, setting out of soldiers, and other taxes; which lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money, nevertheless, have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust and negligence, in those that should pay, deliver and employ the same; for redress and remedy whereof, Be it enacted" &c. It would seem, then, that previous to this statute, there had been various instances of charitable donations, which had not been carried into execution, by reason of the frauds, breaches of trust and negligence, of the trustees. And this being the evil, what was the remedy to be applied? That depended precisely upon the state of the law and jurisprudence of the country at the time. If the law had provided a remedy for the evil; if there was a tribunal open to the injured for their redress; if, as is clear, all beneficiaries whose interest was definite and certain, might enforce their own rights before the ordinary tribunals; and if, as is supposed, in the case of vague and uncertain charities, the king, as *parens patriæ*, was bound to interfere, through his attorney general, for their protection; then, the defect was not in the law, but in the execution of the law. Instead of passing a new law, constituting a new tribunal, to enforce what the ordinary tribunals were fully adequate to enforce, if such vague legacies were good at all, all that was necessary, was, to stimulate the diligence of the attorney general, and other officers of the crown, to enforce these charities, in the manner now pursued in the chancery of England. This must be particularly obvious in relation to the queen's own charities, which, like others, were negligently 471 and fraudulently administered. *To suppose that the queen's own charities would not have been enforced, if the doors of her own chancery were open to enforce such charities as these, would be, I think, a groundless conjecture. It is far more reasonable to conclude, that, as these vague

dispositions were certainly against the general principles of the common law, this new statute was enacted for the purpose of giving them validity, and enforcing them, by a scheme, clumsy enough, it must be admitted, and therefore affording strong evidence that the commodious remedy in equity was unknown, but yet obviously designed for that purpose, as I shall presently shew.

But though we cannot account for the statute of charitable uses, upon the supposition, that there was a remedy for indefinite charities, yet is the statute very easily explained upon the contrary supposition. The common law, whose system of rules was often technical and unbending, recognized the validity of no gift or bequest, where the beneficiary was not ascertained, and could not be ascertained by any thing upon the face of the instrument itself. Yet, in process of time, the impulses of charity, the spirit of superstition, a devoted zeal for the public interests, and the pride of adding one's name as patron to great public institutions, doubtless gave rise to many attempts to convey or settle estates to such purposes. The character of queen Elizabeth very naturally impelled her to build up and sustain these benevolent establishments of the well disposed, how uncongenial soever they might be to the rules of the common law. But this rule of the common law was founded on the intrinsic difficulty, that, as the grantee or beneficiary was uncertain, it was impossible that any person could present himself in a court of justice, upon the ordinary principles of the common law, with any claims to the execution of the charity in his behalf. This was the mischief. The remedy was, to create a commission whose duty it should be "to inquire, as well by the oaths of twelve lawful men as by all other lawful ways and means, of all such gifts, limitations, appointments &c. and of the abuses, 472 breaches of *trusts, negligences &c. in respect to them;" "and upon such inquiry, hearing and examination thereof, to set down [i. e. make] such orders, judgments and decrees, as that the said lands &c. may be duly and faithfully employed, to and for such of the charitable uses, and intents (before rehearsed) for which they were given." These commissioners published a general notice to the parish, calling upon all persons grieved to come forward with their complaints; and, under their very general powers, they heard the complaint of any person coming within the description of the beneficiaries however general; Duke, p. 10. They then issued a writ to the sheriff, commanding him to summon a jury, who made an inquest finding the facts. The party interested was summoned and heard; and then the commissioners decreed. They had power to remedy the defects of assurances, and where they were uncertain, to give them certainty, as far as possible; Id. 28, 109, 113, 114. Even where void at law, they could make them good; Id. 78, 79, 80, 81, 119. And when the objects were general, they decreed feoffments and other assurances to be made, and renewed from time to time, to keep up the number of feoffees for the charitable use;

Id. 63, 67. By these proceedings, the two obstacles to the execution of these charities, were removed—1. The want of a certain beneficiary, who might call upon the trustees to fulfil the trust, was remedied by appointing as many several commissioners throughout the kingdom, as the chancellor of England, or the chancellor of the duchy of Lancaster, might think necessary, in their respective jurisdictions, whose ex officio duty it should be to inquire into such breaches of trust. 2. After inquiry, the respective commissions were authorized "to make such orders, judgments and decrees as that the said lands may be duly and faithfully employed" &c. This clause without question gave, and was intended to give, a full power to the commissioners (subject to the correction) of the chancellor, to render that certain by their orders and decrees, which before was indefinite and vague. It clothed them with author- 473 ity to give *the direction to the charity of the donor; to fix upon and prescribe the course of its administration; to compel its execution in favour of the object jointed out, if one was so designated, though still too vague to be held good at common law; and, where no object was distinctly declared, to make such a scheme of the charity, as might be nearest the avowed wishes of the donor or testator. In this clause, as interpreted, we find, I think, the germ of the principle of administering charities cy pres, and, indeed, of the various other principles now prevailing in the courts; principles (particularly the cy pres principle) which are utterly without foundation in reason or justice, unless they can be traced to some imperative command, or ample authority conferred by parliament itself. Does it not strike the most common understanding as an invasion of right, to give an estate which is devised to a Roman Catholic charity, to a charity of the church of England, on the principle, that the first was void at law, and the next is cy pres the testator's intention, when nothing in the world could have been farther from his intention? In the case for instance, of the Attorney General v. Baxter, 1 Vern. 248, A. by will, gave £600. to Mr. Baxter, to be distributed among sixty ejected ministers, and £20. to be laid out in his book, entitled Baxter's Call to the unconverted. He and the sixty poor ejected ministers were non-conformists, and for that reason, most probably, the objects of the testator's bounty. Yet, because they were non-conformists, the use was declared void as to them; but it was said, that the money being given for religious charity, must be disposed of in charity, and that this being intended for ejected ministers, ought to go amongst the clergy; whereupon it was decreed to go to maintain a chaplain (a conformist) in Chelsea hospital. And this upon the doctrine of cy pres, though it is obvious that the non-conforming testator never could have intended such a disposition of his estate. Though this decision was reversed, it shews the spirit in which the statute was administered. Such extravagant pretensions in the courts, 474 can only be accounted for *upon the idea already suggested, that the broad

powers conferred by the statute of Elizabeth, laid the foundation of this jurisdiction, which otherwise would have been an unauthorized invasion of private right.

Before I pass from these views of the subject, it may be proper to remark, as the foundation for a conclusion hereafter to be drawn, that the broad and comprehensive language of this statute, gives reason to believe, that, if there was any common law doctrine about indefinite charities, that doctrine was completely covered by the provisions of the statute. For, it was not a mere act organizing an inquisitorial commission, but its provisions were construed, and rightly construed, to give validity to charitable bequests, which were held void at the common law. 1 Ch. Ca. 134, 195; Hob. 136; Finch, 221; Ch. Ca. 267.

Having thus deduced from the statute of charitable uses, that before its enactment, indefinite legacies were not considered as susceptible of being enforced, though for charitable objects, it may next be observed, that the scanty cases to be found in the early reporters, afford no ground for a contrary opinion. It is obvious, indeed, from Porter's case, 1 Co. 23, that the ingenuity of professional men had been taxed to invent some mode of making good these charitable bequests. In that case, Gibbon devised real estate to his wife, upon condition that she should grant it for the maintenance of a free school and of certain alms-men and women. Instead of so applying it, she leased it for forty years. The heir entered for the condition broken, and conveyed to the queen. The court was of opinion, that the condition was broken, and the entry of the heir lawful. Here, then, seems to have been a case as late as the 34th of Elizabeth, in which, instead of seeking to enforce his charitable trust, by a bill in chancery at the instance of the attorney general, the awkward expedient was resorted to, of conveying to the queen, who, I presume, was to see to the distribution of the charity. For, it is justly remarked by chief justice Marshall, that, in

that case, "no question arose concerning *the possibility of enforcing the execution of the trust. It was not forbidden by law, and therefore the trustees might execute it. On failing so to do, the condition was broken, and the heir might enter; but it is not suggested, that the cestui que trust had any remedy." After the entry of the heir, there was clearly none; for the entry for the condition broken, utterly defeated the estate; and the trust which grew out of it, if it was ever available, was defeated also. "In the argument of Porter's case" (says the chief justice) "the only mode suggested for insuring the school the benefit intended, was by an act of incorporation and a letter of licence." And I intirely concur with him in the opinion, that upon reading this case, which was conducted by lord Coke and other able counsel, it is impossible to resist the conviction, that the court of chancery had not, at that time, the power to afford a remedy for such indefinite trusts. It was, indeed, impossible it should. There was no individual beneficiary, who could have

presented himself before the court, and identified himself as the person intended to take under the will. Nor could the attorney general, at that day, have instituted proceedings for the purpose of enforcing the charity; for not only is there no instance of any such proceeding, I think, but, even after the statute, it was held that no bill could be filed by the attorney general at the relation of an individual, unless for a charity under the statute; 2 Vern. 387. If, then, no individual could sue, claiming to be the identical beneficiary, and if the attorney general could not sue by relation, it is difficult to imagine what suit could have been instituted, before the statute, to enforce the charity. Indeed, from a view of all the cases, I incline to think that the agency of the attorney general arose after the statute. Certain it is I can find no information anterior to it.

Upon the whole, I am well satisfied, that the whole of the doctrine of the english courts in reference to indefinite charities, springs from the statute of 43 Elizabeth, which is not in force in Virginia.

476 Whether that statute ever was in force here, has been made a question in the cause. I incline to think it may have been, at least according to the construction which was given to it, and which considered it not as merely constituting a commission for inquiring into breaches of charitable trusts, but as greatly enlarging, if not as opening an intirely new field for the exercise of benevolence. Though local in its provisions in some respects, it was general in its operation in others. If it ever was in force, however, it was repealed in the year 1792, in the general repeal of english statutes. That repeal was no rash or unadvised act. By an act of the session of 1789, ch. 9, followed by the act of 1790, ch. 20, a commission, consisting of six gentlemen of the most distinguished acquirements, was appointed, whose duty was, among other things, "to prepare bills upon the subject of such english statutes, if any there were, which were suited to this commonwealth, and had not been enacted in the form of Virginia laws." The committee of revisors proceeded to the discharge of the duty confided to it, and the result was the act of 1792, by which all english statutes then in force, were declared to be repealed; the legislature reciting that, at that session, it had specially enacted such of them as appeared worthy of adoption. The repeal of this statute must, therefore, be looked upon as an advised act of legislation, and in the same light as if it had been specially repealed by its title.

I have already taken occasion to remark, that, if there were any recognized charities of an indefinite character at common law, the broad language of the statute of Elizabeth comprehended them. In so far as it did comprehend them, it reduced only to the form of a statute, what was law before the statute; and our legislature, in repealing it, must be regarded as having repealed not its mere naked words, but the principle which they involved. Although, therefore, it should be admitted that certain indefinite charities were recognized at common law, yet as the statute also comprehended them,

and was itself repealed, the common law was repealed eodem flatu with the statute. In this aspect of the *case, it is unnecessary to decide, whether, if an english statute prior to the 4 James I. which repealed the common law, be itself repealed, the common law is thereby revived; notwithstanding the provision 1 Rev. Code, ch. 41, § 2, and notwithstanding the common law principle so repealed, was not at the settlement of the colony, nor ever since, the law of Virginia.

If I have been correct in this course of argument, there can be no pretence for the enforcing of the charities under this will of Mr. Gallego, as they were void at common law, and are not entitled to the protection of the statute of the 43 Elizabeth. Be this as it may, I must have argued to little purpose, and chief justice Marshall must for once have been also singularly unfortunate, if what has been said has not at least shewn, that it is a matter of very serious doubt, whether the power to enforce charities ever did exist independent of the statute. If it be a matter even of doubt, to what conclusion must we come? I am deliberately of opinion, that in that case, a just respect to the policy of the legislature, in relation to religious charities especially; a prudent caution on our part, in assuming doubtful powers; a due sense of the infinite difficulty and embarrassment, which must attend the search after the common law doctrines anterior to the statute of Elizabeth; and a just view of the danger of reviving those obsolete doctrines;—must determine us to leave the subject to the wisdom of the legislature itself. A few remarks on these topics, will close this part of my opinion.

No man at all acquainted with the course of legislation in Virginia, can doubt, for a moment, decided hostility of the legislative power to religious incorporations. Its jealousy of the possible interference of religious establishments in matters of government, if they were permitted to accumulate large possessions, as the church has been prone to do elsewhere, is doubtless at the bottom of this feeling. The legislature knows, as was remarked by the counsel, that wealth is power. Hence, the provision in the bill of rights;

478 *hence, the solemn protest of the act on the subject of religious freedom; hence, the repeal of the act incorporating the episcopal church, and of that other act which invested the trustees appointed by religious societies with power to manage their property: hence too, in part, the law for the sale of the glebe lands: hence the tenacity with which applications for permission to take property in a corporate character (even the necessary ground for churches and graveyards) have been refused. The legislature seems to have been fearful, that the grant of any privilege, however trivial, might serve but as an entering wedge to greater demands. Nor did this apprehension of the dangers of ecclesiastical establishments, spring up for the first time with our republication institutions. The history of ages had attested the prones of such establishments to vast accumulations of property, and the statute

book of England is loaded with statutes of mortmain, which were rendered necessary by the rapacity of the clergy, at least in the early periods of the church. So long as there have been church establishments, with power to receive and accumulate property, so long has the tendency to such accumulation been manifested distinctly. The history of the papal see, and of the religious houses under its dominion, is but a history of the cupidity of monks and devotees, veiled under the sacred garb of our holy religion. The vast domains of the clergy acquired by the catholic establishment of France, are known to us all. From this fatal source, among others, sprung a revolution, which deluged the fairest country in Europe in blood, and, in its horrible progress, spread desolation over adjoining states, and shook the civilized world to its centre. And in protestant England, fenced around as it has been with mortmain acts, we see a church establishment possessed of over-grown wealth and power, less devoted to the cause of genuine religion, than to pamper the luxury and indolence of the high dignitaries of the church. With these examples before our eyes, it is not wonderful that our statesmen have been cautious.

They have been wise in their caution. 479 The *evil has not sprung from particular creeds, or the peculiarities of a confession of faith. It grows out of the very nature of the thing. The church, if made capable to take, while it is continually acquiring, from the liberality of the pious, or the fears of the timid, or the credulity of the ignorant, never can part with any thing; and thus, like those sustaining powers in mechanics, which retain whatever they once have gained, it advances with a step that never retrogrades. The natural cupidity of the human heart, is watched by the devotee himself, with the less jealousy in his pursuit after acquisitions for the church, since he believes it to be purified from the dross of selfishness, and sanctified by the holy object of his ambition. Thus it is, that however humble in its beginning, accumulation is the natural result of the power vested in any religious society to acquire property. The same influence which enables it to gain from the state its first insignificant privileges, will secure to it, from time to time, new though apparently inconsiderable accessions; until, at last, the power will be acquired which legislative jealousy has apprehended. Property, indeed, it need not ask of the legislature. The power to take and accumulate, alone, is necessary: all time has shewn, that the influence of feelings of devotion will do the rest. I speak of those feelings which exist without any undue influence from the pastor of the society. But, if we go farther, and suppose it possible, that those abuses which once have existed, may exist again, the progress will be more rapid, though not more certain. "What (says the accomplished sir Samuel Romilly) is the authority of a guardian, or even of a parent, compared with the power of religious impressions under the ascendancy of a spiritual adviser, with such an engine to work upon the passions; to inspire (as the object may be best

promoted) despair or confidence; to alarm the conscience by the horrors of eternal misery, or support the drooping spirits, by unfolding the prospect of happiness which is never to end."

480 *Such, I conceive, are the general grounds, upon which rests the legislative policy, in relation to the power of acquiring and holding property by religious societies. We have seen, too, a similar policy evinced as to charities generally, in striking at the root of them all, by the repeal of the statute of Elizabeth. It is not (to use the language of one of the counsel) that charity is banished from Virginia. Its benign and salutary influence may warm and animate every heart, and lead to a generous munificence, as the daily habit of our lives, without exposing the state to the evils which have always flowed from what are called conveyances in mortmain. It is not necessary here to detail those evils. But it is relevant to observe, that conveyances in mortmain to corporations, were not more calculated to produce a pernicious locking up of property, than charitable bequests of this indefinite character. A corporation may be dissolved, and the property may be again taken up into the general circulation, by reverting to the donor. But these charities never die. There is no means of putting an end to them in the lapse of ages; for according to this celebrated doctrine of *cy pres*, if the original object should fail, the attorney general and the master in chancery go to work to digest another scheme, *cy pres* the original intention of the donor. Such was the case with the charity to William & Mary college. Experience justified these complaints, and accordingly about one hundred years ago, the parliament of G. Britain found itself compelled to pass the statute 9 George 2, which, in important particulars, repeals the statute of 43 Elizabeth. It is at this moment, when the country whose laws we have adopted, has partly receded from the wretched policy of permitting the whole property of society to be swallowed up in the insatiable gulph of public charities, that we are called upon to reanimate the pernicious principle, which they now deprecate, and which with us has been sleeping in inaction, for nearly two centuries and an half. And this too, when we have put off the panoply of the mortmain acts, by the general repeal of

481 them in 1792. *It is said, indeed, that the legislature may pass the necessary laws for regulating these charitable gifts, and thus prevent the evils that might flow from the unlimited permission of them. But I think, under the existing doubts which hang around the subject, and after the lapse of centuries, during which the law respecting charities, if it ever existed here, has been silent and quiescent, it behoves the judiciary to leave to the legislature, the duty of waking it into life.

This leads me to remark, lastly, that the occasion calls for a prudent caution on the part of the judiciary in the assumption of this jurisdiction. We have already seen, that no cases are to be found, no guide is afforded, as to the course pursued by courts of equity in respect. to charities antierour

to the statute of Elizabeth, if they ever took cognizance of them. But it is said, that the king as *parens patriæ*, from the earliest times had the power to superintend and enforce charities: that this power was exercised by him through the lord chancellor, the keeper of his conscience: that it was so exercised, not under a specially delegated authority, but by virtue of his general judicial functions or extraordinary jurisdiction in matters of equity: that this authority of the *parens patriæ* is inherent in all governments, and therefore in this; and is devolved upon the court of chancery, here, whose jurisdiction is general over all matters in chancery, and is peculiarly adapted to the judicious administration of the law of charities. I shall content myself with referring to the conclusive argument of the chief justice, 4 Wheat. 47, for the position, that the jurisdiction of the chancellor of England over charities, is a branch of the prerogative, and not a part of the ordinary powers of the chancery court, in the exercise of its equitable jurisdiction. The authorities to which he refers are entirely satisfactory upon the point. If this be so, it is sufficiently obvious, that the act which established the court of chancery in Virginia, cannot have transferred to that court this branch of the prerogative. The powers conferred by that act are judicial in their character, and not such

482 as belonged *to the chancellor of England, as the keeper of the conscience of the king, as representing his person, and administering, as his agent, his prerogatives and duties. Admitting then, as we well may, the superintending power of the crown, as *parens patriæ*, over charities, and admitting that this power is inherent in the sovereignty, I will ask upon what ground shall we arrogate it to the judicial branch of the government? That there inheres in every sovereign power, a right and a duty to protect those who have no other protector, as infants and lunatics, cannot be denied: and that there is an inherent power also in the sovereign, to declare that vague and indefinite charities shall be administered, if, in its wisdom, it shall so decree, is equally undeniable. But it remains to be proved, that this power is judicial, and not legislative: it remains to be proved, that the flowers of royal prerogative, which have fallen from the crown of England, have devolved upon the chancellors here. In this government of prescribed and limited powers, no public functionary, no organ of the sovereign power, no department, can assume a power which is not to be found in the law or the constitution. They constitute the commission under which alone authority can be duly exercised. It was in this view, very truly said, that this branch of the royal prerogative, if it had not been withered by the repeal of the statute, would have devolved upon the legislature. That body is the *parens patriæ*, under our system, and it would have remained for it to point out the organ which should administer its important function. My own opinion is, decidedly, that it does not now belong to the judiciary, even if it has existence any where in relation to charities. They must

first be established, to call this guardian power into existence; and I have endeavoured to shew, that there is nothing, now recognized by law in relation to charities, upon which it can operate; for definite charities are but trusts which equity will execute by virtue of its ordinary jurisdiction, and with which, even in England, the attorney general cannot interfere; and indefinite charities are not recognized
483 by law, *and cannot therefore be enforced, either with or without his aid.

The result of this view of the subject is, that the interlocutory order of the chancellor must be reversed, and the bill of the attorney general dismissed.

It is now necessary to advert to the other questions arising in these cases. The chancellor held, 1. that the twenty-six enumerated legacies in the will, and the pecuniary legacies in the several codicils, stood upon the same footing, and in case of deficiency should abate in proportion: and 2. that there was nothing in the will to justify the executors, in paying the whole of any of these legacies to any legatee, to the prejudice of other legatees; and the estate having eventually proved insufficient to pay all, the unpaid legatees are entitled to resort to the executors themselves for their due proportions, and cannot be turned round to demand from the other legatees to refund. Upon these points I concur with the chancellor.

1. As to the first: general or pecuniary legacies must always abate proportionably. The testator, it is true, may arrange this matter otherwise at his pleasure; for *cujus est dare, jus est disponere*. But the order in which legacies are given, affords no evidence of this intention: for, even where the testator intends a perfect equality, some must be given first and some last. Hence the court has, generally, declined laying weight on particular words, as the saying, *imprimis*, or in the first place, or on a direction as to the time of payment. If it did not, there would be no end to claims of preference, considering the variety of expression, and the incorrectness with which wills are frequently drawn. 2 Ves. 421; 1 Vern. 31.

When, however, a testator creates two residuums of his estate, or in other words, residuum upon residuum; the first to be computed after taking out certain specified legacies; the other to be computed after taking out another set of legacies; the intention of the testator is very clearly shewn, to create different grades in
484 his benefactions. As in this *case: the legacy of 50,000 dollars in trust for his spanish relations and the 15,000 dollars to P. J. Chevallie, and the legacies in the will to the manumitted slaves, making a sum total of 69,600 dollars, are clearly to be preferred to the other pecuniary legacies bequeathed by the will, and to the various pecuniary legacies in the codicils; while all these in their turn have preference to those who are to take the last residuum. The case of *Lewin v. Lewin*, 2 Ves. 415, is in this respect like this, and the explanation of it by lord Hardwicke, 2 Ves. 420, in

the case of *Blower v. Morret*, is very applicable.

There is nothing I think in this will to shew, that any of this second class of legatees have preference over others. It was argued, that Mrs. Fisher had preference, not only in point of time, but in point of right; but I do not think the proposition was zealously supported; and it certainly cannot be maintained. The benevolent designs of the testator, in favour of Mrs. Fisher, are indeed very strongly marked; but it cannot be supposed, that, if he had been asked the question, whether, if there was only enough to pay 5000 dollars, she should have the whole, to the exclusion of all the rest of his friends, he would have replied affirmatively. The rule of law, however, requires a proportional abatement in all, instead of a rejection of any; and it is founded, in part perhaps, in the presumption, that, if a testator could foresee that there would not be enough, to pay all his pecuniary legatees, the full amount of what he had given, he would rather have reduced their legacies in equal proportions, than have stricken out any one of them altogether. As to the legacies in the codicils, they certainly stand upon the same footing, by the express arrangement of the will, and upon general and established principles. 2 P. Wms. 24.

2. As to the second point: no blame was imputable, or imputed, to the executors, for postponing as they did, the sales of the testator's real estate. They acted fairly and honestly. But the executors
485 having imprudently (for it is *not pretended they have acted unfairly) paid to various legatees of the second class, the full amount bequeathed to them, and the fund having proved deficient, so that there must be a general abatement among them, two questions arise: 1. To whom are the unpaid legatees to look for their legacies? And 2. are those who have been paid liable to refund at all?

As to the first, I can have no doubt. They have to look to the executors, and to them alone, as they are solvent. If, indeed, they were insolvent, then they might, or might not, have a title to redress from the over-paid legatees, according to the principles which will be presently referred to. But the executors being solvent, there is no pretence for saying, that instead of looking to them, to whom the administration of the fund has been entrusted by the testator and by the law, they must look to those, to whom they have unadvisedly paid it away.

That upon general principles, the legatee has a right to demand payment of his legacy from the executor himself, instead of being turned over to compel legatees to refund who have been paid too much, cannot be denied. It would be a waste of time to cite authority, or to offer reasons, for such a principle. The argument indeed has rather tended to admit it, but to insist upon an exception, arising out of the particular provisions of this will. These provisions bar, the direction "to pay Mrs. Fisher her 5000 dollars, as soon as possible, knowing she is in need," and this clause; "with respect to the payment of the differ-

ent legacies left by my foregoing will or part of my residuary estate, I leave to the judgment of my executors to begin paying those that they may think are most in need." It is contended, that these clauses justified prompt payment, if the assets were adequate; that the assets were deemed adequate; and that an unforeseen depreciation has occasioned the existing inadequacy.

The cases cited in which executors have been relieved against the charge of devasting, on the ground of the reduction
486 *of the assets by unforeseen accidents, are not to be questioned. The executor who pays simple contract debts when there were abundant assets, and those assets have been reduced by a general and destructive fire, or by eviction by title paramount which could not be foreseen, is surely entitled to relief. 2 Freeman, 1; 1 Madd. 1, 63; 1 P. Wms. 354; 1 Rand. 421. In *Miller v. Rice*, 1 Rand. 438, the executor, while the assets were abundant, confessed assets and gave a forthcoming bond, and afterwards, the assets becoming deficient by a general depreciation of property, he was relieved, and justly: for he had not voluntarily paid: he was sued: could he have been required or expected to plead a false plea? When he did plead, he could neither have pleaded plene administravit, nor plene administravit præter, for he had abundant of assets. He was bound then to let the judgment go; and if he had not done so, it would have resulted in the same thing. His plea would have been falsified, and judgment entered. When, therefore, he was about to suffer for his promptness and fair dealing, he was relieved, and properly relieved.

In this case, however, the state of things is very different. To justify a departure from the general course of administration, the executors ought to shew, that they have done that which, in the execution of this will, with its broad discretion, prudent men ought to have done. On the one hand, they were bound, indeed, as soon as possible on account of her needy circumstances, to have paid Mrs. Fisher her legacy. This was one injunction of the testator. But there was another more imperative. It was to pay all the legatees of the second class, either in the will or codicil, *pari passu*. It cannot be pretended, that if the deficiency had been foreseen, such payment would have been good. Now, the executors, ought to have foreseen its possibility at least, and to have guarded against it. Their testator had expressly directed, that the sales should not be hurried, as the time was unfavourable. The depreciation of property had commenced, and might continue. It

487 was impossible to say that *the property would pay the large sums charged upon it. What then was to be done, in this state of conflicting duties, of which the superiour was, to secure equality to all. If it was impossible to reconcile them, the subordinate should have given way, and Mrs. Fisher ought not to have been paid: for though she was to be paid as soon as possible, the possibility contemplated was a possibility consistent with the state of things in other respects. It was, in the

strict sense, very possible to pay her the day after the testator's death. But this he did not mean. It was not, however, impossible, to reconcile these conflicting duties. Two obvious modes presented themselves: to require security to refund, which every executor has a right to require from a legatee, whom he pays in advance of other legatees; or, if Mrs. Fisher's situation did not enable her to give such security (of which there is no evidence) that was itself an additional motive or retaining the principal, and paying her the annual interest; or for vesting the principal in stock for her benefit, but under their control, in case the affairs of the estate should make it necessary to reclaim it. And, if her necessities required an advance of part of the principal, they should cautiously have advanced only so much, as would, under any conceivable state of things, have fallen to her share. In truth, however, there is no evidence, that the wants of this good lady would not have been adequately met by a payment of the interest. If her situation was such, I repeat that it was a motive for additional caution; particularly, if, as is contended, other legatees are to be turned around to her, instead of looking to the solvent executors; for they may well say, that the executors had no right to pay over their money to an insolvent person.

The case of Mrs. Fisher is stronger than that of the other legatees who have been overpaid. As to them no observation can be necessary. The executors had no right to pay them in anticipation, to the prejudice of others. They are therefore liable to the plaintiffs for the full amount of their proportions.

488 *The other question proposed, is as to the liability of the legatees who have been overpaid, to refund. Authorities have been cited to shew, that when an executor has voluntarily paid or assented to a legacy, it is to be taken to be an admission of the sufficiency of the assets, and the legatee will not be compelled to refund; 2 Ves. sr. 194; 1 Rop. on Leg. ch. 9; 2 P. Wms. 296; 1 Eq. Ca. 239, pl. 25; 2 Vern. 225; 1 Bro. C. C. 484. The first of these cases is the strongest of them all, and therefore shall be adverted to, particularly. Now upon examining the opinion of the court, it is evident that the very great weight attached to the admission of assets there, by the payment of the legacy, arose principally from the particular circumstances of the case. The executor had returned no inventory of the estate, and had paid off all the other legatees. And, even in that case, it is not alleged by sir John Strange, that the presumption is conclusive. If he had so decided, it would have been against the general principle which considers all such presumptions liable to be rebutted. The payment of the full amount of one legacy, furnishes indeed a presumption, and a very strong presumption, that there is enough to pay the rest. But what is there in the nature of the situation and character of an executor, that shall exclude him from this common privilege of repelling by evidence, a presumption of fact against him? There is nothing. An executor may have paid one by mistake, or he may from

kindness to that one, have been willing to run the hazard of deficiency. But these would not be reasons for his being compelled to pay another out of his own pocket. I think, therefore, that the authorities can only be understood as saying, that payment to one affords the strongest presumption of sufficiency to pay the others, but not as denying the right of the executor, in a contest with those others, to rebut that presumption.

The question is more difficult as between the executor and the legatee who has been paid. The cases cited are certainly very strong to shew, that where an executor has *made voluntary payments, he shall not recover them back, though the assets prove deficient. It is said to be otherwise where the payment is compulsory; 2 Vern. 205. Or the deficiency of assets was created by debts which did not appear till after payment of the legacy. 2 Fonb. Eq. 377. It is admitted, indeed, that though the executor cannot compel the legatee to refund what was overpaid, other legatees may, where the assets were originally deficient, and all were bound to abate proportionably. But where the assets were sufficient, but have been wasted by the executor, who has become insolvent, even those who have not received anything, shall not force him who has, to refund; for they shall have no advantage of his diligence. Toller's law of ex'ors, 341; 2 Fonb. Eq. 376; 1 P. Wms. 495; 1 Ves. 194.

Notwithstanding the cases which have been decided, in England, where the executor is entitled to the residuum, that the executor shall not recover back from a legatee, what has been overpaid him, I cannot think, that such is held to be the inflexible law with us.

If, indeed, the advances have been long since made, and the estate distributed many years, the executor's bill to refund would not be entertained. Robertson v. Archer, 5 Rand. 319. But the very ground upon which this case was decided, negatives the general proposition, since the court would scarcely have proceeded upon the narrow principle, if the broad principle had been admitted. Indeed, in the well known case of Burnley v. Lambert, 1 Wash. 312, it had been said by the president of this court, after pronouncing that the executor was the proper judge of the ability of the testator's estate, "that after the assent of the executor, the legal property is completely vested in the legatee, and cannot at law be divested by the creditors. That, in such case, the creditors have a double remedy, 1. against the executors at law, in which case the executors have their remedy in equity to compel the legatee to refund; or 2. the creditors" &c. This opinion is but in unison with the general spirit of our decisions,

490 *which have relaxed much of the severity of ancient adjudications, in those cases where no fraud or misconduct is imputed to the executor, in the management of the estate, nor any apparent advantage derived to him from his errors or omissions, but he appears to have acted bona fide and with honest intentions. 2

Call, 86. I am, therefore, inclined to think, that there is no inflexible rule, which refuses to an executor, under all circumstances, a right to recover back from a legatee, an excess of advancements which may have been made to him above his rateable proportion of his legacy. The executors, in this case, might, therefore, file a cross bill, if they pleased, to have that matter fairly settled.

The cases cited by Mr. Leigh, of *Briabane v. Dacres*, 5 Taunt. 114, and *Skyring v. Greenwood*, 4 Barn. & Cres. 281; 1 Com. Law Rep. 43, 6, and 10 Id. 335, 8, are not, I think, decisive of this case. Sir V. Gibbs says, speaking of the right to recover back money paid by mistake of law, but under full knowledge of the facts, that "the party submitting to the demand, and paying the money, gives it to the person to whom he pays it, and closes the transaction between them."—"He who receives it, has a right to consider it as his, without dispute: he spends it in confidence that it is his: and it would be most mischievous and unjust, if he who has acquiesced in the right by voluntary payment, should be at liberty, at any time within the statute of limitations, to rip up the matter, and recover it back. He who received it, is not in the same condition. He has spent it in the confidence it was his, and, perhaps, has no means of repayment." In the case of *Skyring v. Greenwood*, chief justice Abbott expresses the like opinions yet more strongly. But both rely upon the fact, that the party receiving had a right to consider what was paid as his absolutely, and without dispute. But the legatee who has received his whole legacy in advance, is not precisely in this situation. He knows, that no act of the executor can absolve him from refunding at the suit of a creditor; or even at the suit of a legatee, if the executor is insolvent. He does not, therefore, 491 *fall within the principle of either of these cases, in this respect; and, certainly, not within the first, for another reason. The mistake here, is a mistake of fact, or, if you please, an erroneous inference from facts within the executors' knowledge; the mistake there, was a mistake as to the law; and where a doubtful question of law arises, if the party, who might litigate the right, submits to the demand, he can never recall the act upon the ground that he has erred. For, otherwise, there never could be a valid compromise upon a point of law; since, in every case, one or other must be wrong.

Upon the whole, I am of opinion to affirm the general principles of the chancellor's decree, except as to the charities, and to remand the cause to be proceeded in according to these principles, with some slight modifications as to the details.

The decree entered by this court, reversed the chancellor's decree as to the charities, and dismissed the attorney general's bill; and, approving the general principles of the decree, in respect to the other suit brought by the individual legatees, and correcting some of its details, affirmed it in all other respects.

*Hubbard v. Goodwin.
Kennedy &c. v. Same.

February, 1882.

Alliens—Right to Own Trust Estates—Escheat.—Land is purchased by or for an alien, and paid for by him or with money furnished by him, but the conveyance is taken to a citizen, upon express trust that he shall hold for the benefit of the alien and his heirs: **HOLD**, this trust estate of the alien can only be so acquired by him for the commonwealth, and a court of equity will compel the trustee to execute the trust for her benefit.

Same—Same—Same—Profits—Equity Practice.—The court of equity, in such case, follows the law in relation to escheats of legal estates purchased by aliens; and as the law does not, in cases of escheat, give the commonwealth the profits received by the alien or any other person before office found, so neither will equity, in the case of the trust estate, give the commonwealth the profits thereof accrued before decree.

Same—Purchase of Land by Citizen with Alien's Money—Implied Trust—Forfeiture—Quære.—Whether in the case of a purchase of land by a citizen, and the payment of the purchase money by or with the money of an alien, a resulting trust may be implied in equity for the alien, and such implied trust executed for the commonwealth? and, per **TUCKER**, L. C., equity will not, in such case, imply a trust for the alien, in order to forfeit it to the commonwealth.

Decrees—Between Co-defendants—When Proper.—It seems, there cannot properly be a decree between co-defendants in equity, in any case, in which the plaintiff is not entitled to a decree against both or either; and it would be inconvenient to extend that practice further.

Thomas Fretwell Philips, an alien, subject of G. Britain, came to Virginia in 1805, and, either personally or through the agency of Daniel Brodie, contracted with W. M. Cary, for the purchase of a parcel of land called Celeys in Elizabeth City county, for 8000 dollars. Philips paid the whole of the purchase money, or advanced it to Brodie to be paid, to Cary; but, in order to prevent the land from escheating to the commonwealth, and therefore to conceal Philips's interest in it, the conveyance from Cary was taken, not to Philips, the alien,

***Alliens—Capacity to Hold Lands—Trust and Legal Estates.**—In *Cross v. De Valle*, 6 Fed. Cas. 889, it is said: "When a trust is perfected in favor of an alien, the crown may be entitled, yet when a trust in favor of an alien is not *in esse*, but only *in fieri* and executory, the court will do no act to give it to an alien who by law cannot hold. *Lewin, Trusts*, 43. This subject was discussed with much learning and ability in the case of *Hubbard v. Goodwin*, 3 Leigh 492, by the court of appeals of Virginia; and the court sustained the conclusion that a trust estate acquired by an alien is acquired for the state, and that a court of equity will compel the trustee to execute the trust for the benefit of the state." See also, citing the principal case on this subject, *Dunlop v. Harrison*, 14 Gratt. 258, 259, 265.

See generally, monographic note on "Escheat" appended to *Sands v. Lynham, Escheator*, 27 Gratt. 291.

†**Decrees—Between Co-defendants—When Proper.**—Where the pleadings and proof show no right of the plaintiff to relief against any defendant there cannot be a decree between co-defendants. *McKay v. McKay*, 33 W. Va. 735, 11 S. E. Rep. 217, citing *Hansford v. Coal Co.*, 22 W. Va. 70; *Hubbard v. Goodwin*, 3 Leigh 522. To the same effect, the principal case is cited in *Radcliff v. Corrothers*, 33 W. Va. 664, 11 S. E. Rep. 232; *Western Lunatic Asylum v. Miller*, 29 W. Va. 332, 1 S. E. Rep. 744; *Watson v. Wigginton*, 28 W. Va. 532; *Blair v. Thompson*, 11 Gratt. 452 (see also, foot-note); *Ould v. Myers*, 26 Gratt. 405, and foot-note; *Thorntons v. Fitzhugh*, 4 Leigh 220. Also on this question, the principal case is cited in *Strother v. Strother*, 1 Va. Dec. 374, where it is held that wherever a case is made out between defendants, by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity is entitled to make a decree between the defendants and is bound to do so. To the same effect, see *Ruffner v. Hewitt*, 14 W. Va. 738, citing the principal case at p. 746.

See monographic note on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 618.

but to Brodie who was a citizen. Philips took possession of the land, resided upon it, and took the profits to his own use, so long as he lived. He had a daughter named Sarah, the wife of John Goodwin, and she had an infant son, Thomas Fretwell
493 Goodwin: *the daughter, her husband, and her son, were all aliens: they came to Virginia during Philips's lifetime, and lived with him till his death, which happened in 1808. He died intestate. After his death, John Goodwin and his wife occupied Celeys, and took the profits, till 1809, when Goodwin died; and then Mrs. Goodwin continued to occupy and take the profits of the land, till 1811, when she married the same Daniel Brodie to whom Celeys had been conveyed by Cary in 1805. From the time of Brodie's marriage with Mrs. Goodwin, they resided at Celeys, and Brodie took the profits, until 1815, when his wife died, without having had any child by him; and thenceforth, Brodie continued to hold and enjoy the profits of the land, till his death in 1819. Meantime, Brodie sent his step son, T. F. Goodwin, to England, where he remained for several years, and until he attained to full age, under the care of John Goodwin, his paternal grandfather, and his other relations there.

Philips, it seemed, died in possession of personal estate, consisting of slaves, stock and furniture, at Celeys, besides money. Upon the death of Philips, in 1808, administration of his estate was granted to John Goodwin: upon the death of Goodwin in 1809, his widow took administration of her husband's estate, and administration de bonis non of her father's: and upon her death in 1815, her second husband, Brodie, took administration of her estate, and administration de bonis non of the estate of Philips.

Brodie left a will, whereby he directed that Celeys (which he described as the land which he had purchased of Cary) and all the slaves and other personal property there (which, he said, he had acquired by his marriage) should be sold, and that all the debts due and moneys belonging to his deceased wife, should be collected, by his executors; and then directed, that his debts should be paid out of the proceeds of the sales of Celeys and the slaves and personal property there, and that 2230 dollars should be deducted from the same fund, which sum he bequeathed to his own

494 *relations; and he bequeathed the residue of the proceeds of those sales, and the whole amount which should be collected of moneys due to his late wife, to his step-son T. F. Goodwin, for life; remainder to his child or children, if he should leave any; and, if he should leave none, remainder to the testator's two nieces, Mary the wife of William Nimmo, and Martha the wife of Edmund Kennedy. All the property he held in his own right, he devised and bequeathed to the same two nieces and a nephew. And he appointed E. Kennedy and W. Nimmo his executors.

The executors proved the will, and took upon them the execution thereof. They continued to hold Celeys, till the end of the year 1821, about which time the executor Nimmo died; and then Kennedy, in execu-

tion of his testator's will, exposed it to sale, at public auction, and he himself became the purchaser, at the price of 4800 dollars.

After this sale was made, William Sharp the english guardian (or who acted as the guardian) of T. F. Goodwin, by letter of attorney, appointed William Gray of Norfolk, his agent to attend to the interests of his ward in Virginia. And in 1823, Gray caused a bill to be exhibited, in the superior court of chancery of Williamsburg, in the name of T. F. Goodwin, still an infant, against Kennedy, now the surviving executor, and Mary Nimmo administratrix of W. Nimmo, now dead, who had been the other executor, of Brodie: wherein Goodwin, claiming as a legatee under Brodie's will, impeached the sale which had been made of Celeys by the executor Kennedy, on the ground that it had been unfairly sold, and purchased by the executor himself, at an under value; and prayed, that the sale should be set aside, and a resale of the subject, and an account of Brodie's estate, and of the executors' administration thereof. Kennedy, in his answer to this bill, denied that there had been any actual fraud in his purchase of Celeys, but declared he was perfectly willing that the sale should be set aside, and the land sold again for the best price that could be got.

And, in September 1823, he wrote a
495 letter to R. *B. Taylor (the counsel retained to prosecute the suit for T. F. Goodwin) offering to make sale of Celeys, upon such terms as he should approve, for the benefit of the parties concerned; to which Taylor, after consulting Gray the agent, wrote an answer, acceding to the proposition, and adding—"We think it would be proper to offer the property for sale, on credit, with good security, but that it should be set up so as not to sell for less than 6000 dollars. It would, perhaps, be better to endeavour to make a private contract, as the sum to be obtained would then be known beforehand; but if a public sale be made, it should be so conducted as not to sacrifice the property at less than 6000 dollars, which Hubbard would have given."

Accordingly, in May 1824, Kennedy sold Celeys to Thomas Parker, for 6000 dollars, payable in instalments, and conveyed it to him. Of this sale, and of its terms, Gray and Taylor were apprised, and they approved it.

And in October 1824, Parker sold and conveyed Celeys to Matthew Hubbard, upon the same terms on which he had purchased it; Hubbard undertaking to pay the purchase money to Kennedy, which Parker had contracted to pay, as the instalments thereof should fall due.

Goodwin's suit against Brodie's executors, in the court of chancery of Williamsburg, was heard in June 1824; and the chancellor ordered accounts of Brodie's estate, and of the executor's administration thereof. But while these accounts were in progress before the commissioner, Goodwin having attained to full age, came to Virginia: he arrived in September 1825. And the legislature, at the session of 1825-6, passed an act, granting and releasing to him all the right, title and interest, which had accrued,

or might accrue, to the commonwealth, or to the president and directors of the literary fund, in the land called Celeys; and authorizing him to sue for the same, in any court of law or equity, and to hold it when recovered, in the same manner, in all respects, as if he were a native born citizen;

upon condition that he should become
496 a citizen of the U. States, *within two years from the time of passing the act; saving to all persons, other than the commonwealth, or the president and directors of the literary fund, any right which they had or might have in the land if the act had never been passed. And, by another act passed at the session of 1826-7, so much of the former act as imposed the condition that Goodwin should become a citizen of the U. States within two years, was repealed, and that condition dispensed with.

In June 1827, Goodwin exhibited his bill in the court of chancery of Williamsburg, against Kennedy in his own right and as surviving executor of Brodie, Mrs. Nimmo the administratrix of W. Nimmo the deceased executor of Brodie, and Parker and Hubbard, the purchasers under Kennedy at his second sale of Celeys: wherein he set forth the facts above detailed, as to the purchase of Celeys in 1805, by or for Philips; Philips's paying, or advancing to be paid, the whole purchase money to Cary; the conveyance taken to Brodie, in order to avoid the escheat; the successive occupation of the land by Philips during his life, by John Goodwin and wife during Goodwin's life, by Mrs. Goodwin till her marriage with Brodie, and then by Brodie till his death in 1819; the will of Brodie; and the sale of Celeys by Kennedy to Parker, and by Parker to Hubbard. And he alleged, that upon the purchase of Celeys from Cary, and the conveyance thereof taken from Cary to Brodie, Brodie executed a bond or some other instrument to Philips, whereby he acknowledged that the land was Philips's property, and that he was only a trustee for Philips, and agreed to hold the legal title, and to convey the same, according to his directions; which instrument came into Brodie's own possession upon his marriage with Mrs. Goodwin in 1810, and had either been destroyed by him, or was now in the hands of his executors. That Brodie being only a trustee for Philips, and Philips the cestui que trust being an alien, the trust estate was escheatable to the commonwealth, and the commonwealth having by the act of 1825-6 and 1826-7,
granted and released all her rights in

497 *the subject to the plaintiff, he was now entitled to demand the land itself. And that Kennedy, when he sold the land in question to Parker, and Parker when he bought it, and Hubbard when he purchased it of Parker, had full notice of the trust upon which Brodie had held the legal estate. Therefore, the bill prayed a decree for the land, and for a conveyance and release of the legal estate of the same to the plaintiff; accounts of the profits received by Brodie, from the date of his marriage with Mrs. Goodwin till her death, and thenceforth till his own death; of the profits received by Brodie's executors from his

death till the first sale to Kennedy; of the profits received by Kennedy, from his purchase till his sale to Parker; and of the profits received by Parker and by Hubbard, successively, during their occupation of the land; and a decree for such profits against the parties respectively, as well as compensation for any damages that had been done to the property, by cutting timber, or other waste.

Kennedy, in his answer to this bill, averred, that he had no knowledge whatever of the secret trust for Philips, on which it was alleged Brodie held the legal estate of Celeys, or of the facts alleged, from which such trust was inferred; and that he had not found among Brodie's papers, any instrument of writing declaring such trust. He had acted under the conviction, that the estate belonged absolutely to his testator, Brodie; he had, in execution of his testator's will, sold the land to Parker, upon terms approved by persons representing (as he thought) the interests of the plaintiff in Virginia; he had received from Hubbard, who had purchased from Parker, a considerable part of the purchase money, which he had applied, in due course of administration, to the payment of his testator's debts; and he was ready to render an account of his transactions.

Mrs. Nimmo, administratrix of Nimmo, the deceased executor of Brodie, in her answer, said, that as her intestate had had no part in making either of the sales
498 of Celeys, so *neither had he ever received any part of the profits of that estate; he died in 1821.

Hubbard, in his answer, said he was not informed and had no particular knowledge of any of the matters alleged in the bill, respecting the secret trust upon which Brodie held the legal title of Celeys for Philips. He had heard, that the plaintiff was prosecuting a suit to recover his share of the proceeds of the sale of Celeys, or to have the first sale set aside, and the estate resold; but he never heard it questioned, that Brodie's executors had full power to sell. Before he purchased the land of Parker, he ascertained that it had been sold by Kennedy to Parker, with the assent of the plaintiff's then agent and counsel in Virginia, and upon terms which they approved: his purchase, in truth, promoted the objects which the plaintiff's agents, at the time, were seeking to accomplish: and he had paid Kennedy, the executor, about 4000 dollars of the purchase money.

There was the fullest proof, that Celeys was purchased of Cary for Philips; that Brodie was only Philips's agent in making the purchase; that the whole of the purchase money was paid by Philips, or furnished by him to Brodie to be paid, to Cary; that the conveyance was taken to Brodie, instead of Philips, only because the one was an alien incapable to hold real estate, and the other a citizen; that the land was occupied by Philips, and by Goodwin and wife, and by Mrs. Goodwin, successively, till her marriage with Brodie in 1811; that Brodie, repeatedly, during Philips's life, at the time of his death, during John Goodwin's life, and after Brodie's own marriage with

Mrs. Goodwin, during her life, and after her death, acknowledged that Celeys was the property of Philips and his heirs, having been bought for him and paid for with his money, and that he Brodie claimed no interest in it, but only held the title as Philips's friend, and for his benefit; that, soon after Philips's death, John Goodwin his son in law, requested Brodie to convey Celeys to him, which Brodie refused to do, because he was an alien, but said, that whenever Philips's heir at law should
499 *become a citizen, and capable to hold the estate, a conveyance thereof to such heir should be immediately executed.

In a letter written by Brodie to John Goodwin, the grandfather of the plaintiff, in 1818, and in another written to the plaintiff himself in 1819, Brodie spoke of Celeys as the property of the plaintiff. And it was proved, that shortly after the purchase from Cary, Philips desired a neighbour, Robert Lively, to apply to C. K. Mallory, a lawyer (since dead) to prepare an instrument of writing to secure the title of Celeys and some debts due from Brodie to him; that Lively accordingly desired Mallory to write such an instrument; that Mallory did so, and Lively carried the draft to Philips; and that this paper was afterwards executed by Brodie; Philips remarking, at the time, that if they were all to live, there would be no necessity for such an instrument, to which Brodie answered, that it was perfectly right. But only the general purpose of this instrument, was proved; its precise contents were not proved, nor was it ascertained what had become of it.

There was no proof, and no reason to suspect, that Kennedy, when he made the sale of Celeys, or indeed, until this bill was filed, had any notice, that Brodie held the legal title of Celeys, in trust for Philips and his heirs, or otherwise than simply and absolutely as his own.

But there was proof, that Parker and Hubbard, both, had been informed before any part of the purchase money was paid, and before Parker's sale of the land to Hubbard, that Brodie had purchased it for the benefit and in trust for Philips; and that they had both heard, that Brodie had executed a bond to Philips to convey the title to him or his assigns; which bond, it was suspected, had come into Brodie's hands after his marriage with Mrs. Goodwin, and had been destroyed by him.

The chancellor, declaring that Brodie had held the legal estate of Celeys in trust for Philips and his heirs, and that Philips being an alien, that trust was, in effect, a trust for the commonwealth, which,
500 by the acts of assembly of 1825-6 *and of 1826-7, was now vested in the plaintiff; therefore, decreed, that Hubbard should surrender the possession to him, and that the defendants should make him conveyances and releases of the estate. And he ordered accounts to be taken, of the profits of the estate, received by Brodie from the time of his marriage with Mrs. Goodwin in 1811, till his death in 1819; by Brodie's executors or either of them, from the time of their testator's death till the sale made by Kennedy to Parker; by Parker from the time of

his purchase till his sale to Hubbard; and by Hubbard since; and an account of all damages done to the land by Hubbard, since he had been in the occupation of it; and accounts of the estate of Brodie, and of the transactions of his executors, Kennedy and Nimmo, in the administration of his estate.

From this decree, Hubbard and Parker, immediately, appealed to this court.

The commissioner, notwithstanding the appeal, proceeded to take all the accounts ordered by the decree. And he reported, that the profits of Celeys, received by Brodie from his marriage with Mrs. Goodwin till her death, amounted to 625 dollars; that the estimated profits received by Brodie, from his wife's death till his own, amounted to 600 dollars; that, after Brodie's death, Celeys was rented out, and that the rents from that time till the sale to Parker, were received by Kennedy, and amounted, principal and interest, to 1184 dollars, chargeable to Kennedy; that the estimated profits during Parker's occupation, were 88 dollars; and during Hubbard's 989 dollars. The commissioner also reported accounts of the administration of Brodie's estate by his executors; by which it appeared, that (excluding what had been received by Kennedy, from Hubbard on account of the purchase money of Celeys, as not being a just credit to the estate) there was a balance due from the estate to Kennedy of 2508 dollars; and that upon Nimmo's account of administration, there was a balance due from his estate to Brodie's, of 2154 dollars.

501 *Upon this report coming in, the chancellor decreed, that Mrs. Nimmo, the administratrix of W. Nimmo the deceased executor of Brodie, should, out of the assets of Nimmo's estate in her hands, pay the plaintiff the sum of 600 dollars (being the estimated amount of profits received by Brodie himself after the death of his wife) with interest from the date of the decree till paid; and that Kennedy should pay the plaintiff the sum of 1184 dollars, with interest on 851 dollars, part thereof, from the 1st September 1829; (the date of the commissioner's report) this last sum being the nett balance of rents received by Kennedy from the time of Brodie's death till the sale to Parker. But Parker being now dead, and the cause pending in the court of appeals as to Hubbard, the chancellor, forbore to make any decree against either of them, in respect of the profits.

And from this decree Kennedy and Mrs. Nimmo appealed.

Leigh for the appellant Hubbard, and Stanard for the appellants Kennedy and Nimmo. The appellee can only claim under the act of assembly of 1825-6, such interest as the commonwealth had in Celeys; and the commonwealth's rights thus granted to the plaintiff, are placed on the ground, that Brodie held the legal estate, in trust for Philips, an alien, and that Philips's trust estate was escheatable in equity. Suppose Brodie took and held the legal estate, upon a simple trust expressly declared by deed for Philips and his heirs and assigns; was such a trust estate of an alien, in its nature, an escheatable interest? Such a

trust estate is no wise different from a use in lands before the statute of uses; and we know from the best authority, that one of the reasons for passing the statute of uses, to transfer uses into possession, was, that the practice of conveying lands to uses defrauded the lord of his escheat; 2 Black. Comm. 231, 2. Hence, it appears that a use in lands was not an escheatable interest. If A. enfeoff B. to the use of C. and B. the feoffee to uses, is attainted of treason, the king shall have the land discharged of the use; *Harg. Co. Litt. 13, a, note 7; Pimb's case, Mo. 196. In the case of a devise of lands to an alien, upon trust to sell, the legal estate in the alien, though only a trustee, is escheatable to the crown; Fish v. Klein, 1 Meriv. 431. It is then, the legal estate that escheats, in consequence of the incapacity of the feoffee to uses, or of the trustee, to hold it, or of his attainder, not the use or trust estate, by reason of the incapacity or a attainder of the cestui que use or cestui que trust. For, so long as there is a person holding the legal estate, capable to hold it, there is no want of a tenant owing allegiance and service to the state in respect of the land held, no matter to whose use, or upon what trust, he holds. Thus, if there be lord and tenant, and the tenant enfeoffs J. S. and declares no use; the cestui que use [that is, the feoffor himself] does felony and is attainted; the lord shall not have a subpoena to have the land; and it seems the heir of the feoffor shall not have it, for there is corruption of blood; and, therefore, it seems, the feoffee shall retain it to his own use; 10 Vin. Abr. Escheat, A. pl. 16, p. 140. And upon the like principles was decided, in modern times, the case of Burgess v. Wheate, 1 W. Blac. 123; 1 Eden, 177, S. C. In Holland's case, 1 Roll's Abr. 194, 534; Alleyne, 14 S. C. it was held, that, if an alien purchase a copyhold in fee in the name of J. S. in trust for him and his heirs, upon office found that J. S. had the legal estate in trust for the alien, neither the copyhold nor the trust was escheatable at law, but the king must sue in chancery to have the trust executed for his benefit. And in Attorney General v. Sands, Hardr. 488, 495, where the question was whether a trust estate of a person attainted for felony, was forfeited to the crown, Hale, chief baron, said 'I hold that such a trust in an alien is forfeitable, and will belong to the king, as was held in Holland's case' &c. It is obvious, that this remark of Hale, was extrajudicial, and founded wholly on Holland's case; and that, as to Holland's case, the point adjudged was that the trust estate in a copyhold was not escheatable at law, and that the court

502 did not *and had no jurisdiction to adjudge, but only said obiter,

that the king should sue in chancery to have the trust executed for his benefit. And these are the authorities upon which the elementary writers have repeated the opinion, that, though a trust estate in an alien be not escheatable at law, it is in effect escheatable in equity; that the crown may, in chancery, compel the execution of the trust for its own benefit. But all those opinions have reference to cases of express

503

trusts. Here, Brodie did not take and hold Celeys upon any trust for Philips the alien, expressly declared; at least, we think, there is no proof of any such express trust. It appears, indeed, that an instrument of writing was drawn by Mr. Mallory, and executed by Brodie to Philips in his lifetime, for the purpose of securing the title of Celeys to Philips; but the contents of that instrument, in other words, the scheme devised by Mr. Mallory to effect the object, has not been ascertained. It is surmised, that Brodie got possession of this paper, after his marriage with Mrs. Goodwin, and destroyed it: but this is only surmise and suspicion: and the evidence of his repeated admissions, after his marriage and even after his wife's death, that he had purchased the land as Philips's friend and for his benefit, that it had been paid for with Philips's money, and that it was not his own property, ought to relieve his memory from this suspicion: for, if he destroyed the paper, he could have had no other view in destroying it, but to conceal its contents; that is, to conceal what his subsequent repeated admissions evince he had no care to conceal. If the court will found any decree upon the supposed contents of this lost paper, and make an effort to ascertain them by inference from the circumstances of the case; what, probably, were the contents of it? Was it a simple express declaration that Brodie held, and should hold, the estate in trust for Philips, his heirs and assigns? Mr. Mallory would hardly have hit upon such a device as that, of all others the most likely to endanger and defeat the object, which it was the design of the instrument to accomplish.

It was, most probably, a covenant, 504 *or bond with condition, that Brodie should convey the legal title to Philips or his heirs, whenever he or they should become citizens of the U. States. The answer which Brodie made to John Goodwin, when he demanded a conveyance, was exactly conformable with such an obligation: he refused to convey to Goodwin, because he was an alien, but said, that whenever Philips's heir at law should become a citizen, a conveyance to such heir should be immediately executed. And if this was the purport of the lost instrument it was only an executory contract entered into by a citizen with an alien, to convey lands to him when he should become a citizen. And then the question will be, whether such an executory contract gives to the alien covenantee, such an interest in land, as is escheatable, in law or equity, to the commonwealth? Surely, the commonwealth cannot demand specific execution of such a contract, and that in anticipation of the event on which the covenantor stipulated to execute it, in order to have the benefit of the escheat. Throwing the lost instrument out of the case, the plaintiff can only rest the claim of the commonwealth, in whose place he stands and whose rights alone he is intitled to demand, on the resulting trust to Philips, implied by law, from the fact that the estate conveyed to Brodie, was purchased and paid for with Philips's money. In Sanders's note upon Lloyd v. Spillet, 2 Atk. 150, note 2, it is said, that

"if the consideration money is expressed in the deed to be paid by the person in whose name the conveyance is taken, and nothing appears in such conveyance, to create a presumption that the purchase money belonged to another, then parol evidence cannot be admitted, after the death of the nominal purchaser, to prove a resulting trust, for that would be contrary to the statute of frauds—but if the nominal purchaser, in his lifetime, gives a declaration of or confesses the trust, this takes it out of the statute;" and the authorities are cited for both branches of the proposition. Whether the declarations made by Brodie in his lifetime, on the subject of the estate in question, were such as takes 505 *this case out of the statute of frauds, is submitted to the court. Taking it that they were so, can there be such a resulting trust for an alien, so as that it shall escheat as his property to the commonwealth? Where land is purchased and paid for with the money of one person, and the conveyance taken to another, a trust results for the person who pays the purchase money; but this resulting trust is the mere creature of the law; it is the act of the law that creates or implies the trust estate. Now, an alien may take by purchase, though he cannot hold; but by act of law he cannot take, as by descent, curtesy, dower, guardianship. 7 Co. 25; 1 Bac. Abr. Alien, C. p. 132. And since equity is only part of the law, no trust estate can be implied for an alien, in equity. In this view of the case, therefore, Philips had no interest in Celeys, legal or equitable, escheatable to the commonwealth, at law or in equity; and, consequently, the plaintiff has no right to the land. But, supposing that the trust estate was in Philips; and such a trust estate as equity, following the law in respect to the escheat of legal estates purchased by an alien, would seize for the commonwealth; and supposing that Parker and Hubbard purchased with notice of the trust; they cannot be charged with any fraud; for they purchased with the knowledge and assent of the plaintiff's agents at the time, and to promote the plaintiff's interest; and it would be hard and inequitable, that they should suffer loss, because he thinks proper to relinquish his claim under Brodie's will, and make his appeal to the liberality of the legislature. At any rate, equity to such a case, will not go beyond the law in cases of escheats; and therefore, this decree is certainly erroneous in giving the plaintiffs the profits; since, in cases of escheats at law, the commonwealth never recovers profits accrued before office found. 3 Wheat. 589. There is no process or remedy provided for the recovery of profits of lands escheated, previously accrued, and no instance of an account or recovery of such profits.

506 *Johnson for the appellee. The question is, Whether Philips took such an equitable estate in Celeys, as that, if he had been a citizen, he could, in equity, have compelled the execution of the trust by Brodie? and if so, Whether, as Philips was an alien, the commonwealth could, in equity, compel the execution of the trust for her own benefit? There is no necessity,

to maintain, that, if lands be purchased and paid for with an alien's money, and the conveyance of the legal estate be made to a citizen, admitting that this is only a trust implied by law and resulting to the alien, it is such a trust estate as is, in equity, escheatable to the commonwealth. If there were any occasion to maintain the proposition, it might, I should think, be maintained without difficulty. For an alien may purchase and take real estate, as well as a citizen; the law permits him to do so; but he cannot hold: he may purchase but he purchases for the benefit of the commonwealth. Neither is the disability of an alien to hold freeholds, or chattels real, for his own benefit, considered as a penalty or forfeiture, but it arises merely from the policy of the law, and therefore it has been held, in equity, that he cannot demur to a discovery of any circumstance necessary to establish the fact of alienage. Attorney General v. Duplessis, 2 Ves. sen. 286; 1 Bro. P. C. 415. But here, there was an express trust. There was a bond or covenant executed by Brodie to Philips, to secure Celeys to him; an instrument, which Brodie probably suppressed, since he had the opportunity, and was the only person that had any interest, to suppress it; and the contents of this instrument are sufficiently ascertained to have been a declaration of the trust, by the fact, that Brodie did hold the legal estate, upon a simple trust for the use of Philips; that Philips held the possession during his whole life, and his heir at law held it afterwards, and enjoyed the whole profits. But, throwing the lost instrument out of the case, Brodie's letters, admitting that Celeys belonged to T. F. Goodwin, the grandson of Philips, and heir at law of his daughter,

507 contain a sufficient written acknowledgment of *the trust on which he held the legal estate. Nay, his parol admissions and declarations of the trust, would suffice to establish it: the case, in its very nature, is not within the statute of frauds: like the case of a deed absolute on its face, but intended and delivered as a mortgage, the trust may be established by parol proof. Sugd. law vend. ch. 15, § 2, p. 443-6; Boyd v. M'Lean, 1 Johns. Ch. Rep. 482, where the cases are reviewed by chancellor Kent. Taking it then, that Brodie held the legal estate of Celeys, upon an express trust for Philips, the alien, it is impossible to doubt, that as the legal estate, if that had been purchased by and conveyed to the alien, would have been escheatable to the commonwealth at law, so this trust estate purchased by him enured to the commonwealth, and equity would compel the execution of the trust for her benefit: if it were otherwise, the law which inhibits an alien from holding lands for his own benefit, and declares, that he can only purchase for the benefit of the commonwealth, would by this simple device, be reduced to a dead letter. King v. Holland, 1 Roll's Abr. Alien, A. pl. 8, p. 194, 534; Alleyn, 14, Stiles, 20, 40, 76; Attorney General v. Sands, Hardr. 488, 495; 3 Ch. Rep. 33, 35; Earl of Somerset's case, Hob. 214; Cro. Jac. 512; Commonwealth v. Martin, 5 Munf. 117, 140, 141, 143; 1 Com. Dig. Alien, C. 2, 557; 1 Bac.

Abr. Aliens, C. 134; 2 Kent's Comm. 54. Neither does the case of Burgess v. Wheate, 1 Eden, 177, conflict with these authorities; besides, in that case, lord Mansfield dissented (and upon the strongest reasoning) from the opinion of lord keeper Henley and sir Thomas Clarke. The appellee, then, is entitled by the grant of the commonwealth, to the land in question. And the commonwealth was, and by consequence the appellee is, entitled to the profits from the death of Philips. For the title and the right to the possession of the land, vested in the commonwealth, immediately upon the death of Philips, without any office found. Harg. Co. Litt. 2, b, note 5; Willion v. Barkeley, Plowd. 229; 2 Kent's Comm. 47, 53.

508 *CARR, J. The claim of the appellee being founded on the acts of assembly of 1825-6 and 1826-7, granting and releasing to him all the commonwealth's right, title and interest, in the estate called Celeys, we are to inquire what were the rights of the commonwealth, which those acts granted to the appellee and authorized him to assert by suit at law or in equity? From the facts of the case, it is very clear, there could be no escheat, technically speaking; for the legal estate was vested in a citizen. But it is equally clear that this citizen was a mere trustee, holding the estate for the benefit of Philips the alien. It was a good deal discussed at the bar, whether this trust resulted, by operation of law, solely from the facts that the purchase money was paid by one, and the deed made to another, or was in express trust, raised by the agreement of the parties? Upon my mind, the evidence has left no doubt, that it was an express trust. The statute of frauds has no application to the case, even supposing the proof of the trust rests on parol evidence; as I think is clearly shewn by chancellor Kent, upon a full and very able review of the cases, in Boyds v. M'Lean, 1 Johns. Ch. Rep. 586. The declarations of Brodie, made at various times and on some solemn occasions, are full to prove, that he purchased and held this land for his friend Philips, and never paid a cent or laid the slightest claim to it, and that he said he would make the right, whenever any of the family could receive it. But I do not think it necessary to resort to parol evidence, to shew that there was an express agreement between the parties as to the trust. It is in clear proof, that there was a writing executed, by Brodie to Philips, to secure Celeys. We are not, to be sure, made acquainted with the particular terms of this writing nor ought we (I apprehend) to be too strict in requiring this, when we reflect, how this paper has probably disappeared. Brodie was the representative of Philips, and the husband of his daughter, and in these characters, had a right to all his papers and documents. But, though the paper be lost, the acts of the parties throw a *strong light upon its probable contents. Brodie held the legal title to guard it from escheat; Philips, and after him his son in law and daughter, enjoyed the full and free use and possession of the estate. The letters, too, of Brodie to old Mr. Goodwin and the appellee, shew, beyond a question to my mind, that

he considered himself holding Celeys for the appellee. I conclude on this point, that here was a clear express trust in Brodie for the benefit of Philips.

Now, we know that, in equity, the trust is the land; the trustee, the mere instrument of conveyance, in no event to take a benefit. In *Burgess v. Wheate*, 1 W. Black. 161, lord Mansfield uses this strong language: "Twenty years ago, I imbibed this principle, that the trust is the estate at law in this court, and governed by the same rules in general, as all real property is, by limitation. Every thing I have heard, read or thought of since, has confirmed that principle in my mind." It is, and has long been, I believe, the policy of most nations, to exclude from all participation in the soil, those who owe allegiance to a foreign government. It is a principle deeply rooted in the common law of England, which as to this, is our law. By it, an alien cannot hold land: he may take indeed by purchase, but it is only for the benefit of the king, and so soon as there is an office found, it is seized into the king's hands; or if he die, the king is seized without office, for otherwise the freehold would be in abeyance, as an alien cannot have any inheritable blood; by act of law he can take nothing in land, for the law (which, as lord Hale says, *nihil frustra facit*) will not give him an inheritance or freehold for he cannot keep it. The law, therefore, will not give an alien the benefit of descent, curtesy, dower or guardianship. These positions are too well settled to need a reference to authorities. Would it not seem a strange inconsistency in the law, if principles so vital, so carefully guarded, might be rendered a dead letter by a mere change in the form of conveyances? And yet this would be very much the case, if by making a

510 citizen the trustee, the beneficial interest of the alien, in the *land, would be placed beyond the reach of the sovereign. Our country might be filled, our farms occupied, by strangers, owing no allegiance, feeling no attachment, to our government, and adding no strength to our resources; for both their persons, and the wealth they might amass, would be withdrawn in the hour of danger. But the law is not justly chargeable with such inconsistency. In some of our oldest books, we find it laid down, that if an alien purchase land, and take a deed to J. S. in trust for himself and his heirs, the king shall have the land; not, indeed, by an inquest of office, but by a suit in equity. The first case we find on this subject, is that of *The King v. Holland* reported in several books. The case, as I gather it from the several reports of it, was thus: an alien purchased a copyhold in fee, in the name of J. S. for himself and his heirs; and this being found by an office, the copyhold was seized into the hands of the king; J. S. came and traversed the trust, which was found for the king; yet the court decided, upon the peculiarity of the copyhold, being a base tenure, that the king could not recover the land itself, for that would make him tenant to the lord, to do service at his court, which the king could not be, but that he must sue in equity to have the trust executed. Lord

Hale was of counsel in this case, and we see the account he gives of it, in the case of *The Attorney General v. Sands*, also reported by several hands. In *Hardress*, 495, he says, "I hold that such a trust in an alien is forfeitable, and will belong to the king, as it was held in 23 Car. 1, in *Holland's case*: and the reason is, because, an alien has no capacity to purchase for the benefit of any other but the king. And it would otherwise be inconvenient, that aliens should receive the profits of lands to their own use; and the mischief would be the same as if aliens purchased the lands themselves." Again, in a report of the same case, 3 Ch. Rep. 130, 133, it is said, that an alien, who is *cestui que trust* of any estate, such estate belongs to the king. And the chief baron said, that it was the opinion of the judges in *Holland's*

511 case, in *which he was of counsel, that an alien hath no capacity to purchase, but for the king's use. The same law is laid down in 2 Vin. Abr. 258, and in *Bac. Abr. and Com. Dig.* under the head of alien. In *Gilbert on Uses and Trusts*, 43, 243, it is also said, "a trust in an alien, is forfeited to the king." It is not necessary to cite more authorities; these are enough. I, at least, am well satisfied both with the authority and the reason of the cases. I conclude then, that the commonwealth had a right to recover this estate by bill in equity, resembling the escheat at law; and that having transferred this right to the appellee, the decree is correct in decreeing him the land; unless there be something in the case of the purchasers, which should protect them from the interference of equity. It was relied on that they were purchasers without notice; but the record contradicts this; it shews that both Parker and Hubbard had notice of the trust, before they were purchasers.

But I think no rents and profits ought to be given. Such is the settled doctrine in cases of escheat at law; and the reason given there, which I think a very good one, holds equally here.

CABELL and BROOKE, J., concurred.

TUCKER, P. This case brings into question the rights and capacities of aliens.

An alien may take lands by purchase, but he cannot hold them, except for the benefit of the state. But although he can take by purchase, he cannot take by act of law, as by descent or curtesy; in other words, he cannot take by act of the law, but only by his own act; for the law will not cast the freehold upon him, merely that it may be forfeited. There is, moreover, no distinction herein, whether the purchase be by feoffment, bargain and sale, or other deed, or by devise. In all those cases, as the act of the party, and not the mere act of the law, casts the freehold on the alien,

512 he can take; though he can only hold the estate he acquires, *subject to the right of the state to seize it, at pleasure. This can only be done, however, by office found, or something equivalent thereto. For, it is one of the principles of the common law, that the crown can only take by matter of record; a principle established for the security of private property from the grasp of power. And until

office found, or some equivalent proceeding, he may hold against all the world, not excepting the state, and is not accountable for rents and profits previously received. 3 Wheat. 589; 11 Wheat. 332. These principles are so elementary in their character, that it is scarcely necessary to cite authority to prove them. I will refer, however, to 7 Cranch, 613, 618, where all the authorities have been diligently collected.

But though there seems to be no ground for difference of opinion, where the alien takes by purchase the legal title to lands, yet there does not appear to be the same unity of sentiment, in relation to an equitable interest in lands acquired by an alien.

That there are cases, in which the equitable interests of an alien in real property, are vested in the state, it will not be difficult to shew from reason and authority. But that wherever, in the case of a citizen, an equitable interest would be raised, it will be raised in favour of an alien, in order to forfeit it to the state, may, I think, well be questioned.

1. I am of opinion, that equity will never raise a resulting trust in favour of an alien. A resulting trust is the creature of equity. It is raised for the benefit of the party, who, upon principles of justice and the circumstances of the case, is entitled to the subject. Being raised for his benefit, there can be no motive for raising it, when that will pervert it to his prejudice. That which is designed as a boon, will not be changed into a forfeiture. To raise the trust, and thereby forfeit the estate, would be to commit the offence, and make the alien bear the penalty. Accordingly, although there is no case, perhaps, exactly like this; no case, where the court refused to raise a resulting trust for

513 the alien, because *he had paid the purchase money; yet there are cases strongly analogous, in which the court has disclaimed the exercise of a like power, when it could only work a prejudice to the party. Thus in *Redington v. Redington*, 3 Ridg. P. C. 106, 184, where a father who was a papist, had purchased lands in the name of his son, and the question was, whether it should be considered as a trust for the father, or an advancement for the son, it was resolved to be the latter; and a principal ground taken by the chancellor was, that to imply a trust would forfeit the lands, at the very instant the trust should be raised. So in *Commonwealth v. Martin's ex'ors*, in this court, where lands were devised to be sold, and the money paid over to aliens, it was argued, that, upon principles of equity, the devisees had a right to elect to take the land; but it was strongly said, "Why shall equity do so vain a thing, as to convert an useful principle of equity as to cestuis que trust generally, into an engine of destruction as to alien cestuis que trusts, by supposing an election in them, which they are not permitted to exercise?" "The election given to a citizen, is adopted on the principle of extending a substantial benefit to him. Why will equity suppose this power in an alien, not as a benefit to him, but merely for the purpose of forfeiting his estate." 5 Munf. 127. See also *Craig v. Leslie*, 3 Wheat. 563. So too lord Mans-

field, speaking of this right of election in the case of a papist, says, "No: a roman catholic shall not make his election, because there is a law which says, that being a papist he shall not take land." "In common cases, where money is given to be laid out in land or securities, a common person may elect to take the land, a charity cannot; because it is unlawful; and, therefore, though the election be given, yet one alternative being lawful and the other not, a court of equity says you shall do that which is lawful." *Foone v. Blount*, 2 Cowp. 467, 8. Pursuing these principles, and a like course of reasoning, I conclude that equity will never raise a mere 514 resulting trust *for an alien, that it may be forfeited to the state: it will not profess to benefit, when it designs to destroy.

2. I am of opinion, that, in the case of a mere executory contract for a purchase of land, while it yet remains in fieri, no forfeiture accrues. For until the purchase is complete by the execution of a conveyance, there is a locus penitentiae, of which the parties may avail themselves. The act is not yet consummate, which the law has forbidden. If it should never be consummated, there would be no offence against this policy of the law. If the parties, by mutual consent, should rescind their contract, there could be no doubt of their right to do so, and then no forfeiture could ever accrue. If it were otherwise, then upon a contract to sell to an alien, even before a cent of the purchase money was paid, the land of the citizen would be forfeited, while no penalty would fall upon the alien. But,

3. I am very clearly of opinion, that where for the purpose of evading the law, which prohibits an alien to hold lands, he purchases real estate in the name of a trustee, upon an express or secret trust to be permitted to take and receive the rents and profits, this is such a trust as in reason and upon the well received principles of equity, as well as upon authority, will pass to the state and be enforced at its instance and in its favour.

In reason, indeed, there can be no doubt. The inhibition of the law would be vain and nugatory, if it could be evaded by such a trust. The policy of that rule which denies to an alien the capacity to hold lands for his own benefit, rests upon the ground, that it is unwise to permit the soil of the country to be in the hands of the subjects of a foreign power, and its revenues to be enjoyed by them; since the state must be impoverished by transporting the revenues of the land into foreign countries, and weakened by putting a part of its territory under subjection to a foreign prince. Now, in a trust of this description, every evil that can flow from the conveyance of the legal title, equally exists; and hence we shall find, that, for centuries past, it 515 has been held *that the use of an alien shall go to the king. Had not this principle been adopted, the courts must either have permitted the alien to enforce the trust, which would have been a direct infraction of the policy of the law; or they must have held the trustee entitled to the property for his own use, which would have

been to hold out to him the wages of treachery.

The well received principles of equity concur in sustaining this position. Trusts are considered as the legal ownership, governed by the same rules, and liable to the same charges. The trustee is considered as merely the instrument of conveyance. He is treated as a mere machine used to effect a transfer to the *cestui que trust*, and is called a conduit, because without deriving any benefit himself, he serves merely to conduct the beneficial interest to another. The *cestui que trust*, on the other hand, is regarded as the real owner of the estate, and the declaration of the use or trust as the essential part of the instrument. Though courts of law look upon the clause, which binds the feoffee to permit the *cestui que use* to enjoy the land, as nothing, courts of equity look upon it, as every thing. How, then, is the policy of the law sustained, if the alien may be permitted to become the actual owner, the real beneficiary of the land? if, by this arrangement, he is permitted actually to hold and enjoy it as the ordinary landholder; to receive its rents to use its resources, to spend them if he resides among us, in the acquisition of an influence which is depreciated by law, or if he resides abroad, to withdraw them to foreign lands, and, so far, to sap the foundations of our strength and diminish the wealth and prosperity of our people, by this worst of all kinds of absenteeism. I cannot think that such practices can be endured; for by such means, foreigners by selecting confidential friends as trustees, might ensure the actual enjoyment of the lands for a very long series of years, if not forever, in direct contravention of the policy of the law; (5 Munf. 140,) and that space in the land would be filled up by persons alien to our institutions, and the sub-
516 jects *of foreign powers, which ought to be occupied by a faithful yeomanry devoted to the land of their birth or the country of their adoption.

Authority, upon this subject, is, I conceive, equally emphatical. I shall not stop to examine minutely, whether opinions, which have received the sanction of every luminary of the law, from the time of Coke and Roll to our own, were or were not expressed extrajudicially. To the opinion of the venerable sages of the law of ancient times, we are told that great veneration and respect are to be paid, "as evidence that cases have formerly happened, in which such and such points were determined, which are now become settled and first principles." They are among the fountains, from which we draw the common law; and when Coke or Roll or Hale lays down a principle as received, we may safely receive it as an adjudicated principle. If we consider only as dicta, and disregard accordingly, doctrines for which an express adjudication cannot be produced, the most unquestioned principles would be most in danger; for these are most apt to have their sources hidden, in the recesses of a remote antiquity. Confiding then, as I do, in the weight of the authorities, there can be no question, that they concur in establishing

that a trust for an alien enures to the crown. Besides the short annunciation of this doctrine in the successive abridgments and elementary writers, to which reference has been made in the argument, I shall content myself with the mention particularly of the well reflected declaration of this opinion on the part of lord Hale as chief baron of the exchequer. In the case of *The Duke of York v. Sir John Marsham*, Hardr. 432, 436, he cites the case of *The King v. Holland*, in which he had been counsel. There, an alien had purchased a copyhold, which was conveyed to another in trust for him: and in assigning the reasons upon which, as he says, the right of the crown was declared not to be forfeited, there is no intimation of an idea, that it arose from the interest in the alien being merely equitable. On the contrary, the reasons

517 assigned go as well *to deny the right of the king to a forfeiture of the copyhold itself, even if the alien had taken the legal title. In the following year but one, the case of *The Attorney General v. Sands*, which had been long under consideration was decided by lord Hale. Hardr. 495. Upon that occasion, the doctrine respecting a trust for an alien, was distinctly pressed upon the court in the argument; and his lordship, in delivering his opinion against the forfeiture in that case, distinctly admits, "that the trust of an inheritance in an alien, is forfeitable, and will belong to the king; as, says he, it was held in *Holland's case*; and the reason is, because an alien has no capacity to purchase for the benefit of any other but of the king. And it would be otherwise inconvenient, that aliens should receive the profits of lands to their own use, and the mischief would be the same as if aliens purchased the lands themselves; but in that case the king is entitled to the profits only; the land itself is not forfeited to him."

Here then, we have an explicit opinion of lord Hale upon this point, not resting solely upon that in *Holland's case*, but sustained by reasons suggested by his own accurate mind. We also have an explicit statement of the fact that such was the decision in *Holland's case*. This statement was doubtless correct, for Hale was of counsel in the case, and his account of the judgment is far more satisfactory than the report in *Stiles*, in which there appears to me to be some omission, as the resolution of the court no where clearly appears. These decisions, more than 150 years ago, transmitted from generation to generation by the learned, as settled principles of the common law, cannot now with propriety be considered as mere dicta, which should have no influence with the court. As such this court did not consider them in *The Commonwealth v. Martin's ex'ors*; for there, the only debateable question was, whether the aliens were to be considered as having a trust in the lands; for it seems to have been agreed, on all hands, that, if they had, the right of the commonwealth was not debateable.

518 *The case of *Burgess v. Wheate* has been cited. Of this case, I think, it may be truly said, that it is of very doubtful authority. It was decided by lord

Northington and sir Thomas Clarke against lord Mansfield; decided as lord Thurlow says, 1 Bro. C. C. 204, upon divided opinions, and opinions, which continue to be divided, of very learned men." And when we find lord Thurlow himself pronouncing, that it was decided "upon the scanty ground of the defect of a tenant," and declaring an executor trustee of personality for the crown for want of next of kin, we cannot err very far in placing him on the side of lord Mansfield in this matter. If we do so, the scales are balanced, and the opinions of other learned men will make that of lord Mansfield decidedly preponderate. See 2 Kent's Comm. 54, citing Sugden's Gilbert on uses, 86, 404. That learned judge there delivers it as received doctrine, that the crown takes the trust of an alien. There, certainly, can be nothing more unreasonable, I think, than this decision of *Burgess v. Wheate*, if we consider it in any other light than as a mere question of tenure. That the trustee should be permitted, upon the death of the beneficial owner without heirs, to hold the estate to his own use, is utterly at variance, not only with the principles of equity, which consider him as a mere machine, an instrument, a conduit; which declare that trusts and legal estates shall be governed by the same rules, and that the trust shall descend and pass as the legal estate would descend and pass; but, it seems to me, at variance with the natural justice of the case. It is right and proper, that when the owner of property dies without giving it away, and without leaving any object having natural claims to his bounty, such as heirs or next of kin, his property should go to the community of which he is a member. But, in truth, *Burgess v. Wheate* was decided on the ground of tenure. It was a question of escheat for want of heirs, not of right in the crown because of alienage. And it was decided, that there could be no escheat upon the death of the cestui que trust without heirs, because the trustee was in existence *to do the services. It is to me very obvious, that this principle has no application to the case of an alien. That is not (though it is often inaccurately so spoken of as) a case of escheat. The devolving of the rights of the alien on the crown, is arranged by the most distinguished commentator under the head of forfeiture; though, in a case of more recent date than his work, it is said that it is not to be considered as a penalty or forfeiture, but as arising merely from the policy of law; Attorney General v. Duplessis. Be this as it may, it is confessedly altogether distinct from escheat, of which no further evidence need be required, than that, in case of escheat, the property in England goes to the lord of whom the tenant held, whereas in case of alienation, to an alien, it always goes to the crown, even though the land be holden of a mesne lord. Now, though it be true, as decided in *Burgess v. Wheate*, that the interest of cestui que trust shall not escheat (that is, devolve upon the lord for want of a tenant) because the lord has in fact a tenant in the trustee; yet it surely does not follow, that the trust estate of an alien, shall not devolve on the crown, for the same reason; since

the want of a tenant is not the reason upon which it ever devolves on the crown. The case of *Burgess v. Wheate* has, therefore, I conceive, no application here.

After the preceding view of the state of the law which bears upon this case, I proceed to remark, very succinctly, upon the facts as they appear to me. I am clearly of opinion, that the doctrine of resulting trusts does not apply to the case. There is no room for a resulting trust where there is an express trust; and here, I think, there was an express trust, in writing, to permit the alien to take and enjoy the rents and profits to him and his heirs. That the land was purchased with Philips's money is admitted: that Brodie always acknowledged that the property was not his but Philips's is certain. From these circumstances, I should infer that, ab ovo, there was an understanding between Brodie and Philips, that the former was to purchase the 520 land *in his own name, and hold it for the latter. Such an understanding was an express trust though verbal.

But it was not a mere verbal trust. It was a trust in writing. That there was a writing executed by the parties, is perfectly clear; and this fact of itself puts the statute of frauds out of the question; for, if the trust or bargain whatever it was, was reduced to writing, the statute cannot apply, even though the contract or writing be lost. What was the precise nature of that writing, we are not informed by the witnesses. They state, however, that it was a writing to secure the title of Celeys. It was executed in Philips's lifetime, and the conduct of the parties amply supplies the defect of the testimony of the witnesses. Was it a bond to make a title? Philips was an alien, and could not take one; else, the deed might have been made to him in the first instance. Was it a bond to make him a title when he should become a citizen? If so, we should probably have heard of his taking some steps towards it. Nothing of that sort appears: no attempt at naturalization appears to have been made, though the facilities to admission had been, before 1805, the date of this transaction, very much increased.

These considerations shew, negatively, what was not the character of the written instrument. The acts of the parties shew pretty clearly, what was the character of the arrangement between the parties; and it would seem natural to suppose, that the writing contained the arrangement, whatever it might be. What was the arrangement? I answer, that Brodie should continue to hold the estate in his own name, but should permit Philips to enter upon the estate, receive the rents and profits, enjoy it as his own, and have it completely under his control. That this was the arrangement is to be presumed, because this was actually done. Philips did take possession; did enjoy, did receive rents and profits, did have complete control of the estate, and died in possession. After his death Goodwin and wife, both aliens, entered, in right of the wife, and held until his death, in the same manner. After Goodwin's death, Mrs. Goodwin, 521 *still an alien, continued to hold in

the same manner, until she married Brodie in 1811; and after the marriage, Brodie and herself resided on the property until 1815, when she died. What are we to infer from these facts, but that, although the land was held in Brodie's name, it was arranged between him and his friend, that that friend, though an alien, should be permitted to hold, enjoy and control the estate as his own, under the shadow and protection of the deed from Cary to Brodie. A more complete trust cannot, I think, be conceived, and the right of the commonwealth is a necessary consequence. This right might properly have been asserted in the court of chancery, even in Phillips's lifetime; but since, by his death, the title was devolved on the state, without an office found, there can no longer be a question as to that matter. Moreover, the right of the commonwealth is transferred to the appellee, and he is empowered to assert it in any court of law or equity.

Having thus arrived at the conclusion, that the commonwealth had the right, and that the plaintiff is invested with that right, we next proceed to the defences.

Neither Parker nor Hubbard were purchasers without notice of the trust. If they had so purchased, they would not have been affected by the trust. Yet they must have shewn payment of purchase money, and the receipt of the conveyance to protect them. But, in truth, it is clearly proved they had both sufficient notice, not only before one cent of the money was ever paid, but before Hubbard even became the purchaser.

It was said, this sale was authorized by the guardian and counsel of the appellee. No such authority could have been given by him, for he was an infant; and it was not, therefore, possessed by the parties who exerted it. In fact, at that time, the commonwealth, and not Goodwin, was the party interested.

As to the profits: The commonwealth (or Goodwin who stands in her stead) can come into equity only upon the principle, *equitas sequitur legem*. They rely that

522 trusts *must be treated as legal estates, and upon that ground assert the rights of the state. If so, then the principle must be followed up to its consequences. We cannot blow both hot and cold. If equity follows the law, it must follow it throughout. Now, at law, until office found, the alien may receive the rents and profits and shall never be accountable for them. 3 Wheat. 563, 589. And this is the consequence, I take it, of the fact, that there is no remedy for such profits. In *Wheaton*, no case is cited in support of the position; but it seems sufficiently obvious upon this ground simply. The office found merely ascertained title of the crown, whereupon it entered by its officers. But no damages were provided for, nor were damages ever found by the inquest, nor is any remedy devised for the recovery of them. And this was equally the case, whether the alien himself or any other took the profits. Upon office found, they could not be recovered. Now, equity in following the law, cannot go further than the law. Equity, therefore, cannot

decree rents and profits. The alien or any other person may take them without accountability, until office found or until some equivalent proceeding. What is the equivalent proceeding in this court? The decree. The office found ascertains the title of the crown, and vests the possession. That is the effect here of a decree, and until the decree there is no such effect. Therefore, I am of opinion, that so much of the decree of the court of chancery as decrees a title to be made to the appellant be affirmed, and, as to all other matters, that it be reversed.

I am clearly of opinion, that the court ought not in this cause to undertake to adjust the transactions between Hubbard and Kennedy. None of the cases in which the court has decreed between defendants, have gone so far. I think it has been done in no case where the plaintiff was not entitled to a decree against both or either. The practice should not be extended further. The contest, if any, between defendants can never come fairly before the court.

523 There is no issue made up, nor any provision for taking *their testimony in reference to the peculiar matters in difference between them. Indeed, it does not follow, that in answer to a plaintiff's bill, the defendant should go on to state his own case in reference to his difference with his co-defendant.

However, as the appellants were both properly made parties in the court of chancery, in reference to the question of title, they must pay the costs of that court. They must have their costs here.

Both decrees reversed, so far as they directed an account of profits, and decreed the payment of the profits by Kennedy and Nimmo's administratrix, and the first decree, for the land itself, affirmed.

Duff v. Duff's Ex'ors.

February, 1832.

Appellate Practice—Capacity of Testator to Make Will—Opinion of Lower Court Affirmed—Case at Bar.

—In a controversy concerning the probate of a will of real as well as personal estate, in a circuit court, the evidence of the witnesses as noted by the Judge, is, by consent, spread on the record: the evidence thus stated, is wholly silent as to the execution of the will by the testator, and attestation by the witnesses; but it is clearly to be collected from the record, that the only point in controversy was, whether the testator was of sound mind and that the due execution of it, supposing him sane, was not disputed: the circuit court, being satisfied that the testator was of sound mind, and, therefore, admitting the will to probate, this court, concurring in the opinion of the circuit court as to the sanity of the testator,

***Appellate Practice—Remanding of Causes.**—In the principal case upon the question concerning the probate of a will, the only point in controversy was, whether the testator was of sound mind, the question of due execution, supposing him sane not being disputed, the circuit court being satisfied that the testator was of sound mind admitted the will to probate and the appellate court concurring in the opinion as to the sanity of the testator affirmed the sentence. But *TUCKER, P.*, who dissented, thought that the cause ought to be remanded to the circuit court for a new hearing, on which the evidence of due execution might be supplied. In the discussion of the question as to when a cause ought to be remanded to the inferior court for rehearing, *TUCKER, P.*, in the following cases refers to his opinion in the principal case. *Miller v. Argyle*, 5 Leigh 466; *Cropper v. Burtons*, 5 Leigh 431; *Watkins v. Carlton*, 10 Leigh 574; *Stillingtons v. Brown*, 7 Leigh 275, and note.

affirmed the sentence—Dissentiente. TUCKER, P. who thought, that the cause ought to be remanded to the circuit court for a new hearing, on which the evidence of due execution, now wanting, might be supplied.

A writing purporting to be the last will and testament of Samuel Duff, was offered for probat, by the executors therein named, in the county court of Russell; and Rees Duff, a son of the deceased, appeared to contest the probat. There were six subscribing witnesses to the will; four of whom, and sundry other witnesses, 524 were examined in the *county court; which pronounced sentence, "that the said writing was executed as a will of real and personal estate, according to the statute in such case made and provided, and that the testator, at the time of making and executing the same, was of sound disposing mind and memory;" and therefore, "that the said writing should be established, and recorded, as the last will and testament of the said Samuel Duff deceased." Rees Duff appealed from the sentence to the circuit court.

In the circuit court, the following agreement between the parties, by their counsel, was entered on the record: "It is agreed between the counsel for both parties, that the testimony of the witnesses to be examined upon the hearing of this appeal here, as the same shall be taken down by the judge of the court, shall be used as the evidence in the event of an appeal, to avail as much as if their depositions were regularly taken." The testimony was accordingly noted down by the judge, from the lips of the witnesses; and he prefaced his notes of the evidence, with these words: "Mr. Estill states the case, with the circumstances necessary to enable the court to understand it. The only question is, Was the testator of sound mind when he executed the will?" And then followed the testimony of three of the subscribing witnesses, and of several others, as noted by the judge; all of which related to the question of sanity only: no question was asked, by the counsel on either side, or by the court, touching any other point. It appeared that the will was written for the testator, by one of the witnesses; and in the testimony of the three subscribing witnesses examined in the circuit court, as stated by the judge, not a word was said concerning the execution of the will, or their attestation thereof. The circuit court, upon consideration of the evidence, affirmed the sentence of the county court; and then Rees Duff appealed to this court.

Leigh, for the appellant, discussed the question as to the testator's sanity, upon the evidence. And he admitted, that 525 *it was sufficiently apparent from the record, that that was, in fact, the only point of dispute in the courts below; yet, he said, there was such a fatal defect in the proof of this will, as stated in the record, that this court could not affirm the sentence, even if it should think the testator's sanity unquestionable. There was no proof whatever, that the will was attested by the subscribing witnesses, in the presence of the testator; no proof, indeed, that the will was executed by the testator, in any way. In the actual state of the proof,

he thought, the court must reverse the sentence; and, either pronounce sentence against the will (which, if it should concur in opinion with the courts below, as to the sanity of the testator, it would, he was aware, under the circumstances of the case, be very loath to do); or remand the cause to the circuit court, for a rehearing there, in order that the whole case might be fully stated on the record.

Johnson, for the appellees, maintained, that there could be no reasonable doubt, that the testator was of sound disposing mind and memory. If, for the defect in the proof as to the execution and attestation of the will, this court should reverse the sentence, he said, the latter alternative suggested by the appellant's counsel, was certainly the proper course: the court would never pronounce a sentence, which would, in effect, set aside and annul a good will, upon a ground, on which the party opposed to it, never thought of contesting it. But he contended, that this court ought to pay no regard to the supposed defect in the proof. The parties agreed, that the judge's notes of the testimony, should be substituted in place of depositions regularly taken; and thus adopted his state of the case and of the controversy; and he prefaced his state of the evidence, by saying, that Mr. Estill stated the case, with the circumstances necessary to enable the court to understand it; and that the only question was, whether the testator was of sound mind when he executed the will? Now, it was plain, the judge stated that this was 526 the only question, because Estill said

*it was so; and plain, that Estill was the appellant's counsel, since he opened the case, in the circuit court: and, as the only question he raised, was as to the sanity of the testator at the time of the execution of the will, he admitted the due execution, if the testator was sane. The evidence in the circuit court, was properly confined to the only question of fact in dispute, the sanity of the testator. In the county court, the evidences as to the execution and attestation had been adduced; and the sentence of the county court shewed, that due execution and attestation was proved there.

CARR, J. It is clear from the record, and was admitted in the very candid argument of counsel, that the sole matter in contest in the courts below, was, Whether the testator was of sound mind when he executed the will? The question of due execution of the will, formed no part of the controversy; and I cannot doubt, that we ought, on this record, to take it as a point admitted by the parties. The record shews, that, in the county court, the due execution of the will was regularly proved. In the circuit court, it seems from the entry on the record, that before the cause was gone into, the counsel agreed, that, in case of appeal, the testimony, as the same should be taken by the judge, should be used as evidence. This I understand to be a substitution of the judge's notes of the evidence, for regular depositions, and thus making those notes a part of the record; especially, as we must of necessity conclude, that his statement was examined and

agreed to by the counsel. The judge, being aware of this substitution, would of course be more full and particular in taking his notes. Mr. Estill I take to have been counsel for the appellant, because the judge's notes shew, that he was the opening counsel. Now the judge begins his notes, thus: "Mr. Estill states the case, with the circumstances, which are necessary to enable the court, to understand it. The only question is, was the testator of sound mind when he executed the will?"

527 *This is the introduction to the testimony, and was no doubt taken from the lips of Mr. Estill, as he opened the cause. I repeat, it is agreed to, and made part of the record by the counsel, and must be taken by us as forming a portion of the case. The conclusion from it is irresistible to my mind, that the parties were satisfied with the proof of the due execution of the will, and meant only to contest the capacity of the testator. What the parties admit need never be proved. Three of the witnesses to the will are examined before the circuit court, and it is stated by them, that they did witness it, but in that general and incidental way which shews that this was not the matter in contest. It would, I think, have a very mischievous effect, if we were to suffer a party, not merely to stand by, but actively to co-operate in thus turning the cause into another channel, and then come to a superiour court upon some formal point, from which his own conduct has led off the attention of the court below.

With respect to the soundness of the testator's mind, at the time of executing the will, I am clearly of opinion, that the sentence of the courts below, is correct; and I think it ought in all things to be affirmed.

CABELL, J. I am of the same opinion.

TUCKER, P. I am of opinion, that, in this case, the evidence in behalf of the sanity of the testator preponderates. But this is not sufficient to sustain the sentence of the courts below. The record exhibits no proof of the due execution of the will, according to the statute. The question before us admits of no division: it is integral. We are to pronounce, not upon the mere question of sanity, but upon the propriety of admitting this will to record, as a will of real and personal estate. We can neither infer any admission, nor that any testimony was given, other than what has been inserted in the record; both because the statute requires all the evidence to be spread upon it, and because it appears, that, in point of fact, that was done. The

528 consequence *must be, as I think, a reversal of the sentence; but in what manner and upon what terms, it is important to ascertain.

Before the act of 1810, 1 Rev. Code, ch. 64, § 18, p. 194, which required the testimony to be spread upon the record, in cases of probat, where either party desired to appeal, the appeal brought before this court the whole question of fact as well as of law; and the parties were not tied down to the evidence that had been given in the court below, but were at liberty to fortify it, and to maintain their case by any additional testimony that was deemed necessary. Hence a defect (such as has occurred

in this case) might always have been corrected by farther examinations here. But that cannot now be done. The statute of 1810 declares, that "it shall not be lawful for the court of appeals in any civil action to hear or receive parol testimony;" and from that date, this court has always held, that it was confined to the testimony spread upon the record, in all cases concerning mills, roads, probats of wills, or grants of administration. We cannot, therefore, supply the defect in this case by an examination of the attesting witnesses, as to the ceremonies which attended the execution of this will. Yet a reversal out and out, in this case, might produce manifest injustice. It was said by judge Green, in *Bagwell v. Elliott*, 2 Rand. 200, that "if a will offered for probat be contested and rejected, this might be used thereafter, as the decision of a competent judicial tribunal, and would condemn it forever." And in England, a sentence in the ecclesiastical court as to the validity of a will of personality (as to which alone that court has jurisdiction) is conclusive between the parties to it, until repealed. Phil. Law Ev. [264].* To give to the decision in this case, such an effect, would be in conflict with what, from the facts before us, we suppose may be the justice of this case. What then is the rule of practice, which should be pursued, in

529 order *to adapt the decisions of the court to the principles of justice, under the new state of proceeding established by the statute of 1810?

We shall look in vain for precedents to guide us in this matter, among the former decisions of this court, as the difficulty we encounter, could not embarrass those who have gone before us. However, in *Wilcox v. Rootes*, 1 Wash. 140, we find enough to satisfy us, that the court in pronouncing sentence against the will, thought itself impowered to do so without prejudice to the probat of any other will which might be produced. The necessity of such a precaution is not, indeed, obvious; but its adoption affords evidence of the caution of the court at that time. In the recent case of *Smith v. Jones*, 6 Rand. 33, this court was of opinion, that the testimony in the record did not sustain the instrument as a valid will of real estate; but the subscribing witness, who put the testator's name and mark to the will, had not been examined, and it was very probable that his testimony would have supplied the deficiency: And the court sent the cause back, that his testimony might be taken. But, as it appears from the opinion of the judge in that case, that an application had been made to the court below, for an opportunity to procure the evidence of the witness, which was improperly refused, the order sending back the cause for further proceedings, should, perhaps, be ascribed to that error, rather than to any general principle which should govern in cases like the present.

We are driven, therefore, I conceive, to proceed according to well received principles, and analogies in the law. Now, nothing is more clear, than that when a cause,

*New York ed. of 1820.

of whatever kind, has been once fairly and fully heard and decided upon its merits, the judgment or sentence is conclusive between the same parties, in any other controversy about the same matter. The rule of law is, *nemo debet bis vexari pro eadem causa*, 2 W. Black. 831, 5 Co. 31, 5 Bac. Abr. 440,

530 though, where the action is only mis- conceived, *or the judgment is given for a fault in the declaration or pleadings, or upon the manner not the matter of the plea, the judgment is not conclusive of the rights of the parties. So if the party demurs to the evidence, the judgment upon that demurrer, is final and conclusive, and no subsequent suit will lie for the same cause of action. So, if upon a special verdict, the facts are so specially found, as to enable the court to give judgment according to the right of the case, such judgment will be rendered, and will be final and conclusive. But if a special verdict be so uncertain or defective, that the court cannot pronounce judgment according to the right of the case, or if it appears from the verdict itself, that there is some other fact necessary to be ascertained, a *venire de novo* must be awarded. It is scarcely necessary to cite cases to this point: but that of *Bond v. Seawell*, 3 Burr. 1773, is too apposite to be omitted. In that case, two of the witnesses to the will had never seen the first sheet of it; but as the court was of opinion, that, if the first sheet was in the room at the time of attestation, it was sufficient, the special verdict, which had not found as to that fact, was set aside, and a *venire de novo* awarded.

The same principles run through the whole of our proceedings. Thus, if a bill of exceptions states a case so that the court can clearly discern the right, judgment will be pronounced accordingly; but if it states the case imperfectly, if it shews upon its face, that there is some other matter, which was necessary to have been stated, in order to a fair decision, the case will be sent back for a new trial. So of the pleadings: if the declaration be radically defective, shewing no cause of action whatever, a repleader can never be awarded; but where it does not state a defective case, but only states a good case defectively, a repleader will be awarded; the proceedings will be set aside up to the writ, and the parties permitted to begin *de novo*. 2 Salk. 579; 5 Bac. Abr. Pleas and Pleadings, M. 3, p. 457; 1 Chitt. plead. 634.

531 *All these principles are but contrivances of the courts to come at the justice of the case; to prevent, on the one hand, the renewal of litigation on a matter once fully adjudicated, and, on the other, to avoid rendering a final and conclusive sentence, where the proceedings themselves evince, that there is some fact not ascertained, which is susceptible of being established, and which ought to be ascertained, in order to enable the judge to pronounce judgment according to the right of the case.

Pursuing these principles, I am of opinion, that where the court sees that the whole case on a question of probat, is fairly before it, it ought to pronounce a general and definitive sentence, affirming or revers-

ing the sentence of the court below: but where it is obviously otherwise, it is in its discretion, to send the cause back for further proceedings, unless the conduct of the party has excluded him from the privilege.

Thus, in the case before us: the defect is, that there is no testimony in the record, as to the execution of the will. Yet there are six subscribing witnesses. These witnesses would prove, that the will either was, or was not, duly executed. At present, they prove neither. Hence we see, that the very gist of the case is not presented. The essential fact is susceptible of being ascertained, but is not ascertained. This court has no information about it. Therefore, in my opinion, the cause ought to be sent back. This is the more reasonable here, as the decision of the court in favour of the will, or some agreement, not appearing in the record, admitting the execution of it, may have lulled the executors into security. A party can never be in fault for not producing farther testimony, when the tribunal which sits in judgment upon his case, tells him there is sufficient. If that tribunal be mistaken, he is surely entitled to a new hearing of the cause.

But the other judges being satisfied with the sentence, in all respects, it is affirmed.

532 *Conrad v. Harrison and Others.

March, 1832.

(Absent BROOKE, J.)

Mortgages—Subsequent Mortgage of Same Land—Order of Liability.—S. mortgages a parcel of 300 acres of land to B. to secure a debt due to him; then S. mortgages all of the same land, except 75 acres, to H. to secure debt due to him, these 75 acres being excepted and reserved out of this second mortgage, because the mortgagor was then in treaty with a third person for the sale thereof to him, which treaty was afterwards broken off; and then S. mortgages the whole parcel of 300 acres to C. to secure a debt due to him: HELD,

1. **Same—Same—Marshalling Assets.**—That H. the second mortgagee, has a right, as against Sisson the mortgagor, B. the first mortgagee and C. the third mortgagee, to insist that the debt due to B. shall be satisfied out of the parcel of 75 acres reserved out of the second mortgage to H. so as to leave that part of the subject mortgaged to H. untouched, and applicable to the satisfaction of the debt due him: and.

2. **Same—Same—Order of Liability.**—That C. the third mortgagee, has no right to call on H. the second mortgagee, to contribute, *pro rata*, to the satisfaction of the debt due to B. the first mortgagee.

Same—Case Doubted.—The proposition, that where "a judgment is recovered against a debtor, and then the debtor alien his lands to divers alienees by divers conveyances, all the debtor's lands, in the hands of his several alienees, are alike liable to the judgment creditor, and the lands in the hands of the several alienees must contribute *pro rata* to satisfy the judgment," stated by the court in *Beverley v. Brooke*, 2 Leigh. 428, doubted, but held not applicable to the present case.

***Successive Alienation of Incumbered Land—Order of Liability.**—On this question the principal case is cited in the following: *McClung v. Bierne*, 10 Leigh 402, 408, and *note*; *Henkle v. Allstadt*, 4 Gratt. 292; *Alley v. Rogers*, 19 Gratt. 389, and *note*; *Jones v. Phelan*, 20 Gratt. 241, 242, 243; *McClintic v. Wise*, 25 Gratt. 456; *Whitten v. Saunders*, 75 Va. 569; *Miller v. Holland*, 84 Va. 656, 5 S. E. Rep. 701; 2 Va. Law Reg. 702. To the point that where part of a tract of land subject to a lien is conveyed, the residue is primarily liable for the whole debt, the principal case is cited in *Baughner v. Elchelberger*, 11 W. Va. 226; *Payne v. Webb*, 23 W. Va. 664.

See monographic *note* on "Mortgages" appended to *Forkner v. Stuart*, 6 Gratt. 197, and "Marshalling Assets" appended to *Carrington v. Didier*, 8 Gratt. 280.

John Brock, by deed dated the 4th June, 1817, sold and conveyed to Jesse Sisson, a parcel of 360 acres of land in the county of Rockingham, for 7000 dollars; of which Sisson paid Brock 2000 dollars in cash, and, by deed of the same date, conveyed the whole of the land to Henry Gambill, in trust to secure the payment of the balance of the purchase money, 5000 dollars, in instalments. Sisson, having made sundry payments to Brock, and reduced the debt he owed him to about 400 dollars, and being indebted to Reuben Harrison and Jesse Cravens, in the sum of 3212 dollars, by deed dated the 23rd February 1822, conveyed the land he had bought of Brock, "except about 75 acres on the east side of the tract, which the said Sisson was about to sell to Peter Durrow," to Philip Koontz, in 533 trust *to secure the debt of 3212 dollars due to Harrison and Cravens. At the time this last mentioned deed of trust was executed, Sisson was in treaty with Durrow, for the sale to him of the 75 acres reserved by the deed; but that treaty was afterwards broken off, and no sale was made to Durrow. By deed dated the 4th April 1824, Sisson conveyed the whole of the land he had bought of Brock (including the 75 acres, which he had reserved out of his mortgage to Harrison and Cravens) to the same Philip Koontz, in trust to secure the payment of a debt of 820 dollars due to Henry Conrad. All these deeds were duly recorded: besides, Conrad, as well as his trustee Koontz, had full notice of all the preceding conveyances and incumbrances; and Harrison and Cravens, when they took their mortgage of February 1822, had full notice of the previous mortgage to Brock. After the execution of the deed of trust to secure the debt due to Conrad, Harrison, one of the cestuis que trust and creditors secured by the deed of February 1822, purchased Sisson's equity of redemption in the whole of the land that had been bought of Brock, and procured from Brock, an assignment of his claim for the balance of about 400 dollars yet remaining due to him, and of the deed of trust of the 4th June 1817, executed by Sisson to secure the debt to Brock.

In a bill exhibited in the superiour court of chancery of Staunton, by Conrad against Harrison, Cravens, Sisson, and the trustee Gambill (the trustee Koontz was not a party, having died before suit brought) the purpose of which was to adjust the rights of the incumbrancers, and to settle the priorities among them; Conrad insisted, that the balance of 400 dollars due to Brock and by him assigned to Harrison, should be satisfied out of that part of the land, which was mortgaged to Harrison and Cravens, by the deed of trust executed by Sisson to Koontz, of February 1824, leaving the 75 acres (reserved by the exception in that deed) which Sisson was then about to sell to Durrow, untouched, and applicable, in the first 534 instance, to the satisfaction of the

*debt of 820 dollars secured to Conrad by Sisson's deed of trust to Koontz of April 1824. And Harrison and Cravens, in their answers, insisted, that the 400 dollars, balance of the debt due and secured to Brock by Sisson's deed of trust to Gambill

of June 1817, to which Harrison was entitled by assignment from Brock, ought to be charged upon and satisfied out of the 75 acres, which were reserved in Sisson's deed of trust to Koontz to secure the debt due Harrison and Cravens, leaving that part of the land which was mortgaged by that deed, untouched, and applicable to the satisfaction of the debt of 3212 dollars thereby secured to Harrison and Cravens.

The chancellor declared, that Conrad had no right to require, that the 75 acres should be exempted from the lien of Brock's mortgage of June 1817, to the benefit whereof Harrison was entitled, since the effect of such exemption would be to throw the whole burden of that first incumbrance, upon the only subject embraced by the second mortgage to Harrison and Cravens, of February 1822, for the advantage of Conrad, the third and last incumbrancer. Therefore, he decreed and ordered, That the 75 acres should be sold by the marshal of the court, and that the nett proceeds of the sale thereof should be applied, first to the payment, to Harrison as assignee of Brock, of the balance due upon Brock's mortgage of June 1817, and the residue, if any, to the payment of the debt due to Conrad upon his mortgage of April 1824. And that, the 75 acres being first sold, the residue of the land should then be sold by the marshal, and the nett proceeds of sale applied in the following order: 1st, to the payment of any balance of the debt due to Harrison on Brock's mortgage, that might remain unsatisfied after applying the proceeds of sale of the 75 acres to that debt; 2ndly, to the payment, to Harrison and Cravens, of the debt due them on their mortgage of February 1822; 3rdly, to the payment of the debt due Conrad, upon his mortgage of April 1824; and 4thly, if there should be 535 any balance remaining, that should be paid into court, subject to future order. From this decree, Conrad appealed to this court.

Johnson, for the appellant. 1. Conrad was entitled to priority of satisfaction out of the parcel of 75 acres. For, the intent of the parties to the deed of February 1822, whereby 75 acres of the land, which Sisson was about to sell to Durrow, was excepted and reserved out of the mortgage to Harrison and Cravens, was, to enable Sisson to sell that parcel of 75 acres, clear and unincumbered to Durrow; and if that parcel had been sold to Durrow, Harrison and Cravens, who, with such intent, and with full knowledge of Brock's incumbrance at the time, assented to the reservation of it, ought not to have been allowed, as against Durrow, to insist that the debt due to Brock should be charged upon it, in exoneration of the parcel mortgaged to them. Neither could their rights be varied or made better, by the circumstance, that, not Durrow, but Conrad, became the purchaser of the 75 acres; they intended to leave it in Sisson's power, to sell a clear unincumbered title in that parcel; and it made no odds to them, who was the purchaser. But, 2. supposing Conrad not to be entitled to priority in respect of the 75 acres; yet here, in effect, the whole of the subject was first mortgaged to Brock, and then part of it

mortgaged to Harrison and Cravens, and last, the residue of it mortgaged to Conrad. And Conrad has a right to insist, that the part mortgaged to Harrison and Cravens, shall contribute, rateably with the part mortgaged to him, to the satisfaction of the debt due to Brock the eldest incumbrancer; and this in strict analogy to the settled principle of the law, that if a judgment be recovered binding the lands of the debtor, and then the debtor sell parcels of the lands to several purchasers, at several times, all the purchasers shall contribute, in just proportion, to the satisfaction of the judgment. 5 Vin. Abr. Contribution and Average, A. pl. 3, 4, 6, 7, 12, 19, p. 561, 2; 6 Bac. Abr. Scire facias, C. 5, p. 114, 115; Harbert's case, 3 Co. 11. The doctrine 536 has *been applied in equity; and so applied, as to compel several purchasers of lands previously mortgaged, to contribute to the satisfaction of the debt due on the mortgage. *Cheesborough v. Millard*, 1 Johns. Ch. Rep. 409; *Mayo v. Tomkies*, 6 Munf. 520, 8; *Chamberlayne v. Temple*, 2 Rand. 384. In *Beverley v. Brooke*, 2 Leigh, 426, 439, 444, where a judgment had been recovered against a debtor holding lands, and the debtor had afterwards aliened his lands to several purchasers at divers times, I endeavoured to maintain, for the eldest purchaser, that the lands in the hands of the junior purchaser, ought, in equity, to be first subjected and applied to the satisfaction of the judgment debt: but the court held, that the law was perfectly settled otherwise; that "all the alienees of the lands of a debtor bound by a judgment or recognizance, no matter in what order the alienations were made, are bound to bear equally the burden of satisfying the judgment, by mutual contributions, pro rata, according to the value of the property held by them; all being considered as in *æquali jure*, without regard to the priority of their purchases or conveyances."

Leigh, for the appellees. 1. When Harrison and Cravens took their mortgage of February 1822, whereby the 75 acres, which Sisson was about to sell Durrow, were reserved out of the mortgage, they had no other intent than to obtain adequate security for the debt due to them, and they acted under the belief, that the part of the land mortgaged to them was adequate security for the debt. They knew that Brock had a mortgage of the whole land; and that they would have a right, as against Brock and Sisson, to compel Brock to take satisfaction out of the part which was mortgaged to him but not to them. It was no part of their duty to take care of the interests of Durrow, or any other purchaser from Sisson, of the 75 acres. It was the purchaser's business to take care of himself, and to see that the purchase money he contracted to pay Sisson, should be applied to relieve the subject from Brock's incumbrance.

537 The *purchaser of the 75 acres stood in Sisson's place; he purchased Sisson's rights; he purchased subject to all claims, legal or equitable, which attached thereto in Sisson's hands. 2. As to the question of contribution among the junior mortgagees, to satisfy the eldest mortgage;

the proposition contended for, seems hardly reconcilable with the fundamental principle or maxim, that regulates priorities among equitable incumbrancers: *Qui prior est in tempore, potior est in jure*. To say, that in the case of a mortgage of a subject, followed by successive mortgages of the equity of redemption of the whole of the same subject, every elder shall have priority over every junior mortgagee throughout—but that, if after the mortgage of the whole subject, there shall be several mortgages of several parts of it, to different persons, at different times, all the junior mortgagees of the equity of redemption, shall contribute, pro rata, out of the parts mortgaged to them, respectively, to pay off the debt due on the first mortgage,—seems a very odd distinction. There may be more reason, perhaps, for a distinction between the cases of subsequent absolute purchasers of parcels of a subject under mortgage, and mere mortgagees of the parcels: but even this distinction would be irreconcilable with general principles of equity. Chancellor Kent has decided, upon full consideration and the strongest reason, that there shall be no contribution between purchasers, at several times, in succession, of several parcels of lands under the lien of a prior judgment, or of a prior mortgage. *Gill v. Lyon*, 1 John. Ch. Rep. 447; *Cloves v. Dickenson*, 5 Id. 235, 241, 2. I must own, that, in the argument of *Beverley v. Brooke*, though Mr. Johnson did not cite the decisions of chancellor Kent in the cases just mentioned, yet he urged, and with great force too, the same general reasoning, on which that judge founded his opinion; but as it was only a minor point in that cause, and no authorities upon it were cited at the bar, the argument in support of it was not reported. But *Beverley v. Brooke* is not exactly in point to the present case: the eldest lien in that case, 538 *was a judgment; and this court sitting in chancery, placed the subsequent mortgagees in the same situation, in which it supposed the law would have placed them, if the judgment creditor had sued out a scire facias against them as terre tenants. *Mayo v. Tomkies* is not at all in point: there, the subsequent purchasers of the parcels of the mortgaged lands, claimed under a devise which charged the parcels equally.

CARR, J. The only serious question in this case, is that which has been raised, and very well argued, on the subject of contribution. I have laboured exceedingly, to understand it; but I feel doubtful of my success; especially, as the present inclination of my mind seems opposed to my former opinion.

I premise, that I do not think this question at all affected by the exception or reservation in the deed from Sisson to Koontz for the benefit of Harrison and Cravens, nor by the understanding, which the appellant's counsel supposed, existed between the parties to that deed. For the intent and design of the parties, we must consult the deed itself. That gives a lien on Sisson's land, except 75 acres on the east side of the tract. As to the land thus excepted, Harrison and Cravens have no claim on it

as a security for the debt due them: but that is all: they say nothing as to the effect of Brock's lien upon it; much less do they stipulate to relinquish any right, which their position as incumbrancers may give them, to throw Brock's lien on this excepted land. We must, then, decide this as a general question.

Considering Conrad's claim to preference over Harrison, by throwing Brock's lien off the 75 acres, wholly unfounded, has he a right to stand on equal ground with Harrison? to claim a rateable contribution of him, in the payment of Brock's debt? It lies at the very root of this doctrine of contribution, that the parties shall stand in *æquali jure*. The vendor or his heir can never call on his vendee for contribution.

Suppose, after Sisson's deed to Harrison *and Cravens, and before that to Conrad, Brock's trustee had advertised, and sold the 75 acres retained by Sisson; he could never have called on Harrison to bear his part of a common burden. So far from it, if Brock's trustee had advertised the whole land for sale, there can be no doubt, that Harrison and Cravens could have enjoined the sale of the part covered by their deed, until it should be found, that the sale of Sisson's 75 acres would not satisfy Brock's lien; and for such deficiency only would the residue of the land have been liable. So, if Sisson had died, and this land (the 75 acres) had descended to his heirs, it would have been first liable in their hands, nor could they have asked contribution of any body; except indeed of each other, if they had borne the burden unequally. Harrison and Cravens, then, having this 75 acres between them and Brock's lien, when they took their deed, is there any act or omission of their's since, which could deprive him of this protection? None such is relied on. Could the sale or mortgage of this 75 acres by Sisson to Conrad, with full notice, change the equity of the parties, and give Conrad a right to contribution, which all must admit Sisson had not? This would violate that settled rule, that a vendee with notice, takes the land with all its equitable burdens, and stands precisely in the shoes of his vendor. Look at the position of these parties; do they stand in *æquali jure*? I think not. Harrison and Cravens took their deed, knowing they had the 75 acres between them in danger: Conrad took the 75 acres, with the same knowledge: a knowledge calculated, essentially, to influence the contract of each. Suppose a man had bought a thousand acres of land, at the price of 10,000 dollars; that he had mortgaged it for the purchase money, and had paid all of it but 1000 dollars; and another wants to buy a hundred acres of this land: in making his contract, it will not weigh a feather in the scale, that the whole tract is still bound for 1000 dollars, while he knows that nine hundred acres still remain in his vendor's hands liable for this balance, before the hundred acres he
540 proposes *to buy can be charged. He would, without hesitation, give the full price, and pay the money, satisfied that the lien could never touch him. But suppose the vendee of the thousand acres, had

sold to different purchasers nine hundred acres, and offered the last hundred to another, with the original lien for 1000 dollars still on the tract? assuredly, his prospects in the purchase would be very different; and common prudence would induce him to pause, till he should see clearly how the incumbrance was to be met. It seems plain to me, therefore, that the successive purchasers, or incumbrancers, do not stand in *æquali jure*; and that no one who comes after, can call on those before him for contribution. Sir W. Harbert's case, 3 Co. 11, b, when carefully examined, will be found to rest on these principles of equity. The same subject is very ably handled by chancellor Kent, in several cases; especially in *Clowes v. Dickenson*.

If it be asked, how I can reconcile this decision with that of *Beverley v. Brooke*, in which I sat, and agreed fully with the rest of the court? I answer, that I cannot reconcile them to my own satisfaction. I can only say, that, in each, I have decided as I thought right. I well remember to have examined with care, the authorities cited in *Beverley v. Brooke*, by our excellent and learned brother [Green, J.] whose aid I most sincerely wish we had now; and to have thought his deductions from them correct. In that case, the decisions of chancellor Kent now cited, so powerful in their reasoning, seemed to have escaped both the bar and the bench. There was no reference to them. The counsel, indeed, took the ground in argument; but we thought all the authorities were the other way.

I am for affirming the decree.

CABELL, J. As to the first point, it is enough to say, that I concur with judge Carr, that the exception of the 75 acres out of the deed of trust of February 1822, to secure the debt due Harrison and Cravens, furnishes no ground to sustain Conrad's claim to priority of satisfaction out of that reserved parcel.

541 *The other question is, Whether, on general principles, Brock's debt, which every body admits must be provided for, is to be first charged on the parcel of 75 acres? or whether it is to be charged, rateably, on that parcel and on the residue of the land conveyed in trust to Cravens and Harrison? There is no difference, as to this question, between creditors secured by mortgage, and creditors secured by deed of trust; and as the case may be thereby simplified, I will consider it as if Sisson were mortgagor and Brock mortgagee of the whole tract, and Harrison and Cravens, and Conrad, were subsequent mortgagees, each, of particular parts of the tract.

All mortgages, whether original or subsequent, are regarded, in a court of equity, as mere equitable incumbrances for the security of the debt; and it is the business of that court, so to mould and direct these equities, as to effect the purposes of justice.

If there were no other persons concerned in this case, than Sisson the mortgagor, Brock the first mortgagee, and Harrison and Cravens the second mortgagees, all would admit, that a court of equity, in providing payment for Brock's debt, ought so to direct it as not unnecessarily to lessen

or impair the security of Harrison and Cravens; and, consequently, that Brock's lien ought to be made to fall, in the first place, on the 75 acres not included in the mortgage to Harrison and Cravens, and in which Sisson and Brock were alone interested. If this would be so, in that case, I cannot conceive how the alienee of Sisson's equity of redemption, can stand on better ground than Sisson himself. And, accordingly, there never has been a case, where one of two subsequent mortgagees were held to be contributory to the other. They are not in equal right; but the last mortgage takes in subordination to him who precedes him.

It is supposed, that the case of *Beverley v. Brooke* is in conflict with these principles. But that case is different from this, in some important respects. That was not the
542 *case of subsequent incumbrances, after a prior mortgage, but after a prior judgment. In that case, English had obtained a judgment against Pickett, who afterwards mortgaged a part of his lands to *Beverley*, and then, the whole to *Scott*. English, by his judgment, had a legal lien, and could have taken out an *elegit* against all the lands of Pickett; and it was not competent to a court of equity, to restrain or limit him in the exercise of that legal right. Besides, he was not plaintiff, nor did he ask any thing of a court of equity. He stood on his legal rights, which bound all of Pickett's lands; and this court, conforming to the law, executed that lien, by directing that all the lands should contribute, rateably towards the satisfaction of his judgment. Whether that decision was right or not, it will be time enough to inquire when a similar case shall occur. It is sufficient, for the present, to say, that that case is materially different from this; for here, the original lien is merely an equitable incumbrance, and not a lien by judgment; and here, the person claiming contribution, is plaintiff in equity, and therefore, can ask nothing but equity.

I concur in the opinion, that the decree should be affirmed.

TUCKER, P. The rights of the parties in this case, must first be examined upon general principles of law, independent of the influence, which the exception in the deed of trust of February 1822, is supposed to have upon it. In this regard, Conrad's pretensions will be found to rest on no reasonable foundation. Brock having a deed of trust on the whole land, and Harrison and Cravens a subsequent deed of trust on one part of it, and Conrad a still later deed of trust on the whole, it is found, that there will not be enough to pay all. Brock must be paid, for he has the first lien. Harrison and Cravens, or Conrad, must lose. Which ought to be the loser, the prior or the subsequent incumbrancer? The latter, assuredly. Conrad does not think so: but he can sustain his claim, only by shewing
543 that he has a right, either to throw the whole burden from his *shoulders upon Harrison and Cravens, or a part of that burden by compelling them to pay rateably.

That Conrad should throw the whole bur-

den upon Harrison and Cravens, who obtained their lien before he obtained his, would indeed be without example. The principle is clear, that where a first incumbrancer (as Brock in this case) has two funds to resort to, and a subsequent incumbrancer but one, the latter may compel the former to seek satisfaction out of that on which he has no lien, provided he does not thereby interfere with the superiour rights of a third person. Thus, if Harrison and Cravens had no incumbrance, Conrad might demand that his 75 acres should be relieved, and the burden thrown on that portion which would yet have remained in the debtor's hands. But Harrison and Cravens have an incumbrance on that part; an incumbrance prior to Conrad's; and it would reverse the order of things, and upturn the established principles of equity, if he, who is subsequent in point of time, should be prior in point of right. Conrad, therefore, has no pretension to throw the whole burden upon Harrison and Cravens.

Neither is he entitled to throw any part of the burden upon them. Before he purchased, no person had that right. His purchase was made with knowledge of their lien, and of Brock's incumbrance, and with presumed knowledge of the legal effect of those liens. Would it be just or reasonable, that Harrison and Cravens, without any fault, or assent on their part, should thus be incumbered with any part of this burden? Far otherwise; for they not only have a right to resist Conrad's pretensions to throw the burden on them, but if Brock himself had been about to do so, they would have been entitled to demand that the whole burden should have been thrown upon Conrad. This is a necessary consequence of the principle of equity, already stated, that where a first incumbrancer has two funds to resort to, and the subsequent incumbrancer can only charge one of them,

the first incumbrancer shall be compelled to seek redress, *in the first
544 instance from the other fund. Thus, if Sisson still held the 75 acres of land, Harrison and Cravens would have a clear right to demand that Brock's 400 dollars should be paid out of that parcel, if adequate to the purpose, so as to leave their fund untouched. It is no sufficient objection to this, that Harrison and Cravens would thus, in effect, have satisfaction out of a fund on which they had no lien. That objection has never been considered availing, since the case of *Lanoy v. The Duke of Athol*, 2 Atk. 444. See *Attorney General v. Tyndall*, Amb. 614; *Aldrich v. Cooper*, 8 Ves. 381. The principle is firmly established, and cannot now be called in question, that if two funds of a debtor are liable to one creditor, and only one fund to another, the former shall be thrown upon that fund, to which the other cannot resort, in order that he may avail himself of his only security.

Now, if upon the execution of the deed of trust to them, Harrison and Cravens had this right against Sisson, they must have the same right against Conrad, because when Conrad purchased, he took his 75 acres, subject to its liability in the hands of the debtor, in preference to the land already incumbered to Harrison and Cravens. He

sits (as has been well said) in the seat of his grantor, and must take the land with all its equitable burdens. It cannot be in the power of the debtor, by the act of selling the remaining land to discharge it, and throw the burden back upon Harrison and Cravens. If so, we should then have this unheard of state of things, that one man shall lose his rights and property, without his fault or his assent, and another shall be enabled to take them away without an equivalent. The equity of Harrison and Cravens, therefore, as against Sisson, to throw the burden upon his 75 acres, still subsists as against Conrad, who purchased from him with a full knowledge of all the facts, and a presumed knowledge of all the legal consequences of those facts.

But it is said to be settled, that all the alienees of the lands of a debtor, are bound to contribute, rateably, to the
545 *satisfaction of a judgment which binds them, without regard to the time or order of their purchases. And it is contended, that the case of a mortgage does not differ from that of a judgment, nor the case of incumbrancers from that of alienees.

That the principle contended for is in direct conflict with that which, I think, has been already shewn to be established, is sufficiently obvious. That it is in conflict with the reason of the thing, seems equally plain. "If," says chancellor Kent, "there be several purchasers in succession, at different times, I apprehend, that, in that case also, there is no equality, and no contribution as between those purchasers. Thus, for instance, if there be a judgment against a person owning three acres of land, and he sells one acre to A. the two remaining acres are first chargeable in equity, with the payment of the judgment debt, whether the land be in the hands of the debtor or of his heirs. If he sells another acre to B. the remaining acre is then chargeable, in the first instance, with the debt as against B. as well as against A. and if it should prove insufficient, then the acre sold to B. ought to supply the deficiency, in preference to the acre sold to A. because, when B. purchased, he took his land chargeable with the debt in the hands of the debtor, in preference to the land already sold to A. In this respect, we may say of him, as is said of the heir, he sits in the seat of his grantor, and must take the land with all its equitable burdens. It cannot be in the power of the debtor, by the act of assigning or selling his remaining land, to throw the burden of the judgment, or a rateable part of it, back upon A." Upon these principles, set forth in *Clowes v. Dickenson*, chancellor Kent proceeded in that case, and on the same principles, he had previously decided the case of *Gill v. Lyons*. I do not perceive how the reasoning, or the conclusion, of the judge can be successfully controverted. His decisions, indeed, are not binding authority upon this court; but we are bound to follow the light of reason, from whatever
luminary it may be poured upon us.

546 *Sustained by this high opinion, I should have no difficulty in pronouncing, that a subsequent alienee or in-

cumbrancer of one of several mortgaged subjects, can never call upon a precedent incumbrancer of another, for contribution, but for the case of *Beverley v. Brooke*, in which the common law doctrines are cited, approved and enforced, in reference to incumbrancers, and that too in a court of equity. Without questioning the truth of the doctrine at law, I should have conceived the principles of chancellor Kent would have prevailed in equity. The distinction between the cases grows out of the difference of the tribunals, as happens in a thousand instances. It rests upon principles of equity unknown to the common law, and the creatures of courts of chancery; principles, which form a part of that artificial but beneficent system, which has so admirably contrived to soften the rigour of the common law, and to transfer the purest ethics through the whole of our jurisprudence.

While, however, the case of *Beverley v. Brooke* stands as the law of the court, we are not justified in taking a distinction from the difference of the tribunals of law and equity: that was a case in equity as well as this. But that was the case of a judgment; this, of a mortgage: and if I could see no distinction between them, I should not be disposed to extend to this case, as it is not identical, a principle with which my reason is not satisfied. There is, however, some distinction between the cases. The right of the purchasers, as we are told in the authorities cited, is not to compel each other to contribute, but to force the plaintiff in the judgment, by *audita querela* or *scire facias*, to issue his execution against all. If this is not done and one pays all, it would seem he is without remedy. 3 Co. 14, b. But, in the case of the mortgagee, there are no means of compelling him, at law, to turn all the parties out of the mortgaged premises. His title is at law absolute as to the whole. The incumbrancer who would enforce contribution, can only have it in equity: and if he asks it there, he must shew that he has equity; and this, I take it, the last incumbrancer cannot shew, as against the prior mortgagee.

547 *It remains, as to this part of the case, only to say that the exception or reservation of the 75 acres, contained in the deed of trust to Harrison and Cravens, can have no influence in withdrawing the case from the influence of general principles. The argument was, indeed, strong and imposing, and if there could have been no other motives for the exception than the protection of the 75 acres from the operation of this equitable principle, it would present a question of much difficulty. But there was another ample and more obvious motive for this exception: the protection of these 75 acres from Harrison and Cravens's lien for 3212 dollars. Brock's lien was trivial; the debt due him was reduced to 400 dollars: it could prove no obstruction to a sale: who ever purchased could easily clear it off with part of the purchase money. Not so, if it had been bound for the 3212 dollars. If offered for sale, it might well have been objected that that large debt would sweep the whole.

If once bound, Harrison and Cravens might have been unwilling to release it, unless they got the whole proceeds of sale, which would have thwarted the views of Sisson, who wished the command of these funds. These, I conceive were the views of the parties. They are, at least, more likely to have been the operative motives, than a protection for a mere equitable right, of which, it is very probable, not one of the parties to the instrument had any knowledge or conception. We cannot consider the exception, therefore, as a waiver of that right, since it may be ascribed to a different and more obvious consideration.

Decree affirmed in omnibus.

548 *Sale v. Dishman's Ex'ors.

March, 1832.

(Absent BROOKE, J.)

Partnership—Bond Executed by One Member—Liability of Other Members.—Though a bond or covenant executed by one partner of a mercantile house, in the name of the firm, for a debt of the partnership, is not binding on his copartner who did not seal the instrument, yet the debt being originally a debt of the concern both partners are liable for it to the creditor.

Same—Liability of Estate of Deceased Member.—And though the surviving partner of a mercantile house is alone liable at law to the creditors of the house, yet if the surviving partner prove insolvent, the estate of the deceased partner is liable, in equity, for the debts of the partnership.

Same—Same—What Amount of Laches Will Exonerate—Quere.—What degree or kind of laches of the creditor, or dealing between him and the surviving partner, in respect of the debt claimed of the partnership, will suffice to exonerate the estate of the deceased partner from the debt.

Same—Same—Diligence Required of Creditor in Enforcing Claim.—It seems, mere delay of the creditor to assert and prosecute his demand against the surviving partner, will not suffice to exonerate the estate of the deceased partner. And there is no analogy between the duty of creditor in such case to assert and prosecute his claim against the surviving partner, and the due diligence which the assignee of a bond is bound to exert against the obligor, in order to entitle him to recourse against the assignor.

***Partnership—Bond Executed by One Member of the Firm—Liability of Other Members.**—On this question the principal case was cited in *Weaver v. Tapscott*, 9 Leigh 427, 430, 432, and foot-note; foot-note to *McCullough v. Sommerville*, 8 Leigh 415; *Ward v. Motter*, 2 Rob. 552, 567; *Morris v. Morris*, 4 Gratt. 327; *Brooke v. Washington*, 8 Gratt. 254, 257; *Niday v. Harvey*, 9 Gratt. 470; *Baylor v. Dejarnette*, 13 Gratt. 172; *McArthur v. Chase*, 13 Gratt. 704; *Black v. Campbell*, 6 W. Va. 64; *Gordon v. Funkhouser*, 100 Va. 675, 42 S. E. Rep. 679.

+Same—Death of One Member of Firm—Liability of Estate.—See, on this question, citing the principal case, *Galt v. Calland*, 7 Leigh 601, 603, and note; foot-note to *Jackson v. King*, 8 Leigh 689; *Jackson v. King*, 12 Gratt. 508, 510, 513; *Glazebrook v. Harveys*, 1 Va. Dec. 270; *Powell v. White*, 11 Leigh 329.

+Same—Same—Laches.—The principal case is cited in *Coles v. Ballard*, 78 Va. 148. In *Welfey v. Shendoah*, I. L. M. & M. Co., 83 Va. 77, 3 S. E. Rep. 376, the principal case is cited to the point that a court of equity can only decree upon the case made by the pleadings.

And in *Whittaker v. Southwest Va. Imp. Co.*, 34 W. Va. 229, 12 S. E. Rep. 511, it is said: "Next as to the defense of laches. It is argued that as this defense is not made in the answer, the defendant cannot have its benefit on demurrer. This position is sought to be sustained by the language of the judges in *Sale v. Dishman*, 3 Leigh 548; but it cannot be sustained, for it is opposed to the case of *Jackson v. Hull*, 21 W. Va. 601, wherein JUDGE SNYDER says that 'it is now the clearly-established rule in equity that the statute of limitations, or objections in analogy to it upon the ground of laches, may be taken advantage of by demurrer as well as by plea.' This language is the text of 1 Daniel, Ch. Pr. p. 569, § 9, where many authorities are cited."

See monographic notes on "Partnership" appended to *Scott v. Trent*, 1 Wash. 77, and "Laches" appended to *Peers v. Barnett*, 12 Gratt. 410.

Newton Berryman and James Dishman were merchants and partners at Port Royal, trading under the firm of Berryman & Dishman, though it appeared, that, in fact, Dishman had only permitted his name to be used as one of the firm, in order to give Berryman credit, and had advanced him about 500 dollars in money, which he was to receive back, with interest, without regard to the profit or loss of the trade. In March 1812, a contract was made between William Sale and Berryman & Dishman, whereby Sale agreed to sell and deliver to Berryman and Dishman, between 600 and 700 barrels of indian corn, and Berryman & Dishman agreed to pay Sale for the corn, four dollars per barrel, on or before the 1st January 1813. This contract was evidenced by covenant signed and sealed by Sale, and by Berryman alone in the name of the firm of Berryman & Dishman. But, it appeared, that Dishman

had advised Berryman to purchase the 549 corn. Under this contract, *Sale delivered Berryman & Dishman 688 barrels of corn. The partnership of Berryman & Dishman was dissolved in April 1812; and public notice was given of the dissolution, and all persons having claims against the firm, were requested to present them to Berryman for settlement and payment. Dishman died in June 1813. And, on the 23rd April 1814, upon a settlement of accounts between Sale and the surviving partner Berryman, there was a balance found due to Sale, on account of the corn, of 1320 dollars; for which Berryman gave his bond to Sale, who, however, declared, at the time he took it, that he would not give up his recourse against Dishman's estate.

In February 1819, Sale exhibited his bill, in the superior court of chancery of Fredericksburg, against Berryman, and Austin Smith and George White executors of Dishman, setting forth the facts, as above stated, and that Berryman was now utterly insolvent; alleging, that the corn had been sold and delivered to Berryman & Dishman, and chiefly, in fact, upon the credit of Dishman; insisting, that, though Berryman's covenant signed and sealed in the name of the firm, was not Dishman's deed, yet, independently of that covenant, the partnership was bound to pay the value of the corn sold and delivered to it; and that, though the claim could only be enforced against the surviving partner, at law, yet, in equity, the estate of the deceased partner was liable for the debt: and praying a decree for it against Dishman's executors.

Dishman's executors, in their answers, set forth the terms of the connexion between their testator and Berryman, and said that Dishman was only a nominal partner; that Sale had in fact dealt with Berryman alone; and that upon the dissolution of the partnership, all the social effects were left in Berryman's hands, to meet its engagements: and they insisted, that, under the circumstances of the case, Sale, having after the dissolution of the partnership, and after Dishman's death, taken Berryman's bond for the balance due him on account of the corn, thereby precluded 550 himself *from all recourse against Dishman's estate. They did not

plead, or otherwise rely on, the statute of limitations, in their defence. Neither did they allege, that Sale, by a prompt and timely assertion and prosecution of his claim against Berryman, might have recovered the debt of him, before he became insolvent.

Berryman's answer also stated the terms of his connexion with Dishman, and gave a detailed account of the transaction with Sale; and he alleged, that he was entitled to credits for effects assigned to Sale, the proceeds of which were to be applied towards the discharge of this debt.

The facts of the case, as above stated, were fully proved. It was admitted by Dishman's executors, that Berryman had become insolvent before this suit was brought by Sale. Dishman's executors filed copies of sundry executions sued out by sundry creditors against Berryman, and of sundry mortgages of property executed by Berryman to secure debts due by him to other creditors, in 1815 and 1816; whereby it appeared, that, in the course of those two years, executions to a larger amount than Sale's claim, had been satisfied out of Berryman's property, and that he had, besides, mortgaged other property to other creditors, to a yet larger amount in value.

The chancellor dismissed the bill; and Sale appealed from the decree to this court.

The cause was argued here by Stanard and Johnson for the appellant, and Leigh for the appellees; but it was more fully discussed by the judges.

CARR, J. The appellees' counsel objected to the jurisdiction of the court of chancery to give relief upon this bill, and in support of that objection, cited the case of *Linney's adm'r v. Dare's adm'r*, 2 Leigh 588, as resembling this. It is certainly like it in some of its features, but very unlike it in others. We declined the jurisdiction in that case, because at the time of filing the bill, the plaintiff had a perfect

551 *and plain legal remedy, as Ross, one of the obligors bound for the debt, was admitted, on all hands, to be perfectly solvent: in this case, it is admitted on the record, that before Sale's bill was filed, Berryman was insolvent; so that, in fact, the plaintiff had no remedy at law, when he came into equity. Whether that fact, under the circumstances attending it, will entitle him to relief here, is another question. We know, that one partner cannot by deed bind the firm. The covenant, therefore, entered into by Berryman, for the purchase of the corn, imposed no obligation on Dishman. But it is in proof, that the corn, with his advice and assent, was sold and actually delivered to the firm. This created a debt against the firm, binding Dishman as well as Berryman; a simple contract debt as to Dishman. By the death of Dishman, this debt survived against Berryman; and the creditor lost all remedy at law against Dishman's representatives. Berryman, afterwards, executed his bond for the debt. But neither the death of Dishman, nor the execution of Berryman's bond, discharged Dishman's representatives in equity. Their situation, however was materially changed. They were, now, neither primarily nor absolutely liable. For the

authorities relating to this point, and the further view of it there taken, I refer to the case of *Linney's adm'r v. Dare's adm'r*. The books all lay it down, that the first resort of the creditors is to the surviving partner, and if he be not responsible, then they may come upon the estate of the deceased partner in equity. I said, in *Linney and Dare*, that I had not met with a case, where the creditor had been suffered to come upon the assets of the deceased partner in equity, until he had first sued the surviving partner at law, and shewn a defect of assets, or such partner had been declared bankrupt: but I did not mean to be understood as supposing that there could be no such case. Insolvency may be ascertained just as satisfactorily without a suit as by one; whatever puts the fact beyond a doubt, is sufficient. Here, insolvency before the suit, is admitted. But when it took place, we are not informed. It

552 *is said, with great reason, by lord Eldon in *Ex parte Kendal*, 17 Ves.

525, 6, that, as this resort to the funds of a deceased partner, is a demand in equity only, it can be enforced only on equitable principles; and that, where the dealing of the creditor with the surviving partners, has been such, as to render this relief inequitable, he will not be relieved. One instance of such dealing, is a course of conduct, shewing that the creditor means to relinquish his remedy against the assets of the deceased, and look exclusively to the surviving partner. I see no such intention in the present case; for when Berryman offered Sale his obligation for the money, he refused at first, and finally accepted it, with a declaration, that he had no idea of releasing his claim on Dishman's estate. But Sale, with Berryman's bond in his possession, waited upwards of four years, before he took any step to recover the money: and if Dishman's executors had put this matter in issue, and shewn us, that, but for this delay, the money might have been made out of Berryman, I strongly incline to think, that this also would have been such conduct, as would have rendered it inequitable to permit his resort to the estate of Dishman; for lord Hardwicke, speaking of this application to equity, in *Bishop v. Church*, 2 Ves. sr. 107, says "The plaintiff must come as from a pure fountain; must shew himself not to be guilty of any laches, much less collusion, turning to the prejudice of the other side, which might be strong enough to rebut that equity set up beyond what the rule of law admits." But the defendants made no such point in the pleadings; gave no notice of such a defence to their adversary: nor can this be supplied by the documentary evidence touching the point found in the record.

Upon the whole, I think the chancellor's decree should be reversed, and a decree entered for the appellant.

CABELL, J. This is the case of a creditor of a mercantile house, seeking to recover his debt from the representatives of a deceased partner: and the question is, whether he has shewn himself entitled to recover?

553 *It is an elementary principle, that

on the death of one of two or more joint partners in trade, the legal obligation to pay the debts of the house, devolves exclusively on the survivors or survivor. But it is equally true, that the deceased partner, although discharged at law, is regarded, in equity, as still liable for the debt. That liability, however, cannot be made to affect his estate, even in equity, until the surviving partner becomes insolvent. Therefore, the first question in this case, is, whether it sufficiently appears, that the surviving partner was insolvent, before the commencement of the suit?

There is no particular kind or degree of proof prescribed for establishing the fact of insolvency. In England, it is considered established by the party becoming a bankrupt; so also, by a judgment and execution and a return of nulla bona. But, in the case before us, the insolvency is admitted by the parties, on the record; which precludes the necessity of any other proof, and is of itself the establishment of the fact.

As the act of limitations was neither pleaded, nor any way relied upon, it is unnecessary to inquire, whether it would have been applicable to the case, or whether it would have availed, if it had been pleaded or relied upon. Mere length of time between the death of the deceased partner and the commencement of the suit, cannot avail, except as evidence of payment; and it cannot be pretended, that the time, in this case, was sufficient for this purpose.

Then, the only real question is, whether the creditor is bound to shew, that he has used due diligence in endeavouring to recover the debt from the surviving partner? or to shew, that an early prosecution of the suit against the surviving partner, would have been fruitless? I am clearly of opinion, that no such obligation rests upon him. The doctrine of due diligence, as between indorser and indorsee, and assignor and assignee, has never been applied as between a creditor of a mercantile house and a deceased partner.

The reason is most obvious. The
554 indorser or assignor *is never considered a debtor, or as liable for the debt, until the indorsee or assignee has first shewn that he has used due diligence, and has failed to recover the debt: but the deceased partner is considered, in equity, as originally and equally liable with the surviving partner: and the doctrine of due diligence can never apply as between joint debtors. That it does not apply, in such a case as the present, is clearly proved by Slesch's case, 1 Meriv. 563, for, although the delay there was only six months, it would have been as fatal, on the ground of due diligence, as a delay of as many years. Nor does the creditor lose his recourse against the estate of the deceased partner, even if, being requested, he refuses to sue the surviving partner himself, or to permit the representative of the deceased partner to sue in his name: as appears by the case of Bishop v. Church, 2 Ves. sen. 100, 371. The representative of the deceased partner, if he be dissatisfied with the delay, or unwilling to encounter its risk, has his redress in his own hands: he may either pay the debt, or institute a suit against the surviving partner for a settlement of the accounts; or he may, without

paying the money, sue the surviving partner and the creditor. It is no objection to the authority of Bishop v. Church, that, in that case, both of the partners had bound themselves by bond, for the payment of the debt. For the bond being only joint, not joint and several, the deceased partner was as much discharged at law, from all obligation to pay the bond, as the deceased partner, in this case, was discharged from the legal obligation to pay this simple contract debt. Moreover, if the deceased partner be regarded merely as a surety, he has no more right than other sureties, to demand of the creditor, that he shall sue the principal. And that other sureties have no such right, except under our particular statute, 1 Rev. Code, ch. 116, § 6, p. 461, (which does not extend to a case like this), is clear from the case of Croughton v. Duval, 3 Call, 69.

I do not feel myself required, on the present occasion, to decide, as a general question, what sort of dealing between
555 *the creditor and the surviving partner, or what sort of laches on the part of the creditor, would be sufficient to rebut the equity of the creditor. It is sufficient for the present, to say, that, in my opinion, there is nothing, in this case, to impair the claim of the appellant.

TUCKER, P. It is apparent from the original agreement, signed by Berryman in the name of the firm, for the purchase of the corn from Sale, that the firm was looked to as debtors for the amount. It is natural, that it should have been so, as Dishman lent his name to give credit to the firm. The contract thus signed, and (by mistake of received principles, which deny the right of one partner to bind another at law by a seal) being sealed also, was nevertheless binding in equity upon both partners. When, indeed, it appears that the creditor intends to look only to the individual partner, it may be otherwise; but, in equity, the form of the thing is immaterial, if the substance of the contract was to bind both. Thus, even a joint bond is, in equity, after the death of one of the obligors, construed to be several as well as joint; because, in justice, in conscience, and by the intent of the parties, both are debtors. Wherever the real consideration is paid to both, both are bound to make satisfaction, though, through ignorance, the instrument is so drawn as to have another effect at law; and, as there is no legal remedy, a court of conscience will, if it can, reach the effects of the persons borrowing and receiving the money. Bishop v. Church, 2 Ves. sen. 100. In this case, then, the partners were clearly bound by the original contract. Without controverting the case of Tom v. Goodrich, 2 Johns. Rep. 213, which was an action of assumpsit, I think it is evident, that, unless it appears that the note or bond of an individual partner, is designed to be accepted in discharge of the partnership, it will not have that effect in equity. Thus, even if a judgment be obtained against a surviving partner, on notes of the firm, that judgment
is, at law, an extinguishment of the
556 original notes (for, transit *in rem adjudicatam) and so in case of a bond, it would be, at law, an extinguishment of the simple contract; yet, in both cases, it would be in equity a partnership debt still. Jacomb

v. Harwood, 2 Ves. sen. 265; Heath v. Percival, 1 P. Wms. 682; Orr v. Chase, 1 Meriv. 729; David v. Ellice, 5 Barn. & Cress. 196, 11 Com. Law Rep. 201. And this principle I understand to be distinctly recognized by this court, in Williams v. Donaghe's ex'or, 1 Rand. 300, and in Linney's adm'r v. Dare's adm'r, 2 Leigh, 588. Now, in the present case, the implication that the taking of Berryman's bond was intended to absolve the partnership, is not only weakened by the fact that he was the only surviving partner, but it is expressly repelled by Sale's declaration, at the time, that he would not give up his resort to Dishman's estate. If the taking this obligation did not discharge Dishman, the subsequent dealings with Berryman had not that effect.

The principal questions discussed at the bar, respect, 1. the jurisdiction of the court, and 2. the supposed laches of the plaintiff in pursuing Berryman.

On the subject of jurisdiction, I think there is no difficulty. It was admitted, that Berryman was insolvent, when this suit commenced. No suit at law against him could avail, and therefore none could be required. It is also obvious, that as to Dishman's estate, the only remedy was in equity. The case is, therefore, not like Linney and Dare, where the jurisdiction was denied, because the creditor had a complete legal remedy against Ross, the surety, and it was no concern of his to bring the parties into equity, in order to fix the demand on the representatives of the principal. In this case, there is no remedy at law.

The other question is more difficult. The partnership was dissolved in 1812, and in May 1813, Dishman died. From that date till 1819, no proceedings were instituted against Berryman, who, in the mean time, became insolvent; and the first suit against him is that which we are now considering, the main design of which is to subject
557 *Dishman's estate. In the interim, it would seem he had parted with valuable property, and had discharged very considerable demands, from which it may be inferred, that this debt might have been recovered of him, if it had been prosecuted immediately.

That the liability of the estate of a deceased partner, is neither immediate nor absolute, seems to be very clear. It cannot be charged at law, but if the surviving partner is not responsible, it is liable in equity. In this case, it is indeed agreed, that Berryman was insolvent when the bill was filed: but the question recurs, whether it suffices to establish an insolvency, contemporary with the suit? It is contended, that that is not enough; and that before the deceased partner's estate can be charged, due diligence must have been used to procure payment from the surviving partner; and it must appear, that notwithstanding the exertion of such diligence, the debt could not be recovered from him.

Now, in considering this matter, we must bear in mind, that though the common law, deviating herein from the *lex mercatoria*, holds partnership contracts to produce only a joint obligation because they are joint in form, and considers them as attaching only upon the survivors; yet the courts of equity,

following what is apprehended to be the general mercantile law, considers a partnership contract several as well as joint, and binding upon the survivors. Gow's law of partn. 436, 7. The money is advanced or the goods delivered upon the credit of all the partners. All are presumed to have derived more or less benefit from the transaction; and the question of more or less, the court will not enter into. Hence the equity to charge the estate of the decedent, though discharged at law: an equity set up beyond what the rule of law admits, which, therefore, may be rebutted, if the party is guilty of fraud or collusion, or even of laches. 2 Ves. sen. 107. What does amount to laches? is the important question here. "With respect to the time (says Gow, p. 443,) when the creditors should prosecute their demands against the surviving partners, in order to retain *their right of resorting to the estate of a deceased partner, no rule of convenience exists, which requires them to do it within any assigned or arbitrary limitation." It seems to have been supposed by some, that it must be done within some very short period of time. But it is very doubtful (as is well observed by the master of the rolls in Sleaford's case, 1 Meriv. 569,) whether the estate of a deceased partner would be benefited by such a rule; since few houses could stand the sudden and concurrent demand, which that rule would necessarily bring upon a surviving partner. A house might be reduced to bankruptcy, which, in the ordinary course of business, might have been able to fulfil its engagements; and a demand would thus be brought on the estate of the deceased partner, from which it might otherwise have been wholly exempt. Accordingly, in that case, Miss Sleaford was held not to have lost her equity by eight months delay. In Lane v. Williams, 2 Vern. 277, 292, the laches was much greater,* but did not bar the creditor. In Daniel v. Cross, 3 Ves. 277, it was nearly two years before the bankruptcy of the survivor: and in Hamersley v. Lambert, 2 Johns. Ch. Rep. 508, Hubbell, the deceased partner died in September 1803, and the surviving partner was discharged as an insolvent in October 1807—an interval of four years. In that case, the delay was held no bar: though chancellor Kent goes, perhaps, too far in saying, that Miss Sleaford's case established the doctrine, that "neither delay, nor lapse of time, nor dealing with the survivor, nor calling for and receiving part of the debt from the survivor, amounts to a waiver or bar of the claim upon the assets of the deceased." "It is," says he, "in equity a joint and several debt; and as lord Parker observes in one of the cases, the assets of the deceased must lie at stake, until the
559 bond is *paid." I rather think, there is no settled rule or analogy yet established upon this subject. To require the same diligence which is demanded in cases of bills of exchange, was very readily

*So says the master of the rolls in Sleaford's case: but in the note of the editor of the late edition of Vernon, the case appears to be very incorrectly reported. He states the note to have been a year old: and he details circumstances as appearing in the case, upon which it might have been decided, without a reference to the principle under discussion. (Note by the judge.)

considered out of the question. To put the case upon the footing of the implied contract for due diligence between an assignor and assignee, would, it appears to me, be pregnant with the very evil so strongly stated by the master of the rolls in *Sleech's case*. The case of the assignor and assignee, indeed, must always stand upon its own peculiar grounds. The principles established as to the duties of the assignee, have taken a halfway ground between the liability in cases of negotiable instruments, on the one hand, and the duties of a creditor in relation to the surety in a bond, on the other. They have been laid down for the regulation of this new kind of medium, which has been created by giving validity to the assignment of bonds, and authorizing the assignee to sue in his own name. No fair analogy can be drawn, between the case of the deceased partner and the assignor of a bond. The assignor has parted with his interest, and stands merely as a guarantor: the deceased partner was one of two joint debtors; in his lifetime, he would have had no right to call upon the creditor, to proceed against his co-partner, or to complain that he had not done so; and though, after his death, a court of chancery will not charge his estate with the equity, until the insolvency of the survivor is established, yet I am not aware of any express decision, which requires him to proceed within any limited time. He is still the debtor; and the assets of his estate "must lie at stake until his debt be paid." He was bound to see it paid in his lifetime: he was bound to follow his creditor: his creditor was neither bound to look after him, nor to pursue his partner. At his death, his obligations ought to devolve, with his estate, on his representatives: they ought to press the payment by the surviving partner, or to demand that the creditor should proceed, if danger of his insolvency be apprehended. This would be in strict analogy with the case of the surety in a

560 *bond, who never can charge his creditor with laches, until he has prompted him in vain to pursue the principal. Considering the decedent's estate as only bound in equity, courts of equity have indulgently said, it shall not be charged till the surviving partner is insolvent, because the debt ought in justice to be paid, if possible, by the funds of the concern. It treats the deceased partner as a surety only; and that is going far enough. He is absolved, indeed, by collusion: he is absolved by giving time to the surviving partner, or by new arrangements with him: he may be absolved by failing to sue when required to do so; but, if there be no such requisition, he is in no sort culpable. This is what is meant by laches, in relation to him. In no other sense, can the cases be reconciled with this expression of lord Hardwicke: his own decision cannot; for in the case of *Bishop v. Church*, 2 Ves. sen. 100, 371, it appears that Church died in 1740, and Owen, the surviving partner, became bankrupt (as I understand the state of the case) after the creditor Bishop's death in 1747, and after repeated and unavailing requests by Church's representatives, that Bishop would sue Owen, or let them sue him: yet lord Hardwicke was of opinion, that he did not lose his recourse, because he

was not bound to do so, unless they first paid him his money.

I am, therefore, inclined to the opinion, that though chancellor Kent has attributed to the master of the rolls in *Sleech's case*, a stronger expression of opinion than that case will justify, and lays down his own, perhaps, too broadly; yet it is not going too far to say, that mere delay in instituting proceedings against the surviving partner, will not discharge the decedent's estate, unless the creditor has been called upon to institute proceedings for the safety of that estate, and has declined or has failed to do so. Such conduct would justly be held, to rebut the equity which is raised in behalf of a creditor, against a deceased partner.

But, the court consisting, at this time, of only three members, perhaps it is better to waive the decision of the question 561 *now; and the rather as it does not seem essential; for I do not think the question of laches is fairly presented. Surely, if the defendants designed to rebut the plaintiff's equity on the ground of laches, they ought to have charged it, that it might have been fairly inquired into. As they have not done so, the fact should not be regarded as established by the exhibits, which were irregularly filed, since they related to matters not in issue between the parties.

Decree reversed.

Mowry v. Miller.

March, 1832.

[24 Am. Dec. 680.]

Malicious Prosecution*—Advising and Procuring Prosecution for Felony—Case.—Action on the case, for defendant having advised and procured a third person to institute a malicious prosecution against plaintiff for felony: *Held*, the action lies against defendant for advising and procuring such prosecution.

Same—Declaration—Without Probable Cause.*—In every such action, the declaration must allege that the prosecution was without probable cause: but that allegation relates to the state of the fact, that the prosecution was without probable cause, not to the state of the defendant's knowledge that there was no probable cause.

Same—Same—General Demurrer.—On general demurrer to a declaration, the court looks always to the substantial meaning of its allegations, to ascertain whether it states good cause of action.

Same—Same—Variance as to Date—When Immaterial.—In an action on the case for advising and procuring a malicious prosecution, it is not material for the plaintiff to prove the exact day of his acquittal as laid in the declaration, so that it appears to be before the action brought; and, therefore, a variance in that respect, between the day laid,

***Malicious Prosecution—Probable Cause.**—In *Scott v. Shelor*, 28 Gratt. 806, the principal case is criticised as to the rule laid down that the allegation in regard to probable cause relates to the state of the fact that the prosecution was without probable cause, not to the state of the defendant's knowledge that there was no probable cause: that case (*Scott v. Shelor*) holding that probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. To the same effect, the principal case is cited in *Spengler v. Davy*, 15 Gratt. 388. But see *foot-note* to *Spengler v. Davy*, 15 Gratt. 388, and *Vinal v. Core*, 18 W. Va. 33, 41, citing the principal case.

†**Demurrer.**—See monographic note on "Demurrers" appended to *Com. v. Jackson*, 3 Va. Cas. 501.

‡**Malicious Prosecution—Declaration—Variance.**—In *Arthur v. Crenshaw*, 4 Leigh 399, the principal case is cited to the point that where the time of the trial of a particular fact is not material, a variance from the date, in alleging the trial and the result, will not be material, although it is to be proved by the

and the day stated in the record produced to prove the acquittal, is not material; the day not being laid in the declaration, as part of the description of such record of acquittal, and being laid under a scilicet.

Case, brought by Miller against Mowry, in the circuit court of Shenandoah. The declaration was in the following words:

"B. Miller complains of G. Mowry, in custody &c. of a plea of trespass on the case: For that, whereas the said Miller is a true and honest citizen of the common-

562 wealth *&c. and hath never been guilty,

or, until the committing of the grievances by the said Mowry, herein after mentioned, been suspected to have been guilty of felony &c. Yet the said Mowry, well knowing the premises, but contriving and maliciously intending to injure the said Miller, in his good name &c. and to bring him into public scandal &c. and to cause him to be imprisoned &c. heretofore, to wit, on the 24th October 1825, at &c. consulted with, advised and procured one S. Zirkel, to go before George Moore a justice of the peace in and for the county aforesaid, and, then and there, induced the said Zirkel, falsely and maliciously and without any probable or reasonable cause whatsoever, to charge the said Miller with having feloniously stolen 1400 dollars in bank notes, the property of the said Zirkel, from the possession of the said Mowry; and upon such charge, he the said Mowry prevailed on and compelled the said Zirkel, by the false, scandalous and malicious representations of him the said Mowry, and without any reasonable or probable cause whatsoever, to procure the said Moore, being such justice as aforesaid, to make and grant his warrant &c. for apprehending the said Miller, and for bringing the said Miller before the said Moore, or some other justice of the peace for the said county, to be dealt with according to law, for the said supposed offence; and the said Mowry directed, advised and procured the said Zirkel, under and by virtue of the said warrant, afterwards, to wit, on the 24th October 1825, at &c. wrongfully and unjustly and without any reasonable or probable cause whatsoever,—and, at the instance of the said Mowry, caused the said Miller to be arrested &c. and imprisoned &c. until the said Zirkel, at the instigation of the said Mowry, by his false, scandalous and malicious charges, caused the said Miller to be carried before the said Moore justice of the peace as aforesaid, and to be committed by the said justice for examination, without any probable cause, to the jail of the said county, there to remain until discharged by due course of law—And,

563 afterwards, to wit, on the 7th October 1825, at *a court held at &c. by J. S.

[and others, naming them] justices of the peace for the said county, for the examination and trial of the said Miller for the said felony, and who had competent and legal authority to hold such court,—having heard and considered all that

the said Zirkel, and the said Mowry, who instigated the said Zirkel to prosecute the said Miller, could say touching and concerning the said supposed offence,—then and there, to wit, at &c. on the said 7th October aforesaid, adjudged &c. that the said Miller was not guilty of the said supposed offence, and then and there caused the said Miller to be fully acquitted of the said supposed offence, and discharged &c. and the said complaint has not been further prosecuted, but is wholly ended and determined—Wherefore the said Miller saith, that he is injured, and hath sustained damage &c."

Mowry, 1. demurred generally to the declaration, and 2. pleaded not guilty.

Upon the demurrer, the court held the declaration good. And upon the trial of the general issue, there was a verdict for the plaintiff, for 500 dollars damages, and judgment was given accordingly.

At the trial, Miller offered in evidence the record of his examination before the county court for the felony of which he had been accused, and of his acquittal; whereby it appeared, that the court by which he was examined and acquitted, was in fact held on the 7th November 1825, instead of the 7th October as stated in the declaration; whereupon Mowry's counsel objected to the variance between the record, and the allegation of the trial and acquittal in the declaration; but the court overruled the objection, and allowed the record to be read in evidence; to which Mowry's counsel filed exceptions.

Mowry applied to this court for a super-seas to the judgment; which was allowed.

Stanard, for the plaintiff in error. The demurrer to the declaration ought to have been sustained. For, 1. though

564 *one who institutes a prosecution maliciously and without probable cause, or who conspires with another to institute such prosecution, is liable to an action, in the one case for a conspiracy, in the other for malicious prosecution; yet to advise another to institute such prosecution, is not actionable. And 2. if to advise such a prosecution be actionable, it ought to be distinctly and expressly averred in the declaration, not only that the prosecution was malicious and without probable cause, but that the advice to institute it was given without probable cause. *Ellis v. Thelman*, 3 Call, 3; *Young v. Gregorie*, Id. 446; *Kirtley v. Deck*, 2 Munf. 10; *Marshall v. Bussard*, Gilm. 9. Here, the declaration does not allege, that Mowry without probable cause, advised and procured Zirkel to institute the prosecution, but that he advised and procured Zirkel without probable cause, to institute it. The circuit court also erred, in admitting the record of Miller's acquittal in evidence at the trial. The day of his examination and acquittal was material; and the variance between the record exhibited, and that alleged in the declaration, in this particular, was fatal. *Pope v. Foster*, 4 T. R. 590, is directly in point.

Leigh, contra. He who advises, procures and instigates another to a malicious prosecution, is the author of the injury; and it would be strange if an action will not lie against the real wrong-doer, but only against the instrument, who may perchance be innocent. Upon the general demurrer

record, provided the time be not alleged as descriptive of the record by means of a *prout patet per recordum* or otherwise.

And in *Taylor v. Bank of Alexandria*, 5 Leigh 476, the principal case is cited to the point that a variance in dates under *videlicet* is not material. See monographic note on "Malicious Prosecution" appended to *Guerrant v. Tindler*, Gilm. 36.

to the declaration, the court is to ascertain the substantial meaning of it. This declaration may not be drawn with the most perfect logical precision: but, seeing that it charges, that Mowry advised, procured and induced Zirkel, falsely and maliciously, and without any probable or reasonable cause, to institute the prosecution, it is an over nice criticism to say, that it does not mean, that Mowry, maliciously and without probable cause, instigated Zirkel, but only that Mowry (innocently) instigated Zirkel, maliciously and without probable cause,

565 to institute the prosecution. The allegation *is distinct, that the prosecution itself was without probable cause; which is enough. As to the variance between the record of the acquittal adduced, and the allegation of the acquittal; the declaration does not purport to recite the record, or to allege the acquittal with a prout patet per recordum: the substantial part of the allegation is, that Miller was finally acquitted before this suit was brought. In *Pope v. Foster*, as I infer from the report, the declaration purported to set out the record of the acquittal, in form; otherwise, it seems strange, that the date of the acquittal, set out under a scilicet, should have been held material, the acquittal being alleged to have been, and having been in fact, before the action brought for the malicious prosecution.

TUCKER, P. The first objection in this case goes to the cause of action. It is said, that in every case for malicious prosecution the defendant is charged with active agency, and that an action for merely advising another to institute a prosecution, is not sustainable. For my part, I can conceive nothing more direct than the charge here. It is, substantially, a charge that the defendant maliciously and without probable cause consulted with, advised and procured one Zirkel, falsely and maliciously and without probable cause, to prosecute the plaintiff for felony. This procurement is surely actionable. The language of the declaration corresponds with the form of declaring in an action on the case in the nature of an action for a conspiracy; and it was admitted in the argument, that the facts set forth, would be sufficient, if proved, in an action against two or more, to sustain such an action. If so, a charge of such advice and procurement by one, cannot less entitle the plaintiff to this action.

It is next objected, that from their connexion in the declaration, the words without probable cause, apply only to the act of Zirkel, not to the advice and procurement of the defendant. The charges of malice, and want of probable cause, are reiterated, and stand in connexion with both.

566 *Yet, in truth, according to my view of the matter, the objection could not avail, if true. The law requires the plaintiff in this action, to set forth that the prosecution was without probable cause. But, as this is merely because no man can maintain an action for a malicious prosecution, where there was probable cause, it is obvious, that those words should be made to refer to the state of fact, as it respects the person prosecuted, and not to the degree

of knowledge of that fact in the party prosecuting.

Then, as to the supposed variance. If the declaration had purported to recite the record of the prosecution, the variance might, perhaps, have been fatal. But that is not the case here. It merely alleges the fact that the plaintiff was acquitted on a particular day; it does not profess to recite the record. Now, the material and substantive part of the allegation was, that the acquittal was before action brought. The date was immaterial. The case of *Pope v. Foster*, which was cited as in point, has been overruled by the case of *Purcell v. Macnamara*, 9 East, 157. In this latter case, the action was for a malicious prosecution; the plaintiff alleged in his declaration an acquittal on a particular day, but without a prout patet per recordum; the record, when produced, proved a different day: but it was held, the precise day was not material, the substance of the allegation being that the acquittal was before action brought. This case has been since approved, in *Philips v. Shaw*, 4 Barn. & Ald. 435, 5 Id. 964, 6 Com. Law Rep. 477, 7 Id. 318.

We are, therefore, of opinion to affirm the judgment.

567 *Samuel v. Marshall and Wife and Others.

March, 1832.

Deeds—Imbecility of Donor—Fraud.—A person reduced to a state of mental imbecility by habitual intoxication, makes a voluntary and irrevocable deed of gift of his whole estate, to a cousin german, to the disherison of his half sisters, reserving the use to the donor for life, without any reasonable motive assigned for such an act: HELD, fraud and imposition may be inferred from the circumstances, and from the very nature of the contract; and this deed of gift is fraudulent and void.

Same—Same—Drunkenness—Validity of Contract—Case at Bar.—In such cases, drunkenness, if produced by the donee, or if so extreme, that the party did not know what he was about, is a material circumstance in deciding on the validity of the contract; and imbecility of mind, however produced, combined with other ingredients, and particularly, with the absence of consideration, has always an important influence on the question of the validity of contracts.

***Contracts—Validity—Imbecility.**—Although a person may labor under no legal incapacity to do a valid act or make a contract, yet if the whole transaction, taken together with all the facts, mental weakness being one of them, shows that consent was wanting, it would be void. Of this description was the case of *Samuel v. Marshall*, 3 Leigh 567. Greer v. Greers, 9 Gratt. 333 (see also, note, citing the principal case).

On this question of mental capacity to contract, the principal case is cited in *foot-note* to *Beverly v. Walden*, 20 Gratt. 147. And in *Miller v. Rutledge*, 83 Va. 867, 1 S. E. Rep. 302. It is said, quoting from *Minor's Inst.* 572, the test of legal capacity is said to be that the party is capable of recollecting the property he is about to dispose of, the manner of distributing it, and the objects of his bounty. But, of course, the particular act must be attended with the consent of his will and understanding, clung the principal case. And in *Porter v. Porter*, 80 Va. 122, 15 S. E. Rep. 500, the principal case is cited to the point that mere weakness of the understanding is no objection to a man's disposing of his own estate. See also, *Jones v. McGruder*, 87 Va. 379, 12 S. E. Rep. 792, citing the principal case on the question of undue influence.

And in *Korne v. Korne*, 30 W. Va. 7, 3 S. E. Rep. 30, it is said: "This is not an instance of a contract made by a person of great mental weakness or imbecility. In such case courts have often held that the transaction, when grossly inequitable or unfair, might be set aside, although the incapacity of such person be not an absolute disqualification for the transaction of business. It therefore seems

Chancery Practice—Issue Directed—When Proper.—If the evidence on a question of fact in a suit in chancery, though various and conflicting, be such as ought to satisfy the chancellor's conscience as to the truth of the case, he need not direct an issue to try the fact.

Distributes—Suit to Settle Estate—Parties.—The distributees of a deceased person may maintain a bill in equity, to impeach and set aside a deed of gift of personal estate made by the decedent in his lifetime, as fraudulent; and the court may, at their suit, declare the deed fraudulent, and annul it; but the subject itself can only be decreed to the personal representative of the decedent, or to the distributees in a case in which the personal representative is a party.

Richard Coleman, by deed dated the 25th April 1822, recorded in the county court of Spotsylvania in July 1823, conveyed to his cousin german, Josiah Samuel, his heirs, executors, administrators and assigns, in consideration of natural love and affection, all his lands, slaves, stock of every description, household furniture, and plantation utensils, reserving to himself the use and profits of the property, for and during his life. The conveyance was merely voluntary.

After the death of Coleman, B. Marshall and Elizabeth his wife, W. Coleman and Sarah his wife, H. Wright and Lucy his wife, and J. White and Thirsa his wife (the female plaintiffs being the half sisters, heirs at law and distributees, of Coleman) exhibited a bill against Samuel, in the superior court of chancery of Fredericksburg, alleging that Coleman's mind, naturally weak, was so impaired and stupified by habitual and constant intoxication, the

568 means of which were profusely supplied him by Samuel, in order to accomplish his own fraudulent purposes, that he was utterly incapable of making any valid disposition of his property; and that the deed of April 1822 was obtained from him, while he was in this state of mental imbecility, by gross deception and fraud practised by Samuel; and therefore praying that the deed should be declared void, and set aside, and the plaintiffs declared entitled to the subject; and general relief.

Samuel, in his answer, admitted, that Coleman was an habitual drunkard, but denied, that this habit had so impaired his mind as to render him incapable of managing and disposing of his property; on the contrary, he said, that Coleman, when sober, was perfectly capable to do so; and, at the time he executed the deed in question, he was quite sober, was in possession of his

faculties, knew what he was doing, and was fully competent to make any disposition of his property. He stated the relation between Coleman and himself; that they were brought up and educated together, and contracted the closest friendship in early youth, which continued uninterrupted till Coleman's death; and after Coleman attained to manhood, before he was addicted to any bad habit, he declared, that in case he should die without heir, he would leave his estate to Samuel, and frequently repeated the same declaration during his life: that he did not supply Coleman with intoxicating liquors, for the fraudulent purpose charged: that Coleman executed the deed in question, of his own free will and accord; that he, Samuel, exercised no influence, and practised no deception or fraud upon him, to obtain it. And he further stated, that in the autumn of 1822, Coleman determined to break up house-keeping, and to live with Samuel; he also determined to sell some of his property, and pay his debts: that, with Samuel's assent and concurrence, 200 acres, parcel of the land conveyed by the deed of April 1822, were sold for 1400 dollars, of which 100 dollars were paid in a bond for that sum assigned to him, and the residue in slaves five in

569 *number, valued at 1300 dollars: that Coleman, in like manner, with Samuel's consent and concurrence, sold three of his slaves, and part of his stock and plantation utensils, the proceeds of which sales were applied to the payment of his debts: that Samuel, with Coleman's consent, had sold the five slaves received for the 200 acres of land, on a credit, but the money not having yet fallen due, he had not received it: that Samuel had sold the residue of the land conveyed by the deed for 300 dollars; and that he had paid one small debt of Coleman, and intended to pay all his debts.

Many depositions were taken and filed by both parties, upon the questions of fact—

1. Whether Coleman's mind was so impaired by inveterate habits of intoxication, as to render him, whether drunk or sober at the time of executing the deed of April 1822, incompetent, in point of understanding, to make any disposition of his property? Upon which point, the evidence of the witnesses was (as is usual in such cases) various and conflicting; but, in the opinion of the chancellor and of this court, the weight of evidence was, very decidedly, against his competency.

2. Whether he was sober at the time of executing the deed? According to the evidence of the subscribing witnesses to the instrument, he was sober, and, in their opinion, of competent mind to know what he was doing, and to dispose of his property; but these subscribing witnesses were persons whose acquaintance with him, it appeared, had just commenced; and on the other hand, there was proof, that upon the deed being afterwards mentioned to him, he said he had no recollection of having ever executed such an instrument, and spoke in harsh terms of Samuel.

3. Whether any undue influence was exercised over him, or any deception or fraud practised upon him, by Samuel, in order to obtain the deed from him? As to which there was no direct evidence of undue influence or fraud; no evidence except what might be

to me that the following cases, and others relied on by the appellants, have no application to this case: *Deem v. Phillips*, 5 W. Va. 168; *Samuel v. Marshall*, 3 Leigh 567; *Whitehorn v. Hines*, 1 Munf. 567."

See generally, monographic note on "Contracts" appended to *Enders v. The Board of Public Works*, 1 Gratt. 364; monographic note on "Deeds" appended to *Flott v. Com.*, 12 Gratt. 564.

***Equity Practice—Issue Out of Chancery.**—On this question, the principal case is cited in *foot-note* to *Grigsby v. Weaver*, 5 Leigh 197; *foot-note* to *MaGill v. Manson*, 20 Gratt. 567; *Greer v. Greers*, 9 Gratt. 332; *Hord v. Colbert*, 28 Gratt. 60; *Fishburne v. Ferguson*, 84 Va. 102, 4 S. E. Rep. 575; *Rohrer v. Travers*, 11 W. Va. 151; *Arnold v. Arnold*, 11 W. Va. 462. See monographic note on "Issue Out of Chancery" appended to *Lavell v. Gold*, 25 Gratt. 473.

***Distributes—Suits for Settlement—Parties.**—On this question the principal case is cited in *foot-note* to *Moring v. Lucas*, 4 Call 577; *Hansford v. Elliott*, 9 Leigh 96, and note; *Miller v. Jeffress*, 4 Gratt. 477; *Livesay v. Helms*, 14 Gratt. 444; *Robertson v. Gillenwaters*, 85 Va. 118, 7 S. E. Rep. 371.

See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

inferred from the contents and purpose of the deed itself, and from the circumstances, that *Samuel had promised to pay the draftsman of the instrument a very high compensation for drawing it; that Coleman was staying at Samuel's house at the time, and was very subject to be influenced by others, to make wills and conveyances of his property, and had been induced by solicitations to make several such dispositions of it (previous to this) which had been cancelled: there was evidence, indeed, that at the time he executed this deed, one of the motives he assigned for it, was, that he wished to get rid of such importunities.

4. Whether he was upon friendly terms or not with his half sisters and their husbands? Upon this point again, the evidence was contradictory: there was evidence, that he entertained, and had always entertained, a rooted aversion to his sisters; and evidence to the contrary, that he was affectionate towards them.

The chancellor declared the deed null and void, and directed a commissioner to ascertain and report, what part of the subject conveyed by it was still held by Samuel, and the profits thereof, and how much money he had received of the proceeds of such part of the subject as had been sold.

The commissioner reported, that Samuel had received 300 dollars for the part of the land sold by him, out of which he had paid a debt of 15 dollars due from Coleman; leaving 285 dollars in his hands. That the nett proceeds of sale of the five slaves sold by Samuel, as admitted in his answer, and the value of sundry articles of personal estate of Coleman which Samuel had converted to his own use, amounted to 1600 dollars; but that Samuel had as yet received only 150 dollars of the money due for the proceeds of the five slaves. That other slaves remained unsold in his hands, the profits of which amounted to 181 dollars. That other articles of personal property of Coleman had been sold, by agreement between the parties, and bonds taken for the proceeds, payable to the marshal of the court, which were deposited in court, to abide the final decree: these bonds amounted to 186 dollars.

571 *Upon this report coming in, the chancellor decreed, that Samuel should pay the plaintiffs, the sums of 285 dollars, balance of the proceeds of land sold by him, and 1600 dollars nett proceeds of the five slaves, &c. with interest on those sums, respectively; that he should pay them the sum of 181 dollars, amount of profits of the slaves remaining unsold; that he should deliver them these slaves; and that the bonds made payable to the marshal for 186 dollars should be delivered over to them. From this decree Samuel appealed to this court.

Standard for the appellant, 1. argued the questions of fact upon the evidence, and insisted, that Coleman was of competent understanding to make the deed, and that no deception, imposition or fraud, no undue influence or art, to obtain the deed from him, was justly imputable to Samuel. 2. That, at any rate, considering the contrariety of the evidence touching the material facts, the chancellor ought to have directed an issue to ascertain the truth by the verdict of a jury. 3.

That the decree was certainly erroneous, in setting aside the deed, so far as it related to the personal subject, upon this bill of Coleman's distributees, and decreeing this part of the subject to them; for none but Coleman's administrator could maintain such a bill;—and erroneous too, in decreeing Samuel to pay 1600 dollars in money, when the far greater part of that sum appeared to be still due upon the bonds taken for the proceeds of the five slaves sold by him.

Leigh, for the appellees, 1. submitted the first and main question to the court: he said it was not necessary to argue it; the court would weigh the evidence. 2. He said, a court of chancery might direct an issue to inform its conscience, but it was, in no case, bound to do so: the question was, always, whether or no, in sound discretion, an issue ought to be directed. Pryor v. Adams, 1 Call, 382; Stanard v. Graves, 2 Call, 369; Rowton v. Rowton, 1 Hen. & Munf. 91; Hampson v. Hampson, 3 Ves. & Beam.

572 41. *And 3. he contended, that if it was wrong to decree the personal subject to Coleman's distributees, against an executor de son tort (as, he said, Samuel was) the distributees could entertain a bill to impeach and set aside the fraudulent deed, which prevented the devolution of the subject to Coleman's administrator, who would be a trustee for them.

Standard replied, upon the last point, that to entertain such a bill as this for the distributees, to set aside the deed in respect of the personal subject, would lead to this difficulty: if, upon their bill, a decree should be rendered setting aside the deed, would that decree preclude Samuel from insisting on the fairness and validity of the deed in a suit brought by Coleman's administrator to impeach it? when, if the decree were for Samuel, he could not plead it in bar of a suit brought by the administrator to impeach it. The bill should be dismissed as to the personal subject.

TUCKER, P. On the merits of this case, I am clearly of opinion to affirm the decree. The conveyance of the whole of the estate of a wretched sot, about whose capacity to contract, even for valuable consideration, the whole country is divided, to a cousin, to the prejudice of four half sisters, reserving to himself but a life estate, and giving away the residue for nothing, cannot, I think, be sustained with any sort of propriety. Drunkenness, it is true, is no excuse for crime; but if produced by the donee, or if so extreme, that the party does not know what he is about, it has been considered as a material circumstance in deciding upon a contract: and imbecility of mind, however produced, combined with other ingredients, and particularly with the utter absence of consideration, has always had an important influence upon the question of the validity of contracts. That Coleman was reduced to a state of imbecility, which rendered him liable to be plundered by the designing, I think is abundantly proved. That he was the object of the designs of several around him, we learn are from his own declarations, and it appears he himself was afraid,

573 that, in some *moment of more than common imbecility, he would fall a prey to their cupidity. That he has done so

at last, appears to me very certain. It only remains for the tribunals of justice to redress the wrong.

The motives which have been assigned for this extraordinary act, are inadequate to account for it. The boyish promise to make his cousin the inheritor of his estate, if he should die without heir, though we should extend it farther than the express words, by the gloss of supposing that he meant his dying without children, will not account for such an act, at a time of life when romantic notions, are tempered, in the man of sense, by reflecting on what is due to nature and to feeling. Still less will it account for the execution of a deed in his lifetime, instead of a will to take effect after his death; an absolute instead of a revocable instrument; an instrument, which destroys at once, the only motive that stimulates most of those around a miserable drunkard, to pity his weakness, to bear with his offensiveness, to protect him when he cannot take care of himself, and to minister to him in his revolting infirmities; instead of an instrument, which, by being revocable in its character, would hold out a perpetual lure to all the seekers after his fortune, and secure to him, to his latest breath, their mercenary services, if he could not command their affectionate attentions. Had he made a will, instead of a deed, we should probably not have found him, as represented by one of the witnesses—dying, without the benefit of medical aid, which, if it could not have saved his exhausted constitution, might, at least, have soothed and mitigated the sufferings of his dying moments.

The next motive assigned for the execution of this deed, is a desire to free himself from the constant solicitations of those around him, to give his property to them. He did not, then, wish to part with his property. Why has he done it? If this was the motive, the act must be interpreted as commensurate with the motive. Construe the deed to have

574 been made upon a secret trust, that the property was to be *held for his benefit and at his disposal, and that the execution of it was intended merely to hoodwink the greedy expectants around him; then, indeed, the motive will account for it; but then, in execution of the trust, the property must be reconveyed. This view of the transactions, indeed, not only presents it in a less offensive form in its inception, but is rendered not improbable, by the fact, that Samuel conveyed away the property as Coleman directed, subsequently to the deed; and that Coleman himself disposed of it at pleasure, but referred those to whom he sold, to Samuel for a title, which was made accordingly. Yet these facts are not much in unison with the declaration, repeatedly made by him, that he did not recollect that he had ever made such a deed. So that the mind cannot be free from doubt which hypothesis to adopt. Either will lead to the same result.

Another fact upon which reliance is placed, to account for this extraordinary deed, is the alleged variance between Coleman and his half sisters. It is most singular, that as to one of them, this alienation of affection is said to have existed when she was only about seven years old; and it cannot be denied, that

there is a conflict of testimony as to his feelings towards them all. But take it for granted—in this state of things, no importunity was to be feared from them. Coleman could sufficiently vent his spleen against them by a will. Are we to suppose, that the inveteracy of his feelings was such as to induce him to shut the door upon all hope of reconciliation? If he executed a will to their prejudice, it might be revoked, in case he should be reconciled to them. But by executing a deed to another, he tied his hands forever: he put it out of his power to yield to the impulse of natural feelings in their favour, whenever the unnatural hostility between them should have an end. Is it, then, most charitable to suppose, that Coleman, if he was of sound mind, executed this deed to cut himself off from future repentance in their favour, or that he, who from his boyhood had been looking forward to the reversionary interest in this estate, had contrived this

575 scheme by which he *might "make assurance doubly sure." I think I outrage human nature least, by the latter supposition.

It was said, that there is no proof of any fraud, imposition or contrivance on the part of Samuel. It is true, that except what has leaked out about the compensation to the draftsman for drawing the deed, we see little of Samuel's agency. But fraud is neither less certain, nor less successful, for being concealed. When it is so, it may indeed elude us, unless detected in the results. Such is the case here. The estate of an imbecile is conveyed to Samuel, without consideration, by an irrevocable instrument, executed among strangers, out of his own neighborhood, and to the prejudice of four half sisters, the natural heirs of his bounty; and this upon flimsy pretences, which can in no wise justify or account for the transaction. These facts are sufficient to stamp the transaction as one which this court should discountenance; and from them, and not from the conflicting opinions of witnesses as to the extent of Coleman's capacity, I conclude, that the deed was properly set aside by the chancellor.

Had there been a *quid pro quo*, we might have hesitated. But, surely, the question is very different, between a contract for valuable consideration, and this gift by an habitual sot, of his whole estate, to take effect at his death, to the disherison of his sisters and natural heirs. In other states, a commission of lunacy might have been issued against him, which would have placed his property intirely out of his control: and, even in the english courts we are told, a commission of lunacy extends to the case of imbecility produced by habitual intoxication, and this in a case "where the party, when he could be kept sober, was a very sensible man, but in a constant state of intoxication he was perfectly incapable, and would have been constantly contracting insanity;" per lord Eldon in *Ridgeway v. Darwin*, 8 Ves. 66, 7. If we have not gone so far in Virginia, it behoves us, at least, to protect such unfortunate persons from overreaching bargains and improvident gifts of their estates, when every

576 natural *feeling is quenched by intoxication. The cases of *Whitehorn v.*

Hines, 1 Munf. 557, Bridgman v. Green, 2 Ves. sen. 627, Huguenin v. Baseley, 14 Ves. 273, are not stronger than this.

The decree, however, is erroneous, in directing Samuel to surrender the personal estate of the decedent Coleman, to the plaintiffs, they not being his proper representatives, though they are interested to set aside the deed; and also, in decreeing payment of the uncollected proceeds of the five slaves, that were received in part payment for the 200 acres of land, and afterwards sold by Samuel. The decree is to be corrected in these particulars.

The decree entered by this court, declared, that there was no error in the decree of the court of chancery, so far as it went to vacate and annul the deed which the bill sought to set aside; but that it was erroneous, in directing the surrender of the personal property and the payment of the personal assets, to the plaintiffs, they not being the legal representatives of the deceased Coleman; and also, in decreeing the payment to the plaintiffs of the proceeds of the sale of the five slaves received in part of the price of the land sold, instead of decreeing, that so much as had been collected, and the bonds and evidences of debt for the residue thereof, should be paid and delivered over into the hands of a receiver, to be collected and held by him, until, as between the appellees and the personal representative of the decedent, the right to the same should be ascertained. Therefore, the decree as to these particulars was reversed with costs, and as to the residue thereof affirmed; and the cause remanded, to be further proceeded in according to the principles here declared. But this decree to be without prejudice to any suit, which any legal representative of Coleman may hereafter bring against Samuel for the recovery of the assets of Coleman in his hands.

577

***Selby v. Morgan.**

March, 1833.

(Absent TUCKER,* P.)

Usury—Loan of Bank Stock—Sale.—Question, whether, under the circumstances of the transaction, a sale of bank stock upon a credit, at par, the cash value of the stock at the time of sale being twenty per cent. below par, was a bona fide sale, or an usurious loan under cover of a pretended sale.

Same—Sale of Bank Stock at Par—Market Price below Par—Effect—Case at Bar.—S. being under an urgent necessity to raise a sum of money, requests M. to assist his agent in negotiating a loan thereof at bank; M. lends his assistance, but the bank refuses to lend the money; then M. proposes to S. to sell him bank stock at par upon a credit, the stock being then 20 per cent. below par in the market; and M. enters into a negotiation with the bank to

borrow the money S. wanted, for S. upon a pledge of the stock: the bank offers to lend the money upon a pledge of the stock and S.'s note indorsed by M. and M. having thus settled the terms of the loan with the bank, sells his stock to S. at par on a credit, and, immediately, the bank lends S. a sum equal to 4-5ths of the par value of the stock, on a pledge of the stock and on S.'s note indorsed by M. **Held**, this is a fair sale of bank stock by M. to S. and not a device to cover an usurious loan of money.

In January 1825, a mercantile house of Baltimore having recovered a judgment against Walter Selby of Jefferson, and sued out a writ of fieri facias thereon, which was levied on Selby's property; and Selby having given a forthcoming bond for the delivery of the property at the day and place of sale, and having forfeited the bond; and an award of execution thereon, in the month of March following, being expected as a matter of course; Selby was under an urgent necessity to raise funds, about 4000 dollars, to discharge the debt, and anticipate the award of execution. Therefore, he got a Mr. Hunter, to go first to Baltimore, to procure indulgence from his creditors, if possible, and if he should fail in that effort, then to proceed to Alexandria, and to obtain a loan from some of the banks there, or of any of the banks in the district of Columbia; and he sent a letter by Hunter to Jacob Morgan of Alexandria, requesting him to assist Hunter in negotiating the loan. Hunter's efforts to procure indulgence from

578 the creditors, having *proved abortive, he proceeded to Alexandria, delivered Selby's letter to Morgan, and explained to him the necessity Selby was under to raise money. Morgan lent his aid to Hunter, to negotiate a loan for Selby, at the banks in Alexandria, and at a bank in Georgetown; but no loan could be obtained. And then Morgan wrote the following letter to Selby:

"Alexandria, 21st January 1825. Dear sir, Mr. Hunter handed me your letter of the 10th inst.—Mr. Hunter's efforts, together with my own, have proved unsuccessful in procuring a loan for you. Indeed, all our banks are in a situation, which forbids their lending, except at short periods. I mentioned to Mr. Hunter, that I had bank stock, which you might have, if you thought it would answer your purpose: I would sell it upon such time as would enable you to meet the payments, if nothing better can be done. I can accommodate you to whatever amount you may require. Let me hear from you—and believe me &c. (signed) J. Morgan."

Upon the receipt of this letter, Selby (it seemed) wrote to Morgan, inquiring upon what terms he would sell him 5000 dollars of bank stock; and Morgan wrote him the following letter in reply:

"Alexandria, 5th February 1825. Dear sir, I duly received your letter of the inst. I will sell you 5000 dollars of bank stock of the banks of this town, at par, payable in two years, upon your note with collateral security, with interest at six per cent. payable semi-annually. With this stock, you can immediately command 4000 dollars, either by giving a stock note to the banks, or an individual one, payable in one or two years, or to sell the stock for money. In the first case, you can at your leisure, sell the bank stock, if you do not like the present price of it; in time, the stock may get to par. I

*He decided the cause in the court of chancery.
†**Usury—Sale of Bank Stock at Par—Market Value below Par—Effect.**—Nothing is better settled, in Virginia than that stock, bonds and notes may be sold, like any other property, at any price not above par which may be agreed between the parties. And the sales of stock and notes on credit at par when the market price was as much as 20 per cent. below par have been sustained as lawful. *Brockenbrough v. Spindle*, 17 Gratt. 33, 41, citing *West v. Belches*, 5 Munf. 187; *Greenhow v. Harris*, 6 Munf. 472; *Selby v. Morgan*, 3 Leigh 577. To the same effect, the principal case is cited in *Gordon v. Dooley*, 10 Fed. Cas. 785; *foot-note* to *Bank of the Valley v. Stribling*, 7 Leigh 26; *Thornton v. Gordon*, 2 Rob. 728.

See monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 698.

should think, then, it would be preferable to borrow what money you want, upon it. The dividends upon the stock will more than pay the interest on the sum you require; and your collections perhaps, 579 *will enable you to pay the amount, without recourse to a sale at all. This is the way I have recently sold a considerable quantity of stock, to those who require loans of money for a longer time than the banks are willing to lend. And I can now sell, in the same way, at any moment, upon the same terms, all the stock I have. If this will answer your purpose, please let me know, and immediately you can command the money. I am &c. (signed) J. Morgan."

The market price of stock being at the time as Selby was informed, some twenty or thirty per cent. below par, he hesitated to purchase on the terms proposed; and sent Hunter to Baltimore again, to solicit indulgence from his creditors, with authority, in case he should fail, to accede to Morgan's terms, and purchase his stock. The creditors proving obdurate, Hunter wrote the following letter to Morgan:

"Baltimore, 11th February 1825. Dear sir, I am now here in relation to the claim of T. & G. against Mr. Selby, in satisfaction of which, the offer from you of the bank stock is proposed by Mr. Selby to be acceded to, in case Messrs. T. & G. do not agree to withhold their execution against him, which I have little hope of their doing. Mr. Selby has executed a bond payable to you for 5000 dollars, the amount he wishes to purchase, (and which I have with me) and also a covenant binding himself to execute a deed of trust forthwith upon his property, for the payment (and which I shall see attended to) for the purpose of obtaining the money immediately and without delay, as the scarcity of time does not admit of a more definite arrangement. If this arrangement accords with your arrangements, let me know immediately upon receipt of this, as I shall wait here for your answer. Respectfully &c. (signed) P. P. Hunter."

To this letter, Morgan wrote the following answer: "Alexandria, 14th February 1825. Dear sir, I have just received your letter of the 11th inst. I cannot consent to the arrangement you propose in relation to 580 my stock. I am still *disposed to sell Mr. Selby the amount of bank stock he requires, but in payment of which I must be fully secured, and that security accorded and approved of, before the sale can be consummated. The length of time he requires on the stock, alone renders this condition indispensable. I am &c. (signed) J. Morgan."

With this letter, Hunter returned to Selby, who thereupon repaired himself to Alexandria, in the hope of making better terms with Morgan. The only change of them to which Morgan would assent, was to allow him a credit of two and three years, instead of two years, for the price of the stock, payable in instalments with interest to be paid semi-annually: he still insisted on the par value. Selby still hesitating to purchase on such terms, returned home. But, on or about the 24th March 1825, he went again to Alexandria; and on this second visit, the arrangement was concluded. Morgan sold Selby seven-

teen shares of stock of the bank of Alexandria of 200 dollars each, and sixteen shares of the bank of Potowmac of 100 dollars each, at par, amounting to 5000 dollars, which Selby was to pay in two instalments, half within two years, and the other half within three years, and to pay him the interest on the whole, half yearly; and on the 26th March, upon Selby giving Morgan his bonds for the instalments, and a deed of trust of two parcels of valuable land in Jefferson to secure the payment, the stock was transferred to Selby. And on the same 26th March, a loan of 4000 dollars, for twelve months, was made by the bank of Alexandria to Selby, upon his own note indorsed by Morgan for his accommodation, and upon a pledge of the whole of the stock purchased of Morgan.

At the time of this sale by Morgan to Selby, of this bank stock at par, the market price of the stock was, at the least, twenty per cent. below par; and this was known to both parties. The stock was afterwards, in April and June 1827, sold to pay the debt it was pledged for to the bank; and the proceeds was only 3560 dollars 25 cents.

So far the facts of the case were uncontested and uncontested.

581 *In August 1827, the trustee to whom Selby had conveyed his lands in Jefferson, to secure the debt to Morgan, having, at Morgan's instance, advertised the lands for sale, in pursuance of the deed, to satisfy so much of the principal as was then due, and all arrears of interest—

Selby exhibited a bill against Morgan, in the superiour court of chancery of Winchester, setting forth the undisputed facts of the transaction above stated, and alleging moreover, that in the interval between Selby's first visit to Alexandria, when he declined to purchase the stock on the terms proposed, and his second visit, when the bargain was concluded, Morgan had himself negotiated with the bank of Alexandria, the terms of the loan of 4000 dollars to Selby, upon Selby's note indorsed by Morgan, and upon a pledge of thirty-three shares of bank stock; and that on Selby's second visit, Morgan informed him of this negotiation with the bank, and of the terms on which the bank had agreed to lend the money, and engaged to indorse the note for Selby's accommodation, in order to induce him to purchase the stock on those hard terms; that this, at last, was Selby's inducement to assent to the terms; and that the negotiation of the loan at bank, was part of, and connected with, the transaction of the sale of the stock by Morgan to him: charging, therefore, that the sale of the stock was a device to cover usury extorted from him by Morgan, and that that contract was, in effect, not a sale of stock, but an usurious loan to Selby, of money obtained from the bank upon the credit of Morgan's indorsement and the pledge of Morgan's stock: and praying an injunction to inhibit the sale of his lands under the deed of trust, and general relief.

The injunction was awarded.

Morgan, in his answer, admitted all the facts above stated as being uncontested; but he denied the other allegations of the bill in very explicit terms.

In March 1828, the chancellor dissolved the

injunction, and Selby appealed to this court. The cause was heard here in March 1829, before judges Brooke, Cabell, Carr 582 *and Green; and upon the proofs then in the cause, the court was equally divided in opinion, upon the question of fact, Whether Morgan's engagement to indorse the note for Selby's accommodation, in order to obtain the loan of 4000 dollars from the bank of Alexandria, was so connected with the contract between Selby and Morgan for the sale and purchase of the stock, as to constitute a part of this contract, and the consideration in part of Selby's purchase of the stock? Judge Carr held the negative, and that, therefore, there was no pretense for Selby's complaint, that the transaction for the sale and purchase of the stock, was usurious: judge Brooke was of opinion that the transaction was not usurious, in any view of the case; and judges Cabell and Green held the affirmative on the above question of fact, and thence inferred, that the transaction was usurious. By this decision of this court, the chancellor's order dissolving the injunction was affirmed; and the cause remanded to the court of chancery.

After the cause was returned to the court of chancery, it was clearly proved, that on the 7th March 1825 (whether or no Selby was then at Alexandria upon his first visit, did not certainly appear) Morgan requested the president of the bank of Alexandria, to ascertain from the directors, whether they would lend Selby 4000 dollars, upon the hypothecation of seventeen shares of stock of the bank of Alexandria, and sixteen shares of the bank of Potowmac; and they refused to lend the money on that security, but came to the resolution to make the loan to Selby, upon the security of a pledge of the stock, and of Selby's note indorsed by Morgan: that Morgan was immediately informed of this resolution, by the president of the bank: that Selby had no share in the negotiation with the bank for the loan, and never was apprised of it, till informed by Morgan: and that the delivery of Selby's bonds and mortgage to Morgan, to secure the purchase money of the stock, the transfer of the stock by Morgan to Selby, the hypothecation and transfer of the stock by Selby to the 583 bank, the execution and delivery to *the bank of Selby's note indorsed by Morgan, and the payment by the bank to Selby of the 4000 dollars lent him, were contemporary acts. And it was also proved, that in December 1824, Morgan held only ten shares, and in February 1825, only thirteen shares, of the stock of the bank of Alexandria; so that he must have purchased part of the stock he sold Selby, after the treaty with him commenced.

Upon this new evidence, Selby moved the court of chancery to reinstate the injunction. This motion was overruled. And Selby again appealed to this court.

The cause was very earnestly debated here, by Leigh for the appellant, and by Nicholas and Johnson for the appellee.

Leigh said, that Morgan knowing Selby's urgent necessity for money and his purpose to borrow it, was the first to propose to sell him bank stock, if that would answer his purpose, namely, his purpose of raising money; and, in his letter to Selby, of the 11th February

1825, after pointing out to him the advantages of the purchase of the stock, upon the terms proposed, as a method of raising the money, either by the hypothecation of the stock, or by selling it for money, he told him, that "this was the way he had recently sold a considerable quantity of stock, to those who required loans of money for a longer time than the banks were willing to lend;" that "he could now sell, in the same way, at any moment, upon the same terms, all the stock he had;" and he desired Selby, "if this would answer his purpose" (namely, of raising money) "to let him know, and immediately he" (Selby) "could command the money." The transaction, then, commenced in an effort of Selby to borrow money, under an urgent necessity, known to Morgan; and this letter amounted to an avowal of an usurious intention; an avowal, that this proposed sale of stock was the way which Morgan had devised and practised, to cover loans of money to those who, like Selby, could not borrow it of the banks. And that this was his real design, was the more apparent from the fact, that he did not, at 584 the time, hold as *much stock as he proposed to sell; that he had to buy part of the stock he sold Selby. It was then the scheme of Morgan to get usury on his money: he bought at twenty per cent. below par, for the purpose of selling to Selby, on a credit, at par (though the purchase money was to bear legal interest, and so was made equal to cash, and to be perfectly secured by a deed of trust of real estate) in order, that Selby might raise money on the stock, to the amount of its real value. Then, in the consummation of the transaction, the money that Selby got of the bank, was not, in truth, lent to Selby, at his request, upon the credit of his note and an hypothecation of his stock, but was lent at Morgan's solicitation, upon the credit of Morgan's indorsement, and of an hypothecation of stock furnished by Morgan for the purpose; which, in substance and effect, was the same thing, as if Morgan had borrowed the money of the bank upon his own note indorsed by Selby, and an hypothecation of his own stock, and then lent the money to Selby. And the effort of the counsel was, to liken this case to those of *Lowe v. Waller*, 2 Doug. 736; *Kent v. Lowen*, 1 Camp. 177; *Dunham v. Dey*, 13 Johns. Rep. 40; *Dunham v. Gould*, 16 Id. 367, S. C.

Nicholas and Johnson maintained, that the transaction was exactly what it purported to be on its face—a sale of bank stock by Morgan to Selby, upon a credit of two and three years, at a price of twenty per cent. above the cash market price at the time of sale; and that the case was, in principle, the same with that of *Greenhow's adm'r v. Harris*, 6 Munf. 472.

CARR, J. When this case was before this court at a former time, the only question which I discussed in my opinion then delivered, was the question of fact, Whether Morgan engaged to indorse Selby's note at bank, as a part of the contract for the sale and purchase of the bank stock? Coming to the conclusion, that the promise to indorse formed no part of the contract, there was no necessity for my investigating

585 *the law of the case. I think the impression on my mind was, that,

if the promise to indorse formed a part of the contract, the transaction was usurious; but it was an impression taken up without examination. The new evidence has changed my view of the facts. When it was found that Selby could not effect a loan of the banks, and the treaty for Morgan's stock commenced, the idea seems to have been, that by depositing the stock with the bank, it would lend the money, on the note of Selby without an indorser. But on the 7th March, 1825, (when Selby was, probably, at Alexandria, and the treaty on foot) the president of the bank, at the request of Morgan, applied to the directors, to know whether they would lend Selby 4000 dollars on his depositing as a security stock of the banks of Alexandria and Potowmac, to the amount of 5000 dollars? The board refused the loan on the stock, unless Selby's note should be indorsed by Morgan. An entry to this effect was made on its journal, and of this, the president says, he gave Morgan information. From this time, I cannot but suppose, that the treaty for the stock, proceeded upon the ground, that it was to be hypothecated, Selby's note given to the bank, and Morgan to indorse it. Selby bought the stock at par, executed his bonds to Morgan for 5000 dollars, payable with interest, in two and three years, and secured by deeds of trust; he gave about twenty per cent. above the cash price in the market; Selby then deposited the stock with the bank, with a power of sale; executed his note, which Morgan indorsed; and the bank paid Selby the money lent. It is contended, that the transaction, though in appearance a sale of stock, was, in truth, a loan of money at exorbitant usury. This is the question for examination.

In all such cases, lord Mansfield tells us, "The view of the parties must be ascertained, to satisfy the court, that there is a loan and borrowing, and that the substance was, to borrow on the one part, and to lend on the other." We have decided often, that the sale of stock, or any other *property, at whatever price, does not of itself constitute usury. In *Greenhow v. Harris*, judge Roane says, "I distinctly admit the right of a party to sell property, such as bank shares, at whatever price is agreed on. The transaction becomes usurious, only, when the object is to borrow money, and not to purchase stock, and the price of the stock is graduated as a device to effect the purpose; or where there is a combination between the seller of the stock on a credit, and the purchaser for cash." Does the case before us fall within the definitions here given? Was the substance, to borrow on the one part, and to lend on the other, and not to purchase stock? I can have no doubt, that Selby meant to buy Morgan's stock, and Morgan to sell it. It is equally clear that Selby was in distress for money, and wanted the stock as a means to raise it; and that Morgan knew this. Indeed, their first communications on the subject, grew out of a request of Selby that Morgan would assist his agent Hunter, in an attempt to negotiate a loan with the banks. The attempt failed, and then Morgan wrote to Selby telling him that he had stock, which he would sell him at par, giving him such time as

would enable him to make collections; pointing out the facilities which the stock would afford in raising money, especially by giving a stock note to the banks, or an individual one, by which he tells him he could command the money at once. The whole aspect of the case exhibits Morgan as the seller of stock, not the lender of money. And the difficulty with me has been to bring this within any of the cases which have been cited. In *Stribling v. Bank of the Valley*, 5 Rand. 132, we decided, that the sale of stock at twenty per cent. above the market price was usury, because (solely because) there was indissolubly linked to that sale, a loan of money by the seller to the buyer. Here that distinctive feature is wanting. Morgan sells his stock, the bank lend its money, not to Morgan but to Selby; not on Morgan's credit, but on the credit of Selby, the stock

and Morgan: a loan not influenced by the purchase and rate *of the stock, but made by the bank, in the course of its every day business; a loan agreed on all hands to be free from usury. I cannot well imagine, how a loan thus distinct, thus fair in itself, where no combination, no community of interest or profit can be detected, between the seller of the stock and the lender of the money, should make the sale of the stock usurious, which without it all admit would be untainted.

This case was likened to *Lowe v. Waller*. There, Waller wanted to raise £200. on a bill of exchange. Stratton & Harris hearing of it, sent their broker to let him know, that they would lend him £100. in money and £100. in goods, but that the goods should be choice sorts; he should have them at the warehouse price, and should not lose by them. When Waller went to see them, they pretended that they had no money then, but goods only, and desired that the business might lay over. Thus, they lured him on for about three weeks, knowing his extreme distress for money. At length, they sent him word, if he would come the next day, he should have £50. in money, and the rest in goods. He attended. One of the partners went out, and soon returned, saying he could get no money, but if Waller would take the whole in goods he should have them directly. Waller agreed: a broker who was present, sorted out the goods: they were immediately taken by him to an auctioneer, who sold them for £117. a sacrifice of nearly fifty per cent. Lord Mansfield said, it was impossible to wink so hard, as not to see, that there was no idea between the parties, of any thing but a loan of money; and that the only purpose of Stratton & Harris was to contrive to get more than legal interest. The device was, to give the transaction the colour of the sale of goods. Stripping off this covering, the court considered the goods sent to auction, as still the goods of Stratton & Harris; the money raised by the sale, as their money; and this money advanced by them to Waller, at a premium of near fifty per cent. And this has always been, and I trust always will be, con-

sidered a perfectly *sound decision. But does our case fall within it? I cannot think so. There seems to me some strong distinctions between them: from first to last, the treaty between Selby and

Morgan, was for a sale of stock. Morgan never offered to lend Selby money. It was, in truth, a sale of stock. If you connect it with the bank transaction, it was still a sale of stock, which Morgan knew Selby meant to hypothecate with the bank for a loan of money, and to enable him to effect which, Morgan agreed to indorse his note. Still there was no borrowing and lending between Selby and Morgan; no sale of the stock to the bank to raise the money; nor any sale or sacrifice of it contemplated. The 5000 dollars in stock were pledged, as a collateral security for the 4000 dollars borrowed by Selby of the bank, not of Morgan; and it was understood, that the loan was for twelve months. Thus Selby would have twelve months to return the loan, and redeem his stock; and within this time, he seemed very confident that he could make his collections. In truth, eighteen months were given him: if within that time he had paid him off his note, the stock would not have been sacrificed: he would have held it. In *Pollard v. Baylors*, 6 Munf. 433, it is strongly laid down, that a penalty from which a party may deliver himself, by complying with his contract, does not make such contract usurious. While Selby kept the stock, the dividends represented its par value in money; and, in the mutations of the market, the stock might have risen far above its par value. We have known this the case with more than one bank. This case, therefore, does not fall within the principle of *Lowe v. Waller*.

The case of *Kent v. Lowen* was also relied on. There, Lowen made a promissory note to Coates & Co. for £153. 15. 0. payable at ninety days; it was indorsed to the plaintiff, who brought assumpsit on it; the defence was usury; the facts were these; Coates & Co. accommodated Lowen with their acceptance at three months, in consideration of which Lowen executed his note to them at ninety days for the same sum, with the addition of two and a half per cent. 589 *commission. The device attempted there, was to cover the usury by that usage, under which country bankers have been allowed to take a certain commission, besides legal interest, for their trouble and expense; but that was for discounting bills: here (lord Ellenborough said) there was no colour for a commission, Coates & Co. being the acceptors, and not the discounters of the bill; and the commission was a mere cloak for usury. I consider that just as plain a case of usury, as if Coates & Co. had advanced money to Lowen to receive two and a half per cent. above legal interest. Their acceptance bound them to pay the money unconditionally, and it was their money on which they took the usury. But our case is not like that. Morgan sold stock to Selby, and indorsed Selby's note to the bank: but this did not make him the lender of the money: the bank was the lender: he was a mere surety for the borrower, lending his name to him. The difference of his position from that of Coates & Co. is strikingly illustrated by the fact, that indorsers are allowed to take a commission for the loan of their credit and responsibility.

The case of *Dunham v. Dey* was cited. It turns on precisely the same point with *Kent v. Lowen*; and admits of the same answer.

I beg leave to refer, though, to what justice Spencer says, upon the subject of indorsers: "It has been said (he observes) that it is the usage for indorsers of bills of exchange, and sureties on custom house bonds, to take a per centage, for advancing their responsibilities. I see nothing improper in this; there is no loan of money directly, or indirectly, in either of these cases; they come neither within the terms nor the mischiefs of the statute; and they are innocent transactions."

Thus the case before us seems to me essentially different from those cited in its support. The sale of the stock being by Morgan, and the loan of the money by the bank, without the slightest proof of collusion or combination between them, I cannot so connect the transactions, as to taint the sale of the stock with usury.

590 *I think the chancellor was right in refusing to reinstate the injunction.

CABELL, J. Upon a careful re-examination of this case, I am now of opinion, that the transaction was not usurious; and, therefore, that the order of the chancellor overruling the motion to reinstate the injunction, must be affirmed.

BROOKE, J. I am clearly of the same opinion.

Order affirmed.

Gilliam v. Clay and Others.

March, 1882.

(Absent TUCKER, P.)

Witnesses—Competency of Oblige and Assignor to Prove Bond Usurious.—The obligee and assignor of a bond is not a competent witness for the obligor. In any controversy between the obligor and assignee, to prove that the contract was founded in a usurious transaction between the assignee and obligor.

James Gilliam executed his bond, dated the 28th January 1819, to Charles Gilliam for 2000 dollars, payable two years after the date. Charles Gilliam, by assignment expressing that it was made for value received, and dated the 11th February 1819, assigned the bond to Charles Clay. And James Gilliam, by deed of trust, dated the same 11th February, conveyed certain real estate in Lynchburg, to trustees, to secure the payment of the debt to Charles Clay, the assignee of the bond. Charles Clay gave this bond to his son Oden Clay, and then died. The money not being paid, Oden Clay the holder of the bond required the trustees to make sale of the trust subject, and pay the debt out of the proceeds, and they accordingly advertised it for sale, in pursuance of the deed.

591 *Whereupon, James Gilliam exhibited a bill against Oden Clay and the trustees, in the superior court of chancery of Lynchburg, alleging, that he (James)

***Witnesses—Competency of Assignor of a Bond to Prove Usury.**—For the proposition that the assignor of a bond is not a competent witness for the obligor in any controversy between the obligor and assignee, to prove that the contract was founded in a usurious transaction between the assignee and obligor, the principal case is cited in *Chapman v. Hiden*, 2 Pat. & H. 97; *Wise v. Lamb*, 9 Gratt. 399, 306, and note; *Thornton v. Gordon*, 2 Rob. 727.

See monographic note on "Witnesses" appended to *Clalborne v. Parrish*, 3 Wash. 146; monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801; monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 608.

applied to Charles Clay, the assignee, for a loan of money, and negotiated the terms of the loan, which were usurious; that he offered his own bond and the real security he afterwards gave, but Clay told him that the bond must be executed to a third person, and assigned by the obligee to him; that thereupon, he executed his bond for the 2000 dollars to his brother Charles Gilliam, Charles assigned it to Clay, and James executed the deed of trust to secure the payment to Clay; that no consideration passed between Charles the obligee, and James the obligor, or between Clay the assignee, and Charles his assignor; that the sum which Clay actually paid him (James) was only 1450 dollars; Clay retaining the other 550 dollars, by way of discount at the rate of thirteen and three quarters per cent. per annum, computed on the amount of the bond, which was the usurious premium agreed to be paid by James Gilliam for the loan. Therefore, the bill prayed an injunction to inhibit the trustees from selling the trust subject, and general relief. The injunction was awarded.

The defendant, Oden Clay, answered, that his father had given him this bond as an advancement; and, as to the allegations of usury, that he was intirely ignorant on that subject.

The trustees also, in their answers, disavowed all knowledge of the usury charged.

The only proof which the plaintiff adduced of the alleged usury, was the deposition of Charles Gilliam, the obligee in the bond, and assignor thereof to Charles Clay; and this deposition stated the facts charged in the bill, explicitly and positively.

The chancellor was of opinion, that Charles Gilliam the assignor, was not a competent witness to prove the charge of usury; and, therefore, dissolved the injunction, and dismissed the bill. From this decree the plaintiff appealed to this court.

592 *Leigh, for the appellant. It is settled, that in an action by an indorsee and holder of a note negotiable at bank against the maker, the first as well as any other indorser is a competent witness for the maker, to prove usury, either between the maker and payee, or between the maker and any indorsee. Taylor v. Beck, 3 Rand. 316. Yet, in such an action, the holder must in his declaration shew his title from the payee and first indorser, just as in an action upon a bond by the assignee against the obligor, the assignee must in his declaration shew his title from the obligee and assignor. If, in this case, the assignee had brought debt on the bond against the obligor, and the obligor to sustain the plea of usury, had called the assignor to prove usury as between the obligor and assignee: how would the assignor have been interested in the event? His interest would be, that the assignee should succeed against the obligor, since a recovery against him would, in all likelihood, prevent the assignee from having recourse against himself: in this view, his interest would be against the party adducing him as a witness. If the obligor should be cast, he certainly could never have any action against the obligee. But if the assignee should be cast in his action

against the obligor, and that upon the plea of usury, as between him and the assignee, sustained by the evidence of the assignor, the assignee would have his action against the assignor upon the contract of assignment; and in this action, the record of the action against the obligor would indeed be evidence, but evidence only to prove due diligence to recover of the obligor, and to prove that the recovery was defeated by the defence of usury; but it would not be evidence, as between the assignor and assignee, that there was usury in fact between the obligor and assignee. If the assignor should rely upon that defence, he would have to prove it by the testimony aliunde; he would not be allowed to sustain the defence, by the exhibition of a verdict founded on his own evidence. But here is a bill in equity exhibited by the

obligor against the assignee and his 593 trustees, praying general *relief, upon which the court might have properly awarded an injunction only to stay the sale of the trust subject which the obligor had mortgaged to the assignee of his bond, until the question of usury should be tried and determined at law. Marks v. Morris, 2 Munf. 407; Martin v. Lindsay's adm'rs, 1 Leigh, 499; Fitzhugh v. Gordon, 2 Leigh, 626. I do not see how the assignor can have any interest, that a decree to that effect should be rendered for the obligor. Such a decree would be no evidence for any purpose whatever, in an action at law by the assignee against the obligor on the bond, or against the assignor on the contract of assignment, or in an ejectment by the trustees for the trust subject; since the suit and decree in equity, would be res inter alios acta.

Johnson for the appellee Clay. The holder of a note negotiable at bank (which stands on the footing of a foreign bill of exchange) may sue the maker, or the first or any other indorser; and though, in either case, he is obliged, in his declaration, to shew his title from the first indorser, yet in an action against an indorser he is never bound to shew the record of any action he may have prosecuted against the maker, and his failure to recover the contents of the note from him. But in an action by an assignee of a bond against the assignor, the plaintiff is obliged to shew the record of any action he may have brought against the obligor, to prove due diligence and his failure to recover or get satisfaction of the debt from him, in order to entitle himself to recover it from the assignor. Suppose the assignee in this case, had brought his action on the bond against the obligor; he had pleaded usury as between him and the assignee, and called the assignor to prove the plea true; the assignor had been admitted as a witness, and proved the usury; and a verdict had been found upon that evidence, and judgment rendered, for the defendant; then, if the assignee had brought an action against the assignor on the contract of assignment, he would have been bound to shew in 594 his declaration, *due diligence against the obligor, and the reason of his failure to recover the money of him, and for that purpose to shew the record of his action against the obligor: but that record would shew, that his claim was tainted with usury,

without at all shewing how it had been proved to be so; and so, by his own shewing, he would not be entitled to recover against his assignor. It is thus that in an action at law by the assignee against the obligor, the assignor would have an interest to sustain the obligor's plea of usury as between the assignee and obligor; and therefore, would be an incompetent witness to such a purpose. If incompetent at law, he is equally so in this suit in equity. If his evidence should be admitted here, as a foundation for the decree suggested by the appellant's counsel, to injoin the sale under the deed of trust till the question of usury shall be tried at law, it is not easy to see, why it would not be equally admissible on the final hearing, as a foundation for a final decree that the claim is usurious. If the evidence were admitted here for any purpose, the record of this suit, containing the deposition of the assignor, would be admissible evidence in any controversy at law between the assignee and obligor; and so the deposition of the assignor would be in fact read on the trial of the action at law.

Leigh, in reply. In the trial of an action of debt on the bond brought by the assignee against the obligor, upon the plea of usury as between them, if the assignor was called and admitted as a witness to prove the plea, there would be no difficulty whatever in exhibiting on the record the fact of such evidence being adduced and admitted, by a bill of exceptions; and if it was not done, it would be the assignee's own fault. And, in his action against the assignor, he would not be bound, in framing his declaration, to follow the usual form; there is nothing to prevent him, after shewing the record of his action against the obligor, from averring and proving that the obligor's plea of usury between him and the assignee, had been sustained by the evidence of the assignor contrary to the truth of the facts; and so,

resting his claim against the assignor
595 upon the contract of assignment *expressed to be made for value received, and putting it on the assignor to prove the usury if he relied on it in his defence, by other evidence than a verdict founded on his own testimony. Suppose, in an action by an assignee of a bond against the obligor, the obligor should plead usury between him and the obligee, and should sustain the plea by evidence unquestionably competent, and so defeat the action; would the record of that action be such conclusive evidence of the usury, in the subsequent action by the assignee against the assignor, as to preclude the assignor from shewing a fair and legal consideration given by him to the obligor? If in such case, the record would not conclude the assignor's defence, neither would the record, in the present case, conclude the assignor's claim against the assignee.

CARR, J. The only question is, Whether Charles Gilliam, the obligee and assignor of the bond, is a competent witness to prove the usury between the obligor and assignee, alleged in the bill? I think he is not a competent witness. I am well aware, that objections to the competency of evidence have been much narrowed by the later adjudica-

tions, and that to disqualify a witness, he must have some legal, certain and immediate interest in the result of the cause, or in the record, as an instrument of evidence. Has not this witness such an interest? In Taylor v. Beck, we decided that an indorser might be a witness, where his evidence operated against his interest; as if he was called to prove some vice in the transaction between himself and the maker of the note, not touching the contract between himself and the holder. But here the effect of the evidence would be very different. The witness stands as obligee and assignor: he is examined to prove, that he gave no consideration for the bond; that he received none for the assignment, but was a mere instrument, in effecting an usurious loan, made by his assignee to his obligor. It is seen, at a glance, that this evidence, so far as it may avail, renders the whole transaction—the bond, the assignment, and the deed of trust, utterly void; and thus clears the wit-

596 ness of his liability as assignor. *It is objected, however, that this is not a bill for final relief, but merely seeking to stay the hand of the trustee, till the assignee of the bond shall sue on it at law, and thus give the obligor an opportunity of pleading and proving the usury. This objection admits, in effect, that, if this were a bill for final relief, this witness could not be heard; and very properly admits it; for he would be, by his evidence, establishing the usury, upon which the court would decree the whole transaction void, and cancel the deed, bond and assignment. But does it make any difference, as to the competency of the witness, whether this be a bill for final relief or not? If so, and we are to have the usury proved in this proceeding, by evidence which would not be heard on a bill for relief; it is carrying the principle of Marks v. Morris to a fearful extent indeed. Here is a transaction perfectly fair on its face; a bond executed, and assigned for value, and a deed of trust to secure it. A court of equity is called on to injoin the trustee, because the transaction is usurious, and to send the assignee to law to sue on his bond, for the express purpose of enabling the obligor to establish the usury, and thereby get clear of the whole debt. Before we take this strong and decisive step, must we not be well satisfied that usury has been practised? and must not that conviction be wrought by competent disinterested testimony? Suppose a bill filed charging usury, and professing to be full handed with proof; and that the answer denies the charge, and no proof of it is produced: would we not dissolve and dismiss at once? But between no proof, and a witness directly interested in establishing the usury, where is the difference? Surely, our minds cannot be impressed with the existence of usury in this proceeding, by a witness whom we would reject for his interest, if we were hearing the case finally, and who would be utterly incompetent to give evidence, in a trial at law on the bond, of which he is the obligee and assignor. The fountain is polluted at its source and the waters cannot be pure.

The other judges concurred, and the decree was affirmed.

597 *Moore and Another v. Holcombe and Others.

March, 1832.

[24 Am. Dec. 683.]

(Absent BROOKS, J.)

Bonds—Assignment—Effect of Equities of Third Persons as to Bona Fide Assignee.—Though the assignee of a bond takes it subject to any equity of the obligor, that attached to it in the hands of the obligee, he does not take it subject to any equity of a third person not party to the bond, of which he has no notice.

Same—Same—Same—Case at Bar.—Therefore, where H. sold land to M. and took no security for the purchase money; and M. then sold the same land to F., took his bonds for the purchase money, and assigned those bonds for valuable consideration, the assignees having no notice of H.'s claim to a lien on the land for the purchase money due him by M.—though H. might have been entitled to payment of the purchase money due him from M. out of the purchase money due from F. to M. if F.'s bonds for the same had remained in M.'s hands, yet H. cannot assert any such equity as against the bona fide assignees of the bonds.

Predham Moore sold a parcel of land in Campbell to John Lee, for 8000 dollars, and executed a conveyance of the same to him, but the conveyance was never recorded. Lee, before he had paid any part of the purchase money to Moore, sold the land to Hancock, or rather he exchanged it with Hancock for real property in Lynchburg; but Lee neither conveyed the land to Hancock, nor put him in possession of it. Hancock, afterwards, sold the land to Moore, the original owner, for 12,000 dollars worth of timber to be delivered at Lynchburg. Lee being thus indebted to Moore in the sum of 8000 dollars, and Moore indebted to Hancock in the sum of 12,000 dollars, the parties met, and made an arrangement, whereby Hancock agreed to pay Moore the sum of 8000 dollars which Lee owed him, by setting off and discounting that sum from the sum of 12,000 dollars, which Moore owed Hancock, on account of his pur-

***Bonds—Assignment—Equity of Third Party.**—While it is well settled that the assignee of a chose in action takes subject to all the equities of the debtor against the assignor, existing at the time of the assignment, yet, if he purchases in good faith he does not take subject to the equities of third persons, who are not parties to the transaction and of whose equity he has no notice. 6 Va. Lat. Reg. 114, citing *Hunter v. Lawrence*, 11 Gratt. 111; *Brodnax v. Ross*, 9 Leigh 12; *Moore v. Holcomb*, 3 Leigh 597; *Mott v. Clark*, 9 P. St. 299 (49 Am. Dec. 564, and note). To the same effect, the principal case is cited in *Gordon v. Rixey*, 76 Va. 704; *National Valley Bank of Staunton v. Harman*, 75 Va. 610; *Stoner v. Harris*, 81 Va. 455, 456, 457, 459, 465.

See monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801; monographic note on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 409.

Vendor and Vendee—Equitable Lien.—The implied equitable lien of the vendor of an equitable estate, where the contract of a sale is not recorded, will be enforced by a court of equity against the vendee, his heirs, purchasers with notice, and unsecured general creditors, but not against purchasers for value without notice, nor against mortgage or trust creditors with or without notice. *Poe v. Paxton*, 26 W. Va. 614, citing the principal case.

In *Brasley v. Catron*, 8 Leigh 527, the principal case is cited to the point that the equitable lien of the vendor ought not to be extended beyond its present limits as it is violative of the policy of our law which seeks as far as possible to discourage secret liens. To the same effect, the principal case is cited in *McCandlish v. Keen*, 18 Gratt. 622; *Poe v. Paxton*, 26 W. Va. 612; foot-note to *Kyles v. Tait*, 6 Gratt. 44.

Equal Equity—Priority.—In *Cox v. Romine*, 9 Gratt. 20, it is said, it may be laid down as a general rule, that between mere equities, equal in all other respects, the elder shall prevail. If, however, the junior claimant shall have an advantage of law, or superior equity, such party shall prevail, citing the principal case.

chase of the land from him; and Lee was to give his bond to Moore for 500 dollars, for the rents and profits of the land during the time he held it. All this was accordingly done: and Moore executed a covenant to Hancock to deliver him 4000 dollars worth of timber, being the residue of the consideration he had contracted to pay Hancock for

598 *the land. As the conveyance from Moore to Lee had never been recorded, and as Lee had not made any conveyance to Hancock, and as Hancock's sale to Moore had again vested the right to the land in him, the parties thought nothing more necessary to re-vest in him the legal title also, but to surrender to Moore the deed he had executed to Lee, to be cancelled: the deed was, therefore, surrendered to Moore. Moore delivered only a part of the timber he had covenanted to deliver to Hancock; and Hancock brought an action against him upon the covenant, for the residue, and recovered judgment for 1511 dollars damages, and costs of suit. By this time, it appeared, Moore was insolvent. Hancock assigned this judgment against Moore (inter alia) to Holcombe and others, trustees, to secure a debt due to Martin Hancock. But before Hancock had recovered the judgment against Moore, Moore sold the land in question to Lewis Franklin, for 6500 dollars, payable in instalments of 1000 dollars, each, in June 1827-'28-'29-'30-'31-'32, and 500 dollars in June 1833; and Moore conveyed the land to Franklin, and Franklin gave him his bonds for the several instalments. At the time of Franklin's purchase, he had no notice of the debt due by Moore to Hancock, or indeed of Moore's having ever purchased the land from Hancock. Moore assigned Franklin's bonds for the purchase money, to Murrell & Meem, for a valuable consideration; and they gave Franklin immediate notice of the assignment.

After the sale by Moore to Franklin, and the assignment of Franklin's bonds to Murrell & Meem, but before Franklin had discharged any of the bonds, Holcombe and others, the trustees to whom Hancock's judgment against Moore was assigned, Martin Hancock, the cestui que trust, and John Hancock, exhibited a bill in the superior court of chancery of Lynchburg, against Moore and Franklin, in which they insisted that the 4000 dollars worth of timber which Moore had covenanted to deliver to John Hancock, for the balance of the purchase money he had contracted to pay

599 Hancock *for the land, having been no otherwise secured than by Moore's personal covenant, Hancock had a lien, in equity, upon the land itself, for so much of the consideration as remained unpaid; namely, for the amount of Hancock's judgment against Moore for 1511 dollars, and interest thereon; and that this lien bound the land while it was in Moore's hands; and as Franklin had not yet paid any part of the purchase money, it bound the land in his hands also. And they prayed the court to declare and enforce the lien, and meantime to enjoin Franklin from paying Moore the purchase money he had contracted to pay him.

The answers of Moore and Franklin shewed the fact, that Franklin's bonds for

the purchase money he owed Moore, had been assigned by Moore, for valuable consideration, to Murrell & Meem, and that they had given notice of the assignment to Franklin; and that Franklin had no notice of the equity asserted by the bill, until after he had received the notice of the assignment of his bonds to Murrell & Meem. Moore insisted, that the plaintiffs had no such equitable lien as they claimed: Franklin said, that if they had, he ought to be relieved from the payment of the purchase money he owed, pro tanto; and submitted to the court, whether Murrell & Meem the assignees of his bonds, or the plaintiffs, had the preferable right.

Murrell & Meem moved the court for a rule upon the plaintiffs, to make them parties defendants in the cause; which motion was overruled.

There was proof, that Moore had assigned Franklin's bonds to Murrell & Meem for valuable consideration, and that they had given immediate notice of the assignment to Franklin; proof also, of the transactions between Moore and Lee, Lee and Hancock. Hancock and Moore, and then of the arrangement between Lee, Hancock and Moore, and the several contracts for the sale and purchase of the land, as above stated; but no proof, that Franklin had the least notice of the equity asserted in the bill, or of the facts

on which the plaintiffs' claim to the equitable lien was founded, *until some time after his purchase from Moore, and after he had received notice of the assignment of his bonds by Moore to Murrell & Meem; or that Murrell & Meem ever had notice of the plaintiffs' equity, until some time after Franklin's bonds had been assigned to them, and they had paid the consideration for the assignment, and given notice thereof to Franklin.

The chancellor declared, that the plaintiffs were entitled to the equitable lien asserted in their bill, upon the land in Franklin's hands, and made an interlocutory decree for the plaintiffs accordingly: from which decree the defendants appealed to this court.

Johnson for the appellants.

Leigh for the appellees.

CARR, J. This is a bill in equity to subject land to sale, under the lien for the purchase money. As the effort seems, of late, to have been to push this doctrine of equitable lien, beyond what seems to me its legitimate extent, I have thought it might not be amiss to look a little into it. It is a doctrine of comparatively modern date, and seems to have arisen from a supposed understanding between the parties. In *Gilman v. Brown*, 1 Mason, 212; 4 Wheat. 292, in *notis*, judge Story discusses the subject with much learning. He says, "The rule is manifestly founded, on a supposed conformity with the intention of the parties, upon which the law raises an implied contract; and therefore it is not inflexible, but ceases to act, where the circumstances of the case do not justify such a conclusion." In that case, there was certainly no express waiver of the equitable lien: it was brought by an appeal to the supreme court of the U States, 4 Wheat. 255, and the supreme court was clearly of opinion, that, from the circumstances, the parties contemplated no such lien, and therefore decided, without difficulty, against

its existence. In *Bailey v. Greenleaf*, 7 Wheat. 46, it was decided, that this lien could not be asserted against creditors holding under a bona fide conveyance from the vendee; and this, after a most able examination of the authorities by the chief justice. Some of his remarks are exceedingly strong to shew the mischief which would flow from extending this equity beyond its just bounds. He says, this lien "is a secret invisible trust, known only to the vendor and vendee, and those to whom it may be communicated in fact. To the world, the vendee appears to hold the estate divested of any trust whatever; and credit is given to him, in the confidence that the property is his own, in equity as well as at law. A vendor relying upon his lien, ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is, in some degree, accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate, on which he claims a secret lien." *Id.* 51, again, he says, "The lien of the vendor, if in the nature of a trust, is a secret trust, and although to be preferred to any other subsequent equal equity, unconnected with a legal advantage, or equitable advantage which gives a superiour claim to the legal estate, will be postponed to a subsequent equal equity connected with such advantage." *Id.* 57. And for this he cites *Buller's* note, *Harg. Co. Litt.* 290. b, note 1, § 13, and *Stanhope v. Earl Verney*. there stated. These remarks seem to me very sound; and beyond the limits here established, I am unwilling to extend the equitable lien.

In the case before us, looking at the facts of the transactions between Moore and Lee, Lee and Hancock, Hancock and Moore, and then between the three parties, the case does not appear to me, so much like a regular sale and transfer of land, as a cancelling, by the parties all round, of their contracts,— Moore paying Hancock 4000 dollars in timber for his speculation, and taking back his land: more especially, as, instead of regular conveyances, they agreed that the deed made to Lee should be destroyed, and that

Lee should give Moore his bond for 500 dollars for the rents "and profits of the land while he held it. These facts furnish strong evidence to my mind, that the parties never expected or intended to apply the equitable lien to this transaction. But I shall not discuss this point further; for it is clear to me, that if, as between Hancock and Moore, this lien ever existed, it has been lost, by the subsequent transactions. Moore soon after he got back the land, sold and conveyed it to Franklin, who executed to him his bonds for the purchase money; and these bonds were assigned to Murrell & Meem, for valuable consideration, and Franklin had notice of these assignments before he had notice of Hancock's claim to this secret trust, this lien for purchase money. The assignees ought to have been made parties; for, as nobody can suppose Franklin will be left exposed to pay both claims, the question is, which has the preference? But though not parties, the claim of the assignees, is perhaps sufficiently before the court, to enable us to make this comparison. We have seen from the case of

Bailey v. Greenleaf, that this equitable lien will be "postponed to a subsequent equal equity, if connected with a legal advantage." The assignees here, have that very legal advantage. They can sue at law on the bonds, and this lien will furnish no defence in that forum. Therefore they have nothing to ask of equity, but hands off—let us alone. But independent of this legal advantage, their claim is, I think, decidedly the best. It was said in the argument, that these assignees took the bonds subject to all the equity of the obligor. True, to all the equity of the obligor: but it is equally true, that they do not take them subject to the latent equity of a third person. *Murray v. Lylburn*, 1 Johns. C. R. 443; *Livingston v. Dean*, Id. 479. And that is the case here. Franklin has no equity against these bonds, unless he be liable to this equitable lien: he cannot be liable to both: and I think it clear, that he is liable to the bonds.

I have discussed these questions, since what has been said may tend to put an end to the controversy; but they are not properly presented by the record; since
603 *Murrell & *Meem*, though parties interested in them, have not been made parties in the cause. They ought, undoubtedly, to be made parties, that they may have an opportunity to assert their rights.

CABELL, J. Without deciding the point, I am willing to consider Hancock as having the same rights that he would have had, if he had conveyed the legal title to Moore, and if the consideration for the purchase had been a pecuniary one. If there were no persons concerned in this case, other than Hancock, Moore and Franklin, it would be perfectly clear, that, as Franklin received notice of Hancock's lien, before he paid his purchase money, the land would be liable in his hands, for the unpaid purchased money due from Moore to Hancock; and it would be equally clear, that Moore, also, would have a lien on the lands for the purchase money due to him from Franklin; although that lien would be subordinate to the lien of Hancock. But there are other persons, whose interests are involved in the controversy. Franklin's bonds to Moore for the purchase money, have been assigned to *Murrell & Meem*, for valuable consideration, and (it seems) without notice of any equity affecting them. This assignment of the bonds transferred to *Murrell & Meem*, the lien on the lands which Moore had before the assignment. Is this lien, thus acquired, subordinate in the hands of *Murrell & Meem*, to that of Hancock? I think not.

The doctrine of the lien of a vendor of lands, is the creature of a court of equity. It ought not, therefore, to be so applied as to operate injustice. So long as it is confined to the parties and their heirs, and to those claiming under them with notice, it can never be liable to objection. But the lien of the vendor, whether it be regarded as a natural equity, or as a trust, is founded on no matter of record, or even of express contract, but is merely implied from the supposed intentions of the parties. It is, in itself, secret and invisible. The vendor had it
604 in his power to make it otherwise, *by reserving a lien, expressed in his deed to the vendee, or by taking a lien from the

vendee, in some other form, so as to be notice to all the world. If he omit to do this; if he convey the land to the vendee, in such a manner as to make him appear to be the complete owner, with full power to sell or to charge it; justice forbids, that he should use his secret lien to the injury of those who, in ignorance of it (an ignorance produced by his own omissions), have acquired for valuable consideration, either the legal title or an equitable incumbrance. That this is so, as to a purchaser of the legal title, is undeniable. It is certainly true, also, as to a mortgagee, who is not regarded in a court of equity as a purchaser, in the full extent of the term, but as an equitable incumbrancer, having the advantage of a legal title. It is also true as to a mere equitable incumbrancer, who has not the legal title, but who has the preferable right to call for the legal title; as a creditor whose debt is secured by a deed of trust. I think the principles of equity require us to go one step further, and to protect from this secret lien of the vendor all subsequent equitable incumbrances, however acquired, provided they be acquired for valuable consideration and without notice. What is the principle of justice, that exempts from the lien of the vendor, a subsequent purchaser? It is, that he has made his contract and paid his money, without notice. His acquisition of the legal title, does not add to the justice of his claim, the weight of a feather. In justice, then, the equitable incumbrancer stands on the same ground with the purchaser of the legal title; for he also has made his contract, and has paid his money, without notice of the secret lien of the vendor. I do not think it necessary to fortify the equity of a mere incumbrancer, by shewing that he has a legal advantage or preferable right to call for the legal title: he has an equitable lien on the land: that is sufficient for his purpose. It is not to be affected by the lien of the vendor; because, even as to the mere equitable

incumbrancer, the vendor has no equity. It is on this ground that *I think
605 *Murrell & Meem* must prevail in this controversy. I place no reliance on their having a legal title to the bonds, although I do think they have such title. That is not the sort of legal advantage of which the cases speak: the legal advantage there spoken of, is, I think, some advantage as to the land: but the only legal advantage, which the assignment of the bonds gave to *Murrell & Meem*, was a legal title to the bonds, and the right to sue at law, in their own names: as to the land, the assignment gave them no legal advantage whatever; as to the land, their claim was purely equitable. True, they might have sued at law on the bonds, but that did not strengthen their claim to the lands.

The doctrine of lien, if thus understood and enforced, will have a just operation, and be freed from the reproaches so frequently cast upon it.

Murrell & Meem ought, therefore, to be made parties, they being the parties interested to contest the claim asserted by the appellees; and, if in the controversy between them and the appellees, their case shall turn, as it now appears, that they acquired these bonds, bona fide, by assignment for valuable

consideration, and gave Franklin notice of the assignment, before they had any notice of the equity asserted by the appellees, their claim to the money due on the bonds ought no wise to be affected by that equity.

TUCKER, P. I shall consider this case, as if there had been an ordinary sale for money by Hancock to Moore, a deed made, and part of the purchase money in arrear; reserving for some other occasion the inquiry, whether the vendor's lien extends farther than to secure the payment of purchase money; in other words, whether it can be extended to secure the performance of covenants to do some collateral act as the consideration of the sale.

In the view I take of the case, the material facts are simply these: Moore, after his purchase from Hancock, sold the land to Franklin, executed a deed to him, received his bonds for the purchase money, and 606 assigned them to Murrell & Meem, all which occurred before Franklin had any intimation of the claim, of Hancock. On hearing of the claim, he determined to retain the purchase money, until it should be decided, whether Hancock, or the assignees of the bonds, had the best right to it. He has, therefore, been in no default, nor has he at all committed himself, for Murrell & Meem did not take the assignments upon any assurance of payment from him. They never applied to him until after the assignment. It is obvious, therefore, that there is no pretense for making him pay it twice: so that the question is really between Hancock and the assignees, which shall have this portion of the purchase money yet in the hands of Franklin. In other words, whose is it? Does it belong to Hancock by virtue of his implied lien, or to the assignees who have purchased the bonds without notice of the arrears due to Hancock? I think the latter have the best right.

Where the vendee of land still retains the estate it is clearly liable for the whole of the unpaid purchase money by virtue of the vendor's lien. Where he has sold to a sub-vendee, and the title has been made by him, and the money paid before notice of the original vendor's lien, the sub-vendee holds discharged of that lien. Where, however, a part of the purchase money is unpaid by the sub-vendee, the land in his hands is liable for that unpaid portion, but for no more. The equity is, that he shall pay to the original vendor whatever he himself yet owes to his own vendor. If he owes any thing, he, and his land, are discharged, upon his paying up that to the original vendor's demand; and if he owes nothing, neither himself nor his land is in any wise responsible.

Try this case by these principles. Was any thing due from Franklin to Moore (when he received notice of Hancock's claim) which equity demanded that he should pay over to Hancock instead of Moore? Nothing was due. His bonds, indeed, had been due to Moore, but Moore had sold them, for 607 value, to persons who knew nothing* of the vendor's pretensions. From the moment of that sale, Franklin ceased to owe Moore any thing. He became the debtor of the assignees; and as he owed Moore nothing,

he could be liable to Hancock for nothing, as has been already shewn.

It is true that assignees take every bond subject to the obligor's equity against the obligee; but I have yet to learn, that they take subject to an unknown equity of a stranger against the obligee. The equity set up by an obligor is against the bond: it is to avoid the bond. But the equity of Hancock is not to discharge or vacate, but to enforce, the bond, for his benefit. Can it be possible that the assignees take subject to this equity? They bought, indeed, subject to any equity of Franklin against Moore;—subject to the equity of Moore's debtor against the bond, but surely not subject to any supposed equity of his creditor to enforce it, of which equity they had no notice.

That the vendor's lien is lost as to the land by a sale to a subsequent vendee without notice, is clear. And if he has any lien upon the bonds given by the sub-vendee, why should not that lien also be lost by a sale of the bonds without notice? I can see no reason for the distinction; for as the assignee has possession of the bonds, and has by law a legal right to sue for them in his own name, and has therefore complete power to enforce payment at law, it is very clear that he has the legal advantage. Shall equity take away this legal advantage from a fair purchaser without notice? I think not. *Murray v. Lylburn*, 2 Johns. C. R. 441; *Livingston v. Dean*, Id. 479.

I am, therefore, of opinion to reverse the decree; and if the facts distinctly appeared in evidence as to the assignment, I should direct a dismissal of the bill. In the present aspect of the case, I think it better to send it back, with directions that Murrell & Meem be made parties, as the real contest is between them and the appellants. If the appellants refuse to make them parties, then their bill should be dismissed for want of proper parties.

608 *The decree entered by the court declared, that if Murrell & Meem took the assignment of Franklin's bonds from Moore, and gave notice of the assignment to Franklin, before they received any notice of Hancock's claim to charge the land with the unpaid balance of the purchase money due to him from Moore; in such case, if Hancock might otherwise have had a just claim in equity, so to charge the land with the balance of the purchase money due to him from Moore, that right was lost, and the assignees Murrell & Meem, had a preferable right to the amount of Franklin's bonds assigned to them; that Murrell & Meem, being thus parties in interest, ought to be made parties defendants in the cause; and that the chancellor erred in decreeing in favor of the appellees, before Murrell & Meem were brought before the court to assert their rights: Therefore, the decree was reversed, with costs, and the cause remanded to be further proceeded in, according to the principles here declared.

609 *Ayres v. Lewellin.

March, 1882.

(Absent BROOKE, J.).

Sureties—Summary Motion against Principal—Record—How Notice of Motion Made Part of.—In the case of*

**Pleading—Notice of Motion—Records.—In Skipwith*

a summary motion by surety against principal, to recover money paid by the surety, under the statute 1 Rev. Code, ch. 116, if the defendant appear, and judgment be rendered on a hearing of the parties, the notice of the motion is not a part of the record, unless it be made so by a bill of exceptions to the opinion of the court.

Same—Payment of Several Sums—Right to Several Motions.†—A surety having paid five several sums of money for his principal may maintain five several motions, and recover several judgments, for the debts, and for the costs of each motion.

Several Judgments—One Supersedeas;—Regularity.—One supersedeas to five judgments, though between the same parties, and upon claims of the like nature and though the question be the same in all the cases, is irregular, and ought to be quashed as improvidently allowed.

Same—Same—Reversal—Costs.§—A. recovers five judgments for debt against L. in the county court; at the instance of L. the circuit court awards one supersedeas to the five judgments, and reverses them by a single judgment; to this judgment the court of appeals, at the instance of A. awards a supersedeas, reverses the judgment of the circuit court, and orders the supersedeas awarded by the circuit court to be quashed as improvidently allowed: HELD, A. is entitled to his costs in the circuit court as well as in this court, but not to damages.

Ayres recovered five several judgments against Lewellin, in the county court of Bedford. The record sent from the county court consisted, in the first place, of transcripts of the five judgments: the entry of the first of which was in the following words—"J. Ayres, plaintiff, against G. Lewellin, defendant.—Upon a motion for money paid as surety—This day came the parties by their attorneys; and, on hearing, it is considered by the court, that the plaintiff recover against the defendant, the sum of 100 dollars, with interest from the 13th April 1817 till paid, also 8 dollars 33 cents, and his costs by him about his motion in his behalf expended, &c." The caption of each of the other four judgments, was in these words—"Same plaintiff against same defendant—upon the same motion;" and then followed the several entries of these four judgments; which were, each and all, of the same tenor with that of the first judgment above recited, being each 610 for the same sums of *100 dollars and 8 dollars 33 cents, and the costs of the motion, with this difference only, that interest was given on the sums of 100 dollars severally adjudged in these four cases, from the 13th April 1813, 1819, 1820 and 1821, respectively. And then the record of the county court proceeded thus: "The following notice was filed on the motion for the foregoing judgments, viz. Mr. G. Lewellin; Take notice, that I shall, by my attorney, move the court of Bedford county, on the 4th Monday in this present month, for judgments and award of executions against you in five cases wherein I have been compelled to pay Stephen Martin as

your surety. (signed) J. Ayres. (dated) December 9, 1823." Upon this notice was indorsed an affidavit of due service thereof on Lewellin. And this was the whole of the record of the proceedings of the county court.

Upon the petition of Lewellin, the circuit court of Bedford awarded one supersedeas to the five judgments.

The circuit court held, that the county court erred in rendering five several judgments upon one notice; and in giving five sets of costs upon one motion, whereas it should have rendered but one judgment for the several debts claimed, and given but one set of costs: therefore, the judgments of the county court were reversed, and one judgment rendered for Ayres against Lewellin, for the several debts, with interest on each respectively, and the costs of his motion in the county court; that is, for only one set of costs.

And then Ayres applied to this court, for a supersedeas to the judgment of the circuit court, which was allowed.

Johnson for the plaintiff in error, said, that, though the clerk had appended a copy of the notice upon which Ayres made his motions for the judgments in the county court, to the transcript of the entries of the judgments, and certified, that that was the notice on which the motion for the judgments was made; yet this notice was no part of the record. For Lewellin having

appeared to the motions, and the 611 judgments *having been rendered upon a hearing of both parties, without any objection taken in respect of the notice, it was wholly immaterial what was the notice, or whether there was any notice. Neither could the notice have been made part of the record, but by some defence founded on it, and by bill of exceptions to the opinion of the court touching such defence, and thus making the notice part of the record. Then, the record of the proceedings in the county court presented, simply, a transcript of five several judgments rendered for five several sums of money, paid by Ayres as surety for Lewellin. And, as Ayres might have maintained five several actions of assumpsit for the five several debts; so he might well have maintained, as he did, five several motions to recover the several debts, in a summary way, under the statute, 1 Rev. Code, ch. 116, § 1, p. 460. It was true, that after the caption of the first judgment stating the names of the parties, plaintiff and defendant, and that it was "upon a motion for money paid as surety," the caption of the other four judgments stated that they were "upon the same motion;" but the language of the caption was only the clerical description of the case, and was not, like the judicial language of the court, to be construed strictly; and the captions to the four judgments might well be understood as only describing the nature of the motions to be the same with the first, namely, motions for money paid as surety, not as importing that there was only a single motion made for a single judgment for all the debts demanded; and seeing that, in fact, there were five several judgments for the several debts, as upon five several motions,

v. Mutual Assurance Society, 10 Leigh 506. TUCKER, P., says from the manner in which this record is made up, I take it that the notice was spread upon it, and is therefore part of it. This was not the case in *Ayres v. Lewellin*, 8 Leigh 609. The notice here demands certain quotas, due "as per declarations signed, sealed, etc." These declarations being thus referred to and being filed by the plaintiffs, make part of their case, and are, properly speaking, part of the record.

†**Same—Notice of Suit—Waiver.**—The principal case is cited in *foot-note* to *Muire v. Falconer*, 10 Gratt. 12; *Ballard v. Whitlock*, 18 Gratt. 242 (see also, *foot-note*).

‡**Appeals.**—See monographic note on "Appeal and Error;" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 283.

§**Costs.**—See monographic note on "Costs;" appended to *Jones v. Tatum*, 19 Gratt. 720.

and judgments for the costs of each motion severally, the caption must be so understood. [Tucker, P. The cause was brought up to the circuit court, by one supersedeas to all the five judgments; was not that irregular?]-Johnson said, it certainly was; and that was another palpable error in the proceedings of the circuit court.

612 *Leigh, for the defendant in error, admitted, that a party having paid several sums as surety for another, might maintain several motions for the several debts; but he might also maintain one motion for them all; and if, in fact, he made but one motion, he was entitled to only one judgment for all the debts, and the costs of that single motion; as, if he had counted in one action of assumpsit for several debts so contracted to him, he could only have had a single judgment, and the costs of his action. Here, there was but one notice, and but a single motion. He said, the notice was necessarily part of the record. For the notice of a summary motion of this kind, given by the statute, served the double purpose of process and declaration: it might be waived by consent: it might be admitted by the defendant: but the defendant's appearance was not a waiver or admission of due notice, any more than the defendant's appearance to an action, dispensed with a declaration. It was the notice that ascertained the nature of the claim; it was the notice that gave the court the summary jurisdiction. The first section of the statute giving this summary remedy for sureties (cited by Mr. Johnson) gave the motion; but the 5th section provided, that no judgment shall be obtained by such motion, unless the party against whom the same is prayed, shall have ten days previous notice thereof. Therefore, without a notice of the motion—actual notice given, or notice distinctly waived, or distinctly admitted, by the party entitled to it: without shewing on the record, in one or other of those modes, the nature of the claim; there could be nothing to warrant the exercise of this summary jurisdiction. It behoved the plaintiff to maintain that the notice was part of the record. And if it was, there was but one notice. But suppose the notice not part of the record, and suppose it unnecessary that it should be so; there was but one motion. The caption of the first judgment shewed, that that was rendered upon a motion for money paid as surety; the captions of the other four shewed, that they were rendered upon the same motion. The circuit court

613 thought, that "the *same motion" meant one and the same, which surely was the plain, ordinary import of the phrase: Mr. Johnson insisted, that "the same motion" meant the like motion, namely, for money paid as surety. This was a very violent construction. Nullum simile est idem, said the proverb; e converso, nullum idem est simile tantum. It never occurred to the judge of the circuit court, that idem and simile could not be regarded as convertible. If the captions were part of the record, then, they sufficiently shewed that there was but one motion; on which there were five judgments, and five sets of costs of that one motion

awarded. But take it, that these captions were only clerical language, not the judicial language of the court; that they were only the clerk's description of the cases to which the entries of the judgments applied (and this, he said, was really the true character and function of the captions; for, when a record is made out, the caption of the entry of the judgment on the order book, need not be, and never was, inserted): then, the caption of the first judgment, as well as the captions of the four others, was only a clerical description of the case, in order to shew to what case the judgment applied; and the court could pay no more regard to the caption of the first judgment, than to the captions of the others. And, if this were so; if the caption of the first judgment was to be disregarded, as the mere language of the clerk; how could it be ascertained, that here was a motion, or motions, for money paid by Ayres as surety for Lewellin? and how could the jurisdiction of the county court to render judgment in this summary way, be sustained? Whether it was regular to award one supersedeas to the five judgments or not, depended, obviously, on the question, whether here were five several judgments upon five several motions, or five several judgments on one and the same motion? Suppose the plaintiff had, in one and the same action of assumpsit, counted in his declaration upon the five several debts due him, and the court, instead of rendering one judgment for all the sums, and for the costs of the single action, had rendered five

614 several *judgments for the five several sums, and for the costs of the action five times: there could be no doubt, that one supersedeas would have lain, to correct the error. So here, if there was but one motion for these five several debts, and one set of costs only incurred on that motion; a single supersedeas was the proper process to correct the error of severing the judgments into five parts, when it should have been one and intire, and giving five times the costs actually incurred.

TUCKER, P. In this case, I am of opinion, that according to general principles and the spirit of our decisions, the notice is no part of the record. "The parties came by their attorneys:" the defendant appeared, and having made no objection to the proceeding for want of notice, and having filed no bill of exceptions, we must take it, that there was a due notice proved in each of these several motions. The acts of the court must be presumed to have been right, unless the party has placed upon the record the evidence of its errors. There are several cases that bear on the point: *Glascock's adm'r v. Dawson*, 1 Munf. 605; *Bronaugh's v. Freeman's ex'or*, 2 Munf. 266; *Beale v. Willson*, 4 Munf. 380; *Burke, adm'r v. Levy's ex'ors*, 1 Rand. 1; *Couch v. Miller*, 2 Leigh, 545. It would be strange, indeed, if the certificate of the clerk of a county court, where the minutes only are signed by the court, should be taken as ascertaining what papers were read upon a trial, instead of the court itself being called upon to ascertain them by the solemnity of a bill of exceptions. It is an anomaly which cannot be admitted, since the court would

find it difficult indeed, to pronounce how far the practice should be extended, and where to fix its limits.

If the notice be out of the case, then these five judgments of the county court are utterly independent of each other; and here we have a single supersedeas to all of them. This cannot be right. The supersedeas, where it has the character of original process, as it has here, partakes 615 of the *character of a writ of error: and a writ of error, it is presumed, will not lie to several distinct and separate judgments. Such a practice would lead to great difficulty and embarrassment. The supersedeas, therefore, was improvidently awarded by the circuit court: and if so, this court, instead of affirming the judgments of the county court, must, in proceeding to render such judgment as the circuit court ought to have given, dismiss the supersedeas, as improvidently awarded.

A party defendant who is harassed by a variety of actions, which might be properly united in one suit, is not without a remedy. He may move to consolidate them; and if that motion be overruled, the error may doubtless be corrected by a superior tribunal; in what manner, it is not necessary for me to say, except that a supersedeas is not the proper remedy, where it does not appear from the record, that such a motion was made or rule applied for. In this case, no such step was taken, and it was not therefore competent to the circuit court to look into the matter. In every point of view, I am of opinion, that the supersedeas was improvidently awarded.

The other judges concurred.

After this opinion had been announced, Johnson insisted, that Ayres, the plaintiff in error here, was entitled to judgment for his costs in the circuit court, as well as in this court; and also to damages for retarding the execution of the judgments of the county court, now finally affirmed by this court, under the statutes, 1 Rev. Code, ch. 64, § 11, ch. 69, § 61, pp. 192, 240.

The judgment of the court was, that the judgment of the circuit court be reversed, and that the defendant should pay the plaintiff in error, his costs expended in prosecuting his supersedeas here: and this court, proceeding to render such judgment as the circuit court ought to have 616 rendered, *ordered, that the supersedeas awarded by the circuit court to the judgment of the county court, at the instance of Lewellin, should be quashed, as having been improvidently awarded, and that he should pay Ayres, the plaintiff in error here, his costs about his defence in the circuit court expended. But the court gave no damages.

TUCKER, P., dissented from so much of the judgment as gave Ayres his costs expended in the circuit court. He said—I have examined a variety of cases in this court, in order to ascertain what has been the practice; and I am satisfied, that wherever an appeal is dismissed as improvidently allowed, or a supersedeas quashed as improvidently awarded, the court has always refused to give costs to the party prevailing.

The first case was that of Hepburn v.

Lewis, 2 Call, 497, in which the judgment of the district court was for less than 100 dollars; and the appeal was dismissed as improvidently allowed, but there was no judgment costs.

In Clarke v. Conn, 1 Munf. 160, the appeal from the court of chancery was dismissed after it had been depending five years, on the ground that it was improvidently granted by the chancellor, after his power over the case had ceased; and no costs allowed.

In Lewis v. Long, 3 Munf. 136, the plaintiff sued on a single bill for more than 100 dollars. The jury found the debt to be discharged by less than that sum. The defendant obtained a supersedeas, and the judgment was reversed; from which the plaintiff appealed. The appeal was dismissed after a laborious argument by bar and bench; but no costs were allowed.

In Hutchison v. Kellam and Lymbrick v. Seldon, Id. 202, it was after great argument decided, that the jurisdiction of the court of appeals did not attach where the damages were less than 100 dollars, though the right of freehold incidentally came in question; whereupon the appeals were dismissed, but no costs were given.

617 *In Skipwith v. Young, 5 Munf. 276, the like principle was decided, and the appeal dismissed as improvidently allowed, but without costs.

In Rootes v. Holliday, 4 Munf. 323, the appeal allowed by the chancery court upon an appeal bond executed by a surety only, was dismissed, as improvidently allowed, but without costs.

In Miller v. Blannerhassett, 5 Munf. 197, there was judgment in the county court against Blannerhassett. A writ of supersedeas was awarded by the circuit court of Wood county; whereupon the bond for prosecuting it was executed by a surety, but not by Blannerhassett himself. The circuit court reversed the judgment, and the plaintiff appealed to this court. After argument, it was decided, that the judgment of the circuit court was erroneous, because that court had no cognizance of the cause, the supersedeas having improvidently issued for the cause aforesaid. Reversed, and supersedeas quashed, but without costs.

In Thomson v. Evans, 6 Munf. 397, the appeal was allowed in court, upon the appellant's entering into bond &c. in the clerk's office within thirty days: appeal dismissed, but without costs.

In Ashby v. Kiger, 3 Rand. 165, an appeal from a decree for costs, was dismissed, but without costs.

In all the foregoing cases, the principle was invariably adhered to, of refusing costs where the process of supersedeas was quashed, or the appeal dismissed, on the ground that they were improvidently allowed. I have not depended upon the printed reports of the cases in examining this matter: the entries themselves have been carefully examined.

I can perceive no essential difference in principle, between these cases and that under consideration. That of Miller v. Blannerhassett is very strongly analogous. A case in point is not to be excepted; for,

as the notice is no part of the record, the case appears to us as a single supersedeas to five judgments. This, I am sure, was not designed by the judge who awarded the supersedeas, and who

618 *probably took the notice to be part of the record. Had it been made so by an exception, the question might, perhaps, have been decided differently.

I am therefore of opinion, that on quashing the supersedeas to the judgment of the county court, the costs of that supersedeas should not be given.

619 ***Brockenbrough and Taylor v. Blythe's Ex'ors and Others.**

March, 1832.

(Absent BROOKE, J.)

Contract to Procure and Sell Infant's Land—Case at Bar.—A. and B. holding the legal title of an undivided moiety of land, by purchase and conveyance from C. the title of the other moiety being in D. an infant, and C. having covenanted to sell them the infant's moiety also, and A. and B. having under C.'s conveyance and covenant, taken possession of the whole, and made improvements; they sell and convey the moiety they had purchased of C. to E. for \$12,750; and they covenant with E. to use their best endeavours to get in the legal title of the infant's moiety, and if procured, to sell and convey that also to E. for \$6750; but if the legal title of the infant's moiety cannot be got in, within a year, then E. shall be at liberty, in their name or his own, to institute any legal proceedings against their vendor C. for his E.'s own benefit and advantage; and if they shall not be able to get in the legal title of the infant's moiety, then E. shall pay them the first mentioned sum of \$12,750 only—A. and B. use their best endeavours to get in the legal title of the infant's moiety, within the year, by procuring the infant's friends to make application to the legislature, upon a fair state of the facts, to authorize her guardian to sell and convey it, in which they fail: **Held**, that after the expiration of the year, the contract of A. and B. with E. with respect to the sale of the infant's moiety, was at an end; and tho' E. had a right to prefer a bill against C. and the infant D. for specific execution, in the name of A. and B., yet he was to prosecute that suit for his own benefit, and at his own risque, and as between him and A. and B. was bound to bear the burden of paying the purchase money with interest, to the infant E. upon her conveyance of her moiety, after her full age, in conformity with C.'s contract.

Vendee in Possession of Land—Purchase Money Unpaid—When Liable for Interest.—A vendee of land let into possession, and the purchase money remaining unpaid, shall pay interest thereon, though the vendor be in default, unless he has not only kept the purchase money idle, but given the vendor notice that he has so kept it.

Appellate Practice—Specific Performance—Objection to Vendor's Title—Waiver.—On a bill by vendee against vendor for specific execution, if no objection to the vendor's title be made in the court of chancery, in any form, he cannot be heard to make such objection in this court.

In 1813, Joseph Blythe of South Carolina, being the owner of the equitable estate of an undivided moiety of two parcels of land in the county of Monroe, Virginia, one containing about 770 acres called The Red Springs, and the other called Green-

620 woods adjoining the first, and *containing about 200 acres, which moiety Blythe had purchased at a sale made by commissioners of the superiour court of chancery, under authority of a decree of that court, but the commissioners had not yet made a conveyance thereof to him; and the other undivided moiety of those lands, being the property of Eliza Young, also of South Carolina, infant heiress of Thomas Young deceased—Blythe, by Erasmus Stribling his agent, entered into articles of agreement with John Brockenbrough and Thomas Taylor of Richmond, Virginia, dated the 29th September 1813, whereby Blythe covenanted to sell Brockenbrough and Taylor, the whole of the lands, and to procure a proper conveyance of his own undivided moiety thereof, from the commissioners of the court of chancery, and to execute himself, a conveyance to them, with general warranty, of the other undivided moiety which belonged to Miss Young—And Brockenbrough and Taylor covenanted on their part, to pay Blythe 13,500 dollars, for the whole of the lands; that is to say, the sum of 6750 dollars, on receiving a regular conveyance from the commissioners of the court of chancery, of Blythe's undivided moiety; and the residue in four equal instalments of 1687 dollars 50 cents, each, on the 1st October 1814, '15, '16 and '17, with interest on the two last instalments from the 1st October 1815—but it was covenanted, that none of these deferred payments should be demanded by Blythe, until he should either make a good conveyance of Miss Young's moiety or give good and sufficient security for the conveyance of the title of that moiety when she should attain the full age—And Blythe covenanted to put the vendees in possession of the whole of the lands on the 1st October 1813.

The commissioners of the court of chancery made a conveyance of Blythe's undivided moiety to the vendees; upon which they paid the moiety of the purchase money, 6750 dollars to Stribling, Blythe's agent in Virginia, and received possession of the whole of the lands in October 1813, according to the agreement. But

621 Blythe neither *conveyed (for, indeed, he could not convey,) Miss Young's moiety, nor took any steps to enable him to convey it, nor gave security for the conveyance of the title thereof, when she should attain to full age.

The Red Springs was a watering place, whither company might resort for health or pleasure in the summer; and Brockenbrough and Taylor, shortly after their purchase, expended in improvements (as they allege) 4500 dollars.

By articles of agreement, dated the 31st May 1815, between Brockenbrough and Taylor of the one part, and Philip Rogers of the other,—reciting the articles of September 1813 between Blythe and them, and what had been done in execution thereof,—Brockenbrough and Taylor covenanted to sell Rogers their interest in the lands, for the sum of 12,750 dollars—And it was covenanted that the said purchase money, when paid, should be full satisfaction for the [then] present title of Brockenbrough and

***Appellate Practice—Objection in Lower Court—Waiver.**—In *Handly v. Snodgrass*, 9 Leigh 493, it is said: "Courts have sometimes said that the counsel shall not be permitted to raise in the appellate court, for the first time, a point which, if made in the court below, might have been obviated. 18 Johns. Rep. 566. We follow this principle frequently, in rejecting objections to accounts where there has been no exception, and in other cases. *Brockenbrough v. Blythe*, 8 Leigh 619. And though it is not followed in all cases, yet I am of opinion that in cases of this description the principle is peculiarly appropriate." ***Specific Performance.**—See monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 3 Gratt. 248.

Taylor in the said lands; that when the payment thereof should be completed, they should convey to Rogers, the legal title they acquired by the conveyance of the commissioners of the court of chancery above mentioned (the title, namely, of Blythe's undivided moiety); that they should use their best endeavours to procure the legal title of the other moiety (Miss Young's) and if the title thereof could be procured, they should convey the title of that moiety also to Rogers, and he should pay them for the same, the further sum of 6750 dollars; but that, if the legal title of Miss Young's moiety could not be procured by them, within one year from the date of the articles, then Rogers should be at liberty, in their name or his own, to institute any legal proceedings against Blythe, for his own benefit and advantage; that, in case they should not be able to procure the legal title of Miss Young's moiety, Rogers should pay them the first mentioned sum of 12,750 dollars only, and they should not be bound to convey him the title they then held in the other (Blythe's) moiety, until he

622 *that sum; and that, in case they should succeed in procuring the title of Miss Young's moiety, they should retain the title of the whole of the lands, until Rogers should complete the payment of both the sums of 12,750 dollars, and 6750 dollars, as a security for the whole purchase money, 19,500 dollars. And it was further covenanted, that, as Brockenbrough and Taylor had paid Stribling, Blythe's agent in Virginia, 6750 dollars, for Blythe's moiety of the lands, as that moiety was yet in the agent's hands, and as it might be thought proper to attach the same in his hands, in order to secure a full performance on Blythe's part, of his agreement with Brockenbrough and Taylor of September 1813, or damages for his non-performance thereof,—any proceedings might be had for that object, and such proceedings should be for the benefit of the party entitled thereto, according to the purport and intent of this agreement.

Rogers received immediate possession of the whole of the lands, and, thenceforth, continued to hold them, and to enjoy all the profits. He paid Brockenbrough and Taylor the first mentioned sum of 12,750 dollars, and they conveyed to him the undivided moiety, which had been conveyed to them by the commissioners of the court of chancery; that is, Blythe's moiety. They also, immediately, suggested to Blythe and Miss Young's friends in South Carolina, that the only way in which a conveyance of her title in the other moiety could be effected, during her infancy, was by authority of a special act of assembly, passed for the purpose. And, in consequence of that suggestion, a petition on behalf of Miss Young, of her mother who was entitled to dower of her moiety, the administrator of her father, and Blythe, was presented to the legislature at the session of 1815-16 (through the agency of Brockenbrough and Taylor) stating Miss Young's title to an undivided moiety of the lands; that the Red Springs were mineral waters; that the value of the property depended,

chiefly on improving it as a watering place; and that her mother, who was her
623 natural guardian, *and the administrator of her father, did not consider themselves authorized to expend money belonging to her, in such improvements as were necessary to make this property profitable: and therefore praying the legislature, by special act to be passed for the purpose, to authorize the sale and conveyance of her interest in the lands in question. In consequence of this petition, a bill was passed by the house of delegates, authorizing the guardian or guardians, who should be duly appointed for Miss Young, according to the laws of South Carolina, to sell and convey her interest in the lands. But this bill was rejected by the senate. Thus, Brockenbrough and Taylor failed to procure a conveyance of the legal title of Miss Young's moiety, in the only way in which it was possible to procure such conveyance, within the year next after the date of their agreement with Rogers; and, thenceforth, they regarded their agreement with Rogers, in respect of that moiety, as at an end.

Meantime, in July 1815, a subpoena was sued out of the superiour court of chancery of Staunton, in the name of Brockenbrough and Taylor against Blythe and Stribling, his agent in Virginia, to attach in Stribling's hands, the 6750 dollars which Brockenbrough and Taylor had paid for Blythe's moiety of the land, till Blythe should comply with his contract with respect to the other (Miss Young's) moiety. It did not distinctly appear who sued out this process: Brockenbrough and Taylor were apprised of it, and made no objection. Blythe died in 1817, no proceedings having been had on the foreign attachment in chancery, during his life.

In May 1819, Rogers, without the knowledge or consent of Brockenbrough and Taylor, or either of them, caused a bill to be exhibited in their names, against Blythe's real and personal representatives, Stribling, the agent of Blythe, and Miss Young in the superiour court of chancery of Staunton—setting forth the contract of September 1813, between Blythe and the plaintiffs, Brockenbrough and Taylor, the conveyances of Blythe's undivided moiety of the

624 lands to *them, their payment of 6750 dollars to Stribling, his agent, and the expenses they had incurred in improvements: alleging, that Blythe had died, without having in any way complied with his contract, with respect to Miss Young's moiety; that the plaintiffs had thereby been prevented from improving the property as a watering place, to the degree of which it was susceptible, and so had been disappointed of the profits which they expected, and of the chief advantage which induced them to make the purchase; that Miss Young was still a minor, residing in South Carolina; and that her guardian was claiming her moiety, and threatening a suit for it; a measure which would be very injurious to the plaintiffs, since it would deprive them of the benefit of the improvements they had made, and would render the moiety which would be left them of comparatively little value, the lands being only valuable in one entire parcel, on account of the

mineral waters, and so not admitting of convenient partition. Therefore, they expressed their earnest desire, that Miss Young's title should be conveyed to them; called upon her to disclose the nature of her title; and prayed, that Blythe's representatives might be decreed to procure and convey her title; or, if that could not be done, that the court would direct an issue to ascertain the damages the plaintiffs had sustained, by reason of Blythe's failure to perform the agreement with respect to Miss Young's moiety, and that they might be indemnified out of the money they had paid to Stribling for Blythe, which was still in Stribling's hands.

In this bill, there was no mention of, or allusion to, the sale made by Brockenbrough and Taylor to Rogers, or the fact that he was, and had been since 1815, in possession of the lands, enjoying the whole profits.

The representatives of Blythe put in their answer in 1820. They denied that Stribling had any authority from Blythe, to make the contract with Brockenbrough and Taylor, of September 1813, so far as it respected the sale of Miss Young's moiety of the land; and if he had such authority, they said, the purchasers had retained 625 the purchase money *of that moiety in their own hands, which was an ample security for the fulfilment of Blythe's contract in that particular; and if Miss Young should refuse to convey her moiety, when she should attain to full age, the purchase money contracted to be paid for it, would be the exact measure of damages which the purchasers would sustain by the breach of the contract. Therefore, they claimed the whole of the money in Stribling's hands.

No steps were taken to bring the suit to an early hearing.

Miss Young attained to full age in 1823. And, in 1824, she put in her answer, in which she said, that she was willing to ratify the contract made by Stribling with Brockenbrough and Taylor, so far as it respected her moiety of the lands, and to convey the same to the purchasers; and that she would execute a conveyance, and transmit it to her counsel in this cause, to be exhibited to the court, and to be delivered to the purchasers, so soon as they should pay the purchase money with interest.

She accordingly executed the conveyance, and it was filed in the court of chancery.

Neither Miss Young's title to a moiety of the lands, nor the particulars of Blythe's title to the other moiety, were shewn and regularly deduced: and upon the documents that were filed in the cause, the title, particularly as to the parcel called Greenwoods, did not appear to be perfectly clear. But the title was nowise questioned in the pleadings, or at the hearing.

As to the defendant Stribling, it appeared, that he had, as Blythe's agent, received from Brockenbrough and Taylor, in July, 1815, the sum of 6750 dollars, in full of the purchase money for Blythe's moiety, which was immediately attached in his hands, and that he had paid it into court, soon after the filing of the bill, in 1819. And the only question was, whether he

was bound to pay interest in the interval between 1815 and 1819.

In July 1825, the court of chancery decreed, that upon the plaintiffs, Brockenbrough and Taylor, paying to Miss 626 *Young the sum of 6750 dollars with interest from the times appointed for the payment of the instalments thereof by the agreement of September 1813, the deed executed by her, conveying her moiety of the lands to them, should be delivered to them; and, in case they should fail to pay the same to her within six months, the marshal of the court should sell the whole of the lands, at public auction for cash, and bring the proceeds of sale into court, to be disposed of by future order—and that Stribling should pay Blythe's representatives, the sum of 6750 dollars which he as Blythe's agent, had received of the plaintiffs on account of the purchase money of Blythe's moiety, with interest from July 1815, when he received it.

After this decree was pronounced, Brockenbrough and Taylor exhibited their bill against Blythe's representatives, Miss Young and Rogers; setting forth the contract between them and Rogers of the 31st May 1815, and the proceedings and decree in the first mentioned suit prosecuted by Rogers in their names; and alleging, that they had no knowledge whatever of the proceedings in that suit, till after the decree made therein, and had taken no part in the prosecution of it; Rogers was the real, they only nominal plaintiffs in that cause. That, having by their contract with Rogers, covenanted to use their best endeavours to procure the legal title of Miss Young's moiety of the lands, and, if the title thereof could be procured, to convey that moiety to Rogers, for which Rogers was to pay them 6750 dollars, in addition to the 12,750 dollars which he was to pay them for Blythe's moiety; but, if they could not procure the legal title of Miss Young's moiety within a year after the contract, Rogers should be at liberty, in their names or his own, to institute any proceedings against Blythe [only] for his own benefit and advantage; and, in case they should not be able to procure the title of Miss Young's moiety, Rogers should pay them only the 12,750 dollars, the purchase money stipulated for Blythe's moiety;—they had used 627 their *best endeavours to procure

the title of Miss Young's moiety, in the only way in which it was possible to obtain it, namely, by procuring the petition to the legislature at the session of 1815-16, praying a special act to authorize her guardians to sell and convey the same; and when they failed in that effort to procure a conveyance of her title, within the year, the contract between them and Rogers, according to the true construction thereof, so far as it related to the sale of Miss Young's moiety, was at an end: they had no longer any right to demand of Rogers the purchase money for that moiety, nor he to require them to procure and convey the title thereof to him. That, though they covenanted with Rogers, that, in case the title of Miss Young's moiety could not be procured, he might either in their names or his own, institute any legal proceedings

against Blythe, yet such proceedings were to be for his own benefit and advantage; consequently he was to incur any responsibility which those proceedings should impose on the plaintiffs; he had no right to institute such proceedings in their names, for his own benefit, and to throw the responsibility on them. That they covenanted, that Rogers might institute such proceedings against Blythe only, not against Miss Young also; they had no right to demand of her specific execution of Blythe's contract as to her moiety, nor had she any right to demand specific execution thereof from them; she was only entitled to demand her moiety of the lands in question, and the profits of her property, from Rogers, who held the property, and had received the profits. That, consequently, the proceedings which Rogers instituted and prosecuted in their names, were wholly unauthorized. That, by sinking the fact of his purchase of the property from them, and the terms of the purchase, he had contrived to subject them, instead of himself, to Miss Young's demand; and, by calling on her, in their names, for specific execution of Blythe's contract, had, in effect, made a purchase of her moiety from her, which they never made. And that Rogers now insisted, that, though he had enjoyed 628 the whole profits of the whole *property since May 1815, when he received possession, yet he was only bound by his contract with Brockenbrough and Taylor, to pay them the principal sum of 6750 dollars for Miss Young's moiety, and they were bound to pay Miss Young that sum and all the interest which had accrued thereon, and which the chancellor had directed them to pay her; whereas, they insisted, if Miss Young was entitled to demand interest from the purchasers (which, under the peculiar circumstances of the case, they denied) Rogers was the person bound to pay it. Therefore, they prayed the court to suspend and inhibit, by injunction, all proceedings on the decree in the other suit, prosecuted in their names by Rogers, against Blythe's representatives and Miss Young; and to declare and decree, that, as Rogers was the real plaintiff in that cause, and was the only person justly bound to pay the purchase money to Miss Young for her moiety, and whatever interest was justly due thereon, he and not Brockenbrough and Taylor, should pay the same to her; and general relief.

The injunction was awarded.

Miss Young answered, that she had consented to ratify Blythe's contract of September 1813, for the sale of her moiety of the lands, only upon condition, that the purchase money thereof should be paid to her, with interest from the time stipulated by the contract; and that she would part with her property on no other terms.

Blythe's representatives, in their answer, insisted, that they had a right to the money which had been paid Stribling for Blythe's moiety, whatever might be the result of the controversy as to the other part of the subject.

Rogers, in his answer, insisted, that he had a right, by the terms of the contract of May 1815, between him and Brockenbrough

and Taylor, to prosecute the suit, in their names, against Blythe's representatives and Miss Young, for a specific execution of Blythe's contract of September 1813, according to the terms of that contract. That whatever duty a specific execution 629 thereof would impose on *Brockenbrough and Taylor, they were bound to perform it: if Miss Young was entitled to interest on the purchase money of her moiety, they were bound to pay it; for, by their contract with Blythe, they had stipulated to pay the interest as well as the principal of the purchase money for Miss Young's moiety, when the title thereof should be conveyed to them, after her attainment to full age. And that he, Rogers, by his contract of May 1815, was only bound to pay Brockenbrough and Taylor, the principal sum of 6750 dollars, when they should procure and convey to him Miss Young's moiety. He admitted, that he had been in possession of the whole of the lands, enjoying the whole profits, from May 1815, the date of his purchase; but he insisted, that he was not bound on that account, any more than by his contract, to pay interest; for the uncertainty of the title had rendered it impossible to improve the property without gross imprudence, and so had in a great measure disappointed him of the profits.

The chancellor, upon the motion of Blythe's representatives and Miss Young, dissolved the injunction, which had been awarded to Brockenbrough and Taylor in this suit, to suspend and inhibit the execution of the decree in the other suit. And from this decree Brockenbrough and Taylor appealed to this court.

The cause was argued here, by Wickham and Leigh for the appellants, by Johnson for the appellee Rogers, and by Stanard for Blythe's representatives and Miss Young.

I. The counsel for the appellants examined the contract between them and Rogers of May 1815, and insisted, that the just construction and effect of that contract, was, that Brockenbrough and Taylor should sell Rogers the moiety they had bought of Blythe, of which they had acquired the legal title, for 12,750 dollars; and that they should endeavour to get in the title to Miss Young's moiety, within the 630 ensuing year; if they should succeed

in getting the title of *that moiety within the year, they should sell and convey that also to Rogers, for 6750 dollars; if they should fail to get in Miss Young's title within the year, their contract with Rogers, in respect of her moiety, should be at an end; and he should pay them the stipulated price for Blythe's moiety, 12,750 dollars, only. If they should fail to get in Miss Young's title within the year, and if, in consequence of such failure, their contract to sell Rogers her moiety should be at an end, they, indeed, authorized Rogers to institute proceedings against Blythe, in their names, but for his own benefit, not for their's; and, as he was to have all the benefit, they were not to incur any reciprocal duty or obligation which might result from the benefit that Rogers should derive from such proceedings. They had a right

to call upon Blythe, for a specific execution of his contract to procure a conveyance of Miss Young's moiety, or to give them good and sufficient security that a conveyance thereof should be made when Miss Young attained to full age, or for damages for his breach of the contract in that particular; and this was the right which they authorized Rogers to assert against Blythe, in their names. But they had no claim whatever against Miss Young; and, therefore, did not pretend to authorize Rogers to assert any claim, in their names, against her. They had no right to call upon Miss Young for a specific execution of Blythe's contract to sell them her land; and, by consequence, she had no right to call upon them for a specific execution of their contract with Blythe to purchase it; for there should be no specific execution, where the remedies are not mutual; *Watts v. Kinney*, ante, 272. Rogers, by exhibiting the bill against Miss Young, asking of her specific execution of Blythe's contract for the sale of her property, in truth, proposed and made a bargain with her, for himself. And, as he exhibited the bill in the names of Brockenbrough and Taylor, without their knowledge, and without any manner of authority from them, Miss Young had no right to hold them to a specific execution of their contract with Blythe for the purchase of her moiety, because

631 *Rogers, in their names, thought proper to propose specific execution. That bill of Rogers ought to be considered as Roger's bill, to all intents and purposes; not Brockenbrough and Taylor's, to any purpose whatever. As they had no claim against Miss Young, and she had none against them, Rogers could not give her a claim against them, by asserting a claim in their names against her. The only right she had, was, to demand her property from the person who held it, and the profits of it from him who had received them. She had no claim to purchase money for her property, and interest upon it; because she had never sold it. But if Rogers thought proper, in order to keep the property, and to exempt himself from an account for profits, to propose to take the land upon the terms of Blythe's contract with Brockenbrough and Taylor, as he did by his bill (for it was his bill), and she thought proper to assent to those terms, Rogers, and he alone, was bound to pay her the purchase money. If Rogers had exhibited his bill against Blythe's representatives and Miss Young, in his own name, instead of Brockenbrough and Taylor's; or, if in the bill he exhibited in their names, he had disclosed the fact and the terms of his purchase from Brockenbrough and Taylor; and, in either case, had asked specific execution, for his own benefit; the chancellor should, in that suit, have imposed on him all the duties which resulted from a decree of specific execution at the instance of the purchaser, and ought to have imposed no duty whatever on Brockenbrough and Taylor: and therefore, when the truth was disclosed in this suit, he ought to have so corrected the decree in the other suit, as to exonerate them from the performance of any duty, and to impose on

Rogers, who alone ought to bear it, the whole duty to be performed.

The counsel for Rogers argued, that the just construction and effect of the contract between him and Brockenbrough and Taylor, was,—that they sold him the whole of the lands in question; the moiety which had belonged to Blythe, and of which they had acquired the legal title, for 632 *12,750 dollars, and that which belonged to Miss Young, and which Blythe sold them, and bound himself to have conveyed to them, for 6750 dollars: that Brockenbrough and Taylor were to get in the title of Miss Young's moiety if they could, and then to convey it to Rogers for the stipulated price; if they could not get it in, within the year, they authorized Rogers to institute proceedings in their names against Blythe, for his own benefit; and if by such proceedings he could get in the title of Miss Young's moiety, no matter when he should succeed in getting it in, he was to pay them 6750 dollars for it: that the authority to institute proceedings in their names, against Blythe, was an authority to exhibit a bill against him for a specific execution of his contract with them for the sale and conveyance of Miss Young's moiety; and as Miss Young was a proper and necessary party to such a bill, it was an authority to exhibit a bill, in their names, against her as well as Blythe: that the limitation of a year from the date of the contract, was the limitation of the term at which Brockenbrough and Taylor's duty to make endeavours to get in Miss Young's title, was to cease, and Rogers's right to institute proceedings to get it in, to commence; not the appointment of a time, at which, if Miss Young's title was not previously procured, the contract with respect to the sale of her moiety by Brockenbrough and Taylor, was to be at an end; and that, therefore, the suit which Rogers had brought, in the names of Brockenbrough and Taylor against Blythe's representatives and Miss Young, was authorized by their contract with him; he had a right to demand specific execution of Blythe's representatives and Miss Young, in their names; they were bound to perform the duty which the vendors had a right to demand of them as purchasers asking specific execution, according to their own contract; and Rogers was only bound to perform what he had covenanted to perform as a purchaser from them, namely, to pay them the principal sum of 6750 dollars, according to his contract with them.

633 II. The counsel for the appellants, and for Rogers, contended, that, though Brockenbrough and Taylor had held the possession from September 1813 to May 1815, and Rogers had held the possession ever since, yet Miss Young was not entitled as against them, because Blythe would not have been entitled to interest on the purchase money of her moiety. They thought, that the english doctrines on this subject, however equitable there, could not be applied in this country, without producing the greatest hardship and injustice; since here, the rents of real estate, rarely if ever, equalled the interest of the pur-

chase money; the rents of unimproved lands were almost nothing; and any uncertainty in the title, was a bar to all permanent improvements, without which no profit could be derived from them. The present case was very peculiarly circumstanced. Blythe, being tenant in common with Miss Young, contracted to sell and convey, not only his own moiety; but a good title in her moiety also, or to give good and sufficient security that it should be conveyed, when she should attain to full age. He did neither. It was impossible for the purchasers to improve the property, with any safety to themselves, so long as they had no conveyance of Miss Young's moiety, nor any security that a conveyance would ever be made. Yet it was agreed on all hands, that the value of the property, its capacity to yield profits, depended, chiefly, on improving it as a watering place: this was stated in the petition to the legislature presented by Miss Young's friends in 1815-16, and assigned as the reason why authority should be given to her guardian to sell her interest in it. The purchasers were thus prevented from persisting in the improvements necessary to render the property profitable, and so deprived of the chief benefit of their purchase, during the ten years of Miss Young's minority. Their duty to pay interest on the purchase money could only arise from the full enjoyment of the profits. Indeed, Miss Young ought not to be considered as having been, at any time, out of possession of her moiety of the land; for the

634 purchasers being entitled "by purchase from Blythe to his undivided moiety, were tenants in common with Miss Young; their possession was that of tenants in common, and no wise adverse to her's; and as to her moiety, they ought not to be regarded as vendees in possession. But if any body ought to be charged with interest on the purchase of Miss Young's moiety, it was Blythe. For he contracted to sell Miss Young's moiety, and to convey the title, or to give good security for the conveyance of it; and by his breach of his contract in that respect, he, in effect, put it out of the power of the vendees to improve the property to the degree of which it was susceptible, and to enjoy the full profits of it. At any rate, Blythe's estate should be responsible to the purchasers, for so much as the amount of the interest may have exceeded the actual profits.

The counsel for Blythe's representatives and Miss Young, advertising to the contracts between Blythe and Brockenbrough and Taylor of September 1813, said, it was obvious, that Blythe sold the whole of the lands, Miss Young's moiety as well as his own; that the purchase money of her moiety was to be paid in instalments with interest; and that Blythe's covenant was, that until he should convey Miss Young's moiety, or give security that it should be conveyed when she should attain to full age, the purchasers should retain the purchase money. If he had given the security, he would have been entitled to demand the instalments, as they fell due; as he did not do so, they had a right to retain the purchase money; which was their security, and security exactly adequate. Meantime,

he put the vendees in full possession of the whole lands. It could hardly be doubted, that if on Miss Young's attainment to full age, Blythe had purchased her title of her, and tendered it to the vendees, he would have a right to claim specific execution of them; and her ratification of Blythe's contract, upon condition that she should receive the benefit of it, and the conveyance of her interest directly to the vendees, came to the same thing as if she had con-

veyed to Blythe, to enable *him to perform the contract, and he had tendered a conveyance to the vendees, and claimed specific execution. That Blythe, and, by consequence, Miss Young ratifying his contract, was entitled to interest on the purchase money of her moiety, resulted from the express terms of the contract of September 1813, and from the best settled principles of law. *Powell v. Martyr*, 8 Ves. 146; *Fludyer v. Cocker*, 12 Ves. 25; *Hughes v. Kearney*, 1 Scho. & Lef. 132, 4; *Burnell v. Brown*, 1 Jac. & Walk. 168; *Selden v. James*, 6 Rand. 465. Therefore, as between Brockenbrough and Taylor, and Blythe's representatives and Miss Young, the chancellor's decree in the first suit was perfectly right. The vendor had no concern in the controversy between his vendees, Brockenbrough and Taylor, and their vendee Rogers; and a decree just with respect to them, ought not to be suspended till their controversy with Rogers should be determined. And, in fact, there was no decree directing Brockenbrough and Taylor to pay any money; the decree was, that if they should not pay the money, the lands should be sold; so that the decree, in its direct operation, affected only Rogers, who held the subject, and they had no right to complain of it.

III. Johnson objected, that it did not appear that the vendors, especially Miss Young, had any good title in the lands, which a purchaser should be bound to accept; and as to the parcel called Greenwoods, the title appeared defective or doubtful.

Stanard answered, that there never had been any objection made to the title, by the pleadings or otherwise.

IV. It was objected to the decree in the first suit, that it authorized and directed the sale of the whole of the lands, to pay the purchase money of Miss Young's moiety thereof: that her own moiety only ought to be held subject to her claim.

636 *It was answered, that Blythe's contract was one and intire, to sell the whole of the lands; and that he had a lien on the whole of them for the purchase money of each and every part.

CARR, J. In the examination of this case, as between Blythe and his vendees, Brockenbrough and Taylor, I shall put out of view their contract with Rogers, and shall consider it, as if they had continued to hold the lands, and had exhibited the bill in the first suit, and prosecuted it to a decree: I shall so consider the case, in order to simplify it, and because it can do no injustice to Brockenbrough and Taylor; since their contract with Rogers could no wise vary Blythe's rights; and, as to him, they must be considered as having exhibited the bill that was filed in their names, and as hav-

ing prosecuted that suit. From the date of Blythe's sale, in September 1813, he took no step to perform his contract in respect of Miss Young's moiety; made no conveyance thereof to the vendees, with warranty; gave no security that her title should be conveyed when she should attain her full age. The subpoena against him was sued out in July 1815. The bill was filed in 1819. It made Blythe's representatives and Miss Young parties defendants: it contained an earnest call for a specific execution of Blythe's contract, as to Miss Young's moiety; and it was only in case Blythe should be unable to execute it specifically, that it asked damages for his breach of contract. Miss Young came of age in 1823, and put in her answer in 1824; in which, while she denied her obligation to do so, she consented to convey her title, upon receiving the purchase money with interest, which by the contract of September 1813, was to be paid to Blythe; and she filed a conveyance in court, to be delivered to the vendees, upon their paying the purchase money with interest. The chancellor's interlocutory decree in that suit, pronounced in July 1825, was a decree for specific execution.

637 *The principal objection to that decree, was, that interest was thereby given to Blythe (or, which is the same thing in effect to Miss Young), from the dates from which the instalments were to bear interest by the contract of September 1813, though Blythe had made no conveyance of Miss Young's moiety with warranty, nor given security that the title should be conveyed, nor procured Miss Young's title till 1824, but had in these particulars, broken his contract, to the serious injury of the vendees. It is true that Blythe's contract binds him to make a deed to the vendees, with general warranty, for Miss Young's part of the land: but it names no time for doing this. It was well known, that the title was in her, and that she was an infant: it could not be the meaning of the parties, that Blythe should make the deed before he got the title; this was not the security the parties contemplated; that was, to hold the purchase money until the deed should be made, or until Blythe should give sufficient security for a good title, when Miss Young attained her age. The vendees took possession of the property under the contract, and have never been disturbed in it. They say, indeed, that they have suffered damages, by being prevented by the uncertainty of the title, from making the various improvements necessary for a watering place, and reaping the golden harvest, which would have followed: but we have no evidence upon this point; and these speculative damages are the most difficult of all things to be estimated. Perhaps, they might have made thousands; perhaps, they might have sunk every thing. But this is certain, they have had possession of more than 900 acres of land; some of it among the most fertile I have ever seen. The record tells us, this land adjoined the Sweet Springs, a long established watering place; which, we may fairly presume, would furnish a ready market for the products of the soil. Be all this

as it may, the vendees have not brought an action for damages: they have filed their bill for a specific execution, praying that the title, if it can possibly be had, 638 may be decreed to them; and it is only in case they cannot get this, that damages are asked for. This suit they prosecute in such a lingering way, as not to bring it to hearing till 1824; waiting (it would seem) till Miss Young (whom, without legal or equitable claim upon her, they had made a party) should come of age. She attained her age in the latter part of 1823, and before the hearing, her answer is filed agreeing to ratify the contract, and tendering a deed, to be delivered, on receiving her purchase money and interest. To this deed there is no exception taken, no reference asked as to title: and the question is, was the chancellor wrong, under these circumstances, to decree interest on the purchase money? It is most clear, that against Miss Young, he could make no decree, except such as she assented to; and the plaintiffs knowing this, and still making her a party, and praying for her title, must be considered, as consenting to take it, on such terms as she should prescribe. But independently of all this, it is the settled rule, that a vendee, in possession of both land and purchase money, coming for a specific execution, shall pay interest, even though the vendor has been in default, unless he has not only kept the purchase money idle, but has given the vendee notice that it was so. I think the rule a sound one, and applicable to this case. There was no error then in decreeing interest.

But it was objected, that the decree directs the sale of the whole of the land, unless the purchase money should be paid within a given time. This objection would seem to come with a bad grace from vendees, who have insisted on the specific execution of the contract. They could only expect to get the title which they have prayed for on paying for it. The purchase money was a lien upon the whole land.

Thus I am of opinion, that, as this case appeared upon the record in the first suit before the chancellor, his decree was right.

But, before the institution of that suit, other circumstances had occurred, other transactions had taken place; 639 *and these have been made the subject of the new bill filed by Brockenbrough and Taylor, seeking to suspend the decree in the first suit, and, so far as it affects them, to set it aside. And we are now to consider the case in this new aspect.

In this bill of Brockenbrough and Taylor,—after setting forth their contract with Rogers of May 1815, and the proceedings and decree in the first suit, and alleging that that suit was brought and prosecuted by Rogers, in their names, without their knowledge or consent,—they charge Rogers with misconduct in several respects: 1. in bringing the suit in their names alone, concealing from the court every trace of his contract with them, his possession of the property, and enjoyment of all its profits, making himself no party, and so stating the case, as to make them appear still

the owners and possessors of the property: 2. in making Miss Young a party, against whom they pretended no claim whatever; and 3. in procuring a decree for her title, and putting upon them the burden of paying the purchase money of her moiety with interest, whereas Rogers was the person bound to pay both, and the person against whom the court would have decreed such payment, if he had made himself a party and fairly stated the whole case. Therefore, they prayed, that the decree in the first suit should be set aside, so far as it affected them, and that the execution thereof should be suspended and inhibited by injunction. The injunction was awarded; but the chancellor afterwards dissolved it; and it is from this order of dissolution in this cause, that the appeal was taken to this court. Was the injunction properly dissolved?

It was said that Blythe's representatives and Miss Young, who are in pursuit of the money justly due to them, ought not to be delayed by the disputes between the plaintiffs and Rogers. But it must be remembered, that those parties have ample security, and are getting interest on their money. We must remember, too, that "the constant aim of a court of equity, is, to do complete justice, by deciding

640 "upon and settling the rights of all persons interested in the subject of the suit to make the performance of the order perfectly safe to those who are compelled to obey it, and to prevent future litigation:" Mitf. Plead. 144. And we may well say with this court, in *Lane v. Tidball*, Gil. 133, that, "compared with these objects, a little delay is deemed of no account, in a court of equity."

It was said also, that the original decree did not touch Brockenbrough and Taylor, and that therefore the dissolution could not hurt them. I cannot assent to this position: I think the decree does touch them, and very nearly too. The decree, to be sure, does not say, in so many words, that they shall pay the purchase money: but it says, that upon their paying the purchase money with interest, the title deeds shall be delivered to them, and that, unless they pay it by a certain day, their lands (as the chancellor supposed them) shall be sold. Is not this, in substance, a decree against them for the money? Suppose the marshal sold these lands for half the purchase money due; upon the confirmation of his report, would not an execution issue at once against Brockenbrough and Taylor? I doubt, whether even an order of the court would be necessary; but if so, it would be an order merely in execution of the decree.

But I place this point upon broader ground: I think Rogers was clearly wrong in bringing this suit in the name of Brockenbrough and Taylor solely, and concealing from the court his purchase of the land, and possession under it. I think this omission has operated injuriously to them; and that they had a right, by such a bill as they have filed, to have it reheard and corrected; and this without waiting till an execution had issued against them. I have already stated that the great object of equity is, to settle the rights of all persons interested, and

cut up future litigation. Another ground of rehearing laid down in the books, is, where any facts materially affecting the case have been kept back. Suppose Rogers had made himself a joint plaintiff with Brockenbrough and Taylor, or made 641 himself plaintiff, and them *and the other parties defendants; had stated his own contract, and his possession under it; and had prayed a specific execution: what ought to have been the decree of the court? Clearly, I think, that Rogers should pay the 6750 dollars of purchase money due, with interest; that upon such payment, Miss Young's conveyance should be delivered to him; that upon his failure to make such payment by a given day, the land should be sold to raise the purchase money; and that, if that did not bring the amount, Rogers and Brockenbrough and Taylor should be personally liable to the vendors. Can it be doubted, that such a decree against Rogers would be correct? I cannot imagine the ground of such a doubt. He had bought of Brockenbrough and Taylor, the moiety of the land to which they had the legal right; and as to the other half, he had bought their rights, their contract; and on the terms of paying the same sum, which they were to pay on getting a title: he had enjoyed possession under the contract, and now came into equity for the title: must he not pay the purchase money with interest. When he was asking the execution of one part of the contract, must he not execute the other part, which he had taken upon himself? This seems to me the clearest equity in the world. All the remarks which I made on this part of the subject, as between Blythe and Brockenbrough and Taylor, apply emphatically to Rogers—because, instead of pursuing Blythe for damages, he has gone out of his way, and out of the power given him by Brockenbrough and Taylor, in making Miss Young a party, and praying for her title; as there was no obligation whatever on her, she had a right to make her own terms; and, surely, Rogers had no right to throw any part of this burden off his own shoulders.

It was objected, that there was not a perfect title to the lands. The answer given was a very satisfactory one; that there was not the slightest objection to the title in the bill, or any of the pleadings; that the parties had not put it in issue, and could not now raise the objec- 642 tion. When *Miss Young and the representatives of Blythe filed their answers, setting out their titles, and tendering their deeds; if Rogers had doubted on the subject, he might have asked a reference of the title; and before the master, it might have been shewn, that the defects now imagined, did not exist; the evidence might have been furnished there in a moment, which not being required, may not appear in this record. The chancellor expressly predicates his decree upon the fact, that no exception was taken to the deeds filed. Nay more, Rogers in his answer to Brockenbrough and Taylor's bill (an answer filed after a full disclosure of the title) makes no objection to the title, nor to any thing else, except the payment of interest on the purchase money. That, in

truth, is the only point in difference between him and Brockenbrough and Taylor. Surely, we ought to suffer parties to judge for themselves, and say with what titles they will be satisfied.

I am therefore of opinion, that the order dissolving the injunction was erroneous, and that it ought to be reversed, the injunction reinstated, and the cause remanded, to be proceeded in according to the principles now declared.

CABELL, J. I am of the same opinion. If we were now deciding this case as on an appeal from the interlocutory decree of July 1825, in the first suit of Brockenbrough and Taylor against Blythe's representatives and Miss Young; or, in other words, if we are to be intirely uninfluenced by a regard to the contract between Brockenbrough and Taylor and Rogers; it would be perfectly clear, that that decree must be affirmed. For it would be nothing more than the common case of a vendee of land coming into a court of equity for specific execution of the contract; praying a conveyance of the land, on the terms of paying the purchase money. In that aspect of the case, Brockenbrough and Taylor cannot complain: they get the title which they ask, and with which they are satisfied, and they are directed to pay no more than the balance of the purchase money which

643 *is confessedly due, with interest from the time indicated by their contract. And, if we could suppose Brockenbrough and Taylor to be out of the case, and that in the original suit, Rogers, as the sub-vendee of Brockenbrough and Taylor, was the nominal plaintiff on the record, as he was the real plaintiff in fact, the decree of July 1825 would be equally free from objection; for he would stand in their shoes, and could object to no decree which would be proper as to them.

Has any thing been exhibited in the injunction case, calculated to shew, that the decree of July 1825 is in any respect wrong, so far as it may affect Rogers? I think not. It does not appear from his answer to the bill, that he has any objection whatever to the decree, either as to the title of the land, or as to the balance of the principal due from him, for the purchase money. He seems to be perfectly satisfied with the decree, provided he is not made to pay interest on that balance. An exemption from interest, is claimed, on the ground, that the land owed its principal value to its mineral waters, which could not be rendered valuable without expensive improvements; and that these improvements could not be safely made so long as the title was in a state of uncertainty. But this objection seems to be the effect of an after thought. It certainly had no influence with Brockenbrough and Taylor, during their occupation of the land; for they say, they expended large sums in improvements. Nor does Rogers pretend, that it had any influence with him, between the years 1815 and 1818. He does however say, that after that, he in a measure abandoned the land, in consequence of the uncertainty of the title. If this be so, why did he not communicate the fact to Blythe's representatives, and file a bill for the rescission of the contract,

instead of a bill for specific execution? If he had then filed a bill for rescinding the contract, there is very little doubt but that Blythe's representatives would have acceded to his wishes. He must submit to the consequences of his own acts. He made no complaint; he made no offer to rescind the contract; he retained possession 644 of the land, preferred *a bill for specific execution of the contract, and has now got all that he asked by that bill; a title with which he is satisfied. Under such circumstances, it would be without precedent and contrary to equity, that he should not pay the purchase money with interest.

But Rogers was not a party on the record in the first suit; and, consequently, the decree, so far as it relates to the payment of the purchase money, does not operate on him, the real plaintiff, but on Brockenbrough and Taylor, the nominal parties. When, therefore, it appeared from the bill in the second suit, that Rogers was the real party in interest, the chancellor ought to have reheard the original suit, so as to make the decree for the purchase money and interest fall exclusively on him; unless, indeed, he should be unable to pay it.

TUCKER, P. I am clearly of opinion, that interest upon the purchase money of Miss Young's undivided moiety of the estate ought to be paid. To this conclusion I am equally led, in whatever aspect I view the transaction between the parties. If we look upon her acquiescence in the contract upon the terms of receiving the principal and interest, as of the nature of a new contract, then it is obvious, that she must be entitled to receive that interest, upon which she insists as an indispensable part of the consideration of her conveyance. Whether Blythe ought to be charged with it to the exoneration of the appellants and of Rogers, will best appear by the examination I propose of the conduct and obligations of Blythe. Whether, Rogers or the appellants ought to bear the burden, will appear hereafter.

Looking upon Miss Young's acquiescence in the contract, not as a new contract, but as confirming and carrying the contract of Blythe into execution, how does the case stand? Taking the contract of September 1813, as one made by Blythe's authorized agent (for though Stribling's authority was questioned, yet all parties have united in waiving that question) what was Blythe's engagement as to that 645 portion *of the estate which belonged to Miss Young? "For her undivided two-fourths," it is provided "that Blythe should make to Brockenbrough and Taylor a good and sufficient deed with general warranty." And for the security of the purchasers, it is also provided, "that none of the deferred payments" [which, without doubt, was regarded as the price or consideration of her interest] "shall be demanded, until he shall either make a deed, or give good security that a good title will be made when Miss Young shall come of age." Here then, the fact that he had not title to Miss Young's portion is disclosed: the fact that she was an infant is avowed, and the means of security for the purchasers is provided.

These means are, either the retention of the purchase money, the execution of a deed with general warranty, or the giving of good security that a good title would be made when Miss Young should come of age. Here are clearly three distinct modes of indemnity, of which Blythe, by the frame of the instrument, clearly had the option. He was not bound by its terms to do which they pleased. He was intirely at liberty to do which he pleased. If he chose to give security, or to execute a deed with warranty, he would then have been entitled to receive the purchase money: but if he chose to waive the receipt of the purchase money, he was at liberty to do so, and then it was unnecessary to give the security or to execute the deed. It could not be a reasonable interpretation of the contract, that he should leave the money in their hands, and give the security also. The money was the best security, and the amount was precisely that which they would have recovered back, had he gone on to receive it. For, having only engaged for the title of a third person, the measure of damages, if he failed to get it in, would be the purchase money of the land.

Blythe, then, did not break his contract by failing to give security or to execute a deed with warranty. Has he failed to comply with it since? I think not. Miss Young arrived at age in 1823. Until that

646 *her title, though he united in the effort to effect that object by petition to the legislature. Within a very reasonable time after her maturity, his representatives did procure her acquiescence, and she executed a conveyance accordingly. There has been a more than customary punctuality and precision in the fulfilment of his engagements, and Rogers, the vendee of the appellants, is now in full enjoyment of the whole title. I say nothing of the minor objections to the obscurity of part of the title, since if Rogers had had any doubt about it, the matter should have been distinctly brought before the court by a reference of the title, or otherwise. The failure to do this, must be taken as a proof of Rogers's consciousness, that there was no material difficulty or defect.

In the short view of the transactions which I have taken, it appears, then, that Blythe and his representatives have been in no default. He has procured the title of Miss Young, within a reasonable time. How that title was procured, how her acquiescence was obtained, is matter of no concern to the vendees. He did not represent himself as the owner. He fairly represented a minor as the owner, and engaged for her executing a title when the legal impediment of infancy should be removed. That engagement has been complied with.

Then, how does the question stand as to interest? The record presents the case of a vendor, who has delivered possession of the premises to the purchaser, which he has continued to enjoy without molestation; of a vendor, who has also faithfully complied with his engagement, that a good title should be made upon the happening of a particular event; until which event, he has

left the purchase money in the hands of the vendee, as his security; and that vendee has thus, for more than eighteen years, by himself or his vendee, received the rents and profits, and heid the purchase money also. Is there any principle of law or equity, which can justify us in saying he shall keep both? Shall the purchaser for so long a period receive the profits, while

647 *he is enjoying the interest of the purchase money?—for it would be wilful blindness to the ordinary course of transactions, to suppose, that this money has lain idle. If raised at all, it has been put to interest beyond question; if not raised, the interest has been saved to the party, which amounts to the same thing: for, in either event, he would have enjoyed the vendor's estate for eighteen years for nothing. The injustice of such a proceeding has long since given rise to the rule, that, as to interest and profits, the vendor is to be considered the owner of the money and entitled to the interest, while the vendee is regarded as the owner of the land and entitled to the profits. But he cannot have both. The principle is too familiar to require more than a reference to the cases which were cited at the bar. They establish, beyond question, the general rule, that where the purchaser is let into the possession, and the perception of the rents and profits of the purchased estates, he must pay interest for his purchase money; and if the rule be not universal, the party who claims an exemption from its operation, must bring himself within some established exception. This has been attempted, in the argument of the case; but it has moreover been contended that the english rule is too rigorous for our country.

That rents and profits ordinarily bear but a small proportion to the interests of purchase money, cannot be denied. This is very strikingly the case in Virginia. Hence, where there has been a sale and delivery of possession, and the contract has been disaffirmed, there can be no propriety in the application of the rule. Accordingly it never has been so applied. But where a man purchases land, he has made up his mind to give his money, which would produce a good interest, for land, which will produce much less. Thus, in the present case: had the title been made, and the money paid, the purchaser must have been content with the scanty rents, while the seller would have been receiving full interest. Now, since a court of equity looks upon the sale, as complete so soon as the parties have contracted, it is, 648 quoad *this matter, the same thing as if a conveyance had been actually made; provided the vendee has had actual possession, and uninterrupted enjoyment, and there are no particular circumstances to take the case out of the general rule. From the moment of the contract, the buyer is the owner of the land, and must rest satisfied with his rents; and the seller is the owner of the money, and is entitled to his interest.

But it is said in this case, there were objections to the title which prevented the vendees from proceeding to improve the property, so as to render it profitable. To

this there are many answers: 1. The difficulty in the title was one contemplated at the very inception of the transaction, and yet it was not provided that interest should not be paid. 2. If there were objections to the title, Blythe, I have shewn, was in no default. 3. The vendees have always had ample indemnity in their power; for they have not only retained the purchase money of the portion of which the title was doubtful, but they have also attached the whole purchase money of the residue, for the purpose of securing themselves. Had the title ultimately failed, they would have had, at this day, the 6750 dollars in Stribling's hands, with the accumulated interest of eighteen years, to indemnify them for their improvements; or, if the whole contract had been rescinded, so that this sum would have become their's again, then the land would have become Blythe's, and that would have become liable. I cannot, therefore, but consider this as a pretext on the part of Rogers, who seems to have made no progress in improving; and as to Brockenbrough and Taylor, they were obviously not arrested in their measures, as in less than two years they had laid out 4500 dollars. Upon the whole, I am satisfied, that Blythe's representatives, or (which amounts to the same thing) Miss Young is entitled to interest as decreed by the chancellor.

We come next to inquire who must pay it. Shall the burden fall on Brockenbrough and Taylor or on Rogers?

649 *By their contract with Rogers of May 1815, Brockenbrough and Taylor recited their contract with Blythe, and thus distinctly announced, that their title was imperfect as to Miss Young's moiety; with respect to which, it was also provided, that they were to use their best endeavours to procure the legal title, to be conveyed to Rogers; and if the legal title could be obtained, Rogers was then to pay them 6750 dollars; but, if a legal title could not be procured by them within one year from the date of that agreement, Rogers was then to be at liberty, in their name or his own, to institute any legal proceedings against the said Blythe, for his own benefit and advantage; it being understood, that in the event of their not procuring the legal title to more than Blythe's moiety, Rogers was to pay for that moiety only. It was also provided, that, as it might be necessary to attach the money in Stribling's hands to secure performance of the contract by Blythe, or obtain damages for non-performance thereof, it was agreed, that any proceedings might be had for that object, and that they should be for the benefit of the party entitled thereto, according to the purport and intent of that agreement.

By these articles, then, as I understand them, Brockenbrough and Taylor were bound to use their best endeavours for one year, to procure the legal title of Miss Young's moiety, to be conveyed to Rogers; and if they succeeded, they were to receive 6750 dollars: if they did not, then they passed over to Rogers their rights as against Blythe, to be pursued by him in their names, if he pleased, but at his own risque, and for his own account; and in this event, they were to receive nothing for

Miss Young's moiety. If no title could be procured eventually, Rogers would have been entitled to any damages he could recover in their names, and they would neither have participated in those damages, nor received any equivalent for them. Or, if he proceeded for the title and recovered it, he would recover it "for his own benefit and advantage," and for his own account;

and, of course, upon his own responsibility for *the performance of the contract on the part of Brockenbrough and Taylor with Blythe. For it is observable, that although in the event of their procuring the title to be made to him, he was to pay them the 6750 dollars, since they would have to pay it to Blythe; yet, after the year expired, when he was authorized to sue on the contract for his own benefit and advantage, there is no obligation on him to pay them one cent. He is left to the responsibilities of the contract, which he was authorized to enforce, and charged with its obligations which he was bound to fulfil.

Such, I think, is the clear interpretation of this contract. In compliance with it, Brockenbrough and Taylor, within the year, issued the attachment against Stribling. I attribute the act to them, because it was their duty to do it by the contract; and the compliance with that duty may be presumed, as the act was a proper one, as the suit is in their names, and there is no testimony going to fix the act on another. They also in further fulfilment of their contract to endeavour to get the legal title for Rogers, made an effort to procure an act of assembly authorizing a sale of Miss Young's title. This was the only practicable mode of getting that title, within the year; and when they failed in this, and the year had elapsed, their rights and obligations were both at an end. From that moment, Rogers stood in their shoes, with full title to the benefit of their contract with Blythe, and of course bound by all its provisions. He acted accordingly. In 1819, he procured counsel, and instead of instituting a new suit, grafted his bill upon the proceedings already instituted against Blythe and Stribling. From that moment, the suit was his. It stood, indeed, in the names of Brockenbrough and Taylor, but not improperly, as Rogers had a right to use their names. It was for his own benefit and advantage, and under his exclusive management and control. They were not entitled to meddle with it, because they had contracted to permit him to sue in their names "for his own benefit;" and he, and

not they, was the proper judge of what was so. On *the other hand, they were not bound to concern themselves with it, because they had passed over their rights to him pro bono atque malo,—for better, for worse: and had excluded themselves from any right of interference. Whether, therefore, as it respects Blythe's representatives, this was the suit of Rogers, or of Brockenbrough and Taylor, it was as between those parties, unquestionably the suit of Rogers from the time the bill was filed.

Upon the whole, I am of opinion, that from the expiration of the year after the

date of their contract with Rogers, Brockenbrough and Taylor were cut loose from the transaction, except so far as they might have been liable to Blythe. The chancellor, however, has not decreed against them personally, but only against the land; and I think he has rightly considered the contract as intire, and the whole liable for the purchase money yet due with interest.

But although this view of the case would absolve the appellants from any liability except to Blythe's representatives, in case the whole lands, and Rogers himself, should prove inadequate to the discharge of the purchase money; yet it is by no means a consequence of this opinion, that the chancellor erred in dissolving the injunction, obtained by the appellants to the decree in favor of Blythe's representatives and Miss Young. This is, in truth, the only question before this court. There is no reason afforded by that bill for longer postponing their recovery of the equivalent for their estates, now for eighteen years in the uninterrupted enjoyment of their vendees, and of the claimant under them. I am clearly of opinion, that the injunction was properly dissolved. Whether the original decree was erroneous or not, we are not entitled to inquire, as it has not been appealed from, and as it is clear, that it was a matter of no concernment to the appellants, if I am right in my view of their rights and responsibilities. That decree, though rendered in a cause in which they were nominal plaintiffs, was not personally against them.

It decrees, indeed, a sale of the lands, in the event of the purchase money not being paid *by them: for Rogers was unknown in the case. But it does not decree, that they shall pay it; and no execution can be taken out against them. Had it done so, then their bill would have been perfectly proper. At present, it acts, in effect, upon Rogers only, by directing a sale of his land. It is proper that it should do so, and he must pay the purchase money, or submit to a sale; for the decree is rendered in a cause emphatically his own, and over which the appellants had no control; and while they, on the one hand, are not entitled to appeal from the decree, because it does not affect them, and because they have no right to meddle with the cause which was prosecuted in their names by their own assent, he on the other hand, has acquiesced in the decree, by asking no appeal. Therefore, I am of opinion, that the order dissolving the injunction should be affirmed.

The decree entered by the court, declared, that the interlocutory decree of July 1825 in the first suit, was correct, so far as it decreed the payment of the purchase money to Miss Young, with interest on the instalments thereof from the dates when they were payable, or from which they were to bear interest, by the contract of September 1813, between the appellants and Blythe, and so far also as it subjected the whole of the land to sale, for payment of the purchase money and interest thereon remaining due; and there was no just grounds for a further delay of the sale. That, according to the just construction of the contract of May 1815, between the appellants and

Rogers, and considering the possession of the lands taken and held by him,—Rogers, after the lapse of a year from the date of that contract, and the failure of the appellants to get in Miss Young's title within the year, was entitled to all their rights under their contract with Blythe, and liable (as between him and them) to all their responsibilities under it, and to all responsibilities that might arise out of any remedy he might select to enforce it. That the suit in which the decree of July 1825

was made, was one that Rogers had a 653 *right to prosecute, and did in fact prosecute, for his own benefit; with which suit the appellants did not, and could not, interfere. That Rogers (as between him and the appellants) was liable to all the responsibilities arising out of the first suit so prosecuted, and was bound to exonerate the appellants from them all. That the purchase money and interest due, ought to be sought for, out of the lands, and from Rogers, before resort should be had to the appellants. That the injunction awarded to the appellants in the second suit, ought to be continued, until resort to them should become necessary, so as to protect them from personal responsibility, but no further; it being the opinion of this court, that the decree of July 1825 in the first suit, ought in no other respect to be longer suspended, unless Rogers should, within a reasonable time, to be appointed by the court of chancery, pay the purchase money and interest thereon due; in which case, the court ought to decree, that the appellants shall convey to Rogers the title conveyed to them by Miss Young. But that this decree while it expressed the clear opinion of the court, as to the construction of the contract between the appellants and Rogers of May 1815, and on the points now in controversy between them, was not intended to preclude Rogers from any defence, of which it might be in his power to avail himself, by adducing new evidence, or in any proper way giving a new aspect to the case. Therefore, the chancellor's order dissolving the injunction in the second suit, so far as it conflicted with the principles here declared, was reversed, and the cause was remanded &c. And the court decreed the appellants their costs against Rogers.

654 *Taylor's Adm'rs and Devisees v. Chowning.

March, 1832.

(Absent TUCKER, P.)*

Mortgages—Power Given Mortgagee to Sell—When Sale Valid.—Though if a mortgage be made to secure a debt, and power be thereby given to the mortgagee to sell the subject to pay the debt, the mortgagee cannot execute the power, the character of creditor and trustee, in such case, being

*He decided the cause in the court of chancery.

+**Mortgages—Power to Sell Given Mortgagee—Validity.**—A sale made by a mortgagee under a power given him, without the intervention of a court of equity, independently of a statutory provision, is void. *King v. Tuscumbia, C. & D. R. Co.*, 14 Fed. Cas. 558, citing *Chowning v. Cox*, 1 Rand. 306; *Taylor v. Chowning*, 3 Leigh 654.

But the debtor may sanction and confirm a sale of real estate, made by his creditor as trustee, and will be considered as having done so by being present at the sale and making no objection. *Gordon v. Cannon*, 18 Gratt. 401, citing *Taylor v. Chowning*, 3 Leigh 654. To the same effect, the principal

incompatible; yet, if the mortgagee in fact execute the power fairly, and make sale of the subject for cash, and if the mortgagor be apprised of the sale, and present at it, and make no objection to the mortgagee's proceedings, but on the contrary acquiesce in them, he shall be regarded as waiving his objection to the defect of the mortgagee's power to sell, so far as the purchaser is concerned, and shall not be allowed in equity to redeem, as against the purchaser.

This was the sequel of the case of *Chowning v. Cox*, which was before this court in February 1823, and is reported 1 Rand. 306. A reference to that report will be necessary in order to understand, fully, the report of the subsequent proceedings.

Elizabeth Thompson, by deed dated the 18th November 1801, conveyed a parcel of land called Laurel Grove in Westmoreland, to Peter P. Cox, to secure a debt of 1500 dollars, money of certain wards of Cox, which she had borrowed of him; and thereby entrusted and empowered Cox himself to sell the mortgaged subject to pay the debt. In 1803, Chowning purchased Laurel Grove of Mrs. Thompson for £876, out of which he undertook to pay certain debts she owed, and among them the debt of 1500 dollars to Cox. Chowning exhibited a bill in chancery in 1806, to enjoin Cox from selling the land under the deed of November 1801, upon the ground of some alleged defect in Mrs. Thompson's title. This injunction was dissolved in April 1812. And on the 29th May 1812, Cox proceeded to sell the land at public auction to William Taylor. In August 1812, Chowning exhibited his original bill in this cause, against Cox and Mrs. Thompson, wherein he alleged, that Cox had sold the land to —,

655 whether on the purchaser's *own account or on that of Cox, he professed not to know, and he objected, that Cox being the creditor secured by the deed of November 1801, could not lawfully act as trustee for himself, and had no rightful power to make sale of the mortgaged subject; and, therefore, he prayed that he should be permitted to redeem the land, upon payment of the principal and interest of the debt remaining due on the mortgage. Cox, in his answer to this bill, stated all the circumstances of the sale of May 1812, and that the purchaser was William Taylor. Yet Chowning did not make Taylor a party defendant in the suit. The chancellor, on the hearing, dismissed the bill, as to so much thereof as sought to set aside the sale. Chowning appealed from the decree. This court declared, that the deed of November 1801, did not give Cox any rightful power to sell the land for payment of a debt due to himself, so as to bar Chowning's right of redemption: but it added, "If there were no other persons than the debtor and creditor, interested in this controversy, the court would not only reverse the decree, but provide for a sale un-

der the directions of the court of chancery. But the person who purchased under the former sale, and who has the legal title, has not been made a party. Had he been before the court, he might have given a different aspect of the cause. He might have shewn, that, although the sale cannot be justified on the sole ground of the powers derived from the deed, yet it ought to be confirmed in his favor, in consequence of the subsequent acts of the appellant. He ought, therefore, to have been a party; and the chancellor erred in pronouncing a final decree, without affording an opportunity to bring him before the court." The chancellor's decree was accordingly reversed, and the cause remanded to the court of chancery.

Chowning then exhibited a supplemental bill and bill of revivor, setting forth the former proceedings, and the decree of this court of February 1823; and stating, that, at the sale of the land in question, by Peter P. Cox, on the 29th May 1812, 656 *William Taylor, late of Westmoreland deceased, was the purchaser, at a very inadequate price; that Taylor was well apprised of the authority under which Cox pretended to make the sale, and that Cox was acting as a trustee under a deed in which he himself was a mortgagee, and, therefore, had no rightful power to make the sale; and that Taylor had taken possession of the land, and he and his representatives had enjoyed the profits thereof for many years; and that Cox also was now dead. Therefore, this bill made the administrator with the will annexed of Taylor, and his heirs, and the executors of Cox, parties defendants; and prayed, that Taylor's real and personal representatives should be ordered to account for the profits of the land, since the same came to Taylor's possession; that an account of the debt due by Chowning for which the land was mortgaged, should also be taken; and that Chowning should be allowed to redeem the land, upon payment of any balance of debt, which, after crediting him for the payments he had made, and for the profits which should be found to have accrued to the holders of the subject, should be found due from him.

The administrator and heirs of Taylor, in their answers, insisted, that whatever might be the merits of the controversy as between Chowning and Cox, Chowning had no just claim to the relief he asked as against Taylor and his representatives. For, they alleged, the sale of the land made by Cox, was a sale at public auction for cash, fairly conducted in all respects; that Taylor became the purchaser at that sale for the full cash value of the property, without notice or suspicion of any defect in Cox's title, or in his power to make the sale, and Chowning himself was present at the sale, and made no objection whatever to Cox's proceeding; and that Taylor had paid the whole purchase money to Cox. They stated, that Taylor died in 1814, and they exhibited his will, whereby it appeared, that Taylor devised this land to two of his sons.

657 *Cox's executors answered, that their testator sold the land to Taylor,

case is cited in *Floyd v. Harrison*, 2 Rob. 179, 186, 189.

Trustees—Duties.—The principal case is cited on this question in *foot-note* to *Wilkins v. Gordon*, 11 Leigh 647; *Spencer v. Lee*, 19 W. Va. 188.

Deed of Trust Considered as Mortgage.—On this question, the principal case is cited in *foot-note* to *Breckenridge v. Auld*, 1 Rob. 148; *Spencer v. Lee*, 19 W. Va. 192; *King v. Tusculum*, C. & D. R. Co., 14 Fed. Cas. 556.

See monographic notes on "Mortgages" appended to *Forkner v. Stuart*, 6 Gratt. 197, and "Deeds of Trust" appended to *Cadwallader v. Mason*, Wythe 188.

at public auction, for cash, in Chowning's presence, without any objection on his part; that Taylor paid Cox the purchase money, which was £626. and Cox acting as a trustee, conveyed the land to Taylor, with a covenant of special warranty; that the debts charged upon the land, and to satisfy which it was sold, amounted to £571. 6. 9.; that their testator was, therefore, accountable to Chowning for the balance £54. 13. 3. with interest from the date of the sale of the mortgaged subject; and they insisted, that Chowning had no other just claim against their testator's estate. They also alleged, that they had fully administered the assets of their testator's estate; and they exhibited their accounts of administration, audited and settled by a commissioner of the county court of Westmoreland, by which it appeared probable, that Cox's estate was insolvent.

Cox's deed of conveyance of the land to Taylor, was dated the 13th October 1813. This deed recited Mrs. Thompson's deed to Cox of the 8th August 1801, whereby she conveyed the land to Cox, as a security for 1500 dollars due to him, and constituted him the trustee to make sale of the mortgaged subject; the sale of the 29th May 1812, made to Taylor by Cox, as trustee, in pursuance of that deed; and the payment of the purchase money, £626. by Taylor to Cox; and in consideration thereof conveyed the land to Taylor, with a covenant of warranty in the following words—"And the said Cox, as trustee aforesaid, and in pursuance of the written terms and stipulations of the sale aforesaid, published and declared, and by the said Taylor read, known and understood, on the day of sale of the said land under the said deed of trust" [the deed of the 8th August 1801] "and before the biddings were opened, doth, for himself and his heirs, especially warrant the title of the said land against him the said Cox and his heirs, but against no other person or persons."

Taylor, by his will, dated the 24th March 1814, devised this land in these words:

I give unto my two sons, William
658 *and David, my plantation in Westmoreland county called Laurel Grove, to be equally divided between them; and in case the land should be recovered by William Chowning or his heirs, I give them the money with interest from the purchase or sale of the said land by Peter P. Cox, trustee: if there should be a judgment, and the said land ordered to be re-sold, it is my desire that my executors should attend the sale, and bid to the amount of my claim (with interest) on the said land, or more if they think proper to do so for my said sons; which sum, in case it should exceed the claim on the land, to be paid out of their estate, say William and David's estate or proportion—all over what has been paid for said land, to be paid by them."

It was proved, that Cox's sale of the 29th May 1812, was made in pursuance of public advertisement duly made, of the time, place and terms of sale, and of the authority under which Cox undertook to make the sale: that the sale was attended by a number of persons, and there were other bidders besides Taylor; that the sale was, in all respects,

fairly conducted; that the price was an adequate one; that Cox professed to sell as a trustee, under the deed of the 8th August 1801, and declared that he would only make a conveyance with special warranty against himself and his heirs; that Chowning was present at the sale from first to last; that after twelve o'clock of the day of sale, when Cox proposed that the sale should commence, Chowning requested a postponement for an hour, saying he had hopes of being able to raise 1000 or 1200 dollars, which it was understood Cox was willing to receive, and to give further time for the payment of the balance of the debt; that Cox consented to this postponement; that Chowning left the place and was absent some two or three hours, and upon his return, stated that he had been disappointed in his expectation of raising the money, and that the sale of the land must go on, and then, and not till then, the sale was commenced and proceeded; that Chowning did not make or hint
any objection whatsoever to the sale.

659 *The chancellor was of opinion, that the aspect of the case as between Chowning and the representatives of Taylor, was not substantially different from that which it bore, at the time of the decree of the court of appeals, as between Chowning and Cox; and that, upon the principles of the decree of the court of appeals, Chowning was entitled to redeem the land, upon the payment of the balances due by him upon his contract with Mrs. Thompson, to the representatives of Taylor, the purchaser of the land, so far as it should appear that the purchase money paid by Taylor had been applied to the discharge of Chowning's debts, and the interest thereon accrued and accruing; and that Chowning was entitled to a credit and set-off against the debt he owed, for the rents and profits of the land received by Taylor in his lifetime or by his representatives since his death. Therefore, he directed a commissioner to take an account of the rents and profits of the land since the sale thereof made by Cox to Taylor, ascertaining by whom the same were received; to inquire and report, whether Cox had paid Mrs. Thompson the whole of the debt due to her, and had paid the same out of the purchase money paid him by Taylor; and to set-off the amount of the rents and profits against the balances of debt due by Chowning, so as to shew how much was now due from or to Chowning to or from the defendants or either of them. From this decree Taylor's administrator and devisees appealed to this court.

Leigh, for the appellants. Taylor's representatives, in defending themselves upon the supplemental bill, have, in the language of this court, "given a different aspect to the cause." For, though the circumstances attending Cox's sale of May 1812, which Taylor's representatives have relied on in their defence, were alleged by Cox in his answer to the original bill, yet he adduced no proof of them whatever; and this court neither did nor could pay any respect to them, except so far as they served to shew the propriety
660 *and necessity of convening Taylor as a party before the court. What-

ever was the defect of Cox's power, his sale was, in itself, perfectly fair, in all respects. The only objection to it, was, that Cox being himself the creditor and mortgagee, could not rightfully act as trustee in selling the mortgaged subject, though Mrs. Thompson the mortgagor, and Chowning, who purchased of her subject to the mortgage, both, undoubtedly, intended to confide that trust and power to him. Chowning was exactly apprised of all the facts, and had ample time for deliberation. He had suspended the proceedings of Cox, by an injunction, for six years, during which time he never hinted this objection. After this long delay, Cox proceeded to make the sale, regularly, and in execution of what he deemed his power and trust; a sale at public auction, for cash; so that the purchaser was to part with the purchase money the instant the biddings were closed, to be applied to the discharge of Chowning's debts. Chowning, present at the sale from first to last, so far from making any objection to Cox's right to make the sale, after a vain endeavour to raise money to pay the debt, and so to prevent the sale, declared publicly, that the sale must proceed. Nay more, though he was apprised by Cox's answer to his original bill, that Taylor was the purchaser, he forbore to make him a party for years, and thus deprived him of all pretense to prefer any claim against Cox, to refund the purchase money he had paid him, or to demand security that it should be refunded: he never made Taylor a party, till Cox was dead, and his estate insolvent. Chowning's objection to the sale, was founded on the equity he had to insist, that Cox, who was interested as a creditor, should not exercise the powers of a trustee—that the trust should be executed by some disinterested person; an equity not founded on his own contract, but on the policy of the law, which, in spite of the contract of the parties, denies to a person standing in the relation Cox did, the character or powers of a trustee. He waived this equity by wilful acquiescence in Cox's sale, without objection; nay, by positive assent to it. He barred himself from asserting it against Taylor, by his subsequent conduct: seeing Taylor purchase the land, knowing he was to pay cash, knowing that the purchase money was to be applied to the payment of his own debts, he stood quietly by till all this was done, and never asserted his equity against Taylor, until, by reason of Cox's death and insolvency, if Taylor shall lose the land, he must lose his money too. To these obvious objections to the equity, so late asserted by Chowning against Taylor, it is no answer to say, that he was ignorant of the incompatibility of Cox's interest in the trust with the character of trustee, and of his own legal right to object to his proceedings on that ground. For, in the first place, Chowning, was certainly apprised of his rights, at least as early as August 1812, when he exhibited his original bill against Cox, and willfully forbore to make Taylor a party; and, in the next place, he was exactly informed of all the

facts, from the beginning, and he cannot be allowed to excuse himself for neglecting to assert his rights, and thereby involving the innocent purchaser in loss or difficulty, on the ground of ignorance of the law. 1 Fonb. Eq. book 2, ch. 3, § 4, pp. 151-6, and the cases collected in the notes. If it be said, that Taylor also, as well as Chowning, was apprised of all the facts, and therefore he, no more than Chowning, shall be allowed to allege ignorance of the legal defect of Cox's power to sell; the answer is, that the objection to Cox's proceeding as trustee, lay for Chowning only; and as he alone had a right to make the objection, so he had a right to waive it; and the bidders at the sale had a right to infer that he did waive it. Chowning must be considered as the actor; for Cox was in effect acting as his trustee, since he stood in the place of Mrs. Thompson, who had expressly constituted Cox the trustee to sell the mortgaged subject, to pay the debt which Chowning undertook to pay out of the purchase money he contracted to pay her for the land. In the cases in which it has been held, that money paid under a mistake of the law, cannot be recovered back, the receiver as well as the payer has been consensual of the facts: and it is because the payer is the actor, and because to permit him to recover it back, would be to allow him to involve the receiver in a debt or duty which but for his own mistake he never would have incurred, that the receiver is exempted from all obligation to refund the money. *Brisbane v. Dacres*, 5 Taunt. 144, 1 Com. Law Rep. 43.

Johnson, for the appellee. Though the sale was made in May 1812, yet Cox did not make a conveyance to Taylor till October 1813. Hence it is to be inferred, that the terms of sale which required the purchase money to be paid in cash, were not strictly complied with; that the purchase money was not in fact paid, till about the time when the conveyance was executed. And the very peculiar covenant inserted in Cox's deed, evinces, that Taylor was as well apprised as Cox himself, of the equity asserted by Chowning in his original bill filed in August 1812, and that Taylor contracted and intended to take on himself the hazard resulting from Chowning's claim. Taylor's will too, made in March 1814, clearly indicates his knowledge of Chowning's suit then in prosecution for the recovery of the land, and that his rights were to abide the result of that suit. Therefore, Taylor was no wise injured by, and had no just ground to complain of, Chowning's neglect to make him a party to his original bill. And he must be considered as having not only purchased, but as having also paid the purchase money, and taken his conveyance, with actual notice. He made the purchase at Cox's sale, with actual and exact knowledge of the power under which Cox professed to make the sale; that is, in other words, with full notice of Chowning's equity to redeem the land, notwithstanding the sale thus made without competent authority. He saw the authority under which his vendor was acting: it was his business to inquire and to ascertain, whether that authority was legal

and sufficient to warrant the vendor
 663 in proceeding to sell; and he *must bear the consequences of his neglect to do so, or, if you please, of his ignorance of the principle of law which condemned Cox's proceedings. Chowning was passive, and there was no necessity that he should be otherwise. For the sale made by Cox, being made without lawful power to sell, could convey no just right to the vendee; and whether the title should remain in Cox, or be by him conveyed to the vendee, Chowning's right to redeem the subject would remain the same. Why should he be bound to interfere to prevent a sale, which no wise impaired his rights? Cox and Taylor, the unauthorized vendor and the negligent or wilful purchaser, were the actors, if indeed, it be material to determine which of the parties is to be considered as the actor. But, in truth, the cause depends on very simple principles: here was a mortgaged subject sold by the mortgagee, who had (acknowledgedly) no power to sell it, and purchased by a person who had exact notice of the power under which the sale was made, and who meant to take, and did take, the hazard of any defect in the power of the vendor; and the plain legal consequence is, that the mortgagor has, in equity, the same right to redeem as against the purchaser, which he had as against the mortgagee. The former decree of this court is decisive of the controversy. The court indeed declared, that "had Taylor been before the court, he might have given a different aspect to the cause." But how? by shewing, "that, though Cox's sale could not be justified on the sole ground of the powers derived from the deed, yet it ought to be confirmed in Taylor's favor, in consequence of the subsequent acts of Chowning." Now, certainly, Chowning has done no act whatever, subsequent to the sale, that can have the remotest tendency to the confirmation of it.

CARR, J. When the case of Chowning v. Cox (of which this is the sequel) was formerly before this court, I consider that the court decided a mere abstract principle. This is apparent from the whole
 664 opinion. It commences thus: "This case presents the general question, whether a deed executed by a debtor, conveying land to his creditor, and purporting to constitute him the trustee for selling the land, and applying the proceeds of the sale to the payment of the debt due to himself, can be regarded otherwise than as a mere mortgage, to which the right of redemption is incident." Such a deed was decided to be a mortgage. But when the court came to apply the general principle to the case before it, it said, "If there were no other persons than the debtor and creditor interested, it would reverse the decree, and provide for a sale under the directions of the court of chancery. But the person who purchased under the former sale, and who has the legal title, has not been made a party. Had he been before the court, he might have given a different aspect to the cause. He might have shewn, that, although the sale cannot be justified on the sole ground of the powers derived from the deed yet, it ought to be confirmed in his

favor, in consequence of the subsequent acts of the appellant. He ought, therefore, to have been a party, and the chancellor erred in pronouncing a final decree, without affording an opportunity to bring him before the court." The decree was therefore reversed, and the cause sent back.

It is thought, that by the words "the subsequent acts of the appellant," the court meant to limit the defence of the vendee to the acts of Chowning done after the sale. I do not believe the court meant any such restriction. It had said, in a prior sentence, that if the vendee had been a party, he might have given a different aspect to the cause; thus throwing the whole open to him. It proceeded afterwards to particularize one of the means by which this new aspect might be given; namely, by shewing Chowning's acts of confirmation or assent subsequent to the sale. But, suppose the vendee before the sale, had gone to Chowning, and said, "I see that Cox has advertised your land for sale; is it your purpose to suffer him (who is the creditor) to act also as the trustee? if so, I am inclined to buy:" and Chowning had answered, "Yes; you may buy safely:"

665 Can it be imagined, "that this court meant to shut out such a defence? Is it not a fundamental maxim, that no man shall be affected by *res inter alios acta*? Had not the court pronounced, that Chowning had done wrong in bringing this cause to hearing, without making the vendee, who had the legal title, a party? And would it enable him to profit by his own wrong? which he surely would do, if by omitting to make Taylor a party to his original bill, he could cut him off from a defence, which as an original party he would unquestionably have had. It is clear to me, then, that Taylor comes to his defence, wholly unprejudiced by what has been done; and free to avail himself of any matter of fact or law arising out of the old case or the new.

Taking the general principle to have been correctly decided by the court, we are to inquire, whether, under all the circumstances of the case, the sale of the land made by Cox, shall stand or be set aside? That the parties to the deed intended to give Cox the full power to sell and convey the land, no body can doubt. They expressly swear, that such was their intention. Nor is this an unheard of thing: in the state of New York (as their reported cases shew us) nothing is more common than to give to the mortgagee a power of sale: and in such cases, if he is proceeding to sell, improperly, as the debtor thinks, he files his bill, stops the sale, and brings the matter into equity, just as the debtor does here in deeds of trust. In the case before us, it is the less strange that Mrs. Thompson should place so much confidence in Cox, as to make him the trustee, because he was not, in his individual character, the creditor: the answers and the deed itself declare, that it was the money of his wards, which he was lending out upon the security of this land. Chowning bought the land with a full knowledge of this incumbrance, and it was a part of his contract to discharge it. He went on to pay a part of

the money; but failing to pay the rest, Cox advertised the land for sale. Chowning then filed a bill of injunction to stay the sale, on the ground of defect of title; but made no objection to Cox's selling as trustee. This injunction was dissolved: Cox again advertised to sell the land for cash, to discharge the incumbrance. The sale took place on the 29th May 1812, Chowning being present and making no objection. Taylor became the purchaser; and in August after, the original bill was filed to set the sale aside, not for unfairness, but because the deed was a mortgage, and the plaintiff had a right to be let in to redeem. I am clearly of opinion, that under all the circumstances, it would operate a cruel injustice to set aside the sale. This deed being in law a mortgage, we must presume, that Chowning knew it to be so; for every man is bound to know the law, and ignorance does not excuse. This is laid down in many cases. In *Bilbie v. Lumley*, 2 East, 471, the court said, "Every man must be taken to be conversant of the law. Otherwise there is no saying to what extent the excuse of ignorance might be carried. It would be urged in almost every case." But, besides the conclusion of law, we have the statement of the plaintiff in his original bill, that he did know this to be a mere mortgage: after describing the deed as having a power of sale, he says, "that at the time of entering into the said agreement [with Mrs. Thompson] your orator understood, that there was a mortgage on the said land, as evidenced by this indenture, and that it was nothing more." Possessing this knowledge, he made no objection in the first bill he filed, to a sale by Cox. Failing in that bill, he attended the sale; stood by, and saw an innocent purchaser buy and pay his money, and receive his deed, and made not one word of objection. The sale too, we are told by witnesses, was well attended, and conducted with perfect fairness. After this, can he be heard to object to this sale? It is not worth while to quote the cases which decide, that a man thus concealing his right shall be bound: they are too familiar. If we were even to say (contrary to the conclusion of law, and the statement of the bill) that Chowning did not know that this was a mere mortgage, and therefore was not guilty of fraudulent concealment, still I should be of opinion, that he could not succeed; for where equity is equal, the law must prevail; and here the vendee has the legal title, and far superior equity, since Chowning, to say the least, was guilty of gross negligence.

I am, therefore, of opinion, that the decree be reversed; that the sale of the land made by Cox to Taylor be confirmed, and so much of the bill as sought to set it aside, dismissed.

The other judges concurring, decree reversed.

Robertson v. Hogsheads.

March, 1832.

Chancery Practice—Contract—Rescission—Fraud—Case at Bar—Upon a bill in chancery by vendee against vendor of land, after the contract fully executed by conveyance of the land and securities given

for the purchase money, alleging fraud practised by vendor's agents on the vendee, in the original agreement, and praying that the contract may be rescinded for the fraud, and general relief: the court having held, that plaintiff, under the circumstances of the case, was not entitled to a rescission of the contract, held further, that he was not entitled to ask, that the damages he had sustained by reason of the alleged fraud, should be ascertained by the court of chancery, and decreed to him, in abatement from the purchase money.

Same—Same—Jurisdiction to Decree for Breach.—A bill, in any form, claiming damages for breach of contract, cannot be entertained in equity: neither can unliquidated damages be set-off in equity.

In March 1824, James Robertson exhibited a bill against Thomas Hogshead, John Hogshead and James Cochran, in the superior court of chancery of Staunton, setting forth, that in the year 1817, Robertson made a contract with Thomas and John Hogshead, for the purchase of a parcel of 424 acres of land in Augusta, then belonging to their father, Michael Hogshead, for 6360 dollars, which was a high price,—Thomas and John, the sons, being the agents of Michael, the father, in making the sale. That Michael Hogshead, executed a conveyance of the land to Robertson son, *in December 1817, and very shortly afterwards died, having by his will, made in 1810, directed this same parcel of land to be sold, and appointed his sons, Thomas and John, his executors. That, after the death of Michael, the father, Robertson paid Thomas and John Hogshead 3000 dollars of the purchase money; and in May 1818, gave them his bonds for the balance, 3360 dollars, payable in long instalments, and executed a deed conveying the land to James Cochran, in trust, to secure the payment thereof. That Robertson had paid off some of the instalments, but a considerable balance was still due, and Thomas and John Hogshead were about to coerce the payment thereof, by a sale of the trust subject under the deed of trust. That before the contract for the sale and purchase of the land was concluded, Robertson made inquiries of Thomas and John Hogshead, to ascertain whether there was a sufficient supply of water upon it, for the use of a family, and of stock upon the farm, and as the only running water upon it flowed from a single spring, he inquired, particularly, whether that was a never failing spring, affording a sufficient supply of water at all seasons, declaring that he would not

***Chancery Practice—Jurisdiction to Decree Damages.**—In the principal case, in which a bill was filed by a vendee alleging fraud in the original agreement and praying that such agreement be rescinded for the fraud, the court held that the bill, so far as it related to the rescission, was never sustainable, and taking away that ground, there could be no propriety in filing a bill in equity for the purpose of obtaining compensation of damages. For this proposition, the principal case is cited in *Campbell v. Rust*, 85 Va. 668, 8 S. E. Rep. 664; *Washington City Savings Bank v. Thornton*, 83 Va. 165, 2 S. E. Rep. 193; *Cleaver v. Matthews*, 83 Va. 804, 3 S. E. Rep. 489; *Rice v. Hartman*, 84 Va. 253, 4 S. E. Rep. 621; *Koger v. Kane*, 5 Leigh 608, 610; *Morgan v. Carson*, 7 Leigh 241; *Nagle v. Newton*, 22 Gratt. 823, 824; *Rosenberger v. Keller*, 33 Gratt. 494, 495; *Crislip v. Cain*, 19 W. Va. 530; *Kelly v. Riley*, 22 W. Va. 240, 250; *Laidley v. Laidley*, 25 W. Va. 528.

Specific Performance—Laches.—The principal case is cited in *foot-note* to *Paroll v. McKinley*, 9 Gratt. 1; *Rison v. Newberry*, 90 Va. 530, 18 S. E. Rep. 916; *Ferry v. Clarke*, 77 Va. 408.

See monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 3 Gratt. 243.

purchase any land which had not the advantage of such a supply of water; upon which they assured him, that the spring was a never failing one, and furnished a plentiful supply of water, and that there was besides another smaller spring on the land, that contributed an additional supply, and rarely failed. That this was a wilful and fraudulent misrepresentation on their part, designed to induce him to make the purchase at a high price. That Robertson, having taken possession of the land, ascertained in the summer of 1818, that the water flowing from the larger spring was very much diminished, and that the smaller one afforded little or no water; and about the year 1819, the larger spring also failed almost intirely; and then he ascertained, that it had often failed in former years, before his purchase, and that Thomas and John Hogshead were well apprised of this fact, when they so positively and confidently assured *him of the contrary, in order to induce him to make the purchase. And for this fraud practised upon him by them, Robertson prayed, that his contract for the purchase of the land should be rescinded; that Thomas and John Hogshead should be compelled to refund him so much of the purchase money as he had already paid them, and to surrender his bonds for the balance, to be cancelled; that the trustee Cochran should be enjoined from proceeding to sell the land for the balance of the purchase money, under the deed of trust of May 1818; and general relief.

The defendants Thomas and John Hogshead, in their answer, denied the fraud imputed to them: they denied, that they made any such representation with respect to the springs, as that charged in the bill: they denied, that they were aware of the failure of the springs to furnish a sufficient supply of water, at any time previous to the sale: they denied that the springs had failed since the sale, in the manner, or in any thing like the degree, stated in the bill: and they imputed the bill to the depreciation of the value of the land, and of all other real property in that country, which alone, they said, rendered Robertson desirous to avoid his contract, and suggested to him the complaint of fraud alleged in the bill, as a pretext for rescinding it.

There was a great deal of evidence upon the contested questions of fact: what was the representation in fact made by the Hogsheads to Robertson, with respect to the springs? and what was the real state of them, in dry seasons, both before and after the contract? But whatever was the true state of the springs, it appeared in proof, that Robertson was fully apprised of it, partly by experience and partly by information from others, as early as 1819 or 1820, some four years before his bill was filed: and that in the course of that time, there was a great, general and continuing depreciation of landed property in that country. It also appeared, that Robertson, in 1819, sold and conveyed about an acre of the land.

670 *The chancellor, upon the hearing, dismissed the bill, without prejudice to any action at law which the plaintiff might institute, to recover damages for

the fraud therein complained of. Robertson appealed to this court.

Johnson for the appellant, insisted, that the fraud complained of in the bill, was proved to have been practised by the Hogsheads upon Robertson; and that, considering the known scarcity of water in the particular tract of country where the land in question lies, and the importance universally and justly attached to an abundant or even a sufficient supply of water, this was such a fraud as ought to be redressed by rescinding the contract. Neither was the time which elapsed from the date of the contract till the filing of the bill, any sufficient reason for withholding such relief: for it was impossible for the purchaser, in one or two years, which might be years of peculiar drought, to know the permanent character of the springs: the experience of a course of years was necessary to ascertain, that the water always ceased to flow in the dry seasons of the year. But if the purchaser was not entitled to a decree rescinding the contract, he was entitled to damages for the injury he had sustained from the deceit practised upon him; he was entitled to an abatement of the price, proportioned to the diminution of the value of the land resulting from the defect of the supply of water. And the chancellor ought to have given him this relief, by directing an issue to ascertain the amount of injury, instead of turning him round to an action at law for redress, where he might encounter the bar of the statute of limitations.

Leigh, for the appellees, said, that supposing the allegations of the bill exactly and fully proved (which, however, he denied) it seemed to him impossible, without an utter disregard of the leading circumstances of the case, to listen to the claim to rescind the contract; and, in truth, the

appellant had not so shaped his case, 671 that such relief could be *decreed to him—he had not made the heirs of the vendor parties. The contract was completely executed in the winter of 1817-18; the purchaser received his conveyance, took possession, paid near half the purchase money, and gave his bonds for the deferred payments, and a deed of trust of the property to secure them: in 1819 and 1820, according to his own shewing, he became apprised of the fraud practised upon him by the Hogsheads: yet he continued to pay the deferred instalments of the purchase money, without a breath of complaint, and to pay them to Thomas and John Hogshead, who (as he must have understood) were bound to dispose of the money as part of their father's estate. And then he waited till the property had depreciated to a fourth, perhaps a tythe, of its value at the time of the contract, or probably even at the time he discovered the fraud now complained of, before he preferred his bill to rescind the contract. As to the claim for the damages he has sustained by reason of the alleged misrepresentation with respect to the sufficiency of the springs, and their actual deficiency, he could only ask that relief, under the prayer for general relief; but if there had been a particular prayer for such relief, in the alternative, the court of chancery

could not have given it; for a bill in equity would not lie for damages in such case, or, indeed, in any case.

CARR, J. I think the decree in this case intirely correct. Taking up the case, either upon the bill and answer, or upon the whole evidence, there is no ground furnished for a rescission of the contract, in any stage; but after it was executed by the giving and receiving a deed, taking possession, paying good part of the purchase money, executing bonds for the balance, and a deed of trust to secure the payment, there is not the shadow of a cause for rescission; more especially as the purchaser acquiesced upwards of four years after the fraud (if there was one) was known to him, during which time a great change had taken place throughout the country, affecting deeply the value of lands; and most

672 *especially, after he had sold part of the land. The bill, then, so far as it related to the main end of it, was never sustainable; and taking away that ground, there could be no propriety in filing a bill in equity, for the sole purpose of obtaining compensation in damages for an alleged fraud, and to tie up a part of the purchase money until these damages were liquidated. This is law too well settled to require that I should cite cases to support it. Upon the subject of the fraud charged, I do not choose to pronounce an opinion. The appellant having a right to sue at law for it, ought to go before that tribunal, without prejudice from an intimation of opinion by this court; and the appellees have an equal right not to be prejudged on that point.

CABELL, J. I intirely approve the decree.

TUCKER, P. It is obvious, that no rescission of the contract could have been decreed, or properly asked for, in this case. If the conduct of the purchaser—his delay, his acquiescence, and his sale of part of the land—were not conclusive against the right to rescind in any form in which the bill might have been filed, it is certain, no such right could have been enforced in the form in which this bill has been framed. In the question of rescission, the heirs of Michael Hogshead, the actual vendor, have a deep interest. Whether Thomas and John Hogshead are the heirs and the only heirs of their father, does not appear. Even if they be, they are not made parties in that character. Had the facts of the case justified a rescission, a re-conveyance by the purchaser to Michael's heirs must have been decreed. But as the court knows not who they are, and as they are not before it, this could not have been done: for, peradventure, they might have been interested in resisting the rescission, and might have been more fortunate in combating the pretensions on which it was asked.

As the form of the proceeding, then, excludes the possibility of rescission, the bill can only be looked on as a bill
673 *for an injunction to restrain the payment of an unpaid balance of purchase money, until a claim for unliquidated damages for the alleged fraud shall have

been settled by an issue to be directed by the court. But it has been long settled that unliquidated damages cannot be set-off in equity. *Duncan v. Lyon*, 3 Johns. C. R. 351; *Livingston v. Livingston*, 4 Id. 287; *Webster v. Couch*, 6 Rand. 519. The party aggrieved should have instituted the proper proceedings and ascertained his damages, before he attempted to arrest the payment of the instalment of the purchase money remaining due. Were a contrary practice allowed, an instalment of 3000 might be tied up, though the damages might eventually be only as many cents, or nothing.

Moreover, I take it, a bill for damages only will not lie in equity. The court could only ascertain those damages by sending the case to a court of law. To that court, therefore, the party should apply, instead of clogging the litigation by a suit in equity, which could only end where he ought to have begun. Would it be just (even though the fraud be established) that the defendants should be charged with the costs of this unnecessary proceeding? I think not. Had an issue been directed, and found for the plaintiff, surely the plaintiff ought to be charged with the additional costs unnecessarily incurred by going through the court of chancery to get into the court of law; since he might at once have got into the court of law by issuing his writ for the deceit.

It is no answer to this view of the case, that the answer of the defendant might have been important: the case is not placed on that ground, nor do the facts justify its being now assumed; for there seems to be no deficiency of evidence as to the facts that really occurred in the transaction.

Whether the statute of limitations will bar any action at law which the appellant may now bring, it would be premature to say. But, though this inconvenience should follow, it ought not to lead the court to establish a precedent sustaining a mere action for damages in equity. Such a
674 *proceeding has been questioned even in a suit for specific performance, where the defendant, after the bill was filed, had disabled himself to perform, and has been distinctly reprobated, where he had so disabled himself before filing the bill, and the plaintiff knew of the fact before he commenced the suit; for, says chancellor Kent, "the case is then reduced to that of a bill filed for the sole purpose of assessing damages for a breach of contract, which is a matter strictly legal and not of equitable jurisdiction"—"If this court is to sustain such a bill, I do not see why it might not equally sustain one in every other case sounding in damages and cognizable at law." *Kempshall v. Stone*, 5 Johns. C. R. 193. In *Gwillim v. Stone*, 14 Ves. 128, the bill as to the damages was dismissed, though the court exercised its jurisdiction in directing the contract to be delivered up. In the case at bar, as I have already shewn, the bill is, in effect, a bill for damages only. See also the commentary in *Todd v. Gee*, 17 Ves. 273, upon the case of *Denton v. Stewart*, Id. 276, in notis.

Decree affirmed.

675 *Carpenter and Others v. Sims.

May, 1882.

Roads—Petition—Failure to State Purpose of Road—Waiver of Objection.—Tho' authority is given to the county courts to open only such new roads as may be wanting for a public right of way to some one or more of the places mentioned by the statute, 2 Rev. Code, ch. 236, § 1, yet the purpose for which the road is wanting, need not be stated in the petition of the applicant, if it appear in any other part of the record, or be proved to the court; and if this was a defect in the petition, the party opposed to the application having appeared, and prayed an ad quod damnum, waived the objection.

Same—Inquest—When Notice of Need Not Be Given.—The party opposed to opening a new road, appears and prays an ad quod damnum, which the court awards, and appoints a day for holding the inquest; the defendant shall be presumed to be present in court at the time the writ is awarded and the day of inquest appointed; so that the sheriff need not give him notice of the day of holding the inquest.

Same—Authority of Court to Erect Gates across.—The authority of the county courts to allow gates to be erected on a public road, to save fencing to the owners of lands thro' which the road passes, applies to cases of roads already established; the courts have no authority to order gates to be erected on a road ordered to be opened, to save the county the expense of making compensation to the owners for the additional fencing which such new road will render necessary.

Sims made application to the county court of Madison, to have a new road opened "from Michael Utz's to Hughes' river" in that county, without alleging, that the way was wanted for the convenience of travelling to any of the places mentioned by the statute concerning roads and landings, 2 Rev. Code, ch. 236, § 1, p. 233.† And thereupon, the court appointed viewers, to view the proposed road, and to report to the court, the conveniences and inconveniences, as well public as private, that would result from opening and establishing the same.

676 *The viewers reported, that the road was proposed to be opened "from Michael Utz's to the main road near Hughes' river," through the lands of one Mrs. Klugh, and of the German Lutheran Church, describing its course very exactly; that the opening of the road could produce injury to no other persons, and Mrs. Klugh had no objection to the opening of it through her land; that the road would be a great convenience to the petitioner, Sims, to the neighbourhood, and to the public generally (without stating for what purpose); and that they had also viewed the way along which the present road passed, and were of opinion, that it would be impracticable to make it passable for loaded wagons.

This report of the viewers being returned, the court ordered Mrs. Klugh and Carpenter and others, trustees of the German Luth-

***Roads—Petition—Failure to State Purpose of Road—Waiver of Objection.**—On this question the principal case is cited in *foot-note* to Lewis v. Washington, 5 Gratt 265: Jeter v. Board, 27 Gratt. 916.

†The statute provides, "That where any person or persons shall make application to any county court, to have a new road opened, or a former one altered, within their county, for the convenience of travelling to their county court house, to any public warehouse, landing, ferry, mill, coal mines, lead or iron works, or to the seat of government," the county court "shall appoint three or more fit persons, to be sworn before a justice of the peace, to view the ground along which such road is proposed to be conducted, and to report, truly and impartially the conveniences and inconveniences, that will result as well to individuals as to the public. If such way shall be opened" &c.—Note in Original Edition.

erans to be summoned to shew cause against the opening of the proposed road. The trustees, Carpenter and others, appeared to contest the opening of it through their land; and upon their motion, the court, in pursuance of the statute, Id. § 2, awarded a writ of ad quod damnum, to be executed on a particular day appointed in the order.

The sheriff proceeded to execute the writ on the appointed day, without giving the trustees, Carpenter and others, any previous notice of the time of holding the inquest. And a jury, regularly impaneled and sworn, by their inquisition found, that the proposed road, if opened thirty feet wide, would occupy four acres of the land of the German Lutherans, which they valued at 24 dollars, and would require additional fencing there, estimated at 150 dollars: that, if the road should be opened only fifteen feet wide, it would occupy only two acres, worth 12 dollars: that a road fifteen feet wide, with three gates erected, would be sufficient and satisfactory to the petitioner, Sims, and all others interested in the road, the cost of which gates they estimated at five dollars each, and by the erection of the gates, no additional fencing would be necessary: that the opening of the

677 "proposed road would afford the petitioner, and many others of the neighbourhood, the only way to their nearest meeting house and merchant mill: and that the plantation [of the German Lutherans] would not be injured, in the least, by opening the road.

Upon the return of this inquisition, Carpenter and others, the trustees for the German Lutherans, moved the court to quash it; but the court overruled the motion. And then, upon a hearing of the parties, and of the evidence upon both sides, the court was of opinion, that the road ought not to be opened and established, and therefore dismissed the petition. Sims appealed to the circuit court.

There, the witnesses for both parties were again examined; but, neither party desiring it, the testimony was not stated on the record, according to the statute, 1 Rev. Code, ch. 64, § 18, p. 194. The circuit court was of opinion, that the county court erred in refusing to open and establish the road, according to the terms of the inquisition of the jury; and, therefore, reversed the order of the county court; and, proceeding to make such order as the county court ought to have made, ordered, that the road should be opened and established from Utz's along the course proposed, through the lands of Mrs. Klugh and of the German Lutherans, to the main road near Hughes' river; and that the several sums found in the inquisition, as an equivalent for the land condemned for the road, and for the necessary gates (if they should be allowed by the county court, being summoned for the purpose*) or for the fencing, should be

*The statute 2 Rev. Code, ch. 236, § 21, p. 240, authorizes "the county courts, when they shall deem it necessary, to permit gates to be erected across any roads in their respective counties, which shall not be turnpiked nor used for the transportation of public mails: and such gates to discontinue, at pleasure: provided, that no such permission shall be granted by any court, except upon application

levied for, and paid to, the trustees of the German Lutherans.

678 *The trustees, Carpenter and others, applied to this court for a supersedeas to the order of the circuit court; which was allowed.

In the argument by Stanard, for the plaintiffs in error, and Briggs for the defendant, Stanard made three objections to the proceedings, and the order of the circuit court founded thereon.

1st Obj. The statute gives the county courts jurisdiction to open new roads through the lands of individual proprietors, only when such roads are wanted for the convenience of travelling to some of the places specified in the statute; and Sims, in his application for the road in question, did not allege that it was wanted for any of those purposes: therefore, the county court ought not to have appointed the viewers, and the proceeding was erroneous in the very first step.

Ans. The objection comes too late. Besides, though the statute gives the authority to open new roads only for the purposes therein specified, and the county courts ought not to open such roads, unless it appear that they are wanted for such purposes; yet, it is not required, that the applicant shall state the purpose in his petition. It is enough if he make it appear to the court by proof. Here, the purpose does appear on the record: the inquisition of the jury finds, that the proposed road would afford the petitioner, and many others in the neighbourhood, the only way to their nearest meeting house and merchant mill.

Reply. The writ of ad quod damnum gave the jury no charge to make inquiry upon that point: therefore, that finding in the inquisition was, at most, only an ex parte affidavit of the jurors, which was not evidence.

2nd Obj. The sheriff did not give notice to the parties, through whose land the road was to be opened, of the time of holding the inquest; which the statute expressly requires, and that, notwithstanding the writ of ad quod damnum is awarded always at the instance of the party whose

679 land is *to be condemned for the way, and the court is required to appoint a day for the execution of the writ. 2 Rev. Code, ch. 236, § 2. It does not follow, that the party who prays the writ, is present in court in person.

Ans. If the parties have notice of the time of executing the writ, it is immaterial how it is given to them. Here the parties appeared to contest the opening of the road, and prayed the writ of ad quod damnum; and it must be presumed, that it was ordered in their presence, in open court, to be executed on the particular day appointed in the order. And the writ was executed on the day appointed. The statute requires the sheriff to give notice to the proprietors of the land, only in case they are not present in court, at the time of the order made for the writ of ad quod damnum.

previously entered of record, and then only when a majority of the acting magistrates of such county shall concur therein, the whole number having been, by order of such court, previously summoned for that purpose."—Note in Original Edition.

3rd Obj. The 21st section of the statute giving power to the county courts to permit gates to be erected across public roads, and to revoke the permission at pleasure, relates to roads already established, where the proprietor has been compensated for the land appropriated to the way, and for the additional fencing, which the court may, at its pleasure, put him under the necessity of keeping up. The power is given, obviously, to be exercised only at the instance of the proprietor of the land, to save fencing. The court, in opening a new road, cannot, in order to spare the county the expense of making compensation for the additional fencing which the proprietor of the land may, at any time, and at the pleasure of the court, be obliged to keep up, order gates to be erected. The order of the circuit court, to open the road, and then to levy, and pay to the proprietors, the estimated expense of the fencing, or of the necessary gates, if allowed, is with respect to the latter alternative, wrong in principle. This alternative also makes the order uncertain, conditional and interlocutory.

Ans. This is a point in which Sims and the other persons who want this new road, have no interest: it is a question between the plaintiffs in error and the 680 county. Therefore, *if the order is right in other respects, but must in this particular be corrected, the defendant in error must still have his costs, as being the party substantially prevailing in this court.

BROOKE, J. The objection taken by the counsel for the plaintiffs in error, that Sim's application for the road, did not designate either of the places, to which, by the statute, he was entitled to have a way opened, is obviated by the motion made by the plaintiffs in error, for a writ of ad quod damnum to ascertain the damages they would sustain by the opening of the proposed road, without making this objection to the terms of the application; especially, as the report of the viewers describes the proposed road as terminating in the main road near Hughes' river, which main road must be presumed to lead to some of the places designated by the statute, and the inquisition of the jury, states the proposed road to be the only way to a merchant mill.

The county court erred in refusing to open the road. But the order of the circuit court was also erroneous, in so much as it provides, that gates may be established by the county court. That part of the inquisition of the jury which relates to the erection of gates, was mere surplusage.

Therefore, both the order of the circuit court, and that of the county court, were reversed; and this court proceeding to make such order as the circuit court ought to have made, ordered, that the road should be opened and established, thirty feet wide, from and to the points, and along the course, designated in the report of the viewers, and that the sums of 24 dollars for the land condemned for the road, and 150 dollars for the extra fencing, should be levied by the county court for, and paid to, the plaintiffs in error; and that the defendant in error should recover of the plaintiffs in error, his costs in prosecuting his peti-

tion in the county court, and his costs expended in his defence upon the supersedeas in the circuit court. But the court gave the plaintiffs in error their costs in this court.

681 *Stanard v. Timberlake.

May, 1832.

Forthcoming Bond*—Confession of Judgment*—Effect.—A confession of judgment on a forthcoming bond is a release of all errors in the previous proceedings.

Timberlake having recovered a judgment against Stanard, for debt and costs in the county court of Spottsylvania, sued out a writ of fieri facias thereon, which was returned nulla bona: and thirteen years after the return of that execution, without any proceeding in the interval, he sued out a capias ad respondendum on the judgment; which being served on Stanard, he delivered property to the sheriff in discharge of his body, and gave a forthcoming bond for the delivery of it at the day and place appointed for the sale thereof. Stanard then moved the county court to quash this execution, on the ground, that after such a lapse of time, without any proceeding on the judgment, no execution could regularly be sued out: the court overruled the motion. Afterwards, the forthcoming bond having been returned forfeited, Stanard confessed judgment upon the bond, and the court awarded execution upon it. Then Stanard applied for a supersedeas from the circuit court to the order of the county court overruling his motion to quash the execution; which was allowed: but the circuit court affirmed the judgment. And then he applied to this court for a supersedeas to the judgment of the circuit court; which was allowed.

Briggs, for plaintiff in error.

Stanard, for defendant.

PER CURIAM. The case of Edmonds v. Green, 1 Rand. 44, is in point and decisive. The confession of judgment on the forthcoming bond, was a release of all previous errors in the proceedings, if any there were. Judgment affirmed.

682 *Lynch v. Thomas.

May, 1832.

(Absent CABELL, J.)

Depositions—De Bene Esse—Infirm Witness—Proof of Inability to Attend.—Plaintiff having taken the deposition of an aged and infirm witness to be read de bene esse, fails to take out a subpoena and have it served on the witness to attend at the trial: yet HELD, that upon satisfactory proof of the witness's inability to attend the trial by reason of ill health, the deposition shall be read—Dissentiente BROOKE, J.

Same—Same—Same—Hearsay Evidence of Inability to Attend;—Quere.—Whether upon the question of the witness's inability to attend in such case, hearsay evidence as to the state of his health may properly be heard by the court?

***Statutory Bonds.**—See monographic note on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

***Judgments by Confession.**—See monographic note on "Judgments by Confession" appended to Richardson v. Jones, 13 Gratt. 53.

***Depositions—Absence of Deponent—Hearsay Evidence to Prove.**—The principal case is cited in *foot-note* to Collins v. Lowry, 2 Wash. 75. See monographic note on "Witnesses" appended to Claiborne v. Parrish, 2 Wash. 146; monographic note on "Depositions" appended to Field v. Brown, 24 Gratt. 74.

Executors—Assent to Particular Estate—Effect upon Limitation Over.—Testator bequeaths a slave to an infant son, and then that his wife shall hold the slave bequeathed to his son till he shall attain to full age; the ex'or delivers the slave to the wife, and never resumes possession: HELD, this is an assent of the ex'or to the legacy to the son, and that whether the will be understood to give a present estate in the slave to the son, with a direction that the wife shall hold it for him, or an estate to the wife during the minority of the son with remainder to the son.

Statute of Limitations.—Infants.—The act of limitations never could begin to run against the claim and title of the son to the slave and her increase, till he attained to full age.

Detinue.—Proof.—If in detinue for chattels, the plaintiff prove that he had title at the time of the action brought, and that defendant then had the possession, defendant to defeat the action must shew that he had been divested of the property by due course of law.

Detinue for four slaves, brought in May 1819, by Thomas against Lynch, in the circuit court of Henrico. Declaration in the usual form. Plea, the general issue. At the trial, Lynch filed two bills of exceptions to opinions of the court.

1. The plaintiff offered in evidence, the deposition of one Wilson, which had been taken under a commission, de bene esse. The notice, on which the deposition was taken, informed the defendant, that it would be taken at &c. on the 16th April 1824, between the hours of nine in the morning and sunset of that day, and if that should not be a fair day, or the witness should be unable to attend on that day, then at the same place, and between the same hours of the next day: the caption of the deposition stated, that it was taken at the place and on the day appointed "pursuant to the notice," but it nowise appeared, that it was taken between *the

683 hours of the day specified in the notice, or that that was a fair day. No subpoena had been taken out to require the attendance of the deponent Wilson, at this trial: it appeared, that he had attended as a witness in the cause, at the preceding term; and to prove his inability to attend at this, the plaintiff proved, by a witness present in court, that Wilson was about

***Executors—Assent to Particular Interest—Effect upon Bequest Over.**—It is well settled that an assent to a particular interest is an assent to the bequest over. Frazier v. Beville, 11 Gratt. 16, citing 2 Lomax on Executors, 180; Lynch v. Thomas, 3 Leigh 682. And in Osborne v. Taylor, 12 Gratt. 131. SAMUELS, J., says: "If necessary for the decision of this case, it might be a question how far the assent to the legacy for life of the slaves to Mrs. Johnson enured to the benefit of the slaves who were to be manumitted at her death: whether the assent to the legacy for life should be regarded as an assent to the ulterior disposition of the property. See Bishop's Ex'or v. Bishop, 2 Leigh 484; Lynch v. Thomas, 3 Leigh 682; Nicholas v. Burruss, 4 Leigh 289. In the opinion of a majority of the court it is not necessary for the decision of this case to pass on the question. I content myself, therefore, with a reference to these cases on the subject."

See monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

Limitation of Actions—Infants.—See monographic note on "Limitation of Actions" appended to Herrington v. Harkins, 1 Rob. 591, and monographic note on "Infants" appended to Caperton v. Gregory, 11 Gratt. 508.

***Detinue—What Plaintiff Must Prove.**—The principal case is cited in *foot-note* to Burnley v. Lambert, 1 Wash. 306.

See monographic note on "Detinue and Replevin" appended to Hunt v. Martin, 8 Gratt. 578.

Bills of Exception—Indefinite—Effect.—The principal case is cited in *foot-note* to Barrett v. Tazewell, 1 Call 215.

See monographic note on "Bills of Exception" appended to Stoneman v. Com., 26 Gratt. 887.

seventy years old; that his residence was about a hundred miles distant from Richmond, where the circuit court was held; that sixteen days before the trial, Wilson rode on horseback to the house of the witness, about two miles from his own; that he was then sick with a bilious fever; that the witness had since heard from a neighbour, that he was more unwell; and that, in the witness's opinion, if he had rode to Richmond, he would never have been able to return, by reason of his sickness, age and infirmity. The defendant's counsel objected to the reading of Wilson's deposition: the court overruled the objection, and admitted the evidence: and they excepted to the opinion.

2. The plaintiff, to prove his property in the slaves in question (a woman named Tabb and her three children) gave in evidence the will of his father, John Thomas, who died in 1796; whereby the testator bequeathed to the plaintiff, the woman Tabb and her increase, and other slaves to other sons; and then bequeathed, that his wife should hold the slaves bequeathed to his sons, till they should attain to full age. And the plaintiff adduced evidence, that he was born in 1794 [so that he attained to his full age in 1815]; that the executor of his father, the testator, shortly after his death, delivered the woman Tabb to the plaintiff's mother, who died in 1815; and that, shortly before this action was brought, the defendant Lynch was in possession of the woman Tabb and her three children, in the declaration mentioned and demanded. Whereupon, the plaintiff's counsel prayed the court to charge and instruct the jury,

1. That the statute of limitations "never began to run during the plaintiff's minority," and if five years had not elapsed

684 since "he attained to full age, and before this action was commenced, that statute was not a bar to his action. 2. That, if the executor of the plaintiff's father consented, that the plaintiff's mother should take into her possession the woman Tabb, bequeathed by the testator's will to the plaintiff, and the mother accordingly took possession, then the legal title of Tabb was so vested in the mother, as to enable the plaintiff, when he attained to his full age, to maintain this action for Tabb and her increase, as bequeathed by his father's will to the plaintiff, though the slaves had never been actually in his possession. And 3. That if the jury should find, that at the time this action was brought, the right to the slaves in question was in the plaintiff, and that the defendant then had the possession of the slaves, the defendant to defeat the action must shew that he had been divested of the property in due course of law. The court gave these instructions to the jury, in the words in which they were prayed; and the defendant's counsel excepted.

There was a verdict and judgment for the plaintiff; from which the defendant appealed to this court.

The cause was argued here, by Stanard for the appellant, and by Daniel for the appellee: but the reporter was not in court at the time, and no note of the argument was preserved.

CARR, J. The first question is, as to the admission of Wilson's deposition taken *de bene esse*. It was contended, 1. that no subpoena having been served on the witness, this was an absolute and peremptory objection to reading the deposition, and disabled the party from going into evidence, to prove that the witness was unable to attend; and if not, 2. that he failed in his proof of the inability of the witness to attend, and therefore could not read the deposition. I consider the first position as contrary both to the reason and the law of the case. In jury trials, the general rule

is, that the testimony of witnesses 685 shall be given in *viva voce*. To *compel their attendance, a subpoena issues; but there are many causes, which may render this process ineffectual: the witness may be beyond its reach, or he may be utterly unable to attend; and it would be unjust, that, owing to such accidents, the party should be deprived of his evidence. Therefore, the law has provided, that when a witness, by age, sickness, or otherwise, shall be unable to attend the court, upon affidavit &c. the clerk may, on request of either party award a commission for taking the deposition of such witness *de bene esse*, to be read as evidence at the trial, in case the witness should be unable to attend. 1 Rev. Code, ch. 131, § 15, p. 519. Here we see the remedy plainly provided: if the witness be unable to attend, the deposition may be read. Of the fact of inability, the court must judge upon the proofs. The court is not confined to any particular kind of proof. How, then, can it be said, that a subpoena must issue, and that without it, no other proof can establish the inability? Is there any special virtue in that process? If it be served on a man bedridden for years, can he obey? Or will the service of it furnish proof of his inability, superior to all other? So far from it, this court decided, in *Minnis v. Echols*, 3 Hen. & Munf. 31, that the mere return of a subpoena duly executed was not sufficient proof of inability. And, surely, if not itself proof of that fact, it cannot be necessary to resort to it, in order to let in that which is proof. It is clear to me, then, that the first objection has no weight. But was there sufficient proof before the court, to justify it in admitting the deposition? In *Collins v. Lowry*, 2 Wash. 75, it was decided (and very properly) that hearsay evidence that the deponent has left the country, and has not returned, is not sufficient to authorize the reading his deposition; in *Minnis v. Echols*, that the service of a subpoena will not do, but it must be proved, that the witness is dead, or if living, unable to attend; and in *Butts v. Blunt*, 1 Rand. 255, that depositions ought not to be read in a suit at law, unless it appear that the witness could not attend at the 686 trial. We see, then, both by the *statute and the decisions upon it, that to authorize the reading of the deposition, nothing more is necessary than that the witness should be unable to attend; nor is any higher or more cogent proof required to establish this than any other fact. Now, throwing out of view, the hearsay in this case, as to the continuance and

increase of the deponent Wilson's sickness (though I do not mean to say, that, on this incidental question, addressed to the discretion of the court, it could not hear such evidence, and give it the weight, which, in connexion with the other proof, it might think it deserved) I think the facts proved fully sustained the court in considering that Wilson was unable to attend, and permitting the deposition to be read; it being, in my opinion, regularly taken in all respects.

The next point I shall notice is the exception to the opinion of the court, as to the assent of the executor to the legacy of the slaves in question to the plaintiff. It was contended, that the instruction given to the jury on this point, was glaringly incorrect; that under it, the bare permission of the executor to the widow, to take possession of the slave, though but for a day, and by whatever condition qualified, would prove assent, and so vest the legal title, that it could not afterwards be recalled or contradicted. If I understood the opinion thus broadly, I should agree with the appellant's counsel, that it was incorrect: but I do not so understand it. To judge of it fairly, we must take it in connexion with the context, and according to the subject matter; first the will; then, the proof going to shew assent by delivery under the will; and then the motion to instruct. Thus taken, I think it may be fairly understood, as telling the jury, that the possession to the mother to take possession of the slave, without more, was such an assent as enabled the son at his full age, to sue for the property. Taking it in this extent, was the instruction correct? With respect to what shall constitute the assent of an executor to a legacy, the law has prescribed no specific form: a very slight assent is held sufficient; and it may be either

687 express or implied, absolute *or conditional. He may, not only in direct terms authorize the legatee to take possession, but his assent may be inferred, either from indirect expressions, or particular acts, and such constructive permission will be equally available. His assent may be implied: as, if the executor congratulate the legatee on his legacy; or, if a horse is bequeathed to A. and the executor requests him to dispose of it; or if B. propose to buy the horse of the executor, and he direct him to buy it of A. or if the executor himself purchase the horse of A. or merely offer money for it; either of these amounts to an assent, by implication, to the legacy. The assent may be absolute or conditional; but if conditional, the condition must be precedent: as where an executor assents to the devise of a term, if the devisee will pay the rent in arrear at the testator's death; the condition must be performed, or there is no assent. But assent upon a subsequent condition, as, provided the legatee pay the executor a certain sum annually, is void as to the condition; for, though the state of the fund may authorize the executor to withhold the legacy, or to impose a condition precedent to his paying it, yet if he once part with it, he has no right to clog it with future stipulations, and thus make the legacy conditional, which the testator gave

absolutely. Toller's law of ex'ors, Book 2, ch. 4, § 2, p. 306-312, and the authorities there cited. It was said, that though he might assent to the particular interest of the mother in the slaves, that would not enure to the son, so as to vest his title. Without stopping to inquire whether the will gives the mother any separate estate in the slaves, and taking it to be so, I answer, that the assent to the particular interest does operate as an assent to the bequest over. Thus, if a term be devised to A. for life, remainder to B. the assent of the executor to the devise to A. shall operate as an assent to the devise over to B. and vest his interest. So, also, if there be a devise of a term to a widow, so long as she continues unmarried, and if she marry, then of a rent payable out of the land; the executor's assent to the devise of the 688 term, is *an assent to that of the rent, in case of the devisee's marriage. Toller, p. 309, 10; Com. Dig. Administration, C. b, 1 Roll's Abr. 620; Plowd. 545; Lampet's case, 10 Co. 47, b; Adams v. Price, 3 P. Wms. 11. These authorities seem to me to sustain the instruction on this point completely.

As to the other instructions, I shall content myself with saying, that I see nothing to disapprove in them.

I think the judgment should be affirmed.

BROOKE, J. There are two points in this case, on which I differ from the judge who has preceded me.

I do not think, that the deposition of Wilson taken de bene esse, was admissible evidence, on the proof adduced by the plaintiff, of his incapacity to attend. It is a fact stated in the bill of exceptions, that he had attended at the preceding term, when summoned, I presume, since it is not said that he attended of his own accord. The defendant was entitled to have him examined viva voce, in open court, where he might be cross examined by counsel, in the presence of the jury; and, in excepting to the reading of his deposition, he put the onus on the plaintiff to shew, that every thing had been done, required by the law to compel his attendance, and that he was unable to attend. The first thing required by the law was, that a subpoena should have been served on the witness, to fix on him the obligation to attend. Without this, he is not called on to excuse himself for not attending. I admit, that a case may be stated, in which previous and permanent disability to attend would render it superfluous to summon the witness: but that is not the case before the court. To lay a proper foundation for the excuse offered by the plaintiff, for his failing to attend, a subpoena served on him to oblige him to attend, if able, ought not to have been dispensed with. But what was the evidence of his inability to attend? It was proved by a witness who resided two miles from him, that the witness had seen him about sixteen days before the trial; that he 689 *rode to the witness's house on horseback, that he was then sick with a bilious fever (not very sick, it must be presumed, or he would not have been on horseback two miles from home); that he was seventy years old; and that his resi-

dence was a hundred miles distant. I put out of the case what the witness had heard, on the authority of *Collins v. Lowry*, 2 Wash. 75, and also the opinion of the witness, that, if he had attended on this trial, he would never have returned. I know that questions of this sort are addressed to the discretion of the court; but it is to a discretion, that does not listen to the opinions of witnesses, unless they are professional opinions; which was not the case here. Then, the whole of the evidence was, that the deponent was sick sixteen days before the trial, riding on horseback, two miles from his home; that he was about seventy years of age; and that he had attended the court at the preceding term. On what ground it was inferred from these facts, when it did not appear that he was under any legal obligation to attend, by the service of a subpoena on him, that he was unable to attend on this trial, I am at a loss to conjecture. It could not be inferred from the circumstance, that he was sick, but on horseback, two miles from his home sixteen days before, nor from his age, because, if so, in every like case, a party may be deprived of the viva voce testimony of a witness, in the presence of a jury, which, in many cases, is of the utmost importance in the trial of a cause. On this point, then, I think the judgment ought to be reversed.

The other point on which I differ, is, the instruction of the judge to the jury, that, in this action, the statute of limitations never began to run during the minority of the plaintiff &c. Now, on what facts in the bill of exceptions, this instruction was given, I am utterly unable to perceive. It is the settled rule of this court, that if the facts stated in a bill of exceptions be so imperfectly stated, that the court cannot discover how the case ought to be decided, the judgment should be reversed.

690 *Barrett & Co. v. Tazewell*, *1 Call, 215; *Beattie v. Tabb's adm'r*, 2 Munf. 254. This instruction implies, that the statute of limitations had begun to run at some time, but not in the minority of the plaintiff. Though it did not begin to run in his minority, it may have begun to run, in the lifetime of his mother, the tenant for life; and if so, was not affected by the minority of the plaintiff; as it is a settled rule, that if the statute of limitations legally begins to run, there is no incapacity afterwards, that can stop it. The fact stated in the bill of exceptions, that the defendant was in possession of the slaves in question, shortly before the institution of the suit, gives no light on this point; because it does not negative his possession in the lifetime of the tenant for life. The omission to state the facts, on which the instruction was given, brings it within the cases cited. But the instruction assumes a fact which ought to have been left to the jury: the time when the statute began to run, depended on the adverse possession of the defendant, and of those under whom he might claim. To tell the jury, that it did not begin to run in the minority of the plaintiff, was to tell them, that the possession of the defendant did not commence before that period; and there is no

evidence stated, on which even the jury could find that fact. If the judge had not assumed it, it could not be inferred from the fact stated, that the defendant was in possession of the slaves, shortly before the institution of the suit. On this point, also, I think the judgment ought to be reversed.

TUCKER, P. I am of opinion, that there is no error in the proceedings of the circuit court.

It was, in the first place, contended, that Wilson's deposition was improperly admitted at the trial; both because of its intrinsic irregularity, and because a proper foundation was not laid for the introduction of it. These objections appear to me to be groundless.

The deposition was taken on the day, and at the place, fixed by the notice. It was objected, that it does not appear 691 *to have been taken within the hours specially appointed, and that the notice having intimated that it would not be taken if the day was unfair, the fairness of the day should also have appeared. These objections, it must be admitted, are very nice. They do not seem insurmountable. The caption of the deposition, which must be regarded as the act of the magistrates, certifies that it was taken in pursuance of the notice: and their certificate of this fact is conclusive. Moreover, as to the fairness of the day, that was not necessary to be certified, since the deposition was fixed for the 16th April 1824, when it was taken; and the notice only provided, that if it proved unfair, the deposition would be taken the next day. Had it not been taken till the next day, then, indeed, it must have appeared that the first day was unfair.

It seems to have been supposed, that a deposition taken *de bene esse*, could not be read, unless the witness had been summoned. I myself thought there had been such a decision: but there has been none such in our courts. My impression had been derived, I am sure, from the two cases of *Penn's lessee v. Ingraham*, 2 Wash. C. C. R. 487, and *Banert's lessee v. Day*, 3 Id. 243. On examination, however, even those do not seem to consider the subpoena as indispensable. It would have been strange, if such an opinion should have prevailed under our statute, which authorizes the deposition to be read if the witness be unable to attend. Why should that fact be held to be susceptible of proof in no other way but by a subpoena returned executed? So far from entertaining such an opinion, our courts have expressly decided, that a return of a subpoena duly executed, is not sufficient to establish the witness's inability to attend; as well indeed they might decide, upon testimony so equivocal. They call, therefore, for extrinsic proof; which, if satisfactory of the fact of inability, brings the case within the statute. Suppose the witness was eighty years of age, palsied and bedridden for years: of what service would the subpoena be? It 692 surely could not be necessary *to fortify the conviction, that the attendance of the witness could not be had. In this case, the witness was seventy years old; his residence a hundred miles distant: sixteen days before the trial, another wit-

ness in the cause had seen him. He was then riding out, it is true, two miles from home, but he had then, a bilious fever (an intermittent, I presume). Afterwards, this witness heard from his neighbours, that he was more unwell; and, in the opinion of the witness on oath, if he had come to court, his age, sickness, and infirmity would have prevented his returning. These facts appear to me to require no comment. The judge fairly concluded, that the witness was unable to attend, and, therefore, admitted the deposition to be read.

The other complaints of the appellant grow out of the instructions given by the court to the jury, at the trial. They have been ingeniously and rigorously criticised; but, I think, they were substantially correct. They arose out of the character of the plaintiff's title, and the defendant's possession.

The plaintiff claimed the slaves under his father's will. By that will, they were specifically bequeathed to him; but the testator declared it to be his desire, that his mother should hold them, until he attained to full age. He was born in 1794; attained his full age in 1815, in which year also his mother died; and he sued for the slaves in May 1819. As, however, the assent of the executor of his father to his legacy, was essential to complete his legal title, and to enable him to sue, the fact of that assent was a material point in the action brought by him, and was attempted to be sustained by proving that his mother received possession from the executor. Upon the trial, he introduced evidence to establish the facts above succinctly stated, and then moved the court for three instructions.

The first was as to the statute of limitations. It must be understood *secundum subjectam materiam*. It cannot fairly be construed to refer to any other person than the infant himself; and if so, the instruction was not erroneous; *for the statute could not commence running against him, until he attained his full age.

The second instruction was as to the assent of the executor. Whatever doubts have been expressed on the subject of actions at law for money legacies, by legatees against the executor himself, no reasonable doubt can be entertained of the right of the legatee to sue a third person for a specific legacy, when the executor has completed his legal title to it, by assent and delivery of possession. In this case, therefore, the plaintiff, having produced proof going to establish the fact, that the executor had assented to the legacy of the female slave being delivered to his mother, under the will, and that she accordingly took possession, moved the court to instruct the jury, that the legal property in the slave became thereby so vested in the mother, as to entitle him to sue, although he never had himself the actual possession. It is perfectly clear, *quacunqve via data*, that the assent of the executor, and delivery of the possession of the property to the mother, under the will, enured to complete the plaintiff's legal title. For, if the possession which the will directed the mother to hold till his maturity, was designed to be in right of her son, then the assent of the executor, to

her taking possession under the will, was an express assent to the son's legacy; and *ipso facto* invested him with a complete title, if the testator had good title. On the other hand, if the possession bequeathed to the mother was in her own right, then she had an estate in the chattel for years, with remainder to the son forever: and it seems to be well established that an assent of the executor to the first taker's possession and enjoyment of the legacy, is an assent to the legacy to the remainderman. Toller's law of ex'ors, book 2, ch. 4, § 2, and the authorities there cited. See also 4 Bac. Abr. Legacies, L. p. 445; Bishop's ex'or v. Bishop, 2 Leigh, 487. Now, although the instruction moved for, and assented to by the court, was not asked in the most appropriate terms, yet I see nothing in it, of which the defendant can complain.

694 It might have been more explicit *as to the plaintiff's rights, but certainly does not carry them too far. It cannot be denied, indeed, that the assent of an executor may be limited or qualified or clogged with conditions, which his own security, or the situation of the estate, may require; and so it might happen that the testator might give a priority between the particular estate and the remainderman, in relation to liability for debts, which might affect such a transaction. But it may well be doubted, whether the legal title of the legatee is not so far complete even by the qualified assent of the executor, as to be unquestionable, in an action against a third person; and I think it at least clear, that if the defendant had any interest in the annunciation to the jury, of those modifications of the general principle, he ought himself to have applied to the court for a further instruction. It cannot be necessary, surely, when an instruction is asked on a particular point, that the court should deliver an instruction upon the whole law of the subject, in its remotest ramifications.

The third instruction cannot be distorted to mean more, than that where possession is proved on the part of the defendant, before suit brought, the plaintiff's action cannot be defeated by his parting with that possession, unless he has been divested by due course of law. This is the well established doctrine. *Burnley v. Lambert*, 1 Wash. 308. I do not understand it to be contested, though the counsel have deemed the language of the instruction liable to criticism, and has drawn from it other inferences, which I deem inadmissible.

I see nothing more in the case that requires comment; and conclude with again expressing my opinion, that this long litigation should be terminated here, by an affirmance of the judgment.

Judgment affirmed.

695 *Ford's Adm'r v. Thornton.

May, 1832.

Banks—Right to Set Off Debt Due Bank by Depositors*—Case at Bar.—W. G. having contracted

*Banker's Lien or Setoff.—In *Nolting v. National Bank of Virginia*, 99 Va. 60, 37 S. E. Rep. 804, it is said: "The banker's lien (which, where it relates to balances due on accounts, is a right to set off, rather than a lien—*Ford v. Thornton*, 3 Leigh 696) is defined

a debt to a bank by note payable sixty days after date discounted by the bank for his accommodation, dies before the note comes to maturity, having on deposit in the bank, at the time of his death, a sum of money exceeding the amount of the note: *Held*, that, in case W. G.'s estate prove insolvent, the bank has a right, in equity, to retain the amount of his note out of the money it held for him on deposit, whether there be debts of W. G. of superior dignity to the debt he owed the bank, or not; equity, in such case, regarding the bank as debtor to W. G. only for the excess of his money on deposit above the contents of his note.—*Dubitante BROOKS, J.* If it appeared, that the decedent's estate owed debts of superior dignity.

John Ford and John Thornton were indorsers of a promissory note, for 540 dollars, at sixty days, made by William Gregory, and discounted for his accommodation, by the bank of Virginia at Fredericksburg. Gregory died before the note came to maturity. He had, at the time of his death, a sum of money in the bank, exceeding the contents of his note. But the note coming to maturity before administration of his estate granted, Ford and Thornton retired the note, by giving their own note with an indorser, for the same sum, at sixty days, which the bank discounted for their accommodation. Before this last mentioned note came to maturity, administration of Gregory's estate was granted to Ford and James Maury; and by the joint act of these administrators, when the note of Ford and Thornton came to maturity, the money of Gregory's estate at bank, was applied to the discharge of it. After this Ford died. And then, Ford's administrator, considering the money that had been due on the last mentioned note of Ford and Thornton, as having been jointly and equally due from both, and discharged by Ford alone, brought an action at law against Thornton, to recover a moiety thereof; and recovered judgment against him for the same, by default.

Whereupon Thornton exhibited his bill against Ford's administrator, in the superior court of chancery of Fredericksburg, shewing that the judgment at law 696 had been recovered *against him by surprise; setting forth the facts of the transaction as above stated; insisting, that, as the note of Ford and Thornton was given for a debt due from Gregory's estate; as that note had not been discharged by Ford out of his own funds, but discharged, as it ought to have been, by Gregory's administrators, out of Gregory's money standing at his credit at bank at the time of his death; as the bank, if Ford and Thornton's note had not been given to it in lieu of Gregory's, would have had a right, in any event, and would indeed have been bound, in duty towards the indorsers for Gregory's accommodation, to have retained and applied the money it owed Gregory at his death, pro tanto, to the discharge of Gregory's note indorsed by Ford and Thornton.

when it came to maturity; therefore, Ford's administrator had no just claim against Thornton, for contribution towards the payment of Ford and Thornton's note. And the bill prayed an injunction to inhibit Thornton's administrator from executing his judgment at law.

Ford's administrator, in his answer, stated, that the money in bank standing to Gregory's credit at the time of his death, had been applied to the payment of Ford and Thornton's note given for Gregory's debt, by an arrangement and agreement between Gregory's administrators, Ford and Maury, that the money might be so applied by Ford, but that, if the money due from the bank to Gregory, should be found necessary to pay debts of Gregory's estate, of superior dignity to the debt he owed the bank upon his note indorsed by Ford and Thornton, and discounted for his accommodation, in that case Ford should, out of his own pocket, refund the amount, to be applied to the payment of such debts of superior dignity, in due course of administration; that it had turned out, in fact, that there were debts of superior dignity due from Gregory's estate that required the whole amount of the funds he had left in bank; that, thus, the money left by Gregory in bank, was transferred to Ford, and made his own; and, as it had been applied by him, to the discharge of a debt 697 for which he and Thornton *were jointly and equally bound, his administrator was entitled to demand contribution from Thornton.

There was no proof of the special arrangement or agreement between Ford and Maury, alleged in the answer, with respect to the application of Gregory's money in bank, and the refunding thereof by Ford, in case it should be wanting to pay debts of Gregory's estate, of superior dignity to the debt he owed the bank. It was probable, however, that there was some understanding between them on the subject.

But it did not appear that there were debts of superior dignity due from Gregory's estate, for the payment whereof this fund was necessary, though there was a good deal of documentary evidence relative to that point.

Upon the hearing, the chancellor perpetuated the injunction; and Ford's administrator appealed from the decree.

Patton and Briggs, for the appellant.

Stanard, for the appellee.

TUCKER, P. The money that was standing at Gregory's credit in bank, at the time of his death, was drawn out and applied to the discharge of the note given by Ford and Thornton, to retire Gregory's note, after his death, by the joint act of Gregory's administrators, Ford and Maury, upon some (I think it unimportant what) arrangement or understanding between the two administrators. It is contended, that by this arrangement, this fund was lent by the joint administrators to Ford individually; that thus he has paid out of his own funds, the debt for which he and Ford were jointly and equally bound; and that, consequently, his administrator has a right to contribution of a moiety from Thornton.

According to my view of the case, no part

in 1 Morse on Banks and Banking, as 'a mere right of the bank to retain in its own possession, property, the title of which (absolute or special) is, or in the case of negotiable paper, purports to be, in one against whom the bank has some demand, until that demand is satisfied.' "

The principal case is also cited in 1 Va. Law Reg. 780. See also, monographic note on "Banks and Banking" appended to Bank of the Valley v. Marshall, 26 Gratt. 378; 3 Am. & Eng. Enc. Law (2d Ed.) 835, title Banks and Banking.

of Gregory's deposit in bank, constituted, upon his death, general assets of the estate, except the excess above what was sufficient to liquidate the note of Gregory due to the bank. The *bank, in fact, was only a debtor for the difference. Bull. N. P. 179. Had Gregory, in his lifetime, sued the bank for deposit, though it could not set-off at law, because his note was not due, yet upon shewing in a court of equity, that Gregory and his indorsers were insolvent, there could be no question of its right there, to stop the amount in its own hands. Equitable set-offs or discounts existed prior to and independent of the statute; Ex parte Stephens, 11 Ves. 24; Ex parte Blagden, 19 Ves. 466, 7; Ex parte Flint, 1 Swans. 30, 4. And the doctrine of stoppage in equity has always been far more extended than the doctrine of set-off, even under the broad language of the english statute respecting mutual credits, and our own statute respecting discounts, 1 Rev. Code, ch. 127, p. 487. Thus, in the case just put, although the bank could not, at law, set-off a debt payable in futuro against a debt due in present; yet it will scarcely be denied, that upon proof of danger of insolvency, equity would stop the payment; for, in equity, it matters not that the debt due to the defendant, which he seeks to set-off, is payable in futuro. Thus, in cases of bankruptcy, which are always settled very much upon equitable principles; this is admitted; as in Ex parte Prescott, 1 Atk. 230, the petitioner was a creditor in present, for £110.; the bankrupt, on the other hand, held his bond for £340. payable in futuro: if the debts were set-off against each other, the balance against the petitioner would be £230. but if he had been forced to prove his debt under the commission, and take a dividend only upon it, the result would have been very different: he would have been a considerable loser. The question was considered in reference to the statute of 5 Geo. 2, relating to mutual credits; a phrase, which appears to me not more comprehensive than the word discount, used in our statute, which embraces (I incline to think) all cases of mutual money demands due at the time of the plea; and the statute of 5 Geo. 2, did not do more. Yet, by the equity of that statute, it was decided by lord Hardwicke, 699 that the petitioner *should be allowed to set-off, and be held debtor only for the balance after deducting the bankrupt's debt to him.

If, then, in ordinary cases, where there are mutual debts between two persons, a discount would be allowed, upon its appearing that there was risque of insolvency, although one of the debts may be solvendum in futuro, the bank might in Gregory's lifetime, and to the moment of his death, have insisted on retaining his deposit if there was danger of loss. The only doubt that could arise about this, is, that the deposit of a dealer is, by the usage and custom of the bank, held always subject to his check, notwithstanding he is debtor on an accommodation note. But this usage or custom of dealing cannot be more obligatory on the bank, than an express promise to pay the amount of the deposits. And

yet an express promise to pay, does not exclude the creditor from the right of stoppage or retainer. This has been often decided. Thus, in Atkinson v. Elliott, 7 T. R. 378, Elliott, in May, sold goods to Hodges, for £430. at six months credit; and, in September, he sold him another parcel for £230. also at six months: in November, when the first was due, and the last not due, Hodges gave him a bill of exchange for £600. payable in December, long before the amount for the last parcel of goods became due; and Elliott promised in writing to pay Hodges the excess of the bill when received. Elliott received the amount of the bill in December, when it became due: and Hodges became bankrupt two days after. The assignees demanded the excess of the bill, and Elliott claimed to retain it. His right to do so was resisted because of his express stipulation to pay it; it not having been in the contemplation of either party, at the time of the transaction, to do more than pay off the first sum, which was due. It was, in effect, an agreement, that the excess of the bill should not be applied to the second sum which was not due. Nevertheless, the court held it so applicable, and the retainer was allowed accordingly. "Justice," says lord Kenyon, "requires that the whole account on both sides should be stated, and that 700 *the balance should be the only thing to constitute the debt." It was, therefore, considered as within the case of Ex parte Prescott, and within the equity of the statute of set-off.

The case of Lechmere v. Hawkins, 2 Esp. Rep. 626, is to the same effect. That case did not arise under the bankrupt law. The case of Taylor v. Okey, 13 Ves. 180, corresponds with both of them. The point was upon a claim to set-off against a debt, a sum of money borrowed by the creditor from the debtor under an express promise to pay: the lord chancellor said, "My opinion is that this claim of set-off must be allowed in equity; and except from the circumstance that the parties are not the same, it would do at law under the authority of Lechmere v. Hawkins, which is precisely this case. The argument addressed to me yesterday for dissolving the injunction, was the same that I used; that the express promise bound the party, making it an absolute payment under all circumstances; but lord Kenyon answered, that he knew no such law; and did not think there was any legal obligation, and the mutual demands were within the statute of set-off. But what weighs with me, is what was said by lord Kenyon, who was perfectly acquainted with the rules of equity; that if he should refuse the set-off, it would drive the party into equity."

If then the bank could in case of Gregory's insolvency, have insisted on retaining, that right was not lost by his death. They had a right to say, "We are debtors only for the excess;" and they, doubtless, would have retained, but for the payment of Gregory's note by the proceeds of that of Ford and Thornton. Ford and Thornton having paid it, stood in the shoes of the bank, and, on the well established principles of this court, were entitled to all

its rights and remedies. *Tompkins v. Mitchell*, 2 Rand. 428; *Enders v. Brune*, 4 Rand. 438; *Watts v. Kinney*, ante, p. 272. The bank had a right to apply the deposit to the payment of the debt due to it: therefore, *Ford and Thornton* had a right to demand that it should be so applied. There was no ground for considering those

701 funds part of the general "assets, as in point of fact, the bank was only the debtor of Gregory for the balance. If so, there has been no misapplication of those funds, admitting that they have been paid in discharge of this debt, by the joint check of both administrators. They cannot be responsible for the amount of them to creditors of superiour dignity, because no such creditor, if there be any, could have any right to the application of funds, which were appropriate to the discharge of this bank debt.

For these reasons, I am of opinion, that the decree should be affirmed.

CABELL and CARR, J., concurred in the opinion of the president.

BROOKE, J. I am also of opinion, that the decree should be affirmed, because I think the appellant has not shewn, that there were any debts due from Gregory's estate, of superiour dignity to that which he owed to the bank. But if such debts of superiour dignity had been shewn to exist, requiring the money which Gregory left in bank, to satisfy them, the question would then, have been, Whether upon the death of Gregory, before his note indorsed by *Ford and Thornton* came to maturity, his money deposited in the bank, was assets of his estate, subject, so soon as there was a representative of his estate, to the payment of his debts, in the order prescribed by law? Had Gregory's debt to the bank fallen due in his lifetime, it is admitted, that the bank might have insisted on applying a portion of his money on deposit there, to the payment of the debt he owed it, either in a court of law or equity. But the true point of inquiry in this case, is, What were the rights of the bank, and Gregory's creditors claiming debts of superiour dignity, upon his death before his debt to the bank had fallen due? Would a court of equity disregard the debts of superiour dignity? Would it allow the bank to take payment of the simple contract debt due to it, out of Gregory's money held

702 *by it on general deposit, in preference to his creditors whose claims were of superiour dignity? Of this, to say the least, I have great doubt. If the priority of right to satisfaction out of the assets of a deceased debtor, attaches on them the moment he dies, I cannot see upon what principle (there being equal equity) this priority can be overlooked by a court of equity. The cases that have been decided under the bankrupt laws in England, do not exactly apply. In trade, among merchants, a credit is equivalent to money. A debt in presenti though solvendum in futuro, may be considered as a payment, and a good set-off against money in the hands of the creditor. In the other cases that have been mentioned, it does not appear, that there was any question of priority or dignity of debts: they were cases, in which the substi-

tution of a surety to the rights and remedies of the creditor, was alone in question.

Decree affirmed.

703 *The Auditor &c. v. Dryden and Another.

Same v. Same and Others.

(Absent CABELL, J.)

Clerks of Courts—Official Bonds*—To What Duties It Extends.—The official bond of a clerk of a county or circuit court, with condition for the faithful execution of the office, required by the statutes of 1792, ch. 66, § 18, and ch. 70, § 3, was not intended to secure the collection of taxes on law process &c. though it has been made the duty of the clerk ex officio to collect and account for such taxes, nor are the clerk and his sureties liable upon this bond, for his failure to collect, account for, and pay such taxes into the treasury: the bond required by those statutes, extends only to those duties of the office that are properly clerical.

Official Bonds—Right of Commonwealth to Summary Motion—Quere.—Whether under the provision of the statute 2 Rev. Code, ch. 189, § 4, the summary remedy by motion lies for the commonwealth, on any bond but such as are required and taken for the benefit or security of the commonwealth exclusively?

Samuel Dryden was appointed clerk of the county court of Kanawha on the 11th May 1812, and thereupon, with Andrew Donally his surety, executed an official bond, payable to the governor for the time being and his successors, in the penalty of 3000 dollars, with condition, "that he should duly and faithfully execute his said office, and should not remove or carry, or suffer to be removed or carried, out of the county aforesaid, the records or papers of the said court, or any part thereof, except in cases allowed by law."

The same Samuel Dryden was also appointed clerk of the circuit court of Kanawha, on the 1st May 1812, and with Andrew Donally, John Reynolds and David Ruffner, his sureties, executed an official bond to the governor for the time being and his successors, in the penalty of 10,000 dollars, with condition "that he should duly and faithfully perform the duties of his said office."

In the years 1818, '19, '20, and '21, Dryden, as clerk of the county court, collected and received the public taxes, upon houses of private entertainment, on merchants' licenses, and on law process of the

704 county court, (which taxes the laws made it the duty of the clerks of the county courts, respectively, to collect and account for to the treasury) to the amount of 1043 dollars, which he failed to account for and pay into the treasury.

And in the years 1819, '20 and '21, as clerk of the circuit court, he also collected and received the public taxes on law process of the circuit court (which the laws made it the duty of the clerks of the circuit courts, respectively, to collect and account for to the treasury) to the amount of 742 dollars, which also he failed to account for and pay into the treasury.

The auditor of public accounts made two motions in the general court, on behalf of the commonwealth, at November term 1828—the one against Dryden, as clerk of the

*Statutory Bonds.—See monographic note on "Statutory Bonds" appended to *Goolsby v. Strother*, 31 Gratt. 107.

county court, and Donally his surety in his official bond for his due and faithful execution of that office, for 3000 dollars the penalty of the bond, forfeited, as he alleged, by Dryden's breach of the condition, in failing to account for and pay into the treasury, the sum of 1043 dollars of taxes, by him collected and received as clerk of the county court: the other, against Dryden, as clerk of the circuit court, and Donally, Reynolds and Ruffner, his sureties in his official bond as clerk of the circuit court, for 10,000 dollars the penalty of this bond, forfeited, as he alleged, by Dryden's failure to account for and pay into the treasury, the sum of 772 dollars, collected and received by him for and on account of taxes on law process of the circuit court.

To the first motion, two objections were made by the defendants; 1. that the condition of the bond of Dryden as clerk of the county court, did not extend to the default complained of, that condition relating only to the duties of the office properly clerical; and 2. that the court had no jurisdiction of the case by way of motion. And to the other motion, the same two objections, *mutatis mutandis*, were made by the defendants therein, and a third, namely, that the bond executed by Dryden as clerk of the circuit *court was not a good statutory bond, there being no statute authorizing the taking of it, or the proceeding upon it.

The general court held, that the condition of neither bond extended to the defaults complained of, and that the defendants in the motions, respectively, were no wise bound by the bonds for Dryden's faithful collection, accounting for and paying into the treasury, the public taxes by him collected and received; and for that reason, without giving any opinion on the other objections, overruled both motions, and gave judgments for the defendants.

From these judgments the attorney general, on behalf of the auditor, appealed to this court.

The causes were argued here, by the attorney general, for the appellant, and by Johnson for the appellees.

I. The principal question was, Whether the official bonds of the clerks of the county and circuit courts, according to the statutes existing at the time these bonds were executed, were a security for the due collection of public taxes, which the clerks, as clerks, were required by law to collect and account for? This question depended on the construction and effect of the several statutes relating to the subject; namely, the statute of 1792, Rev. Code of 1794, ch. 70, § 3, Pleasants' *edi.* p. 94, 5, requiring official bonds of the clerks of county courts; the statute of 1792, *Id.* ch. 66, § 13, p. 75, requiring official bonds of the clerks of the district courts; the statute of 1808, Pleasants' collection of public acts,* ch. 120, § 12, p. 152, and of 1809, *Id.* Supplement, ch. 6, § 6, p. 13, requiring official bonds of the clerks of the circuit courts; the statute of 1820-21, ch. 4, § 4, *Seas. Acts*, p. 8, requiring the clerks of courts to give bond with surety for the due collecting and accounting

for the public taxes which the laws make it their duty to collect; and the statutes making it the duty of the clerks of the county courts, to collect the public taxes on merchants' *licenses &c. and on law process of those courts; and the duty of the clerks of the circuit courts, to collect the taxes on law process of the same; 2 Rev. Code of 1819, ch. 185, § 1, 12, 16, 17, pp. 41, 3, 4. In the argument of the point, all the legislation of the country any way relating to the subject, from a very early period, was referred to, and very minutely examined.

II. The second question discussed at the bar, was, Whether the bond which Dryden gave as clerk of the circuit court, was a good statutory bond? Whether there was any statute which required or authorized any such bond to be taken? A question which depended on the construction of the two acts of 1808 and 1809, above cited, requiring official bonds of the clerks of the circuit courts.

III. A third point, very earnestly debated at the bar, was, Whether any remedy by motion at the suit of the auditor, was given on such official bonds as those in question? bonds which may be put in suit at the relation of any individual injured? The statute 2 Rev. Code, ch. 189, § 4, p. 50, provides, that "it shall and may be lawful for the general court, to give judgment with costs, at the motion of the auditor, on ten days previous notice, against any person or persons indebted to the commonwealth, by bond or other specialty, whether the same be taken in the name of the governor or treasurer, or any other person acting in a public character for or on behalf of the commonwealth, and also to give judgment for all bills of exchange and notes, and also for the penalty of all bonds entered into by any person or persons, conditioned for the rendering accounts or other duties." The attorney general insisted, that the summary remedy was given by this statute, upon all bonds whatever, where the commonwealth was injured by the breach of the condition thereof, though a remedy by action of debt on the bonds, lay also at the relation of individuals injured by breach of the condition. Johnson contended, that the remedy by motion on behalf of the commonwealth, lay only on such

bonds wherein she alone was interested; for instance, *he said, no motion could be maintained by the auditor, on the bond of an executor or administrator of a public debtor, to charge the executor or administrator and his sureties, for a devastavit. On all such bonds, in which individuals as well as the commonwealth might be interested, the commonwealth, if injured by breach of the condition, must, like individuals, proceed by action of debt.

CARR, J. Upon the argument, I was a good deal inclined to think, that these judgments were erroneous; but an attentive and minute examination of the various laws on the subject, for fifty years back, has changed my first impression. Various points of objection, were discussed at the bar: I shall confine myself to that on which the cases were decided by the

*This book is commonly called the 2nd volume of the Old Revised Code.

general court. The clerks of courts were made collectors of the taxes on ordinary licences and various kinds of law process, as early as 1769 (8 Hen. stat. at large, p. 345,) and were to account for them half yearly to the treasurer. That statute, after enumerating taxes to be collected by the sheriffs, inspectors of tobacco, and clerks, enacts, that if such sheriffs, clerks, or inspectors, shall fail to account and pay &c. it shall be lawful for the general court or court of the county where they reside, upon motion and ten days notice, to give judgment against them and their sureties respectively &c. But, at this time, the clerks gave no official bond; the term sureties, therefore, could not apply to them. In 1777 (9 Id. 350, 362,) the clerks were made collectors of the taxes on ordinary and marriage licences &c. and they were to account and pay half yearly; and for failing to account they were to forfeit £500. and for failing to pay the money (having accounted) they should be proceeded against as delinquent sheriffs. Then the act subjects delinquent sheriffs to a judgment against them and their sureties &c. Here again we see, that though clerks are subjected in like manner as sheriffs, there could only be a recovery against them individually, for as yet they gave no official bond. In 1784, an act passed changing materially the situation of clerks;

708 *11 Id. p. 464. The preamble states, that many inconveniences had arisen from their residing out of their counties, and the permission given them by some county courts, to remove the records without the county &c. to correct which evils, the statute prescribes the form of the oath, which every clerk thereafter admitted into office should take, and also enacts that every county court clerk shall, on his appointment, give bond and security, in the sum of 3000 dollars, with condition for the due and faithful execution of his office, and that he will not carry the records out of his county, except in cases allowed by law &c. We see here, that no part of the mischiefs to be corrected by this law, was a failure of the clerks to pay up the taxes of which they had been made collectors. Nor does the condition of the bond, nor the words of the oath, point at all towards those taxes. This is pretty strong to shew, that the legislature had not that subject at all in view in passing this law. But there is still stronger evidence, that, instead of looking to this bond, they looked distinctly to another manner of correcting the delinquencies of clerks, as collectors of the revenue. In an act passed at the same session (Id. pp. 378, 9,) the clerks are made collectors of taxes on law process &c., are allowed five per cent. for collecting, accounting for and paying those taxes into the treasury; are required to account and pay them twice a year, and on failure, are subjected to the forfeiture of all their commissions, and also to suspension from their office of clerk, until such payment be made. There is another conclusive reason to shew, that the bond of office was not taken as a security against these failures: that bond was not to be given by any clerk then in office, but only by those subsequently appointed;

and as they held their offices during good behaviour, such new appointments would only be made (in the general) as the then incumbents should die; so that, for a length of time, a great majority of the clerks would consist of those who had given no bond of office. To this majority, the law could not apply, and to the minority it would not; for we could never suppose,

709 pose, that *the legislature meant, that some of the public collectors should be subjected in one way and some in another. I might follow the series down to 1820, and shew that in all the subsequent tax laws, and different editions, the same form of bond and oath has been prescribed for clerks, and the like penalties for failures to pay taxes collected by them; the laws always looking to different methods, for protection against delinquencies as clerks, and delinquencies as revenue officers. It is a very strong fact too, in proof of the general understanding of these laws, and practice under them, that this is the first attempt ever made, to subject the sureties bound in the official bond of a clerk to a recovery for his failure to account for and pay the taxes collected by him. The act of 1820, shews that the legislative attention was at length called to the danger of suffering clerks to hold so much of the public money, without giving bond and surety for the payment of it; and it then remedied the evil. I am for affirming the judgments.

BROOKE, J. I am of the same opinion.

TUCKER, P. I am also of opinion, that there is no error in the judgments of the general court overruling the motions of the auditor in these cases: I think the judgments right, and for the reason given by the court.

The bonds on which these motions were made, were not taken under the act of 1820, ch. 4, which requires the clerks of the circuit and inferior courts to execute bond with surety for the faithful accounting for and payment of the taxes on law process, ordinary licences and other public monies. They are founded on the general official bonds of the clerk. Such bonds were first required of the clerks of the prescribed county courts by the act of 1784, 11 Hen. stat. at large, p. 465, and required by all the subsequent statutes, contained in the several revisals, in relation to the office and duties of clerks. By these acts it is ordained, that every clerk shall enter

710 into bond with *condition for the due and faithful execution of his office, and that he will not permit the records to be removed out of the county except in cases allowed by law. And it is contended, that these words embrace every description of official duty; that they comprehend not only such official duties as then existed, but such as might from time to time be superadded; and that the collection and payment of taxes on law process &c. is as much an official duty as any other imposed upon the officer. These positions cannot be denied as general propositions. The terms are certainly broad enough to comprehend that case at bar, unless it can be shewn, by reasonable deduction, that

the language, however broad, was not employed in this extended signification. This, I think, may be done.

When a statute of the legislature requires the execution of a bond, and prescribes its terms or its character, the interpretation of the instrument is in fact the interpretation of the statute itself. The party who executes it, cannot deny that it should have the interpretation which the legislature designed: and a fortiori, the sovereign power, who prescribed it, cannot fairly extend it to cases which were obviously not intended to be embraced by its provisions. However broad then those provisions, if it shall appear, that the legislature did not intend the bond prescribed, to embrace a particular case, it will be construed not to embrace it: for the true construction of the statutes gives the fair interpretation of the bond. We shall then have occasion to look into our course of legislation, to arrive at just conclusions in this matter. It is not my purpose, however, to go minutely into them, but to refer only to certain general and notorious principles of our legislation, which cannot have escaped the most negligent observer.

The system of requiring security from public collectors, was very early established in the administration of our government. To go no farther back than 1705, we find that sheriffs, in whom was vested the power of collecting the public levies, were also required to give a separate bond
711 *with surety, for the due performance of that duty. 3 Hen. stat. at large, p. 264. But this prudential measure was not more ancient than the distinction observed, and I think uninterruptedly adhered to, between what I will call the revenue bond, and the official bond. The sheriff was an officer not less known to the common law, in his connexion with the administration of justice, than the clerk, and not more known, I believe, in the collection of the revenues of the state. This duty was imposed upon him by statute of early date, as the collection of certain taxes has been imposed upon the clerk by some more recent. Moreover, the sheriff, before he had been invested with the powers and duties of a collector, had been required by statute to enter into a general bond like this of the clerk, for the true and faithful performance of his office. 1705, ch. 3, Id. p. 247. Yet at the very same session, when it was declared that the sheriffs should be the collectors of the public levies, it was provided, that he should enter into bond with two sureties, in double the amount of the public and county levies, with condition to collect and pay them &c. Here then is a clear legislative exposition, more than 125 years ago, that a bond for the true and faithful performance of the sheriff's office, was not deemed to comprehend the collection and faithful payment of the public taxes, though this duty was imposed on the sheriff ex officio. Whether the words might embrace them or not, the legislature shewed, by a simultaneous act, that they did not use them in any such sense. And as words are but the signs of ideas, and our business is with the ideas and not with the words, it matters not what lan-

guage is used, if we can only certainly learn in what sense it is used.

The distinction I have adverted to as having been observed between the revenue bond and the official bond given by the sheriff, runs through our subsequent legislation in relation to that officer. See 5 Hen. stat. at large, p. 516; 6 Id. pp. 464, 482, 483; 7 Id. pp. 11, 79; 8 Id. p. 39; 9 Id. pp. 67, 222, 357; 10 Id. pp. 167, 253, 506; 712 11 Id. 93, 168. *In all these acts, distinct bonds are scrupulously required, with condition to collect and pay over taxes, notwithstanding the official bond, regularly entered into by the sheriff for the faithful performance of his office. At the revival of 1792, the distinction is broadly marked, by the consolidation and juxtaposition of the various statutory provisions before prevailing in relation to this matter. In the act concerning sheriffs, Rev. Code of 1794, ch. 80, § 8, 9, 10; Pleasants' ed. p. 121, it is provided, that the sheriff shall give three bonds; one, for duly collecting and accounting for the public taxes; one, for duly collecting all levies, and also all fines &c. due to the commonwealth; and one for collecting and paying officers' fees, executing and returning process, paying all money received on process, and generally for the faithful performance of his office; and in the act concerning county levies, Id. ch. 134, § 10, p. 252, the county courts are authorized to appoint the sheriff, or any other person, collector; taking a fourth bond for the faithful collection and payment of the county levies: thus clearly evincing, that the official bond was not designed to embrace the collection of taxes and public dues.

Another feature of the system is to be traced in some of these statutes, and is worthy of observation: the provision requiring the official bonds to be recorded in the records of the county, 3 Hen. stat. at large, p. 247, and the revenue bonds to be certified to the auditor of public accounts. The official bonds are not required to be so certified, because the treasury had no concern with them; but the revenue bonds were to be so certified, that the officers of the government might know against whom to move, and be in possession also of the evidence with which to charge them, before the general court.

It is this view of the systematic distinction taken by the legislature, between official and revenue bonds, with which every one at all conversant with public affairs is familiar, that satisfies my mind, that the official bond of the clerk was not designed to cover his collections of
713 taxes. This opinion *is strongly fortified by the first act which required a bond from the clerk. In May 1784, the act passed imposing taxes on law process, and requiring the clerks to collect them. No bond was then required of the clerk, but the payment was enjoined under the penalties of loss of commission and suspension from office. In October 1784, bond was first required from the clerks of the county courts; but the preamble shews, that it was not so required with a view to secure accountability for the revenue collected but to secure the records from removal

and destruction, and to ensure the faithful discharge of the ordinary official duties. Moreover, though the sheriff's bond for revenue, was directed to be certified to the auditor, whose business was with the revenue, this bond was directed to be transmitted to the clerk of the council, merely for safe keeping.

The contemporary exposition of this act, and of the bond to which it gave rise, is irresistably to be inferred, if (as it was confidently alleged in the argument) this is the first case, in which a motion has been ever attempted to be sustained, upon the ground that the clerk's official bond embraced the duty of collecting and paying the taxes collected by him. It can scarcely be possible, that no instance of default has ever before occurred. Hence I infer the universal understanding that the bond did not comprehend the case. Accordingly, in 1820, an act, requiring a revenue bond to be given by every clerk, was passed by the legislature. This, though not authoritative, is pregnant evidence of what the law was understood to be. It is to my mind conclusive evidence of the light in which it was viewed, and always had been viewed, by the intelligent and vigilant officers of the auditor's department. It is well known, that most of the salutary provisions enacted on the subject of the revenue, have been suggested by them. Their situation brings them acquainted with the defects of the laws, and their sagacity suggests the remedy. Such was, probably, the case in relation to the act of 1820: the auditor found the former law defective, and suggested an effectual remedy

714 *to the proper authority. This is much better than straining to extend the operation of a statute beyond its obvious design.

Judgments affirmed.

Maitland and Another v. Newton, Adm'r &c.

May, 1832.

(Absent TUCKER, P.)

Deeds of Trust—Construction—What Passes*—Case at Bar.—A deed of trust and assignment of effects, made by a debtor to trustees, for the benefit of his creditors. In 1800, conveys and assigns to the trustees, all the debtor's estate real and personal in Virginia or elsewhere, upon trust, that the trustees shall collect all the debts due or to become due to the grantor, on account of transactions prior to the deed, and shall sell the real and personal estate, and institute suits at law or in equity for the recovery of the debts due the grantor, to be applied to the purposes of the trust: the board of commissioners sitting under the treaty between the U. States and Spain of February 1819, award a sum of money to the adm'r of the grantor, for and on account of claims on the spanish government for spoillations before the date of the deed of trust—HELD, this money passed by the deed to the trustees for the purposes of the trust.

By deed, dated the 25th November 1809, William Pennock late of Norfolk, conveyed and assigned to Maitland, Armistead and Wilson, trustees, and the survivors or survivor of them, all his estate real and personal whether the same were in Virginia

or elsewhere; upon trust, that the trustees, or the survivors or survivor of them, should collect all the debts due or to become due, to Pennock, for or on account of any matter or thing prior to the date of the deed, and should sell the said real and personal estate, when and on such terms as they should think most conducive to the purposes of the trust, and out of the proceeds of the collections of debts and of the sales, after defraying expenses incurred in the execution of the trust, should pay, 1st, certain debts to certain preferred creditors

715 specified in *a schedule annexed to the deed; and 2ndly, all other debts due from Pennock; provided the creditors of the second class, before they should be entitled to receive the amounts due them, or dividends thereof, out of the trust fund, should, in consideration thereof, release Pennock from all further demands. And Pennock thereby constituted the trustees his attorneys (without power of revocation) for him and in his name, and for the purposes of the trust, to demand and receive all sums of money to him due, or to become due and payable, from any person or persons whomsoever, for or on account of any matter or thing prior to the date of the deed; and on receipt of payment, to give acquittances; or, in cases of non-payment, to institute suits in law or equity for recovery thereof.

Pennock died in 1816, and Newton, who was one of his creditors not provided for by the deed, took administration of his estate.

The board of commissioners sitting at Washington, under the 11th article of the treaty of amity, settlement and limits, between the U. States and the king of Spain, of February 1819, awarded to Newton, as the administrator of Pennock, the sum of 15,471 dollars, for and on account of claims of Pennock, which originated before the date of the deed of trust; and Newton received the money from the treasury of the U. States.

And upon a bill exhibited in the superior court of chancery of Williamsburg, by Maitland and Wilson, the surviving trustees named in Pennock's deed of trust (the other trustee Armistead being dead) against Newton as administrator of Pennock and in his own right, the question was, Whether the money received by Newton, under the award of the commissioners, belonged to him as assets of Pennock's estate, to be disposed of in due course of administration, or to the trustees, to be applied to the purposes of the trust? in other words, Whether Pennock's claims against Spain, passed by the deed of trust?

716 *The chancellor was of opinion, that those claims did not pass by the deed, and therefore dismissed the bill. And Maitland and Wilson appealed to this court.

Stanard, for the appellants, said he had no doubt the chancellor's decree was founded on the authority of Mr. justice Washington's opinion in Vasse v. Comegys, 4 Wash. C. C. R. 570, but the judgment of the circuit court in that case, had been reversed by the supreme court of the U. States; Comegys v. Vasse, 1 Peters, 193. The authority of this judgment of the

*Deeds of Trust—Construction—The principal case is cited in foot-note to Wickham v. Lewis Martin Co., 13 Gratt. 437; Lewis v. Glenn, 84 Va. 965, 6 S. E. Rep. 866. See monographic note on "Deeds of Trust" appended to Cadwallader v. Mason, Wythe 188.

supreme court, and the reasoning on which it was founded, he said, were directly in point to the present case, and decisive, that the appellants were entitled to the money in question, for the purposes of the trust declared by Pennock's deed of November 1809.

Johnson, for the appellees, argued, very strenuously, 1. That Pennock's claims upon Spain, out of which the money in question arose, were not, in their nature, debts due to Pennock, in any sense of the word; they were not claims founded on contract, but claims for losses incurred by illegal seizures made by the spanish government; by spoliations, in fact, on american commerce. 2. That these claims of Pennock, whatever the nature of them might be, did not pass to the trustees, by Pennock's deed of trust of November 1809, either by the words of that instrument fairly interpreted, or by the intent of the parties to be collected from it, upon the most liberal construction. The case of *Comegys v. Vasse* turned upon the construction of the bankrupt law of the U. States; this case depends on the construction and effect of a deed of assignment; and every such deed must operate according to its own peculiar provisions. He argued, that these claims on Spain did not pass under the general description of the subject contained in the deed of trust, all Pennock's estate, real and personal, whether in Virginia or elsewhere; for 717 the provision, that the trustees *should sell the said real and personal estate, plainly evinced, that those general words were intended to comprise specific property only; property capable of sale. Neither did these claims pass among the debts which the trustees were to collect, and apply to the purposes of the trust; since it was obvious that the debts which it was intended they should collect, were such debts, as that, in case payment thereof should be refused, the trustees might institute suits, in law or equity, for the recovery of them. Now, certainly, Pennock's claims upon Spain, claims for retribution from a foreign sovereign, for property taken by force, in violation of the laws of nations, could never be asserted in any form of judicial proceedings.

CARR, J. The simple question is, Whether the deed of trust conveying all Pennock's estate, real and personal, in Virginia or elsewhere, comprehended his claim on the government of Spain, for spoliations committed on his property by her vessels, and retained under unjust decisions of her courts? That the deed does pass this claim, I can have no shadow of doubt. I have no idea of a right or interest vested in a man, which would not pass under a conveyance of all his real and personal estate, more especially when we consider, that this was the deed of an insolvent debtor, conveying and assigning his effects, for the payment of his debts, so far as the fund would go, and obtaining for such conveyance, a complete release from his creditors. This opinion is intirely supported by the decision of the supreme court in *Comegys v. Vasse*. This was a case under the bankrupt law, which conveyed to the

assignees, "all the estate real and personal, of every nature and description, to which the bankrupt may be entitled either in law or equity;" words not a whit more comprehensive than those used in this deed. Upon those words of the bankrupt law, judge Story, delivering the opinion of the court, says, they "are very general and comprehensive"—"broad enough to cover every

description of right and interest attached to and growing *out of property. Under such words, the whole property of a testator would pass to his devisee. Whatever the administrator would take, in case of intestacy, would seem capable of passing by such words."

I am, therefore, for reversing the decree, and remanding the cause, with a declaration, that Pennock's claims on the spanish government passed by the deed of trust to the trustee, for the purposes of the trust; that, therefore, the appellee is liable to the appellants, for the money he has received on account of those claims, or for so much thereof as shall be necessary to discharge and satisfy the debts due to the creditors entitled to the benefit of the trust fund, with interest on such debts; and that, if there shall be any residue remaining after those debts shall be fully discharged and satisfied, such residue shall be considered as assets in the hands of the appellee, to be applied in due course of administration.

The other judges concurred. Decree reversed.

719 *W. & D. Kyle & Co. v. Connelly.

May, 1832.

(Absent TUCKER, P.)

Partnership—Attachment for Debt Not Due—Right of One Member to Sue Out.—One member of a mercantile house to which a debt has been contracted but has not yet fallen due, is competent to make complaint on oath and to sue out an attachment against the debtor, under the provisions of the statute, 1 Rev. Code, ch. 123, § 14.

Attachments—Oath—Objection for Want of—Waiver.—Tho' the statute requires that such complaint shall be made on oath as the foundation of the process, it does not require that the fact of the complaint having been verified by oath shall be certified by the justices, and made part of the record: if, on the trial objection be made that the attachment was issued without complaint verified by oath, the fact that the oath was administered may be proved: if no objection be then made on that ground, it is too late to take such objection in an appellate court.

Partnership—Attachment Sued Out by One Member of Firm—Bond—Validity.—As one member of a mercantile house to which a debt has been contracted is competent to sue out an attachment for the house against the debtor, so that member is the proper person to execute the attachment bond required by the statute, id. § 7. And the bond of the partner suing out the attachment, with surety, conditioned that that partner shall pay all costs, in case the house shall be cast in the suit, and all damages that shall be adjudged against him for suing out the attachment, is a good bond.

Attachments—Value of Goods Attached Uncertain—Judgment.—How judgment shall be rendered for the plaintiffs upon an attachment for a debt con-

***Partnership.**—See monographic *note* on "Partnership" appended to Scott v. Trent, 1 Wash. 77.

†**Attachments—Bond—Validity.**—The principal case is cited, on this question, in Jones v. Anderson, 7 Leigh 312, 313, 315, and *foot-note*; McCluney v. Jackson, 6 Gratt. 103, 104. See monographic *note* on "Attachments" appended to Lancaster v. Wilson, 27 Gratt. 624; monographic *note* on "Statutory Bonds" appended to Goolbsby v. Strother, 21 Gratt. 107.

‡**Same—Judgment.**—The principal case is cited in Joseph v. Pyle, 2 W. Va. 453. See monographic *note* on "Judgments" appended to Smith v. Charlton, 7 Gratt. 435.

tracted but not due, when the attachment has been laid on goods of the debtor, and on moneys due him in the hands of garnishees, where the value of the effects attached is uncertain, and may exceed the plaintiffs' claim.

Upon the complaint and at the instance of Hugh Campbell, one of the partners in the mercantile house of W. & D. Kyle & Co. two justices of the peace of the county of Amelia, issued an attachment against the goods and chattels of Daniel Connelly of that county, for a debt which had been contracted by him to that house but had not yet become payable, under the 14th section of the statute concerning attachments &c., 1 Rev. Code, ch. 123, pp. 478, 9.*

720 *The process,—reciting that H. Campbell, one of the partners of W. & D. Kyle & Co. had complained to the two justices, that Connelly was indebted to the house, in the sum of 1103 dollars, which would become due and payable at a future date, and that he had just cause to suspect, and verily believed, that Connelly would remove himself with his effects out of the commonwealth, before the debt would become payable, and also that he (Campbell) had no knowledge when the debt was contracted of the intention of Connelly so to remove,—therefore, required the sheriff to attach Connelly's estate, or so much thereof as would be sufficient to satisfy the debt &c. and to make return of the process, and how he should have executed the same, to the county court, at its then next ensuing term. The process did not recite, nor did the justices in any way certify, that the complaint was made by Campbell on oath, nor did they return any affidavit of the truth of the complaint, as the foundation on which they granted the attachment.

Before the attachment was issued, the justices took a bond of Campbell with approved surety, in the penalty of 2206 dollars, payable to Connelly, with condition in the following words: "The condition of the above obligation is such, that whereas the above bound H. Campbell, one of the firm of W. & D. K. & Co. hath this day obtained from A. T. T. and J. B. justices of the peace for the county of Amelia, an attachment against the estate of the above

721 named D. *Connelly, for the sum of 1103 dollars, returnable to the next county court; if, therefore, the said H.

*The 14th section of the statute provides, that "whenever any creditor, whose claim amounts to ten dollars or 400 pounds of tobacco, shall have sufficient grounds to suspect, that his debtor will remove, with his effects out of the commonwealth, before his debt will be payable, or whenever such debtor shall have so removed leaving effects, it shall be lawful for such creditor to go before any magistrate of the county or corporation where his debtor resides, or in case such debtor has removed, where he last resided, or where his effects may be found, and make oath to the true amount of his debt, and that he has just cause to suspect, and verily believes, that such debtor will remove himself with his effects out of the commonwealth before the said debt will become payable, or hath actually so removed, and also that he had no knowledge, when the said debt was contracted, of the intention of such debtor so to remove; and thereupon, such magistrate, taking bond and security from such creditor as in other cases of attachments, shall issue an attachment against the goods and chattels of the debtor, returnable to the next court to be held for such county or corporation, which attachment may be served on any goods and chattels of such debtor, or any garnishee or garnishees." The section then proceeds to prescribe the manner of proceeding on such attachments.—Note in Original Edition.

Campbell, one of the partners of W. & D. K. & Co. shall satisfy all costs which shall be awarded to the said D. Connelly, in case the said H. Campbell, one of the partners of W. & D. K. Co. shall be cast in the said suit, and also all damages which shall be recovered against the said H. Campbell, one of the partners of W. & D. K. & Co. for his suing out this attachment, then the foregoing obligation to be void, else to remain in full force and virtue." This bond was duly returned by the justices to the county court.

The sheriff made return upon the attachment, that he had attached a quantity of merchandize (specified in a schedule) belonging to Connelly, and sundry debts due to him from divers persons, in the hands of the debtors as garnishees, whom he had summoned to attend the court, on the return day of the process. It no wise appeared what was the value of the merchandize attached; it seemed to exceed the amount of the debt due W. & D. K. & Co.

When the county court was proceeding to render judgment upon the attachment and the return thereupon made, James Robertson appeared as attorney at law for sundry other creditors of Connelly (who did not appear himself or offer any defence) claiming the effects attached, under a deed of trust, which he alleged, had been executed by Connelly for the benefit of his clients, and had been duly recorded in the hustings court of Petersburg, but the deed was not produced; and, on their behalf, he moved the court to quash the attachment, and the attachment bond, or to dismiss the proceeding, on the ground, that the bond did not bind the whole firm of W. & D. K. & Co. but was executed by H. Campbell only, one of the partners of the house, in his individual name, and therefore did not conform with the requisitions of the statute, 1 Rev. Code, ch. 123, § 7, p. 477.† This motion being overruled by the court, Robert-
722 son, *for his clients, filed a bill of exceptions to the opinion, in which he set out the attachment, the bond, the return of the sheriff, his motion to quash the process and the bond, and the judgment of the court overruling it.

The court then proceeded to judgment on the attachment and return. The entry of the judgment was as follows: Hugh Campbell one of the firm of W. & D. Kyle & Co., having obtained an attachment in favor of the said W. & D. K. & Co. against the estate of Daniel Connelly, whom the said Campbell had just cause to suspect and verily believed was about to remove himself with his effects out of the common-

†The 7th section of the statute provides, "that every justice of the peace, before granting such attachment, shall take bond and security of the party for whom the same shall be issued, in double the sum to be attached, payable to the defendant, for paying and satisfying all costs which shall be awarded to the said defendant, in case the plaintiff suing out the attachment therein mentioned shall be cast in his suit, and also all damages which shall be recovered against the said plaintiff, for his suing out such attachment: which bond shall be by the said justice returned to the court to which the attachment is returnable: and the party entitled to such damages, may thereupon bring suit and recover: and every attachment issued without such bond taken, or where no bond shall be returned, is hereby declared illegal and void, and shall be dismissed."—Note in Original Edition.

wealth, for the sum of 1103 dollars due by single bill, on the — day of — next, to the said W. & D. K. & Co. This day came the said W. & D. K. & Co. by their attorney, and the said D. Connelly being solemnly called, and not appearing to replevy the said attached effects; therefore, it is considered by the court, that the plaintiffs recover against the said defendant, the said sum of 1103 dollars, together with their costs &c.' And it was ordered, that the sheriff should make sale of the merchandize attached, on a credit till the date when the debt to the plaintiffs should become payable, and should take bonds of the purchasers with good surety for the proceeds, and assign the same to the plaintiffs, to the amount of the debt due them and their costs, and if the proceeds should exceed that amount, should assign the bonds for the surplus to the defendant, and return an account of his proceedings to the court. And it appearing, that there were debts due to the defendant, from the

723 garnishees *who appeared according to the summons, to the amount of 332 dollars, the court ordered those garnishees to pay to the plaintiffs the several debts by them respectively due to the defendant, with a stay of execution against the garnishees till the date when the defendant's debt to the plaintiff should become due and payable; and several of the garnishees who had been summoned, not having appeared, the proceeding was as to them continued till the ensuing term.

To this judgment of the county court, the circuit court, upon a petition presented in the name of Connelly, awarded a supersedeas, and afterwards reversed the judgment, and quashed the attachment, and all the proceedings upon it. And then W. & D. K. & Co. applied to this court, for a supersedeas to the judgment of the circuit court; which was allowed.

The argument here, by Bacchus and Leigh for the plaintiffs in error, and Johnson for the defendant, turned on objections taken by the latter, to the regularity of the proceedings, and to the judgment of the county court.

The counsel for the defendant in error, premised, that the statute which gives this summary remedy of attachment,—a new remedy contrary to the course of the common law, and one obviously liable to much abuse,—ought to be strictly pursued; *Asberry v. Calloway*, 1 Wash. 74; *Stuart v. Hamilton*, 2 Hen. & Munf. 48; *Mantz v. Hendley*, Id. 308. And then he insisted, 1. That, as the statute requires, that every complaint on which an attachment shall be issued, shall be made on oath, and as it no wise appeared that the complaint on which the process was issued in this case, was made on oath, the attachment was therefore irregularly issued, and ought for this cause alone to be quashed. 2. If it could fairly be presumed, that the complaint was made on oath, yet it was not the complaint of the creditor, but of one of several creditors; a complaint by Campbell one of the house of W. & D. K. & Co.

724 to whom the debt *was due. Campbell could not have taken the oath required by the statute: the creditor praying

the attachment, is required to make oath, that he had no knowledge, when the debt was contracted, of the intention of the debtor to remove himself with his effects out of the commonwealth before the debt shall become payable. But, in this case, the house of W. & D. K. & Co. was the creditor: all the partners should have joined in the affidavit to the justice of the complaint: Campbell might, indeed, have made oath, that he had no knowledge of the debtor's intention to remove, but he could not have known, and therefore could not with truth have deposed, that all his copartners were alike ignorant as himself, of that intention. 3. The attachment bond was naught. Though Campbell obtained the attachment, it was an attachment for W. & D. K. & Co. They were the plaintiffs. The costs would be adjudged to the defendant only in case they were cast; and they, not Campbell alone, would have been liable for damages at the suit of the defendant, for abuse of the process. But the bond bound Campbell and his surety to pay the costs, in case Campbell one of the partners in the house, not in case the house, should be cast, and to pay the damages which should be recovered against Campbell one of the partners, not such as should be recovered against the house, which was certainly liable to the action for damages. 4. The condemnation of the attached effects was excessive. The court ought to have directed the sheriff to sell only so much of the merchandize attached, as together with the debts due from the garnishees, would have satisfied the debt due the attaching creditors.

The counsel for the plaintiffs in error, maintained, that the proceedings, and the judgment of the county court, were perfectly right. And, in answer to the objections made to them, they said—1. That though the statute required that the complaint should be made on oath, to justify the issuing of the attachment, it did not require, that the affidavit should be returned to court, or that the fact of the

725 complaint *being made on oath, should be certified, and made part of the record; and the objection came too late. *Hawkins v. Gibson*, 1 Leigh, 476. Had it been made at the trial in the county court, it might have been obviated by proof, that the complaint on which the attachment was issued, was in fact verified by oath. 2. One partner of a mercantile house to which a debt has been contracted, might sue out an attachment in such a case as this; and to hold that he could not, would be, in effect, to deprive such creditors of the benefit of the remedy. For aught that appeared in this case, Campbell may have been the partner with whom this debt was contracted; and if so, he was the proper person to depose, and the only person that could depose, that the creditor was ignorant, at the time the debt was contracted, of the debtor's intention to remove. 3. Campbell had a right to sue out the attachment for the house: he, therefore, was the party from whom the attachment bond was to be taken. *Tate's Dig. Attachment*, p. 35, note (b), and the cases there cited, of *Wilson & Co. v. Turpin*, in the circuit court

of Henrico. *Twiss v. Massey*, 1 Atk. 67; *Pleasants v. Meng & al.*, 1 Dall. 381; *Ex parte Hodgkinson*, *Coop. Ch. Ca.* 99; *Ex parte Roberts*, *Id.* 102. The bond bound Campbell and his surety to pay the costs, in case he should be cast in this proceeding for *W. & D. K. & Co.* They, being the plaintiffs, would be bound by the judgment for the costs, if they had been cast, without any bond. As to the damages, Campbell who resorted to this remedy, would alone have been liable for damages, if the process had been sued out without just cause; it was a wrong, and he was the wrong-doer: therefore, the bond properly bound him and his surety to answer for the damages resulting from such wrong. It would be found, on examination of the provisions of the 7th section of the statute, that the bond could not have been conformed with them, more literally and precisely. 4. The judgment of the county court was entered exactly according to the directions of the 14th section of the statute, which prescribes 726 the *judgment to be entered in such cases, and prescribes also the duty of the sheriff in executing the judgment, and in the directions to the sheriff, guards the debtor against any injury that may arise from the condemnation of all his effects attached for the debt, when part will suffice to satisfy it.

CARR, J., delivered the opinion of court, That the judgment of the county court was right, and the judgment of the circuit court reversing it, wrong.

We are bound, in the construction of every statute, to look at the mischief, and the remedy; and so far as the words are not plain and peremptory, to consult the meaning of the legislature. The mischief here, was, that a debtor frequently absconded before his debt became due, and thereby defeated his creditor of the common law remedies. This statute enacts, that, in such case, the creditor may go before a justice, and make oath to the true amount of the debt and when it will become due, and that he believes the debtor is about to remove himself and his effects out of the commonwealth &c. and also that he had no knowledge when the debt was contracted, that the debtor had an intention so to remove; and thereupon, the justice, taking bond and security from the creditor, as in other cases of attachment, shall issue an attachment against the goods &c.

In this case, the attachment was issued, levied on goods and debts in the hands of garnishees, and returned to the county court. There an attorney appeared for certain persons claiming to be creditors of the absconding debtor, and objected to the proceeding. The county court gave judgment, which was reversed by the circuit court on a supersedeas obtained in the name of the debtor.

The first objection I shall notice, is, that it does not appear on the record, that any oath was made by the attaching creditor, before the justices who issued the attachment. The answer is, that the law requires the oath to be made, and that thereupon the attachment shall issue; but does not 727 require, that the affidavit shall be certified or returned by *the magis-

trate to the county court, or shall in any way appear upon the record of the proceedings. If on the return of the attachment, it had been objected before the county court, that no oath had been made, the court would, no doubt, have required evidence of the fact: but no such objection having been taken then, it comes too late before this court.

The next objection is, that the law requiring that the oath shall be made by the creditor, one partner of a mercantile firm cannot make it; because the whole firm (and not an individual member) constitute the creditor contemplated by the act: and this construction is the more relied on, as the remedy by attachment is a summary proceeding, and the law must be strictly followed. This is certainly true: but still it is the law, not the mere letter, that we must follow: we must not so construe it as to sacrifice the clear meaning to the words. The law says, "Whenever any creditor shall suspect his debtor is about removing" &c. he shall have this attachment. It certainly meant to give the remedy to all creditors alike, not to exclude any class, especially the mercantile class, which, from the extent and multiplicity of their dealings, are the very persons standing most in need of this remedy. And yet the construction contended for, would, in most cases, where there was a firm, deprive them of this remedy. We know that such firms consist of several partners, and, most frequently, that these persons reside at different places, sometimes far asunder; one managing the concerns of the trade here, another in New York, in France, in England, or elsewhere. In all such cases, the creditor would be cut off from the attachment given to all; for the different members could not unite in the oath. The object of the law, in requiring the oath of the creditor, was to furnish to the magistrate, such evidence of the facts sworn to, as would justify the issuing the process. Is not this evidence just as strong, when the facts are sworn to by a partner of the creditor firm, as if that same person were the sole creditor? A partner represents the firm: 728 he can bind them *for thousands, or give an acquittance for any debt due to them: he may then be fairly called the creditor, and he swears to the debt, to the removal, or intended removal, of the debtor, and to his ignorance of such intention when the debt was contracted. Thus, I think the words and the reason of the law, are satisfied in this respect.

It was then objected, that the bond was not a good one, because it did not bind the firm. If a partner was the creditor to make the oath, he was equally the creditor to give the bond; and if he gives a bond with good surety to pay all costs and damages, which may accrue from suing the attachment, it is all that a debtor has a right to ask; and such bond has been given here. To require that the bond should bind the whole firm, would (equally with requiring the oath to be made by all) cut off all mercantile houses, whose members are scattered abroad, from this remedy: for we know, that one partner cannot, by deed, bind the firm: and the individual partners

could not be collected, to seal and deliver, each for himself. It has been decided too, in the cases cited at the bar, that a partner may in cases like this act for the firm.

These are the principal objections, and all which it is material to notice. The judgment of the circuit court is reversed, and that of the county court affirmed.

729 *Shields, Adm'r &c. of Waller, and Others v. Anderson, Adm'r of Byrd &c.

May, 1832.

(Absent BROOKE, J.)

Bill of Sale—Retention of Possession by Vendor—Effect.—An absolute bill of sale of slaves being executed for valuable consideration, the vendor notwithstanding the deed retains uninterrupted possession, and dies in possession, of the slaves, and the vendee takes possession after his death, and then a creditor of the vendor takes administration of his estate: on a bill in equity by the adm'r of the vendor against the vendee, to subject the slaves to the debt due to the adm'r. HELD, the bill of sale was fraudulent and void as against the adm'r. being also a creditor, of the vendor: and that the rights of vendor's creditors attached on the subject immediately on vendor's death, and therefore before vendee's possession commenced.

Same—Same—Effect Where Possession Changes before Creditor's Rights Attach—Quære.—Whether, in general, if there be an absolute bill of sale of chattels, and possession do not accompany and follow the deed at the time, but the vendee afterwards gets the possession, before a creditor recovers judgment and sues out execution, or the creditor's rights otherwise attach on the subject, the bill of sale is, in such case, fraudulent and void, or good, as against such creditor?

Same—In Realty Mortgage—Effect as to Creditors.—A bill of sale of chattels, absolute in form, is executed by debtor to creditor, but the transaction is really a mortgage to secure debt: such absolute

The principal case is cited in dissenting opinion in Dabney v. Kennedy, 7 Gratt. 327.

***Fraudulent Conveyances—Retention of Possession by Vendor.**—On this question the principal case is cited in Williamson v. Goodwyn, 9 Gratt. 506, and *foot-note*. See monographic note on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348.

Chancery Pleading—Right of Personal Representative Who is a Creditor to Bring Suit in Character of Both Parties.—In Spooner v. Hilbish, 92 Va. 338, 23 S. E. Rep. 751, it is said: "The plaintiff being both a creditor and the personal representative of the debtor, he might have brought the suit in his own right as creditor and made himself in his fiduciary character a party defendant. Rodes v. Rodes, 24 Gratt. 256; Booth v. Kinsey, 8 Gratt. 560. He chose to bring the suit in his dual character of creditor and personal representative, as was done in *Shields v. Anderson*, 3 Leigh 729. In this there was no error, and certainly not under the allegations of the bill. See Spoon v. Smith, 36 S. C. 588, 15 S. E. Rep. 801, and Werts v. Spearman, 22 S. C. 217."

Personal Representative—Judgment against Heirs or Devisees Not Parties—Effect.—On this question, the principal case is cited in *foot-note* to Robertson v. Wright, 17 Gratt. 534. To the same effect, see Brewis v. Lawson, 76 Va. 40; Laidley v. Kline, 8 W. Va. 230; Anderson v. Piercy, 20 W. Va. 331; Bank v. Good, 21 W. Va. 462.

***Bill of Sale—Retention of Possession by Vendor—Effect Where Possession Changes before Rights of Creditors Attach.**—In Sydnor v. Gee, 4 Leigh 535, the last headnote is to the effect that, if an absolute sale of chattels, fair in itself, be not accompanied and followed by immediate possession, but possession is taken by the vendee before the rights of any creditor of the vendor attaches, the sale is good against the vendor's creditors. And in the same case, TUCKER, P. says: "According to the view I have taken of the case, it is unnecessary to examine the interesting question, which has been so ably argued, as to the effect of the subsequent acquirement of possession by the vendee upon intervening rights of third persons. This question has been touched by one of the judges of this court in Claytor v. Anthony, 6 Rand. 305, and by another in Batton v. Glasscock, 6 Rand. 78, and is mentioned and waived, in the recent case of *Shields v. Anderson*, 3 Leigh 735, 7."

bill of sale tends to deceive and injure others, and is fraudulent and void—per TUCKER, P.

Equity Practice—Fraud—From What Time Statute of Limitations Runs.—To a bill in equity by a creditor, for relief against a fraudulent conveyance of his debtor, the act of limitations if well pleaded in bar would (it seems) run only from the time when the fraud was discovered.

Slaves—Interest on Hires and Profits—From What Time Allowed.—Interest upon estimated hires and profits of slaves, should be allowed only from the date of the decree, and it is error to allow interest from the date of the report ascertaining the amount of such hires and profits.

Richard Byrd late of York, by bill of sale dated the 22d March 1805, expressed to be in consideration of 377 dollars paid him by Francis Bright, conveyed to Bright two slaves, named Sam and Tom. The fact was, however, that Byrd was indebted to Bright in the sum of 377 dollars, and that the bill of sale, though absolute on its face, was intended and delivered as a security for the debt; and, accordingly, Byrd continued in uninterrupted possession of the slaves. The bill of sale was never recorded.

730 *In September 1805, John W. Waller, the brother of Byrd's wife, paid Bright the debt of 377 dollars due him by Byrd, with interest, and took from Bright an assignment of Byrd's bill of sale; and, afterwards, Waller paid Byrd the difference between the sum he had paid Bright and the full value of the slaves, and thereupon Byrd executed an absolute bill of sale of the slaves to Waller. The avowed object of Waller in thus purchasing these slaves, was, that he might give them to his sister Mrs. Byrd. He suffered them, therefore, to remain in Byrd's possession; and, in fact, the possession never was changed from the time of the bill of sale executed to Bright, but remained constantly in Byrd, until his death in 1807. After his death, and before administration was taken of Byrd's estate, the possession of the slaves was transferred to Waller, whether as his own property, or as the hirer of them from his sister, was, upon the proofs in this cause, somewhat doubtful. Waller held the possession till his own death which happened early in 1814.

Robert Anderson, a creditor of Byrd, took administration of his estate; and, in 1811, he brought an action of detinue against Waller to recover the two slaves, claiming them as part of the estate of his testator; in which action, there was a verdict and judgment for Waller, who afterwards died, with the slaves in his possession.

After Waller's death, Mrs. Byrd brought an action of detinue for the slaves, against Gawin Corbin the administrator of Waller, claiming them as having been given and delivered by Waller to her, and having been hired by her to him during his lifetime; and she recovered a verdict and judgment for them.

In 1818, Anderson exhibited a bill in the superior court of chancery of Williamsburg, against Mrs. Byrd, and Corbin, the

***Fraud—At What Time the Statute of Limitations Commences to Run.**—In Rowe v. Bentley, 29 Gratt. 760, it is said: "In the cases of fraud the authorities are conflicting, as to whether at law the statute begins to run from the commission of the fraud, or from its discovery. Angell on Lim. § 188 to § 189; Callis v. Waddy, 3 Munf. 511; Rice v. White, 4 Leigh 474; 1 Rob. Prac. (Old Ed.) pp. 82, 87, 110."

administrator of Waller, shewing, that he was a creditor of Byrd, and had therefore taken administration of his estate, the whole of which sufficed to satisfy only a small part of the debt due to him; and

731 alleging, that Byrd's bill *of sale of slaves Sam and Tom to Waller, of September 1805, was covinous in fact, Waller having (as the bill charged) redeemed the slaves from Bright's mortgage, not with money of his own, but with money furnished him by Byrd for the purpose: that, if the transaction was not thus covinous in fact, yet that Byrd's bill of sale to Bright was fraudulent in law and void as against Byrd's creditors, whether considered as a mortgage, or as an absolute sale; if as a mortgage, because it was never recorded; if as an absolute sale, because possession did not accompany and follow the deed, but remained uninterruptedly with the vendor: that Byrd's bill of sale to Waller of September 1805, was also fraudulent in law and void as against Byrd's creditors, because, notwithstanding that deed, Byrd's possession continued without interruption: and that, even supposing Waller had given the slaves to his sister Mr. Byrd (which he denied) she had taken this gift with full notice of every fact which rendered Waller's title to them nugatory as against Byrd's creditors. Therefore, the bill prayed, that the slaves should be held subject to the debt Byrd owed the plaintiff, and that Waller's administrator should render an account of the profits while Waller held them, and Mrs. Byrd an account of the profits since they had been in her possession.

Mrs. Byrd, in her answer, denied all the circumstances of actual fraud imputed by the bill; but she did not deny the fact of her husband having continued in uninterrupted possession of the slaves, until his death, notwithstanding the bills of sale to Bright and to Waller. She said, that Waller had bought the slaves with a view to give them to her, and had suffered them to remain in the possession of her husband, for her use and maintenance; that after Byrd's death, Waller took possession of them, and gave them to her according to his original design, and that she hired them to him; and upon these grounds, she had brought a suit for them against his administrator after his death, and recovered them. And she pleaded the statute of limitations in bar of the claim set up in the bill.

732 *Corbin, administrator of Waller, answered, that he was ignorant as to all the facts alleged in the bill, except that the slaves, Sam and Tom, were in his intestate's possession at his death, and that Mrs. Byrd had since recovered them in an action of detinue. He did not rely on the statute of limitations as a bar to the plaintiff's claim.

The proofs in the cause ascertained, very clearly, that Byrd remained in uninterrupted possession of the slaves till his death in 1807, notwithstanding the two bills of sale to Bright and to Waller, and that Waller took possession of them after Byrd's death; but there was no evidence of any actual covin in the transactions. The other

evidence related to the profits of the property.

The court of chancery declared, that both the bills of sale were fraudulent in law and void as against Anderson, a creditor of the vendor Byrd, because he had been permitted to retain uninterrupted possession of the property; that Anderson, as a creditor of Byrd, had a right to impugn these bills of sale for the fraud; and that the statute of limitations was not a bar to the claim asserted in the bill, because the frauds complained of appeared not to have come to the plaintiff's knowledge, till within five years next before his bill was exhibited. And the court ordered accounts to be taken, of the debt due by Byrd to Anderson; of Anderson's administration of Byrd's estate; of the profits of the slaves since they had been in Mrs. Byrd's possession; of the profits while they remained in Waller's possession, and in that of his administrator Corbin; and of Corbin's administration of Waller's estate.

The accounts reported by the commissioner, ascertained, that there was a balance of debt contracted by Byrd in his lifetime to Anderson, of 1542 dollars, with interest from the 18th March 1807—that the profits of the slaves, while they were in Waller's possession amounted 909 dollars—that the profits thereof, while in possession of Corbin administrator of Waller amounted to 299 dollars—and that the profits thereof since they had been in Mrs. Byrd's

733 possession, *amounted to 541 dollars. The account of Anderson's administration of Byrd's estate, shewed that Byrd was insolvent, and the small amount of assets that came to Anderson's hands was applied to the credit of the debt due to Anderson. No account of Corbin's administration of Waller's estate was reported; for,

About the time these accounts were taken, Corbin died; and the suit was revived against Richard Corbin his administrator, and John Shields sheriff of York, to whom administration de bonis non of Waller's estate was committed.

Upon the coming in of the commissioner's report, the court of chancery, with the consent of the plaintiff and the defendant Mrs. Byrd, decreed that she should deliver the slaves, Sam and Tom, to the plaintiff, and should pay him the amount of the profits reported to have accrued while they were in her hands; and that Corbin's administrator should pay the plaintiff, the sum of 299 dollars, the amount of the profits of the slaves Sam and Tom, while he held them as administrator of Waller, with interest from the 18th September 1821, the date of the commissioner's report—to be applied by the plaintiff in due course of administration of Byrd's estate.

There being still a large balance due to the plaintiff, he obtained leave to amend his bill, and make new parties; and, by an amended bill, he shewed, that all Waller's personal estate except certain slaves which had been delivered by his administrators to his distributees, had been exhausted in the payment of specialty debts, which bound his lands in the hands of his heirs; and, therefore, he made Waller's children, who were his heirs and distributees, and Shields,

his administrator de bonis non, parties defendants; and prayed that the slaves of Waller's estate, which had been distributed, might be held subject to his claim against Waller, for the profits of the two slaves Sam and Tom, while in his possession; and that the court, if necessary, should marshal the assets of Waller's estate, and substitute and subject Waller's lands, to the extent to which his personal *assets
734 had been applied to the payment of specialty debts, to the satisfaction of this claim of the plaintiff.

The administrator de bonis non, and the heirs and distributees of Waller, having put in their answers, wherein they contested the justice of the former report of the commissioners as to the amount of profits received by Waller; the court of chancery opened that account, and referred it to a commissioner to be stated, as between the present parties to the controversy; and ordered an account to be taken of Corbin's administration of Waller's estate.

The account of Corbin's administration of Waller's estate shewed a very trivial balance in his hands. New evidence was exhibited as to the profits of the two slaves Sam and Tom, while in Waller's possession; and an account thereof, founded on this new evidence, reduced the amounts of profits received by Waller, from 909 dollars, appearing by the former report, to 444 dollars; which sum (though these were estimated profits, not actual hires received) the commissioner charged to Waller's estate, with interest from the 18th September 1821, the date of the first report.

Upon this, the court of chancery decreed, that Shields the administrator de bonis non of Waller should pay the plaintiff the sum of 444 dollars with interest from the 18th September 1821, out of the assets of his intestate, if so much thereof be had, and in default of any assets in his hands, directed that the slaves which had been distributed, and which were in the hands of Waller's distributees, should be sold to pay the debt and interest.

The "defendants" prayed an appeal to this court; the court of chancery allowed the appeal, without requiring any appeal bond, and no appeal bond was given. Anderson also, thinking the estimated amount of profits charged by the last report, and decreed, against Waller's estate, too low, appealed from the decree.

The cause was argued here, by Scott for the parties who were defendants below, and by Stanard for Anderson.

735 *CARR, J. When the amended bill was filed in this case, and Waller's heirs were thereby made parties, in order to charge the lands in their hands, they were not bound by any previous order in the cause, but were at full liberty to contest every thing, which might bear upon Waller's liability for the hire of the slaves in question, and the amount of that liability. They were at liberty, then, to shew, if they could, that the bill of sale of Bright, and the purchase from him by Waller, were fair transactions; for, if fair, Waller was not at all liable for heirs. This liberty, however, has not availed them much; for I agree with the chancellor, that we must

take both the bills of sale from Byrd to Waller, and from Byrd to Bright, to have been fraudulent and void as to creditors, though as between the parties and those claiming under them, they were valid; that from Byrd to Bright being taken as a mortgage. I agree too with the chancellor, that the bill of Anderson is not touched by the statute of limitations, both for the reason he assigned, and for the further reason, that the statute was not pleaded on behalf of Waller the purchaser.

In the argument of the case, the counsel discussed this question: A. purchases slaves of B. the possession not accompanying and following the deed; but A. gets possession under his purchase, before the right of a creditor of B. to come upon the slaves, vests; will such purchase and possession make good the title of A. against the creditor? The question is a grave one; but it does not arise in this case.

Upon the question, whether the chancellor estimated the hires correctly? I cannot find in the record sufficient evidence to satisfy me, that the decree is erroneous. The estimates of hires, when taken, as in this case, after the parties to the transaction are dead, and you can make no deductions for physicians' bills, and the various other drawbacks which may have existed, are nine times out of ten, I think, fixed by commissioners too high. We must remember too, that the last account was taken expressly to give the heirs (who were then

736 first sought to be charged) an opportunity *of contesting as well the true amount of the hires, as their liability to them: as to them the question was to be taken up ab integro. It was decided in *Mason's devisees v. Peter's adm'r*, 1 Munf. 437, that a judgment against executors, is no proof against devisees of land, because there is no privity between them: I presume, there is as little between the executor and the heir. Again, we know that depositions cannot be read against a party who has had no notice of the taking them; and still less against those who, at the time they were taken, were not parties to the suit. Now we see, that all the evidence on which the first report was founded, was taken before the heirs were parties; and this appearing upon the face of the record, need not be presented in the form of an exception to the account. Upon this new evidence, adduced after Waller's hires were made parties, the chancellor was clearly right in his estimate of the hires. But I should not feel authorized to say he was wrong upon the whole evidence.

I do not think we can touch that part of the interlocutory decree, which directs that Mrs. Byrd shall deliver the slaves Sam and Tom to the plaintiff, instead of directing a sale of them; 1. because that was a consent decree; and 2. because it is not before us as to that point, there being no appeal by Mrs. Byrd. Nor does it seem to me, that such sale is necessary, in order to a final decree as to the hires: for the amount of the plaintiff's claim exceeds the sum total of the profits of the slaves and of the value (upon any possible estimate) of the slaves themselves.

The only error I see in the decree, is the

allowance of interest on the estimated hires of the slaves from the date of the first report: interest should be allowed only from the time of the decree.

CABELL, J., concurred.

TUCKER, P. In whatever light we consider Byrd's bill of sale to Bright, the result, in this case, must be, that the
737 *transaction was void as to bona fide creditors of Byrd. If it was a mortgage, it was void, not only because the taking a bill of sale in form, where the real transaction is a mortgage, tends to deceive and injure others, and is therefore fraudulent and void, (6 Johns. C. R. 432, 2 Johns. C. R. 191,) but also for the conclusive reason, that it was not recorded. If it was really an absolute sale, then possession not having accompanied the deed, it was void for that reason. That Byrd remained during life in the undisturbed and uninterrupted possession of the slaves notwithstanding the alleged successive sales to Bright and to Waller, the evidence very clearly establishes.

But it was said that Waller took the possession before the claim of the creditor intervened, and this will protect him against the application of the doctrine of *Edwards v. Harben*, 2 T. R. 587. And the cases of *Bartlett v. Williams*, 1 Pickering, 288, and *Robinson &c. v. M'Donnell &c.*, 2 Barn. & Ald. 134, were cited. Whether the presumption of fraud would have been removed even if possession had been obtained at a period during Byrd's life, subsequent to the sale, but anterior to an execution against him, seems by no means settled with us. The affirmative is very strongly contended by judge Green in *Clayton v. Anthony*, 6 Rand. 285, 305, and, in the same case, judge Carr waives the expression of any opinion upon the subject. The point cannot be decided here. The possession was not taken till after Byrd's death. Now, although the delivery of possession in his lifetime, before execution, should prevent the application of the rule, the same effect would not necessarily follow here. According to the class of cases of which *Temple v. Chamberlayne*, 2 Rand. 384, is one, the creditor has no rights until he has issued his execution. To construe, therefore, a delivery of possession subsequent to the sale, as operating to give validity to the transaction,—as amounting even to a new transaction, to the surrender of the former right, and to a resale with immediate delivery, would not interfere with vested
738 rights. But not so here. *According to *Blow v. Maynard*, 2 Leigh, 29, there was a vested right in the creditor at the death of Byrd, to charge these slaves in equity. This vested right cannot be impaired by any act of the party, who, in the eye of the law, is a fraudulent donee. In the case of *Robinson &c. v. M'Donnell &c.*, *Bailey, J.*, expressly confines his opinion to cases in which there is no intervening right in a third person. See his opinion in *Mair v. Glennie*, 4 Mau. & Selw. 248. The plaintiff, therefore, as creditor of Byrd, had a right to institute this suit against the holders of the slaves as executors de son tort, and to render them and their profits liable to the discharge of his debt. In do-

ing this, he cannot be turned over by one to another, upon the allegation, that, though one received the profits, he has paid them over to the other. All are equally without right, and it can be no exemption to one who has received my money, to shew, that he paid it over to another, who claimed it, but who had no right to it. Waller's estate was, therefore, liable for the hires received by him.

I incline to think, that the estimate of the hires charged to Waller's estate, which was approved and allowed by the court of chancery, was too low: but as the other judges are of a different opinion, I readily yield my objection to the decree on this score.

There is a formal error also in the decretal order directing the slaves Sam and Tom to be delivered up to the complainant, instead of providing for the sale of them. But for the reasons given by judge Carr, I think the error immaterial as it respects the appellants.

The statute of limitations was relied on in the argument; but it was not pleaded by Shields as a defence for Waller's estate, even if it had not been explicitly answered by the remarks of the chancellor in the first decree. Shields is, in effect, the only party appellant here: though the appeal was allowed to all, yet as no appeal bond was given, or indeed required, it can only be considered as the appeal of that party (namely, Shields, the administrator) of whom an appeal bond could not be required.

739 *It was contended, that Waller should be considered as a creditor for the amount of his advances, and be paid pro rata. I do not think so. Though I am not of opinion, that the transaction was actually covinous, yet the law avoids the sale as fraudulent, and treats the holder as executor de son tort. Now an executor de son tort can never retain. Moreover, the contracts of sale as between Byrd and Bright, or Byrd and Waller, are valid as between them. They are not avoided. Of course Byrd's estate is not debtor for the advances, because those advances were made as the price of property, which Waller has received, and not as a loan, or as money paid for his use. If Byrd's estate could be liable, it would only be because of the loss of those slaves. But they were not lost for any defect of title in him; and, therefore, his estate is not responsible. Whether the estate could be made liable on the ground of money paid for its use, provided there were funds to repay it, it is not necessary to decide. The question here relates only to the application of these funds. And considering it in this light, it is obvious, that if the payment of the debt to Anderson, out of the proceeds of this property, which Waller claims, is to be the ground of reclamation, then just in proportion as Waller becomes debtor of the estate, is the fund reduced out of which he expects payment. The proposition of course is inconsistent and not sustainable.

The decree is however deemed to be erroneous in this, that the chancellor has given interest upon the estimated conjectural hires of the slaves from the date of the first

report, instead of hires from the date of the decree. According to the case of Baird v. Bland, 5 Munf. 492, interest is not to be allowed upon conjectural and unliquidated hires; for until they are ascertained, the party is in no default for not paying. Now, this reason applies in full force to the allowance of interest from the date of the report; since until it be confirmed by the decree of the court, the hires are still uncertain, conjectural and unliquidated. This

740 emphatically appears in this case, in which the court has reduced *the estimate to less than one half of that made by the first report. The sum thus ascertained to be due, was, therefore never known until the decree; and yet the chancellor has given back interest for many years on this unknown sum. This cannot be right upon the principles of Baird v. Bland. The decree must be reversed for this error, with costs.

REPORTS OF CASES

ARGUED AND DETERMINED IN

THE GENERAL COURT OF VIRGINIA, FROM JULY TERM 1831 TO DECEMBER TERM 1832.

743 *JULY TERM 1831.

JUDGES PRESENT.

<i>Brockenbrough,</i>	<i>May,</i>
<i>Smith,</i>	<i>Lomax;</i>
<i>Saunders,</i>	<i>R. B. Taylor,</i>
<i>Parker,</i>	<i>Scott,</i>
<i>Summers,</i>	<i>Leigh,</i>
<i>W. Browne,</i>	<i>Thompson,</i>
<i>A. Taylor,</i>	<i>Estill,</i>
<i>Upshur,</i>	<i>J. E. Brown,</i>
<i>Field,</i>	<i>Duncan,</i>
<i>Fry.*</i>	

Word v. The Commonwealth.

November, 1827.

Gaming—**Presentment**—**Failure of Process to State Place**—**Effect**.—Upon a presentment for unlawful gaming at cards at a particular place within six months next preceding, process is issued summoning the defendant to answer a presentment for unlawful gaming at cards, generally, without specifying place or time: **Held**, such process is good and sufficient.

Criminal Law—**Presentment against Infant—Right to Defend in Person**.—Upon a presentment against an infant for a misdemeanor, the infant has a right to appear and defend himself in person or by attorney, and it is error to assign him a guardian and to try the case on a plea pleaded for him by the guardian.

Same—**Right of Accused to Be Heard—Argument of Counsel—Supervision of Court**.—Upon the trial of

*DANIEL, J., was prevented by sickness from attending during the term.

Criminal Law—**Gaming**.—See monographic note on "Gaming" appended to Neal v. Com., 22 Gratt. 917.

Same—**Presentment**.—See monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

Same—**Same**—**Against Infants—Right to Defend in Person**.—See monographic note on "Infants" appended to Caperton v. Gregory, 11 Gratt. 505.

Same—**Right of Accused to Be Heard—Supervision of Court**.—It is the right of every person charged with crime to be fully heard by counsel on his whole case, but the court undoubtedly, has a superintending control over the course of the argument to prevent the abuse of that or any other right. It is a power however, to be exercised with discretion, and with reference to the particular circumstances of each case, subject to review by an appellate court. Jones v. Com., 87 Va. 68, 12 S. E. Rep. 228, citing Word v. Com., 3 Leigh 748. To the same effect, the principal case is cited in State v. Shores, 81 W. Va. 500, 7 S. E. Rep. 418; note in 1 Va. Law Reg. 930. See also Barnes v. Com., 92 Va. 794, 22 S. E. Rep. 784; monographic note on "Arguments of Counsel" appended to Coleman v. Com., 26 Gratt. 865.

a question of fact in a criminal case, the accused has a right to be heard by counsel before the jury, and the court has no right to prevent him from being so heard, however simple, clear, unimpeached and conclusive, the evidence in its opinion may be; but the court has a superintending control over the course of the argument to prevent the abuse of that or any other right of counsel.

744 *Error to a judgment of the circuit court of Buckingham.

At April term 1827, the grand jury presented Word and several others, "for unlawful gaming at cards at H. Lipscombe's tavern in Maysville in the county of Buckingham within six months [then] last past." The court immediately issued process, returnable instant, summoning the persons presented, "to answer a presentment of the grand jury made against them at that term, for unlawful gaming at cards"—without specifying, as the presentment does, when and where the offence charged was committed. The summons being executed on all the defendants, the presentment was tried as to Word, the plaintiff in error, at the same term it was made. He was an infant; and the court, on the motion of the attorney for the commonwealth, assigned him a guardian to defend him in the prosecution. The guardian pleaded for him, not guilty. The jury found him guilty; and the court gave judgment for the fine of twenty dollars imposed by the statute against gaming, and the costs of prosecution.

It appeared by a bill of exceptions filed for the defendant, that, at the trial, "after the evidence was gone through, the defendant, by attorney retained by his mother (who was a widow, he himself being an infant), desired to argue the case before the jury: but the court stopped the attorney, and would not allow any argument in favor of the defendant before the jury; because there was but a single witness in the case, whom it was not attempted to impeach, and whose evidence was clear and distinct as to the fact charged, and his testimony could not be varied by argument—if the witness was believed by the jury, the law was clear, and if the jury did not believe the witness,

the law was equally clear. And the defendant excepted to the refusal of the court to hear the argument of counsel."

The defendant applied to this court, at June term 1827, for a writ of error to the judgment, which was allowed; and at November term following, no counsel
745 appearing for *the plaintiff in error, the cause was submitted to the court, without argument.

And BOULDIN, J., delivered the opinion of the court, that the judgment should be affirmed.* He said—The only question in the case, is, whether the circuit court erred in refusing to allow the case to be argued? If there be error in that refusal, it is because the party had a right to have a speech made on his behalf, whether there was a point of law, or contested fact, in the case, or not. We deem it quite clear, that in every case reasonably susceptible of argument, the expediency of a discussion ought to be left to the counsel, however hopeless the judge may think the task; but it is equally clear, that the time of the court ought not to be taken up in hearing speeches in cases like the present. It is rare indeed, that such cases occur; but when they do, it is both the right and the duty of the court, in exercising its superintending power over the proceedings in court, to control them, as was done in this case. A great proportion of the business of the circuit courts is done without argument, and is not susceptible of it; and while it is the duty of the judge, to pay due regard to the situation of counsel who are urged by their clients to make fruitless exertions, he would betray his trust, if he carried it to a length that would clog the administration of justice.

But after this opinion was delivered, and the opinion of the court in the case of *The Commonwealth v. Garth* (next following this) was also announced, it was suggested from the bar, that both cases presented very interesting and important questions, worthy of much graver consideration than (perhaps) the court had bestowed upon them, and that it would be well for the court to suspend its judgment, and take full time to advise on the subject. The court
746 said it would do *so, and immediately ordered both the cases to be continued; and as the plaintiff in error had retained no counsel, it requested the members of the bar, as amici curiæ, to assist the court with their views of the cases.

In consequence of this request, Leigh, as amicus curiæ, laid before the court a written argument of this case, to the following effect.†

This is a summary proceeding under the 21st section of the statute against gaming, 1 Rev. Code, ch. 147, p. 568. And there are two objections to the regularity of the proceedings, not at all affecting the question presented by the bill of exceptions, to which it is proper to call the attention of the

court; since if they shall appear to the court, as they strike me, to be material and fatal, the court will be spared the trouble of further inquiry.

1st. The presentment is founded on the 5th section of the statute against gaming, (*Ibid.* p. 563,) and charges an offence strictly within the prohibition of the statute, specifying the place where, and the time within which, the offence was committed—"unlawful gaming at cards, at H. L.'s tavern, in Maysville, Buckingham:" but the summons issued by the court upon this presentment, calls the accused to appear and answer a presentment of the grand jury of the same term, "for unlawful gaming at cards," generally, without any specification whatever of place or time. Now, the 20th section of the statute, (*Ibid.* pp. 567, 8,) though it be a very comprehensive statute of jeofails in regard to all prosecutions of the kind, only cures, and was only intended to cure and obviate, all objections to want of precision and certainty, or to any other defect, in the presentment, indictment or information: it does not cure, nor was it designed to cure, any defect or irregularity, any want of certainty or precision, in the process issued upon the presentment. The *21st
747 section (*Ibid.* p. 568,) directs, that where any presentment authorized by the act, shall be made by a grand jury, the court wherein the same shall be made, shall immediately order the proper process, to bring the offender before it, with all convenient expedition"—and then proceeds to provide a course of proceeding in the last degree summary. The court shall "order the proper process:" is that proper process, which gives the accused no notice of the place where, nor of the time within which, the offence is charged to have been committed, and contains no circumstance of specification whatever? The only purpose of the process is to give the accused notice of the charge; such notice as may be of some use to him; such as may give him an opportunity of defending himself; such as may enable him to make instantaneous preparation for defence. He cannot prepare for defence, he cannot summon witnesses to exculpate him from the charge, unless he be apprised in some sort (I admit no great nicety is required) of the particulars of time and place. I apprehend, that under the presentment in this case, if the prosecutor had not proved the gaming charged, at the place and within the time, specified in the presentment, though the accused had gamed at another place or at a former time, he must have been acquitted. The process issued gave the accused no opportunity to summon witnesses to prove an alibi; no opportunity even of ascertaining in his own mind, whether he was present or absent, at the place and within the time, where and when he was charged with offending against the law. The very summary nature of the proceeding directed by the statute, and the dispensing with regular pleadings, afford, to my mind, the strongest reason for requiring, that the process should indicate to the accused the offence with which he is charged, with reasonable certainty and precision—with all the cer-

*In this opinion, JUDGES DANIEL, ALLEN, DADE, JOHNSTON, SUMMERS and BOULDIN, concurred; JUDGES BROCKENBROUGH, SEMPLE, SAUNDERS and FIELD, dissented.—Note in Original Edition.

†The argument of this case (as well as that of the same counsel in the next following case of *The Commonwealth v. Garth*) is reported at large (with some trivial alterations) by the particular desire and direction of the court.—Note in Original Edition.

tainty and precision, at the least, with which the presentment cloaths the charge—in order that he may, on the instant and without the smallest waste of time, prepare for his defence. I humbly submit,
748 that, in the present case, *the process ought to have summoned the accused to answer the presentment made against him by the grand jury, "for unlawful gaming at cards at H. L.'s tavern, in Maysville, Buckingham, within the last six months"—following the presentment in the specification of the offence; and that, in all cases of the kind, the process should, in like manner, be made to conform to and follow the presentment.

2nd. In this case, the accused being an infant, the court, at the instance of the attorney for the commonwealth, assigned him a guardian to defend him, and that guardian pleaded for him. Now, I know that in all civil suits against an infant, he can only defend by guardian, and that it is a power incident to every court of justice to appoint a guardian ad litem; 2 Wms. Saund. 117, f. note 1; 3 Bac. abr. Infancy and Age. K. p. 617. But as to criminal proceedings of whatever nature, I know of no difference between prosecutions of persons of full age and prosecutions against infants, except those substantial distinctions which turn on the question whether the infant be *doli capax*, and a distinction in prosecutions against infants for misdemeanours, not admissible in such prosecutions against adults, between misdemeanours of omission and those of commission; 4 Black. Comm. 22; 1 Hawk. P. C. book I, c. 1, § 3; 3 Chitt. Crim. Law, 724. I apprehend, there is no difference in the method of proceeding, in any criminal prosecution whatsoever, against infants and against adults. In cases of felony, the infant as well as the adult, we all know, must appear and plead in person. In cases of misdemeanour, the infant, as well as the adult, has a right to appear and defend by attorney; 1 Chitt. Crim. Law, 411. And an infant, in a criminal prosecution of any kind, may be outlawed for non-appearance. (*Id.* 348,) which could not be, if the court might appoint him a guardian ad litem. The language in 1 Chitt. Crim. Law, 411, is, "Where infants are prosecuted for misdemeanours, it is the constant practice for them to appear by attorney in the crown office, though in civil cases they must
749 defend by guardian:" the author *cites Tidd, 92, and 2 Ld. Raym. 1284; *Regina v. Tanner* and others. In that case (a prosecution for a riot) the objection was, that the infant appeared by attorney, whereas it was insisted he ought to have appeared by guardian; and the court overruled the objection, because the practice and course was for infants, in such cases, to appear by attorney. The infant has a right to direct his own defence; he is not bound to entrust it to a guardian who is above his control, instead of an attorney who is subject to his control; he is personally liable to the amercement or other punishment, and is therefore entitled to defend himself in his proper person, or by attorney, selected by his own choice.

There are also some considerations,

that belong to this case, as it is presented by the bill of exceptions, and yet do not touch the general question, which (judging from what passed at the former term of this court) I suppose the circuit court intended to decide, and the exception to its opinion was perhaps intended to reserve: that general question will be stated in the sequel: what I mean to shew at present, is, that the general question, as I understood it at the former term, and as this court certainly understood it too, is not presented by the bill of exceptions, or if it may be collected from the record, it is not so presented as to justify, much more to require, a decision of it by this court.

1st. This court can only ascertain the opinion of the circuit court from the record; no information, no explanation, from any other quarter, can be heard or regarded. And upon a critical examination of the bill of exceptions, it will be found, that the circuit court not only refused to allow the counsel of the accused to argue the cause upon the evidence before the jury, but refused to hear any argument of the counsel addressed to the court itself: for, "the defendant excepted to the refusal of the court to hear the argument of counsel"—upon what topic we are not informed. Now, even admitting that the court might with propriety have interdicted all argument

750 upon the evidence before the jury, under an impression, founded upon the peculiar circumstances of the case, that there was no room for fair argument; with what propriety could the judge refuse to hear argument addressed to himself? Argument, either to shew, that his impression of the evidence was erroneous, and that there was room for fair argument before the jury; or that the counsel's desire to argue the case before the jury, was dictated by a sense of duty, and offended against no rule of decorum or principle of justice; or that, by the law, he had the absolute right to argue the case upon the evidence before the jury. If it be said, that these remarks are founded upon a misconception of the bill of exceptions; I shall be ready enough to admit, that they may be inapplicable to the case as it actually occurred in the circuit court; but they are, in truth, founded upon the loose and imperfect state of the case contained in the bill of exceptions; and it is this imperfection only, or I should rather say, uncertainty, which I here design to point out.

2nd. Supposing that there may be a case of a criminal prosecution, in which the evidence adduced shall be all on the side of the prosecution, and the evidence shall be so clear, simple, direct, positive, unimpeachable and incontrovertible, that the court may be justified in preventing the counsel for the accused from arguing the cause upon the evidence before the jury; still, I apprehend, that in order to justify such an interdiction, to justify this court in approving a departure from the usual course of proceedings so rare, and (I may add without offence) so extraordinary, it would not be sufficient for the court to say, in general terms, that the evidence was such, in its opinion, as to leave no room for fair argument before the jury.

The evidence ought to be stated upon the record, so as to enable the appellate court to revise the course of the trial, and to judge of the propriety of denying the accused a hearing by counsel before his country; and the judge ought to take care that it is so stated, since it is his personal conduct which is in question—I say his personal conduct, only because it is
751 impossible *not to perceive, that every case of the kind must be a conflict between the power of the judge and the rights, or claim of right of the counsel and the accused: I must not be understood, in the present instance, to impute any personal blame. If the judge of a circuit court may properly deny to a party accused a hearing upon the evidence before the jury, without setting forth upon the record the circumstances which justify such denial; if his own opinion, that there was no room for fair argument, expressed in general terms, shall suffice, in this appellate tribunal, to sustain a conviction where the accused has been denied a hearing before the jury; then is the judge of the circuit court clothed with power to determine, in the last resort without appeal or supervision, in what cases a party accused is entitled to be heard by counsel in his defence, and in what cases he is not.

3rd. The judge of the circuit court who tried this cause, agreed with me, I presume, in the opinion, that he was bound to state, upon the record, the reasons which induced him to deny to this defendant, a hearing by counsel upon the evidence before the jury; for he certainly intended to assign his reasons. I pray the particular attention of this court to the reasons assigned. The bill of exceptions states, that the court would not allow any argument for the defendant before the jury, "because there was but a single witness in the case—whom it was not attempted to impeach—whose evidence was clear and distinct as to the fact charged—and his testimony could not be varied by argument." There was but a single witness in the case: this was doubtless stated, to evince that there was no contrariety, no complexity, no confusion in the evidence; but when before, was it ever supposed, that the testimony of a single witness is the strongest and most impregnable ground on which a case, civil or criminal, can be rested? It was not attempted to impeach the witness: could there be no argument before the jury against the testimony of the witness, which would
752 not impeach him, that is (as I understand *the phrase) impugn his credit?

May not a witness of undoubted veracity be mistaken? Are not numerous instances remembered, by all counsel and all judges, of the most honest witnesses being clearly proved by counsel to be mistaken, and that from a nice examination of their own testimony? I remember at trial for murder, in which it was a very material question, whether the mortal wound was inflicted with a dirk or with a knife: a witness, who appeared to me to be above all exception, and whose veracity was not questioned, testified, in the most positive manner, that the wound was inflicted with a dirk; he said, he knew the

weapon well, and he saw it: yet the counsel for the prisoner did, by force of argument, upon the very testimony of this witness, convince the court and jury, and (I believe) every bystander, and the witness (I know, for he told me so), that the fatal weapon was a knife. The evidence was clear and distinct as to the fact charged: how often has it occurred, within the experience of each and every judge of this court, that the judge has thought the evidence clear and distinct, and yet the jury has found a verdict directly contrary to the opinion of the court upon the evidence—in civil cases, in which the court has granted a new trial, because the verdict was contrary to the evidence—and in criminal cases, where if the verdict be a verdict of acquittal, the court may not grant a new trial, though the verdict be in its opinion most clearly against evidence? The testimony of the witness could not be varied by argument—true, certainly—but the inference deducible from the testimony—the inference which it was the especial province of the jury to draw from the testimony—might have been varied by argument.

Surely, this court cannot give its solemn sanction to any one of these reasons, singly considered. Combine them—take the language in which they are couched, in the most liberal sense—presume ever thing that a court of law may possibly presume, in favor of the judgment. If there was but a single witness in the case and there-

753 fore no complexity *in the evidence, if that witness was a man of indisputable veracity, and if his evidence was clear and distinct to the fact charged; was there nothing which the counsel for the accused could possibly have had to say in his behalf? does this record shew, that there was nothing which he could have said, pertinent to the case, and beneficial to his client? or that what he intended to say was impertinent? The accused was an infant: suppose it was the intention of the counsel to exhibit him in person to the jury, and submit it to them to determine, whether, considering his tender years, he was *doli capax*: would not that have been proper? We are not informed by this record, what was the topic of argument on which the counsel intended to insist, or whether he indicated or was permitted to indicate it at all. Now, if it were admitted, that the court might, with strict propriety, have discountenanced a particular topic of argument, as not pertinent to the case, it would by no means follow, that the court was right to inhibit all argument, before a single word was uttered, from which a judgment could be formed of its pertinency or its weight.

I have said thus much, for the purpose of shewing grounds, upon which the court may decide this cause, without touching the general question which this court took up at the former term. I own I have been most anxious to find such grounds; and, if that feeling has not misled my judgment, I have found them. I am very solicitous, that this court should avoid the general question. It is, in my humble opinion, right and wise and perfectly judicial, that the court should avoid it, if it be avoidable.

As an *amicus curiæ*, as a member of the bar, as a citizen, I should be grieved to see a question of so great interest, of so much delicacy, of such real magnitude, decided in so petty a case as this is; a case so trivial, that the plaintiff in error has not thought it worth while to retain counsel to argue it for him in this court.

I shall, however, proceed to argue the general question; which I take to be this—If, in the trial of any cause, all the evidence offered to the jury be upon one
754 side, and that evidence, *in the opinion of the court, be clear, distinct and direct, and the credit of the witnesses be not impugned; has the court a right to deny to the counsel of the party against whom such evidence is adduced, the privilege insisted on by the counsel, of arguing the question of fact in issue, upon the evidence, before the jury?

As I understand the question, it does not concern the rights of counsel in civil cases, or in prosecutions for petty misdemeanours, only: it concerns the rights of counsel and of their clients, in the trial of the higher misdemeanours, such as perjury, conspiracy, assaults with intent to murder, rob or ravish; nay, of indictments of felony, and even of capital cases. And this court, at the former term, (unwarily I have no doubt,) resolved the question in the affirmative, without making, in the opinion then delivered, any clear discrimination. It was this, indeed, that first attracted my attention to the case. I feel well persuaded, that the court, upon graver consideration, will not hesitate, if it adhere to its first resolution at all, to confine it to civil cases and to prosecutions for the lesser misdemeanours.

But the necessity of making this discrimination, does, in effect, according to my plain sense of things, condemn the whole proposition. For, I apprehend, it will be impossible to find any reason of policy, much more any reason of law, why the privilege of the citizen to defend his property, upon the question of fact before the jury, against the claim of his neighbour, or an amercement at the suit of the commonwealth, should be more restricted, (in the regard in which we are now considering it,) than his privilege to defend his liberty or his life in prosecutions for crime. To allow the distinction, will be to reverse the known principle of the common law, which allowed counsel to the parties in a civil action and to those who were accused of misdemeanours, and denied counsel to persons accused of felonies—counsel, I mean, to argue the questions of fact upon the evidence before the jury. Property, if it be not as valuable, is just as sacred a right, as liberty or life. All civilized nations
755 *so regard it; and the bill of rights of Virginia, particularly, ranks in the same class, and secures on the same footing, ‘the enjoyment of life and liberty, with the means of acquiring and possessing property, and obtaining happiness and safety.’ Surely, this court will not give its sanction to a distinction between the means of acquiring and possessing, and the means of defending, property: and surely,

too, the plus or minus cannot vary the principle.

Let us, however, consider the question upon the hypothesis, that the proposition is to be confined to trials of civil cases and of the lighter misdemeanours.

The power claimed for the court, is, that it may prevent the argument of the question of fact before the jury, when, in the opinion of the judge, the evidence touching the fact, is clear, distinct and conclusive. If the counsel against whose client the evidence is adduced, be of the same opinion, he will not trouble himself, the court, or the jury, with argument: it is only in cases in which the counsel differs in opinion with the court, that this conflict between the powers of the court and the rights or rather the duties of counsel, is likely to arise. We are speaking of a general principle of practice, to be applied to all counsel; and it will never do to attempt a discrimination between counsel who (in the opinion of the judge) are decorous and judicious, and counsel who are opinative, impertinent or weak. Is it not perceived, that the question always must be, whether the evidence be clear, distinct and conclusive? and that, if the judge, having made up his mind upon that point (which it is not his province to decide), may prevent all argument before the jury upon the evidence, he denies the only means of shewing either to them or to himself, that the evidence is not clear, distinct and conclusive? The claim to exercise such an authority, must always proceed upon a *petitio principii*. I repeat, that juries often differ with the court, and sometimes repeated juries differ with the court, upon questions of fact, depending upon evidence which the court thinks plain and irresistible;
756 and every judge must remember *many instances, in which doubts and difficulties, and insurmountable objections to the sufficiency of evidence, have been developed by the argument of counsel, that did not occur to him at the first impression.

How is it possible for a judge to determine, whether any argument before the jury can be proper and pertinent, or must be idle and useless, without hearing the argument?

It must be admitted, on all hands, that a party to a civil action or to a prosecution for misdemeanour, has a strict right to a trial by a jury of his country, of every question of fact, upon which his rights, liabilities, or his guilt, may depend: neither, I presume, will it be denied, that, generally speaking, he has a right to demand a hearing by counsel before the jury upon the evidence. The true question is, whether this be an absolute right, which he may claim *ex debito justitiæ*, like his right to common process, or his right to trial by jury? Or, does the exercise of the privilege depend on the mere permission of the court? Or, is the claim of the privilege to be addressed to the sound discretion of the court? If it depend on the mere permission or allowance of the court; then, it ceases to be a right or privilege in any sense; and it may be lawfully withheld, in cases of most complicated, contradictory, and doubtful evidence, as well as in the simplest and plainest. If it be addressed to

the sound discretion of the court; then, as in all other cases addressed to the discretion of the court, either party may except for an injudicious exercise of such discretion; and I do not see, why one party may not object to the allowance of an argument before the jury, where he thinks there ought to be none, just as reasonably as the other party may object to the inhibition of argument, where he thinks it ought to be allowed. It must be so, unless the sound discretion in such cases, is a sound discretion *sui generis*: Exceptions may be taken on either side—the circumstances spread upon the record—appeals or writs of error prosecuted. How is an appellate court to review the judgment of a circuit court upon any such

757 point? The *words of the witness may, indeed, be spread upon the record—but their characters for intelligence and integrity, for retentiveness or fallacy of memory, their temper towards the parties, their manner, and all the circumstances that affect the weight of *viva voce* testimony, cannot be spread upon the record. Add to this consideration, the known principle of presumption, that the judgment of an inferior court is right unless the contrary appear; and, then, I think, it will be plain enough, that this discretionary power claimed for the court, to interdict argument upon the evidence before the jury, will amount, very nearly, to an absolute arbitrary power, subject to no control, review or correction.

I admit, without hesitation, the general superintending control of a judge presiding at a *nisi prius* trial; but that authority cannot extend to the denial of any right or privilege given by law, or to the alteration of any settled rule or principle of practice.

As to the convenience of a power in the judge to put a stop to idle and useless argument before the jury; I venture to affirm, that, if the power be conceded to the judges, and be exercised by them in every case in which they shall conscientiously think its exercise proper, more time of the circuit courts will be wasted in altercations between the bench and bar, worse than idle, and more of the time of the appellate courts, in reviewing the exercise of the power, than can possibly be consumed by the utmost prolixity, pertinacity and obstinacy of counsel; and more vexation to the courts, to the bar and to the suitors, will flow from it, than from any principle of practice that the contempt of old and approved usages (ever fruitful of mischief) could devise.

The dignity of a court of justice is part of its authority, which it is bound, by its duty to the public, carefully to preserve. Altercations between the bench and the bar, do indeed tend to degrade the bar, and to expose it to contempt; but they also tend, and that hardly in a less degree, to detract from the dignity of the court. Respect and delicacy towards the bar, will not fail to conciliate and to command

758 *the respect and veneration, which are certainly due from it towards the bench. In the feelings of the counsel, the feelings of their clients, in other words, of all the suitors in the court, will be sure to participate and unite. I implore the court

to close the door to all such altercations between judges and counsel. These sentiments are dictated by a yet more anxious concern for the authority and dignity of the judges, than for the rights of counsel.

It is hardly necessary to add, that I am very far from believing, that, in the case now before the court, any actual oppression was intended; and I trust that nothing I have said will have the least colour of disrespect or want of confidence.

The attorney general told the court, that he had thought it his duty to consider, carefully and impartially, the question presented by the bill of exceptions; and he thought it his duty also to say, that he was clearly of the opinion, that the judgment of the circuit court on that point, was erroneous.

The case stood over until the present term, when almost all the judges of the court being present, the court took it up for consideration.

SCOTT, J., delivered the judgment.

The first error complained of, is, that the summons called the accused to answer a presentment of the grand jury "for unlawful gaming at cards," generally, without specification of time or place: and in support of this objection, it was insisted, that the 21st section of the statute against gaming cures defects in presentments, indictments or informations, for the offence, but does not extend to any irregularity or want of precision in the process. The court is of opinion, that there is nothing in this objection. The object of the summons is to give the party notice, that he is prosecuted for an offence of a particular character, and to apprise him of the time when and the place where he must appear and make his defence. The detail of the particular 759 facts charged *with the accompanying circumstances of time and place is supplied by the presentment.*

The next error alleged is, that, the defendant being an infant, the court, on the motion of the attorney for the commonwealth, assigned him a guardian to defend him, and that guardian pleaded for him. This objection the court thinks fatal. Criminal proceedings against infants, ought, in all cases, to be conducted in the same manner as against persons of full age. The defendant, in this case, had a right to appear in person, or by attorney of his own selection; and the circuit court erred in assigning him a guardian, and trying his case on a plea put in by the guardian.†

The bill of exceptions presents a question of much interest; and although the case might be disposed of without a decision of it, yet as there is a very full court, it is thought best, by a majority of the judges, now to decide it. The question is, Whether, in a criminal case, on the trial of a question of fact before the jury, where the evidence is all on the side of the commonwealth, and is unimpeached, and the court

*On this point, the court was unanimous: but LOMAX and FRY, J., were not present at the resolution of it.—Note in Original Edition.

†On this point, the court was also unanimous: but W. BROWNE, FRY, and R. B. TAYLOR, J., were not present at the resolution of it.—Note in Original Edition.

is of opinion, that it is clear and distinct, as to the fact charged, and cannot be varied by argument of counsel, it may, in its discretion, prevent the counsel of the accused from arguing the question of fact before the jury?

It is the right of every party accused to be heard by counsel on his whole case. The credibility of the evidence, is not only a material, but the most if not the only material part of every case which depends on a question of fact. Of this credibility the jury alone are the judges; and they may form their opinions, not only on the characters of the witnesses as persons of truth, but on their manner of giving testimony, their relation to the parties, their opportunities of being correctly informed, and on a variety of other circumstances which may be calculated to affect their judgment. Therefore,

760 his whole *case, involves directly the right to be heard on the credibility of the evidence against him. The fact that the evidence is direct to the point in issue, and must establish that point or not, according as the evidence is credible or not, even though coupled with the fact that there is no direct evidence to impeach its credit, does not alter the principle, or present a case to which the principle cannot apply. The only question may be, whether the evidence is credible or not; yet that question may be decided, as above stated, from a variety of circumstances attending the case, other than conflicting testimony, which circumstances the jury alone are to weigh. To deny to the party, therefore, the right to be heard in a case of this kind, is, in effect, to deny him all right of defence whatsoever. It is not for the court to say, beforehand, to what point the counsel means to direct his argument. If there be any point involved in the issue before the jury, on which their minds may be enlightened or their consciences satisfied by argument, the accused has an undoubted right to all the advantage that may be derived from that source; and this right would be utterly destroyed, if it were allowed to the court to prohibit argument, merely because, in its opinion, the evidence is so clear that argument cannot vary it. Neither is this the only case in which an argument before the jury might be of importance to the accused, however direct and uncontradicted the evidence against him might be. We deem it unnecessary, however, to enter more at large into an investigation of the subject, since we have no difficulty in deciding, upon the single view of it above presented, that the court had no right to inhibit argument in the case before us. But while we thus decide, we are not to be understood as restricting, in any degree, the power of the court to prevent an abuse of this or any other right, by exercising a proper control over the course of the argument.*

The judgment of the circuit court is to be reversed, all proceedings subsequent to the summons set aside, and the cause remanded for further proceedings.

*On this point, SUMMERS, J., dissented.—Note in Original Edition.

761 *The Commonwealth v. Garth.

November, 1827.

Criminal Law—Case Adjourned from Circuit to General Court—Consent of Accused.—Under the provision of the statute 1 Rev. Code, ch. 60, § 14, a circuit court cannot, in any criminal case, adjourn a question of law arising there, to the general court, without the consent of the person accused, and such consent must be stated in the record; otherwise the general court cannot take jurisdiction of the case.

Same—Instruction—Right of Counsel to Argue against before Jury?—*Quære*.—Whether in a criminal prosecution for misdemeanour, after the court at the trial has, on the motion of the attorney for the commonwealth, given an instruction to the jury on a point of law involved in the general issue, and the defendant's counsel has filed exceptions to such instruction, he has a right to controvert the opinion of the court, so given and excepted to, in argument before the jury?

Case adjourned from the circuit court of Albemarle.

The case, and the questions adjourned to this court, were stated by the circuit court, in the following words: "Upon a presentment against the defendant Garth, for unlawful gaming at cards, at the house of I. Raphael, by winning more than twenty dollars in twenty-four hours—after instructions had been applied for by the attorney for the commonwealth, in these words, to wit, that if the jury should be of opinion, that the defendant did win more than twenty dollars in twenty-four hours, namely, the sum of thirty dollars in twenty-four hours, within twelve months before the making of the presentment, and at the place therein mentioned, then it was immaterial whether the defendant won the said sum of money of one person or of several persons, and that if the defendant won the money from several, though not more than twenty dollars from any one, the case came within the 6th section of the statute to prevent unlawful gaming, (1 Rev. Code, ch. 147, p. 563,) and after an exception taken thereto by the defendant's counsel, —the defendant's counsel claimed the privilege of arguing before the jury, that the law was different from what it had been declared to be by the circuit court, or the gen-

***Criminal Law—Case Adjourned from Circuit to General Court—Consent of Accused.**—In *Com. v. Young*, 9 Leigh 688, it is said: "The court is unanimously of opinion that it has no jurisdiction to decide the questions adjourned to it, because it does not appear by the record that the adjournment was with the consent of the defendant. See *Garth's Case*, 3 Leigh 761."

Instructions—Right of Counsel to Argue against before the Jury.—In *State v. Dickey*, 48 W. Va. 325, 37 S. E. Rep. 608, it is said: "I have above asserted that in Virginia there never was law adequate to sustain the proposition of the right of the jury to decide the law. In *Com. v. Garth*, 3 Leigh 761, it was regarded as an open question, as manifested by the *quære* in the case. The eminent JUDGE LEE must have regarded it as unsettled, because in *Delaplane v. Crenshaw*, 15 Gratt. 487 (Syl. point 12), he said: 'In a civil suit (whatever may be the law in a criminal case), after the judge has given an instruction, the counsel should not be allowed to discuss the same matter which the court has already decided.' But I have shown above that Virginia courts decided that in criminal cases counsel should not argue contrary to the instructions of the court."

The principal case is also cited in *Davenport v. Com.*, 1 Leigh 506, which case directly answers the *quære* in the principal case. *Delaplane v. Crenshaw*, 15 Gratt. 482; *DeJarnette v. Com.*, 75 Va. 683; *Brown v. Com.*, 80 Va. 472, 10 S. E. Rep. 745; *Sparf v. U. S.*, 156 U. S. 51, 15 Sup. Ct. Rep. 312. See monographic notes on "Instructions" appended to *Womack v. Circle*, 29 Gratt. 192; "Arguments of Counsel" appended to *Coleman v. Com.*, 25 Gratt. 865; "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 733.

eral court; and the attorney for the commonwealth insisting, that the defendant's counsel had no right to take that ground in their argument before the
762 jury, in a misdemeanour *case; the court adjourned to the general court, the following questions: 1. Whether counsel could legally argue against the opinion of the court, in a case like the present, or in any misdemeanour case? and 2. Whether the opinion of the court ought to be asked in any case where it may be controverted before a jury?"

At November term 1827, no counsel appearing for the defendant, the case was submitted to the court without argument—

And SUMMERS, J., delivered the opinion of the court. In considering the first question, the court is necessarily led to the consideration of what constitutes the respective provinces of the judge and of the jury. Almost coeval with the institution of juries, we find the rule laid down, that as to questions of fact the jury shall answer, but in matters of law the judge shall decide; and the fitness of this rule has never been questioned; its application alone has occasioned the controversies which have arisen in this country and in England. It is not now the purpose of the court, to settle the many difficult and delicate questions that may arise in giving effect to the proper authority of each forum. The general principles governing this distribution of power, we think, are concisely and accurately stated, in the following terms—that the immediate and direct right of deciding questions of law, is entrusted to the judges; that in a jury, it is only incidental; and that in the exercise of this incidental right, the latter is not only placed under the superintendence of the former, but are in some degree controllable by them. It is sufficient for the present purpose, that we examine this superintending authority of the court with reference to the case under consideration. In the progress of a trial for a misdemeanour, either the defendant or the prosecutor may require the instructions of the court to the jury, on any question of law arising in the cause, whether directly or only collaterally affecting the issue; and,
by particular direction of the statute,

763 the court is required *to sign and seal any bill of exceptions that may be tendered to its opinion, provided the truth of the case be fairly stated. When instructions are given on incidental questions, although the cause may depend intirely on such decisions, as on the admissibility of documentary evidence, or the competency of witnesses to testify, the right of counsel to discuss before the jury the propriety of the admission or exclusion of the evidence, never has been asserted: the pure legal character of such questions leaves no pretext for arguing them before the jury. Can a different rule prevail, or different rights exist, when instructions are given on questions of law directly involved in the issue, and by which the facts proved are to be examined by the jury? We think not. It never could have been in the mind of the law maker, that, after a solemn adjudication of the court, and that made mat-

ter of record, the same question should be open for re-examination before an appellate tribunal, and at the same time open for reconsideration by the jury trying the cause. To admit this principle, as contended for by the defendant's counsel in the circuit court, would be fraught with the most serious mischiefs. In securing to every citizen accused, a fair and impartial trial according to the law of the land, an appeal is given him to this court, for a just interpretation of the law by which he is to be tried, and he is entitled to the operative benefit of such interpretation: but this may be lost to him, if equal rights are possessed by the prosecutor and the defendant in this particular, (which seems to us to be the case) and this new principle shall be interpolated in our criminal proceedings. If the superintending authority of the court be admitted, it follows as a necessary consequence that the right now claimed cannot be conceded: they are in conflict with each other: to admit the latter, is to deny the former, as to every beneficial purpose. A superintending authority in the court cannot exist, if its operation is to be referred to the discretion of the jury, and argument may be addressed to them to shew that they ought to disregard it. If counsel have
764 the right of appealing from *the court to the jury, on the interpretation of the law, the right must equally exist of discussing before the jury, the force and authority of acts of assembly whenever any colourable ground may be supposed to exist; and the wisdom and constitutionality of legislative enactments, may thus become the topics of inquiry, whenever a jury is engaged in a criminal trial. That juries may take upon themselves the decision of both the law and the fact, is not questioned. Happily for us, the doctrine of attain is unknown to our code, and our juries are exempt from any restraint on the honest exercise of their judgments. This power, however, extends also to civil causes; and it is unaffected by the prohibition of new trials in criminal cases, after a verdict of acquittal; since this distinction is not referrible to the rights or the powers of juries, but has its foundation in principles intirely unconnected with them. In neither class of cases can the jury receive evidence of facts which it is their peculiar province to decide, without the court first passing upon its competency; and it would seem to follow, a fortiori, that they must be protected from misrepresentations of the law which is to be applied to such facts. We are aware that the principles here stated, and the reasons we have assigned, may be applied to capital cases, as well as prosecutions for misdemeanours: but, in cases affecting life or liberty, we think the practice of the courts, and the considerations on which it is founded, not only warrants the course, now generally pursued, of reserving instructions (except on collateral points) until the arguments to the jury are closed, but enjoins that order in conducting such trials.

This court is of opinion and doth decide, that counsel cannot legally argue against the opinion of the court, in a case like the present, or in any misdemeanour case. And

this opinion renders an opinion on the second question unnecessary.*

765 *After this opinion had been announced, the court, in consequence of a suggestion from the bar, suspended its judgment, and ordered the cause to be continued, and at the same time requested the bar to aid the court with its views of the question.

Leigh, as *amicus curiæ*, submitted the following written argument to the court:

Here is another instance (alluding to the preceding case of *Word v. The Commonwealth*) of a question of most serious importance raised and referred to this the supreme criminal tribunal in the land, in a case the most trivial imaginable; so trivial, that the party accused has not retained counsel to argue his cause in this forum, and obviously has little or no concern about its result. The proceeding has, to me, rather the air of mooted curious points of law, than of the grave argument and solemn adjudication of causes. It were easy, I should think, for the circuit courts, in all cases like this, to avoid, as according to my notions of propriety they ought carefully to avoid, the course that has been taken in the present case: and (beseeching the pardon for expressing the sentiment, if in the sense of the court it savour of presumption, for, indeed, it is dictated by no such unworthy feeling) I cannot forbear the expression of my earnest wish and hope, that an instance of the like kind may never be repeated. At the same time, in regard to this particular case, I feel personally the strongest assurance, that the adjournment of it is justly attributable to the spirit of indulgence of the judge of the circuit court towards the counsel of the party accused.

Looking only to the record, I am at a loss to understand, upon what ground it was supposed proper, regular or legal, to adjourn this case to this court.

The circuit court law (1 Rev. Code, ch. 69, § 14, pp. 231, 2,) provides, "that the said [circuit] courts, when a question new or difficult arises, may adjourn any matter of law to the general court; or any party thinking himself aggrieved

766 *by the judgment of the said courts, may appeal thereupon as of right, or obtain a writ of error thereto from the court of appeals at the discretion of the court. And the said [circuit] courts, in any criminal case, may, with the consent of the party accused, adjourn a question of law to the general court, which may be there argued and decided, though such accused person be not present." Now, it is quite plain, that the first sentence of this section, authorizing the adjournment to this court of questions new and difficult, at the pleasure of the circuit courts, relates wholly to civil cases; to cases, namely, which if the circuit court decide instead of adjourning, the party thinking himself aggrieved, may appeal from the judgment as of right, or obtain a writ of error thereto from the court of appeals; but, from a judgment in a criminal case, there can be no appeal as

of right to any tribunal, nor has the court of appeals any jurisdiction to allow a writ of error. We must look for the authority of a circuit court to adjourn a criminal case to the general court, to the last sentence of the section; and there it is manifest, that the consent of the party accused is necessary to authorize the adjournment. In this case, no such consent is stated in the record. Therefore, this case, here, is *coram non iudice*.

Again—I really cannot ascertain from the record, whether the questions adjourned in fact arose at the trial or not. The record states, that "after instructions had been applied for by the attorney for the commonwealth," to the purpose set forth, "and an exception taken thereto by the defendant's counsel,—the defendant's counsel claimed the privilege of arguing before the jury, that the law was different from what it had been declared to be by the court, and by the general court." It is not expressly stated, that the court had given the instruction, which the attorney for the commonwealth applied for; nor does it certainly appear, whether the defendant excepted to the instruction given by the court, or to the propriety of giving any instruction at all in that stage of the trial. Unless the

767 instruction was in fact *given, the question could not arise, whether the defendant's counsel had a right to contest the correctness of the instruction before the jury. I should infer, from the expression, "that the defendant's counsel claimed the privilege of contending that the law was different from what it had been declared to be by the court, or by the general court," that the court had given the instruction set forth as having been asked; and my mind certainly inclines to this interpretation of the record: but, on the other hand, from the second question adjourned to this court—"whether the opinion of the court ought to be asked in any case where it may be controverted before a jury"—it might be inferred, that the contest in the circuit court turned on the propriety of giving instructions at that stage of the trial. It does not appear with sufficient certainty, that any of the points adjourned arose at the trial: the maxim is, *certa debet esse intentio et narratio, et certum fundamentum, et certa res quæ deducitur in iudicium*. Co. Litt. 303, a. But, apart from this view, it is absolutely certain, that, so far as the first of the adjourned questions extends beyond "a case like the present," to "any misdemeanour case," this comprehensive question touching all misdemeanour cases, did not and could not arise in the present case. This will be rendered more manifest in the sequel.

Has it been decided by the general court, that if a person win more than twenty dollars in twenty-four hours, at the same place, it is immaterial whether he win it of one person or of several; that, if he win more than that sum of several, though not more than that sum of any one, he offends against the 6th section of the statute against gaming? If the court has so decided, I humbly submit, that the point deserves re-consideration. That 6th section of the statute (1 Rev. Code, ch. 147, p. 563,) .

*In this opinion, JUDGES JOHNSTON, DANIEL ALLEN, SAUNDERS, DADE, BOULDIN, FIELD and SUMMERS, concurred; JUDGES BROCKENBROUGH and SEMPLE, dissented.—Note in Original Edition.

provides, that "if any person, by playing or betting at any game or wager whatsoever, at any time within the space of twenty-four hours, shall win or lose to another [in the singular] a greater sum or any thing of greater value than
768 twenty dollars, the winner *and loser [in the singular] shall be liable to pay" the penalty therein prescribed. The 3d section of the statute (Id. p. 562,) provides, that "if any person or persons whatsoever [in the plural], at any time hereafter, within the space of twenty-four hours, by playing at any game or games whatsoever, or by betting on the sides or hands of such as do play at any game or games, shall lose to any one or more person or persons [in the plural] so playing or betting, the sum or value of seven dollars or more, in the whole, and shall pay or deliver the same or any part thereof, the person or persons [in the plural] so losing and paying or delivering the same, shall be at liberty, within three months then next following, to sue for and recover the money or goods so lost and paid or delivered, or any part thereof, from the respective winner or winners thereof [in the plural] with costs of suit" &c. The provision quoted from the 3d section, is altogether retributive; that quoted from the 6th, is altogether punitive. It is plain that the 6th section does not design to make all playing and betting criminal; it makes the criminality depend on the extent to which the playing and betting is carried; and the difference of its phraseology from that of the 3d section is too marked to have been accidental. Does it, or may it, vary the extent or excess to which the playing or betting, inhibited by the 6th section, is carried, if the sum of more than twenty dollars be won of several persons, and not of one? Is not the winning of that sum of one, indicative of a greater extent or excess of gaming, than the winning the same sum of several? If so, then the winning it of several, is a lesser degree of gaming, than that which the provision punishes—and that it is so, seems to me quite clear. If, for example, four persons sit down to whist, and cut for partners anew after each rubber; when one of them has lost twenty dollars to one other of them, it is more than probable that he has lost to the two others at least twenty dollars more. Therefore, it seems to me, that the offence which the 6th section of the statute was intended to punish, is
769 that degree of gaming indicated *by the winning of more than twenty dollars of one and the same person. The provision of the 29th section of the statute (Id. p. 570,) that the laws against gaming shall be interpreted as remedial and not as penal statutes, cannot, I apprehend, affect the point. If the statute make gaming criminal, only when carried to a certain degree; if it make the criminality depend upon the degree; to hold that gaming short of that degree is criminal, is to hold that to be criminal, which according to the law is innocent. If gaming to a certain degree only is inhibited by the statute as mischievous, gaming short of that degree, is not within the mischief which the statute intended to prevent.

The court will easily discern my solicitude, that it should avoid the question, which, when this case was under consideration at a former term, it was supposed proper to examine and to resolve; and it will as easily penetrate the motive of that solicitude. But though it is my wish that the court should avoid the decision of that very interesting question upon the present occasion, it is neither my design nor my wish to avoid the discussion of it.

The question I understand to be this—Whether on the trial before a jury of the general issue of guilty or not guilty, upon an indictment, information or presentment for a misdemeanour, the accused has a right to be heard by counsel before the jury, on any and every point of law, as well as of fact, involved in the issue, and, if in the course of the trial the court give an opinion upon a point of law whereof a general verdict will amount to a decision, to contest the correctness of such opinion in argument before the jury?

The general subject to which the question relates, is one that cannot have escaped the attention, or failed to exercise the reflection, of every counsel at all versed in criminal causes. It very early, and has very often engaged mine: and I beg leave to state, succinctly and candidly, the opinion, which I have always entertained on the subject, and which every new examination

of it has more and more confirmed—
770 *not because I have the presumption to think my individual opinion of any value or weight, but because I know no better way of stating the propositions I propose to maintain.

I hold, then, that in all criminal cases without exception, by the law of Virginia, the party accused having a right to trial by jury, has also a right to make full defence by counsel before the jury: that the jury has not merely the arbitrary power, but a strict legal right, to hear and to decide every question of law, as well as of fact, involved in the general issue of guilty or not guilty; and whatever question the jury has a right to decide, upon that question the party has a right to be heard by counsel before the jury: that it is also the undoubted right and the duty of the court, whenever in its opinion the occasion requires it, to charge, instruct or advise the jury, upon the law of the case, as applicable to the facts in proof: that the jury owes the highest respect to the opinion or advice of the court touching the law of the case, and ought, in prudence, generally, to follow it as the surest guide; yet they are no-wise bound to give implicit faith to the court; for, if the jury do conscientiously differ from the court as to the law, and the opinion of the court, if followed, would convict, and that of the jury, if persisted in, would acquit, the accused, it is the right and the most solemn duty of the jury to follow its own opinion of the law, and to acquit; but the converse of this last position can never be right. It was part of the design of the institution of jury trial, to shield the accused from the court. And as to the precise question, Whether the accused, or (which is the same thing) his counsel, has a right to contest the opinion

of the court on any point of law, given to the jury at the trial; the resolution of this question depends, I think, mainly if not intirely on the course and order of proceeding. If, before the accused has had an opportunity to make full defence by counsel before the jury, the court, of its own accord, or at the instance of the counsel for the prosecution, instruct the jury as 771 to the *law of the case, the court and prosecutor cannot, by thus anticipating the full defence, both as to law and fact, which the accused has the right of making by counsel before the jury, deprive him of the right to make such defence; and in such case, therefore, the counsel of the accused has a right to contest the correctness of the opinion of the court, in argument to the jury. But if, in any stage of the trial, the accused by his counsel pray the opinion of the court on the law, or on any point of law applicable to the case, he cannot afterwards contest the correctness of the opinion before the jury. And if after the counsel for the prosecution and the counsel for the accused have been fully heard before the jury, upon the whole case, the court of its own accord (as it justly may) or at the instance of either party, or of the jury, give its opinion to the jury, upon the questions of law raised and discussed, in the argument; the counsel for the accused, having been already fully heard, has no right to renew the debate, and to contest the correctness of the opinion of the court so given, before the jury.

Let us first consider how stands the legal right of the accused, to make full defence by counsel before the jury, in prosecutions for felony.

The common law denied counsel to the accused upon the general issue, on charges of felony or treason, but in cases of mere misdemeanour or any offence less than felony, always allowed the right of the party indicted to a full defence by counsel. 1 Chitt. crim. law, 409. The statute of 7 Will. 3, c. 3, § 1, enacted, that all persons accused of treason, such as works corruption of blood, should be admitted to make their full defence by counsel. In Virginia, at all times, before as well as since the revolution, all persons indicted of felony, have been allowed the same benefit of a full defence by counsel, as is given by the statute of William III. to persons indicted of treason; and the act of 1786, c. 57, (1 Rev. Code, ch. 169, § 27, p. 607,) directs, that 772 the court shall allow every person charged with *treason or felony, counsel to assist him at his trial, if he desire it. The amendments to the constitution of the U. States (art. 6,) secures to the accused, in all criminal prosecutions, the right to have the assistance of counsel for their defence.

Now, I pray the court to look at any of the trials for treason in England, since the provision of the statute of William III. that persons accused of treason should be admitted to make their full defence by counsel, in order to see the constant, uniform, practical exposition of this privilege of making full defence by counsel. Take, for instance, the trial of lord George Gordon

in 1781, and the trial of Thomas Hardy in 1794—it will be found, that in both those cases, and in all others where any such question of law could arise, the counsel for the crown and the counsel for the accused, discussed the doctrine of constructive treason at large before the jury, and that the court forbore to give its opinion upon the law, until the counsel had been fully heard upon it by the jury; that the counsel for the crown and for the prisoner, and the court itself, addressed all their arguments upon the law to the jury.

In judge Chase's charge to the jury, in the case of Fries (2 vol. Chase's trial, append.) he said—"It is the duty of the court to state to the jury their opinion of the law arising on the facts; but the jury are to decide, in the present and in all criminal cases, both the law and the facts, on their consideration of the whole case." Again, in conclusion—"If upon consideration of the whole matter (law as well as fact) you are not fully satisfied without any doubt, that the prisoner is guilty of the treason charged in the indictment, you will find him not guilty; but if, upon the consideration of the whole matter (law as well as fact) you are convinced that the prisoner is guilty of the treason charged in the indictment, you will find him guilty." The history of this charge in the case of Fries, deserves to be recalled to memory. Nobody now doubts that the charge stated the law of treason with perfect correctness; 773 nobody, I believe, ever *entertained any serious doubt of it. But the judge prepared the charge, before the trial commenced; and made out three copies of it, one of which he handed to the counsel for the U. States, one to the counsel for the prisoner, and the other was intended to be delivered to the jury. It was no otherwise published: it was not read from the bench. The prisoner's counsel, justly offended at this attempt to anticipate the prisoner's right to make full defence by counsel before the jury, withdrew from the cause. The court, on the next day, sensible of its error, made the fullest retraction, and urged them to proceed in the defence, offering to allow them the utmost latitude of argument upon the law, before the jury. The counsel complained, that the court had prejudged the case; in other words, had formed and written its opinion, before they had been heard on the law, before the jury; for they declared, they had no intention to argue the law of the case before the court. And for forming this opinion, and signifying that he had formed it, before the prisoner had had the opportunity of making his full defence, upon the law as well as the facts of the case, before the jury, judge Chase was impeached.

The court will also recollect the numerous cases that have occurred, of trials before each and every judge upon the bench, in cases of felony, in which the prisoner's counsel have entered at large into the whole law of the case, before the jury; and the jury has retired without a word said by the court upon the subject.

I do not see, that more conclusive authority can be desired, to shew the correctness of my general view of the law upon the

subject, so far as it relates to the relative powers and duties of the court and of the jury, and the rights of the accused and his counsel, in cases of prosecutions for felony. In the opinion delivered by this court, in the present case, at a former term, the correctness of the proposition I am now maintaining, is in a manner admitted; but the rights of the accused are there placed on wrong ground, and ground too, which strikes me as very precarious and *unsatisfactory. The court

774 said—"We are aware, that the principles here stated, and the reasons we have assigned, may be applied to capital cases, as well as to prosecutions for misdemeanours: but in cases affecting life or liberty, we think the practice of the courts and the considerations on which it is founded, not only warrant the course now generally pursued, of reserving instructions (except on collateral points) until the arguments to the jury are closed, but enjoin that order in conducting such trials." I contend, that the right of the accused in cases of prosecutions for felony, to make full defence by counsel before the jury, upon the law as well as the facts of the case, rests on the firm basis of law; on the same basis, on which rests the right to trial by jury: and I cannot be content, that it should be placed on the ground of mere practice, and a practice too, which stands reprobated by the reasoning of the court in cases of misdemeanour, and this reasoning declared to be equally applicable to both cases. And where, I beg leave most respectfully to ask, has the practice of the courts of justice, alluded to in the opinion, prevailed? Certainly in no court with the proceedings of which I have ever been conversant. The practice has been, that the court abstains from giving any charge to the jury, either before the argument of counsel begins or after it is closed, unless desired to do so.

Is there any difference between the legal powers and rights of juries, and the legal rights of the accused and his counsel, in cases of misdemeanour, and in cases of felony?

I must, in the first place, repeat the passage before cited from 1 Chitt. crim. law, p. 409, that, while the common law denied the benefit of counsel upon the general issue, on indictments for felony, in cases of mere misdemeanours, or any offences less than felony, it does not appear, that the right of the party indicted to a full defence by advocates, has ever been disputed. The distinction contended for, is a reversal of the principle of the common law: and by what statute of Virginia, by what precedents, by what approved and established practice of our courts, can a distinction so anomalous be justified?

775 *In the trial of Calender for a libel, before the circuit court of the U. States for the district of Virginia, in May 1800, Mr. Wirt, of counsel for the accused, contended, that he had a right to argue the constitutionality of the sedition law before the jury. Mr. Nicholas, in his evidence given at the trial of judge Chase, gives this account of what passed on that occasion—"Mr. Wirt then addressed the court. He said he had not considered the case elab-

orately; that it appeared to him so clearly that the jury had the right contended for, that he did not imagine it required any great research to prove it. He then proceeded to state, that it was certainly the right of the jury, to consider of and determine both law and fact: Mr. Chase here remarked, that Mr. Wirt need not give himself trouble on that point—we all know, said he, that the jury have a right to decide the law. Mr. Wirt then said, he supposed it equally clear, that the constitution is the law: yes, sir, said Mr. Chase, the supreme law. If then, said Mr. Wirt, the jury have a right to decide on the law, and if the constitution is the law, it follows, syllogistically, that they have a right to decide on the constitutionality of the law in question. A non sequitur, said judge Chase. Here Mr. Wirt sat down." Thus, the opinion of judge Chase is clearly expressed, against this distinction which has been asserted between trials for misdemeanours and trials for felonies. And though he would not allow counsel to argue the constitutionality of the sedition law before the jury, he offered to hear any argument addressed to the court, to prove the right of the jury, to consider and try the question of constitutionality. See 1 vol. Chase's trial, p. 188.

In England, there was an anomalous doctrine, touching cases of libel, acknowledged to be applicable to no other cases whatever—that, in a trial for a libel, the sole province of the jury was to find the fact of publication, and the truth of the innuendos; that the jury had no right to inquire into the guilt or innocence of the author's intentions, or into the question whether the paper prosecuted was libellous or 776 not; *that a verdict of guilty, left those points undecided—because these were questions of law, which it belonged to the court to decide upon the record. This doctrine has been clearly traced up to the days of lord chief justice Holt. And yet, long before the declaratory act of 32 Geo. III, c. 60, by which the doctrine was exploded, it was the constant practice of the counsel for the accused in cases of libel, to argue the points, which the courts had uniformly held to be points of law, and as uniformly instructed the juries that they were points they had no right to inquire into; and, moreover, to argue before the jury, that it was their province to decide those very points. I need only to refer to Mr. Erskine's defence of The Dean of St. Asaph. I am quite sure, there is not a single instance of counsel pursuing this course of argument, being interrupted by the court, or of the counsel for the crown attempting to forestal the argument, by praying an instruction from the court.

I confess myself wholly at a loss for any reason for this distinction, which admits the right of the accused to make full defence by counsel before the jury, both as to law and fact, in cases of felony, and denies the same right to a person accused of misdemeanours. There are many misdemeanours which are more heinous crimes, and punished with greater severity, than many felonies. Libel, riot, conspiracy, perjury and subornation of perjury, bribery and

corruption, assaults with intent to maim, rob, ravish or murder; all these are only misdemeanours, though they are punishable with fine at the discretion of a jury, and imprisonment at the discretion of the court. The keeping and exhibiting of A. B. C. or E. O. tables, &c. is no more than a misdemeanour; and yet it is, or lately was, punishable by imprisonment in the penitentiary, as well as by fine. The persons employed in carrying the mail, or in the post offices, who shall purloin money from a letter, are, by the laws of the U. States, guilty only of a misdemeanour; yet they are punishable with ten years imprisonment.

777 *A distinction has sometimes been attempted between the power of the jury, and the right of the jury, to decide the law as well as the fact, in criminal cases; a distinction, which my mind has never been capable of comprehending. The question is, whether the jury, as a judicial tribunal, be competent to the decision of the law? If the jury be incompetent to decide the law, it is immaterial whether they decide it right or wrong, according or contrary to the opinion of the court; their fault consists in the usurpation of a power which does not belong to them, and their opinion is a mere nullity. If they be competent to decide the law, the very definition of competency is a rightful legal power of judicature.

If any doubt shall remain on the subject of the right of juries, in all criminal cases, to decide the whole case, law as well as fact, either according or contrary to the opinion of the court, I think that doubt cannot fail to be removed by the argument of Mr. Erskine, on the motion for the new trial, in the case of The Dean of St. Asaph, 21 Howell's St. Tri. 971. That argument turns on the very points we are considering; and it was universally allowed to be conclusive, in regard to all cases but trials for libel, as to which there existed that peculiar doctrine before stated.

If a person accused of misdemeanour have an undoubted right to make full defence by counsel before the jury, and if the jury be undoubtedly competent to decide the law, as well as the fact of the case; I really do not see how the inference can be resisted, that the counsel have a right to discuss before the jury every question of whatever nature, which the jury has a right to decide. And to me it seems, that the principle holds good in all criminal cases—murder and petty larceny—the most aggravated misdemeanour punishable by forfeiture and imprisonment, and the most petty, punishable by pecuniary penalty. The difference in the degree of the punishment cannot change the nature of the trial; nor restrain either the legal power of the jury,

778 or the *right of the accused to make full defence by counsel, as to the whole case, law and fact. It is competent to a jury trying the general issue in a civil case, to find directly against the opinion of the court upon the law of it. At common law the jury might be attainted, for such a false verdict at the suit of the party injured; but no attainder ever lay for the crown against a jury find-

ing a verdict of acquittal in a criminal case—this is acknowledged by Lord Mansfield, 21 How. St. Tri. 985. According to the modern practice, in civil cases, the court corrects the error of the jury, by granting a new trial; but if a jury find a verdict of acquittal in any criminal case, there can be no new trial granted however contrary the verdict may be to the law or to the evidence.

It is an established rule, in all our courts of justice, not to allow counsel to contest the correctness of an opinion of the court upon a point of law, given in the course of the trial of any civil case: and without doubt, the rule is correct. For, the court may grant a new trial, if the obstinacy or opiniativeness of the jury lead them to find against its instruction upon the law; and to allow argument to induce the jury to do a vain thing, were only to countenance the prolongation of controversy, without benefit to either party, and to the injury of both, as it necessarily increases the expense of litigation. The party against whom the judgment of the court is given, in a civil case, may appeal of right to a superiour tribunal, where the judgment will be reviewed; in no criminal case, can the accused, if the judgment of the court which tries his cause, be against him, appeal without assigning error. Besides, the practice has always prevailed in Virginia, and is now firmly established, for the courts, in civil cases, to abstain from giving charges to the jury, summing up the evidence, and explaining the law, after the argument of counsel is closed; and, instead of such charges, which counsel have no where been allowed to controvert before the jury, our courts give instructions, in the progress of the trial, if prayed, on

779 the *points of law as they arise; and such instructions ought no more to be open to contest, than the charges to the jury, for which they have been substituted.

Prolix as this argument may seem, I have excluded from it, for the sake of brevity, many topics which I thought pertinent and just.

The attorney general also gave the court his opinion on the case, and the reasons of it: he held, that the first question adjourned ought to be decided in the negative.

The case having stood over till the present term, BROCKENBROUGH, J., now delivered the unanimous resolution of the court, That this court had no jurisdiction to decide the questions adjourned to it. He said—This is a criminal prosecution against the defendant for unlawful gaming. The circuit court had adjourned to this court certain questions of law that arose there; but it does not appear by the record, that the adjournment was with the consent of the defendant. The statute provides, that "the circuit courts, in any criminal case, may, with the consent of the person accused, adjourn a question of law to the general court." Without such consent the case could not properly be adjourned, and this court has no jurisdiction of it. We have always decided, that such consent must appear by the record, and cannot be presumed. The case is to be remanded to the circuit court &c.

780 **Osiander v. The Commonwealth.*

July, 1881.

[28 Am. Dec. 603.]

Criminal Law — Jurors — Opinion Formed — Competency.—A person called as a juror in a criminal case, and examined as to his indifference on his *voire dire*, declared, he had heard reports concerning the case in the country, and a state of the circumstances from one of the witnesses, and had formed a hypothetical opinion, but he believed it would not influence his mind as a juror: he believed the account he had heard of the case at the time he heard it, (and he did not now express any doubt of its truth): if the evidence at the trial should correspond with the account he had heard, his former opinion would remain, but if it should be different, he felt satisfied he should be able to decide the cause, without being influenced by what he had before heard, and without prejudice: and it did not appear, that the witness had ever before expressed the opinion he had so formed.—**Held**, such preconceived hypothetical opinion did not constitute good cause of challenge to the juror.

Same—Same—What Preconceived Opinion Is Good Cause for Challenge.—To constitute good cause of challenge to a juror, on the ground of preconceived opinion of the case formed by him, it must appear, that such preconceived opinion was a decided one. **Same—Same—Opinion Formed—Necessity of Expressing—Quere.**—If a person call as a juror has formed a decided opinion of the case out of doors, it is necessary that he should have also expressed such opinion, to constitute it good cause of challenge to him as a juror?

Osiander was indicted for grand larceny in the circuit court of Campbell, tried and convicted, and sentenced to two years imprisonment in the penitentiary. In impanelling the jury, one Love was called as a juror, and, at the prisoner's instance, was examined on oath, "whether he had formed and expressed an opinion as to the guilt or innocence of the prisoner in relation to the charge alleged in the indictment?" On which examination, Love said, "he had heard the reports of the country, and thought he had heard one of the witnesses state the circumstances, and he had formed a hypothetical opinion on what he had heard, but believed it would not influence his mind as a trier of the cause: if the evidence should correspond with the representations he had heard, his former opinion would remain; but if the proof should be different, he felt satisfied he should be able to decide the case without any influence from what he had before heard on the subject." In answer to an interrogatory of the prisoner's counsel, he further said,

781 "that 'he had no doubt of the truth of the reports at the time of hearing the same (and he expressed no doubt on this examination), and that if the same facts should be satisfactorily proved on the trial, he would come to the same conclusion; but that, if the proof should change or alter the case from the reports he had heard of it, he felt satisfied—he had no doubt—that he would be able to decide the case according to the evidence, without being in any degree influenced by the reports he had heard, or the impression which they had made on his mind.'" Whereupon the prisoner chal-

lenged the juror for cause: namely, "on the ground that he had formed an opinion, as disclosed upon his examination:" but the court being of opinion that there was no legal objection to the juror, overruled the challenge; to which opinion the prisoner filed a bill of exceptions. And now he presented a petition to this court, complaining that the circuit court erred in overruling the prisoner's challenge to Love, for cause, and praying a writ of error to the judgment.

C. R. Baldwin, for the petitioner. An opinion is hypothetical, when it depends on the question either of the truth, or of the legal effect of the evidence: the mind is undecided as to the guilt or innocence of the accused, so long as it doubts whether the facts are true as represented, or if true, whether they constitute or prove the crime alleged. In this case, no doubt, in either respect, existed in the mind of the juror Love. He said, he had no doubt of the truth of the facts, as he had heard them: and he could have had no doubt as to the legal effect of them; for he said, that if the same facts should be proved at the trial, he would come to the same conclusion; his former opinion would remain. How, then, was Love's opinion hypothetical? His opinion was, in effect, a substantial, decided one, though called hypothetical; and an opinion, too, not lightly and hastily taken up, or founded on mere rumour, but deliberately formed upon a statement of the facts by one of the witnesses in the cause, strengthened and confirmed by the reports of the country.

782 *In *Sprouse's case*, 2 Virg. Ca.

375, the court, speaking of an opinion that would be good cause of principal challenge, said, it was an opinion formed on reflection. In that case, the juror Wiant had formed a pretty substantial opinion, upon relations of the evidence which he believed to be true: so had the juror Love, in the present case. There, Wiant had not heard the evidence, or conversed with any of the witnesses, and his opinion was founded only on rumours in the country: but here, Love had heard a state of the facts from one of the witnesses, and his opinion was founded on that statement and upon the reports of the country. Wiant thought that as a juror he could do the prisoner justice, and declared he felt no prejudice, and was open to conviction. Love felt satisfied, that if the proof should alter the case from the reports of it which he had heard—that is, only in that case—he would be able to decide the cause according to the evidence, uninfluenced by the reports he had heard or the impression they had made on his mind; a tacit admission, that, without a change in the evidence of the facts, the opinion he had formed would remain unaltered, and was not to be removed by any argument of the prisoner's counsel, or by any information from the court as to the law applicable to the case.

In *Pollard's case*, 5 Rand. 659, the juror Parker had heard the testimony of one of the witnesses, and had formed an opinion at the time he heard it, but he declared, in very strong terms, that at the time of the trial, he had no prejudice against the pris-

***Criminal Law—Jurors—Opinion Formed—Competency.**—On this point the principal case is cited in *foot-note* to *Com. v. Hallstock*, 2 Gratt. 564; *Jackson v. Com.*, 23 Gratt. 981, 983, and *foot-note* to: *Armistead v. Com.*, 11 Leigh 659, 662 (see also, *foot-note*): *Heath v. Com.*, 1 Rob. 742; *Thompson v. Updegraff*, 3 W. Va. 644; *State v. Baker*, 33 W. Va. 324, 10 S. E. Rep. 641; *The Anarchists' Case*, 8 Sup. Ct. Rep. 26, 123 U. S. 131. See *monographic note* on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 738.

oner or his cause: it did not appear that he had, then, any existing opinion: his first impression, hastily formed, without deliberation or reflection, had probably been abandoned. In the present case, the opinion Love had formed, was in its real character a decided one, existing at the time of the trial.

In Brown's case, 2 Leigh, 769, the objection to the juror was held insufficient, because it did not appear that he had formed and expressed a decided opinion. It is true,

in this case, that the epithet decided 783 is not prefixed to the word *opinion; the juror, Love, said he had formed a hypothetical opinion. But judging from the explanation he gave, he probably did not understand the import of the phrase he used; for that shews, plainly enough, that his opinion was absolute, fixed and decided. In his actual state of mind, the juror had no doubt; but if the evidence should alter the state of the case from that on which he had formed his opinion, he thought he would be able to decide the case, uninfluenced by the reports he had heard, or the impressions they had made on his mind. Perhaps he might; but was he, therefore, an indifferent juror?

The evidence might present the case in a different aspect, and yet leave a striking resemblance: could the court or the juror be sure, that his first impressions would change with the varying hues and colours given to the case by the evidence at the trial? On the contrary, would he not be apt to view every circumstance as corroborative of his preconceived opinion? and if the prominent features of the case as proved, were found like those of the case as reported, might he not, very probably, disregard minor, yet material, points of difference? In cases depending on circumstantial evidence, differences in the testimony, apparently slight, may destroy the connexion of the circumstances; and to break a single link, is to destroy the whole chain. The evidence may leave very strong doubts of a prisoner's guilt, on the mind of a juror, wholly unprejudiced, while a juror prepossessed with information out of doors, and with an opinion formed upon it, will hardly be able to separate the proof in court from the information he has received out of court, or his present from his former impressions. Therefore, however confident the juror, in this case, may have been of his own capacity to give the prisoner a fair trial, it seems to me, that the law should distrust him.

It may be said, that the opinion which Love had formed, had not been previously expressed. It does not appear that it was. But it is not the mere giving expression to an opinion as to the guilt or innocence of a person accused, without

784 *any regard to the character of the opinion expressed, that can disqualify the person expressing it from being a juror in the case. Terrell in Sprouse's case, Parker in Pollard's, and the juror in Brown's, had each expressed the opinion he had formed. Doubtless, a man may be somewhat more committed after he has publicly expressed an opinion, than when it is known only to himself: still the court

will look at something more than the expression: it will look into the opinion itself, and see whether it was hasty, and really hypothetical, and founded on vague rumours, or deliberately and decisively formed upon a probable state of the facts. I can find no case, in which it has been adjudged that the opinion must have been expressed. In England, the triers are sworn well and truly to try whether the jurymen stands indifferent between the parties to the issue; and the trial proceeds by witnesses. They may examine the jurymen challenged, on his *voire dire*, as to the leaning of his affections; but he cannot be interrogated, whether he has previously declared his opinion that the prisoner is guilty: such a declaration would be considered as tending to his own disgrace. 1 Chitt. crim. law, 550. But it may be proved by witnesses. The appeal to the conscience of the juror, is to enable the triers to judge of his indifference; and if he has never expressed his opinions, there can be no other way of ascertaining whether he is indifferent or not. The question always is, simply, whether the juror stands indifferent? If his opinion has been formed on a state of facts which he fully believed to be true, and continues to believe, can he be held to be an indifferent juror, merely because he has never before expressed the opinion. He may be a just man; he may have no malice against the accused; he may feel compassion for him; but if he fully believes him guilty, he is prejudiced against his cause; and his mind, thus prepossessed, will naturally struggle against the conviction of the prisoner's innocence, which, otherwise, the testimony might be well calculated to produce.

785 *SCOTT, J. The cases heretofore decided by this court, have settled, that one who has formed and expressed a decided opinion as to the guilt or innocence of the accused, is not a competent juror; and that it is not material, whether that opinion be founded on the evidence of witnesses whose testimony he may have heard, upon another trial, or conversations with witnesses, or common report; it is enough, that the opinion is a decided one, and has been expressed. The expression of an opinion goes far to shew that it is a decided one. It is, in general, not so readily abandoned as one which never has been avowed. No case, however, has gone the length of deciding, that an opinion, however deliberately it may have been formed, and however decided its character, is not a disqualification, unless it has been expressed. Nor does the court think it necessary to give any opinion on that question on the present occasion; being unanimously of opinion, that the impressions of the juror, in this case, were not of that deliberate and decided character which is necessary to disqualify a juror. He stated, that his opinion was hypothetical, and although he did not doubt the truth of what he had heard, yet, if the evidence turned out otherwise, he had no doubt but that he would be able to decide according to the evidence, without being in any degree influenced by the impressions made on his mind by what he had heard. An opinion, which is declared by the party entertaining

it, to be hypothetical, one which will not in any degree influence his decision, cannot be a decided one; it cannot have been formed on deliberation.

Writ of error denied.

786 *Vass v. The Commonwealth.

July, 1881.

[24 Am. Dec. 695.]

Evidence—Dying Declarations—When Admissible*—Case at Bar.—A person, having received a mortal wound, and being unable, in consequence of the wound, for the greater part of the interval that elapsed before his death, to speak at all, and when able to speak, only able to utter a short word or two, yet retaining his perfect senses and understanding, and being under apprehension of his approaching death,—is asked, Did P. V. strike you first? to which he answered, yes, sir: Did P. V. stab you? to which he also answered, yes, sir: Do you think you are going to die? to which he again answered, yes, sir: and is asked a fourth question, which he is unable to answer, but it does not appear what this fourth question was, or whether it had any relation to the subject, or at what interval after the three first it was put to the dying man—Held, these are such death-bed declarations, being distinct and complete in themselves, as were competent evidence on the trial of P. V. on an indictment for the homicide.

Same—Same—Incomplete—Admissibility.—But, if it had appeared, that the declarations were designed by the dying man, to be connected with and qualified by other statements, and with them to form an entire complete narrative, and before the proposed disclosure was fully made, it had been interrupted, and the narrative left unfinished: such partial declarations would not have been competent evidence.

Same—Same—In Answer to Leading Questions—Effect.—The objection, that the questions to which the answers of the dying man were given, were leading questions, is not properly applicable in such a case.

Philip Vass was indicted for the murder of Henry Polly in the circuit court of Halifax, tried, convicted of murder in the second degree, and sentenced to ten years imprisonment in the penitentiary.

It appeared at the trial, that the deceased was the prisoner's overseer, and was first seen, after he received the wound of which he died (a stab with a knife), in the prisoner's house. No competent witness was present when the mortal wound was inflicted; and, from that time till his death, he was, for much the greater part of the time, unable, in consequence of the wound, to speak at all, and when he was able to speak, he could only utter a short word or two at a time. He received the wound Thursday night, and he lived till the Sunday following:

***Dying Declarations—Grounds for Admissibility.**—The rule of law on the subject of the admissibility of dying declarations is now well settled, that to render such declarations admissible in evidence, they must be shown to have been made when the declarant was under a sense of impending death, and without any expectation or hope of recovery. Whether so made or not, is a preliminary question to be determined by the court on all the evidence of the case. Bull v. Com., 14 Gratt. 620, citing *Vass v. Com.*, 3 Leigh 786; Hill v. Com., 2 Gratt. 694. To the same effect, the principal case is cited in *Swisher v. Com.*, 26 Gratt. 974, and note. See also, *foot-note* to Bull v. Com., 14 Gratt. 620.

Same—Incomplete Statement.—In *Jackson v. Com.*, 19 Gratt. 698, the principal case is cited to the point that where the declarations were designed to be connected with and qualified by other statements and with them to form a complete narrative, but before the proposed disclosure was fully made was interrupted and the narrative left unfinished, such partial declarations are not admissible evidence. See *monographic note* on "Dying Declarations" appended to *Jackson v. Com.*, 19 Gratt. 696; *monographic note* on "Evidence" appended to *Lee v. Tapscott*, 2 Wash. 276.

many witnesses saw him in the interval, and were present when the questions hereafter mentioned were put to him; and they testified, that he was

787 *in his right mind at the time. And then Henry Edmunds was introduced as a witness for the commonwealth, who stated, "that on the Saturday before the death of the deceased, the witness visited him, and put the following questions to him—1. Did Philip Vass [the prisoner] strike you first? to which the deceased answered, Yes, sir—2. Did Philip Vass stab you? to which the deceased also answered, Yes, sir—3. Do you think you are going to die? to which the deceased again answered, Yes, sir—And the witness put a fourth question, but the deceased was unable to answer it." The prisoner's counsel moved the court to instruct the jury to disregard so much of Edmunds's testimony, as detailed the above questions and answers. The court being of opinion, that the deceased was conscious of his approaching death at the time the questions were put and the answers given, and that he was in his senses and understood the questions, refused to give the instruction,—but told the jury, that they ought to disregard the testimony altogether, unless they should believe from the evidence in the case, that the deceased understood the questions, and answered them with perfect understanding of them; that, even if they should so believe, they ought, in weighing the testimony, to take into consideration the manner in which the questions were put and the answers obtained, and also the probability that the questions and answers did not give a full account of the facts in the case; and that the evidence resulting from the questions and answers, was not absolutely inconsistent with a favorable case for the prisoner. To this opinion of the court the prisoner's counsel filed a bill of exceptions. And now the prisoner presented a petition to this court, praying a writ of error to the judgment.

Leigh, for the petitioner. The questions put by Edmunds to the deceased, were leading questions, and for that cause, if for no other, the evidence of the questions and of the answers to them ought to have 788 been excluded or declared *incompetent. That leading questions ought not to be asked on the examination of a witness in chief, is agreed on all hands: such questions, namely, according to Phillip's definition, "as instruct a witness how to answer on material points," as distinguished from matters merely introductory—or, as better defined by Starkie, "questions which suggest to a witness the answer he is to make." Phil. L. Ev.* 221, 2; 1 Stark. L. Ev.+ part II, p. 124, note (u). In the note, Starkie says—"It is not a very easy thing to lay down any precise general rule as to leading questions: on the one hand, it is clear that the mind of the witness must be brought into contact with the subject of inquiry; and on the other, that he ought not to be prompted to give a particular answer, or to be asked any question to which the answer yes or no would be conclusive." Certainly, then, the questions put by Edmunds to the dying

*New York edition of 1890.

+Boston edition of 1828.

man, were leading questions: and if Edmunds's questions suggested his answers, the information thus obtained, was derived from the questions rather than from the answers, and was attributable to Edmunds, not to the dying man. And though there had been no prosecution as yet commenced against the prisoner, and though Edmunds had no personal interest in the case, and probably was not actuated by any improper feeling, yet he put himself in the place, and was performing the part, of a prosecutor, so far as to collect evidence of the prisoner's guilt, to be used in the prosecution for the offence which he anticipated as certain. Besides, if the manner in which the information was drawn from the dying man, was irregular and illegal, it cannot be material by whom the impropriety was committed: the effect is the same—to make the suggestions of the person asking the questions, instead of the dying man's own declaration of the facts, the evidence of the prisoner's guilt. If this objection be a valid one—if the evidence was inadmissible, because it consisted wholly of answers to leading questions which the law will not tolerate—then the only course which could have been

789 taken, was *that which was taken by the prisoner's counsel, to move the court to instruct the jury to disregard the testimony; for the evidence came out for the first time at the trial, and contained in itself the foundation of the objection to its competency; and there was neither any opportunity to have prevented the leading questions from being put and answered, nor any way in which the testimony of them could have been anticipated and suppressed. *Buster's ex'ors v. Wallace*, 4 Hen. & Munf. 88, 9; *Jones v. Lucas*, 1 Rand. 268.

It may be said in answer to this objection to the competency of the evidence, that the situation of the dying man, in consequence of the wound under which he was languishing, was such as to render it impossible to get any information from him but by propounding leading questions to him: and the court may, perhaps, regard that circumstance as enough to refute any objection to the competency of the evidence, founded on the impropriety of that method of interrogation. But if that consideration be of force to obviate this objection, viewed alone and by itself as a substantive objection to the competency of the evidence, yet the fact that the information could only be obtained from the dying man, by leading questions which the law would generally condemn as improper, will still be very material to be considered in its bearing on the more general and interesting question, which the case presents—Whether the death-bed declarations proved by Edmunds, were such death-bed declarations as ought to be admitted in evidence?

It is true, in general, that declarations of a person who has received a mortal wound, made under apprehension of death, are admissible in a criminal prosecution for the homicide; but the declarations that are so admissible, must be declarations of a person in such a situation, mental and physical, as to be able to give a full and complete account of the transaction, and not only to tell a part of the truth, but the whole truth.

Whether death-bed declarations are competent evidence or no, depends on the circumstances under which they are
790 *made, and is always a question for the court; per lord Ellenborough, 1 Stark. ca. 521; 2 Com. Law Rep. 495, S. C.; 1 Phil. L. Ev. 15; *John's case*, 1 East P. C. 357; *Welborne's case*, Id. 359. In the case at bar, the court first decided, upon the circumstances, that the evidence was competent, and then referred it to the jury to weigh the same circumstances, and decide for themselves.

The admission of declarations made under apprehension of death, is an exception to two canons of the law of evidence; namely, that which rejects all evidence not given under the sanction of a judicial oath, and that which excludes all evidence, where the party against whom it is offered, has had no opportunity to cross-examine the witness. And "the principle of the exception to the general rule, is founded partly on the awful situation of the dying person, which is considered as powerful over his conscience as the obligation of an oath, and partly on a supposed absence of interest on the verge of the next world, which dispenses with the necessity of cross-examination." 1 Phil. L. Ev. 215; 1 Stark. L. Ev. Part I., pp. 94, 101; Id. Part IV., p. 458. The law regards the apprehension of approaching death as equivalent to the judicial oath, which is an oath to tell the truth and the whole truth, and equally cogent as the most rigid cross-examination to draw from the dying man, a full, fair, impartial relation of facts: therefore, the law dispenses with the oath, and overlooks the want of opportunity for cross-examination. The reason on which this exception is founded, obviously, has no application to a case, in which the dying man was absolutely incapable of relating the circumstances. How can his awful situation be deemed equivalent to the obligation of the judicial oath to tell the truth and the whole truth, when he was unable to tell the whole truth? How can it be held *an equivalent to an opportunity for cross-examination to elicit a fair, full, impartial relation of all the circumstances, when he was in such a situation, that no cross-examination could have been of any avail? Shall

the judicial oath be dispensed with,
791 *and the want of an opportunity for cross-examination disregarded, in a case in which the dying man, so far from being able to fulfil the obligation of the oath, and to tell the truth, the whole truth, and nothing but the truth, impartially, fully and circumstantially, was unable, if never so much inclined, to tell even a part of the truth, without the aid of leading questions, which, to say the least, supplied the most important parts of his declaration? If the dying man had been in a state of mental inability to give a full relation of the facts, it cannot be denied, that such mental defect would have been a conclusive reason for excluding the evidence of his declarations, though declarations uttered even in the ravings of delirium may perchance be true: and I can see no good reason why a physical inability to give a full account of the transaction, should not have the same effect as mental incapacity would have to exclude a partial

account, that may or may not be a just representation of the truth of the case. For, if a state of mental incapacity may render him insensible of the approach of death, the apprehension of which is the equivalent for the sanction of a judicial oath, the physical incapacity renders his sense of approaching death utterly unavailing to induce a full and impartial disclosure of facts. It will be found, that in all the cases in which dying declarations have been admitted in evidence, the dying man that made them, was, at the time, both mentally and physically capable of telling the whole story, in his own words, without being prompted by leading questions, much more having the story told for him in questions. See the cases collected 1 East's P. C. 353-360. In Reason & Tranter's case, 1 Stra. 499, the dying man was capable of giving a full relation of all circumstances, and of undergoing a cross-examination; and in fact, there was a cross-examination in that case, and the evidence thereby elicited acquitted the prisoners of murder.

Attorney general, contra. The objections that have been made, affect the credit, not the competency, of the evidence; 792 *and as to the credit that should be given to it, the court gave the jury a caution sufficiently favorable to the prisoner.

The objection to leading questions lies properly where the questions are propounded by a party to the controversy or his attorney, who has an interest to discolour the evidence: Edmunds was not a party; and he had no personal interest, no motive, to draw from the dying man any thing but the truth; the law will not regard his proceedings with any jealousy. Leading questions are "such as instruct the witness how to answer"—or "which suggest to the witness the answer he is to make;" that is, questions that indicate to the witness the answer which is desired by the person who puts them. Now, the questions put by Edmunds did not indicate that he desired, or expected, an affirmative or negative answer: they only indicated that he wished to know the truth whatever that was. Therefore, they were not leading questions. The passage quoted from the note in 1 Stark. L. Ev., Part II., p. 124, note (u), is not sustained by any authority; and the proposition, in the broad terms there stated, is unfounded in principle or reason. But, if these were leading questions, they were put in that form of necessity: the dying man's situation was such, that information would no otherwise be obtained from him. Objections to leading questions are founded on the default of the party who propounds them; and are allowed, because, in general, the evidence may still be obtained by propounding the inquiry in proper form; but if such an objection be allowed in the present case, the defect of evidence is irremediable. The evidence must be admitted *ex necessitate*.

The declarations of the dying man were, in themselves, so far as they went, full and distinct: it does not appear, that he had any thing more to communicate on the subject; it is not stated, that the fourth question put to him by Edmunds, which he was unable to answer, had any relation to it. The declarations prove, that the mortal blow was inflicted by the prisoner: that alone is proof of 793 his guilt: if *there were any circum-

stances to extenuate the crime, or to excuse or to justify the act, the burden of proving them lay on him. If the evidence is to be suppressed, because every incident that occurred at the time, was not inquired into and minutely detailed, or because the dying man was incapable, in consequence of the mortal wound, of giving such details: so broad an objection would go the length of suppressing death-bed declarations in almost every case, since in order to make them evidence at all, the declarant must be in extremis. It was not the fault of the commonwealth, that the details were not required: it was not the fault of the commonwealth, or of Edmunds, or of the dying man, that he was incapable of giving them, if they had been required: that was the fault of the prisoner; the effect of the injury which his hand had inflicted. And to allow him to object to the evidence on that ground, would be to violate the principle that no one shall be allowed to take advantage from his own wrong.

LOMAX, J., delivered the opinion of the court. The question of the competency of testimony may depend upon facts extraneous and collateral to the testimony; or the matter and manner of the testimony may be such as to render it inadmissible. To make dying declarations receivable as evidence in any case, it has been laid down, that it must appear that the deceased was conscious of his being in a dying state, at the time he made them. This inquiry into the consciousness of the deceased, is collateral to the evidence of the dying declarations themselves, and the judgment to be pronounced upon it, depends upon proofs which may be wholly distinct from and unconnected with the declarations. So, all testimony presupposes the sanity of the witness who deposes, and whenever the question of sanity is raised, for the purpose of excluding the evidence which is offered, it must depend upon collateral proofs. These questions as to the competency or admissibility of testimony, at whatever stage of the trial they may be 794 raised, (though regularly they *ought to precede the introduction of the testimony objected to) are referred to the decision of the judge. "As it is the province of the jury to consider what degree of credit ought to be given to evidence, so it is for the court alone to determine, whether a witness is competent, or the evidence admissible. Whether there is any evidence is a question for the judge; whether it is sufficient is for the jury. And whatever antecedent facts are necessary to be ascertained, for the purpose of deciding the question of competency, as for example, whether a child understands the nature of an oath, or whether the confession of a prisoner was voluntary, or whether declarations, offered in evidence as dying declarations, were made under the immediate apprehension of death; these, and other facts of the same kind, are to be determined by the court, and not by the jury." 1 Phil. L. Ev. 13, (edi. 1816); Clayton v. Anthony, 6 Rand. 399; Chaney v. Saunders, 3 Munf. 51. This preliminary adjudication of the court upon the question as to the admissibility of the testimony, in case the evidence be allowed, has decided nothing in regard to its credibility. That peculiar

province still remains for the jury. It is every day's practice to admit evidence as competent, which the jury have no hesitation in disbelieving. The court may decide, upon examination of proofs, that a witness is not incompetent for want of reason or understanding: the jury may, notwithstanding, determine within their province, what is the weight of his testimony, and may graduate the credit they will repose in it, from the point of total disbelief to that of the most implicit confidence. If in the judgment pronounced by the court, upon the question of competency, any error be committed, a bill of exceptions, embodying all the facts and circumstances upon which that judgment was given, is the proper mode of presenting the error to an appellate jurisdiction, for review and reversal. If no exception be taken, or if it do not appear what evidence was given to the judge, upon this collateral inquiry in regard to the competency of the evidence,

all must be presumed to have been legal and right. If the jury, in finding a verdict against the prisoner, have committed a mistake, and given undue credit to the testimony, the proper corrective is an application for a new trial, to the court which tried the cause; and if there be any mode of bringing to the consideration of the appellate court, the error of the court below in overruling the application, it would be by a bill of exceptions, stating all the proofs which are offered to the jury. The bill of exceptions must, in either case, adapt itself to the nature of the error complained of, and show precisely wherein it was committed. It is upon the former ground alone that this case is brought before us.

If, therefore, in the case now under consideration, the error complained of was, that the judge had admitted testimony of dying declarations which was incompetent, cause the deceased, when he made them, to be not under the apprehension of impending death, and was not of mental capacity to testify, we must refer to the record to ascertain, whether the matters therein stated show, that the judge must have erred in admitting this evidence; and, in considering this question, we must view it exclusively as a question of mere competency, wholly distinct and apart from any consideration of the weight it might have been entitled to with the jury. The evidence could not be the less competent, though the court might think the jury would have done so in wholly disregarding it.

In this bill of exceptions, it is expressly stated, that the judge was of opinion, that the deceased was conscious of his approaching death, at the time the questions were put to him, and his answers thereto were given; also that he was in his right mind and understood the questions. The evidence, to sustain this opinion in regard to the mental capacity of the deceased, was, (as stated in the bill of exceptions) that many witnesses, who saw the deceased in the interval between the time he received the wound and his death, and at the time the questions were put to him, gave evidence, that he was in his right mind. In

regard to the consciousness of the deceased of his impending death, the direct testimony in the record, bearing

upon this point, is the affirmative answer of the deceased to the question which was asked him, "Do you think you are going to die?" But the consciousness of approaching death may be collected as well from the circumstances of the case (as from the nature of the wound and the state of the body) as from expressions used by the deceased. Woodcock's case, 2 Leach C. C. 563; Dingler's case, Id. 638; John's case, 1 East's P. C. 357. This court, therefore, has clearly no warrant for pronouncing, that the opinion of the judge, as to the sanity of the deceased, and his consciousness of approaching death, was erroneous, unless it can be contended, that the facts stated in the record, furnish such conclusive proof that the deceased was unsound in his mind, and unconscious of imminent death, that it could not be disproved by other evidence however direct and cogent. What are the facts as stated in the record upon this subject?

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In deciding then, whether, under the circumstances in the bill of exceptions stated, the evidence of the death-bed declarations, therein stated, was incompetent evidence and ought not to have been allowed, it must be borne in mind, that in this record, the deceased is adjudged to have been a man sound in his mind, and conscious of standing on the brink of eternity; and that if this adjudication was erroneous, the bill of exceptions has been so framed as not to bring it into question; and that therefore it is now irreversible.

It was argued by the petitioner's counsel, that though it is true, in general, that the dying declarations of a person who has received a mortal wound, made under apprehensions of death, are admissible in criminal prosecutions for the homicide; yet, that the dying declarations, which are so admissible, must be dying declarations of a person in a situation to give a full and complete account of the facts of the transaction,—not only to tell a part of the truth, but the whole truth. The court can not sustain this principle, in the latitude with which it is applied. If facts be stated, which are obviously designed by the party who states them, to be connected with other facts which he is about to disclose, and to be qualified by them, so that the narrative should form one intire

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It was argued by the petitioner's counsel, that though it is true, in general, that the dying declarations of a person who has received a mortal wound, made under apprehensions of death, are admissible in criminal prosecutions for the homicide; yet, that the dying declarations, which are so admissible, must be dying declarations of a person in a situation to give a full and complete account of the facts of the transaction,—not only to tell a part of the truth, but the whole truth. The court can not sustain this principle, in the latitude with which it is applied. If facts be stated, which are obviously designed by the party who states them, to be connected with other facts which he is about to disclose, and to be qualified by them, so that the narrative should form one intire

and complete history of the whole transaction; and before the purposed disclosure is made, it be interrupted, and the narrative remains unfinished; such partial declaration would not be admissible in evidence. The declaration which was offered in evidence in Finn's case, 5 Rand. 701, may be referred to in illustration of this point. But, if the declaration state facts distinctly, and, as far as the declaration goes, it does not necessarily appear, that the facts thus stated were designed to be connected with some other facts, which may be supposed to form a part of the full and complete account of the transaction, it would be going too far to reject altogether the matter thus disclosed, upon any presumption of law, that the narrator was precluded by his situation (he being sound in his mind) from giving a full and complete account of the transaction, or

upon any presumption of fact that the court could form, "that what was disclosed was only a part of the truth, and not the whole truth of the case. It cannot be contended, that the evidence would be rendered incompetent from the circumstance that the deceased was not in a situation to know all the facts. It does not appear in the record, what was the question last propounded to the deceased, nor is there any evidence whatever, of the cause which rendered him unable to answer it. If his situation was such as to disable him, from any other cause, independent of the state of his reason, from giving a full and complete account of the transaction, and from telling the whole truth, not merely a part of the truth, that was a matter for the decision of the jury, and not of the court. Even if it were true, that a supervening disability had abridged the narrative, which, possibly, under other circumstances, might have been given by the deceased, still the question, whether the matter disclosed amounted to a full and complete account, was a question properly left to that tribunal, in which the law vests the power of deciding upon the credit of witnesses, and which alone can determine, from the circumstances of the case, whether a witness has told the whole truth, as well as a part of the truth, and nothing but the truth. If the court can exercise the power of deciding from the face of the testimony, that a witness of sufficient mental capacity, was not a competent witness, because he was unable or refused to answer some particular inquiry; and if the court has the power, moreover, of pronouncing, that the disclosures which he has made, must necessarily have fallen short of a full and complete account of the transaction, or of such an account of it as is worthy to be listened to and weighed by the jury; it would seem to lead to dangerous inroads upon the province of juries. The presumption, that the deceased was not in a situation to give a full and complete account, is derived from Edmunds's evidence, that he had put a fourth question to the deceased, but he was unable to answer it. The reasonableness and the strength of this presumption depend much upon circumstances.

799 There is nothing in the *evidence, to shew that the question, last propounded to the deceased, had any relation to the homicide, and that the matter inquired

about formed a part of a full and complete account of the transaction; much less, that the information sought must necessarily have been that which a person, in a situation to give such an account, could not but have been able to tell. Before we can be warranted in drawing the important inference, attempted from Edmunds's testimony, it would be material to know not only the pertinency of the question to the matter in hand, but also the interval which elapsed between the answer to the third question, and the putting the fourth. If the force of that testimony was susceptible of explanation, and might be varied by other proofs, then, even if this were a question of competency to be decided by the judge, this court can not, as this record is framed, undertake to pronounce, that such explanations and proofs were not submitted to the judge, as the foundation of his decision.

It was, moreover, objected in the argument, that the information obtained from the deceased, was but the answers "Yes, sir," to questions, which were leading questions. It is laid down in the books, that leading questions, that is, such as instruct a witness how to answer on material points, are not allowed on the examination in chief: for to direct witnesses in their evidence, would only serve to strengthen that bias, which they are generally so much disposed to feel, in favor of the party that calls them. 1 Stark. L. Ev. 123. Still, it will be found, the rule is not of universal application; for there are cases withdrawn from its influence, where it is allowed by the courts to be necessary to lead the mind of the witness to the subject of inquiry. It has been said, that it is difficult to lay down any precise rules as to leading questions, and how far it may be necessary to particularize, in framing the questions, must depend on the circumstances of each particular case; 1 Stark. L. Ev. 123, note (u). Wherever this rule is treated of, cases are presupposed, where there is

800 a subject of litigation depending,—*where the witness, to whom answers are suggested in the forms of the questions, has been summoned by one of the parties to that litigation; and where the witness is in a situation which exposes him to a suspicion of bias in favor of the party who calls him. But is there to be found in the law, any principle which would warrant the extension of the rule to a case like the present, and would require that the examination of a dying man as to the cause of his death, should conform to a technical strictness? Here was no matter of litigation, civil or criminal, depending: no prosecution so far as appears, had been instituted, or was known to the dying man; no conceivable connexion between him, who was putting the questions to him, and any interest likely to be subserved by the answers which were sought for; and no bias to be suspected in the mind of the deceased in favor of any interest on this side of the grave.

The answers to these questions would have been more satisfactory, had they responded more fully the circumstances of the homicide. But this court cannot pronounce that they are inadmissible, because they are mere monosyllables—"Yes, sir." The law has no where defined what shall amount to

dying declarations, or the form in which they shall be uttered. It might be unsafe that it should do so. Whether the declarations are such as entitle them to be regarded as dying declarations to be offered in evidence, must depend upon the temper of the deceased when he made them, and upon the circumstances under which they were made. So far as the effect of such declarations is to be weighed by the jury, the court, upon this record, has no power to interfere. The jury were cautioned by the judge at the trial, that they ought to disregard the testimony altogether, unless they should believe from the evidence in the case, that the deceased understood the questions put to him, and answered them understandingly: and even if they should so believe, they ought, in weighing the testimony, to take into consideration the manner in which the questions were put and the answers obtained, and also the

801 probability that the questions and answers do not give a full account of the facts of the case. If the answers of the deceased formed, in the consideration of the jury, an essential part of the proofs in the case, then the verdict they have found, after this solemn caution, has pronounced that the deceased did understand the questions, and answered them understandingly, and that the testimony, notwithstanding the circumstances which seemed to impair its credit, was entitled to their belief. There may have been other evidence, satisfactory as to those circumstances, before the jury; and for aught that appears in the bill of exceptions, the court also, in deciding upon the question of competency, may have been influenced by proofs omitted to be embodied in the case. The objections which have been taken to the form of the questions, and the manner in which they were answered, as well as other objections in behalf of the prisoner, derive their force, for the most part, from a suspicion, unsubdued by the decision of the court (irreversible as has been shewn) that the deceased laboured under a want of mental capacity to testify. If we regard him as a man beyond question of sound reason, and his responses as flowing from a rational and deliberate mind, it seems difficult to distinguish the evidence now under consideration, from that of other dying declarations.

Upon the whole, a large majority of the court is for refusing the writ of error. This court might have given a very different judgment, had the record been so framed as to bring the errors complained of fully before them. Any mistakes which have been committed by the jury, are not within our cognizance; and if any errors were committed by the judge upon the matters submitted to him, the bill of exceptions has not been so framed as to bring those matters within our consideration.

Writ of error denied—Dissentiente, JUDGES FIELD, R. B. TAYLOR and SCOTT.

802 *The Commonwealth v. Tate.

July, 1881.

Justice of Peace—Acceptance of Office of Deputy Sheriff—Effect.—The office of deputy sheriff is incom-

*Justice of Peace—Acceptance of Office of Deputy Sheriff—Effect.—The principal case is cited in foot-

patible with the office of justice of the peace, though by the statute law of Virginia the office of high sheriff is not so; and the acceptance of the office of deputy sheriff vacates the office of justice.

Case adjourned from the circuit court of Washington.

The circuit court, at the instance of the attorney for the commonwealth, made a rule on Charles Tate, to shew cause why an information, in the nature of a quo warranto, should not be filed against him, for acting as a justice of the peace for the county of Washington, after having acted as deputy sheriff of the same since his qualifications as a justice. Upon the return of the rule, the following state of facts was agreed—That Tate qualified as a justice of the peace of Washington, on the 20th July 1802, and acted in that capacity. That on the 15th March 1803, he qualified as deputy sheriff of the county, and acted as such for one year, and then resumed his seat on the bench; and continued to act, alternately, in the one or the other character, at various times, until the 24th March 1821; at which time he was admitted and qualified as deputy sheriff under John Houston sheriff of the county, and acted as such till the 18th March 1823; and since that date till this rule was made upon him, he had acted as a justice of the peace under his commission and qualification of 1802. That under his last appointment of deputy sheriff, he continued to act for the two years, without qualifying anew, or giving a new bond to his principal, at the commencement of the second year of the shrievalty; he having farmed the office from Houston, and given him bond and security, in the first instance, for the whole time of Houston's continuance in office; neither was Houston himself commissioned, nor did he qualify, as sheriff for the second year, but only gave bond for the collection of taxes for the second year, under his first commission. And upon this state of facts, the

803 circuit court adjourned *to this court, the following questions: 1. Whether Tate's acting as deputy sheriff the second year of Houston's shrievalty, was such an acceptance of the office of deputy sheriff, as vacated his office of justice of the peace, so that he could not act in the latter office without a new commission? (which question depended on the construction and effect of the statute of 1821-2, ch. 26, § 2, Sess. Acts, p. 27, concerning the disqualifications of justices of the peace). 2. Whether, independently of that statute, Tate was disqualified from acting in the office of a justice of the peace after having repeatedly accepted the appointment of deputy sheriff of the county? Attorney general for the commonwealth.

Leigh for the defendant.

PARKER, J. As to the first question, taking it to refer to the operation of the statute of 1821-2, ch. 26, § 2,—a large majority of the judges are of opinion, upon the facts agreed, that the defendant's acting the second year as deputy sheriff, under a contract made the first year with the high sheriff for his whole term, was not such an acceptance of office, after the passing of that statute, as, under it, vacated his office of

note to Amory v. Justices, 2 Va. Cas. 523. See monographic note on "Justices of Peace" appended to Wallace v. Com., 2 Va. Cas. 130.

justice of the peace. He continued in office after the date of the statute, but it was under the old contract; and the court thinks that there should have been some distinct act of acceptance, by taking a new oath, giving a new bond, making a new contract, or otherwise, in order to bring him within the terms of that law. The court, therefore, answers the first question in the negative.

Upon the second question, there has been a great difference of opinion among the judges, both at the last and present term; the court, then, being equally divided, and there being now a division in the court, ten judges to eight.

Every one agrees, that, at common law, the two offices are totally incompatible, and that the acceptance of the one

804 *vacates the other. The case of *Amory v. The justices of Gloucester*, in this court, decides this principle in the case of a deputy clerk, by the unanimous opinion of the judges; and that of a deputy sheriff, who is recognized by the law as a public officer, and who is directly responsible to the county court, for the due discharge of many of his duties, is still stronger. The point of difference does not lie here, but arises out of other considerations. It is said, that the office of high sheriff is, by the express provision of the statute concerning sheriffs, to be filled from the county court bench; that it could never have been the intention of the legislature, to make the acceptance of that office, vacate the other office, which constituted the very qualification of the one accepted; that such a construction would sweep away the whole bench of justices, and render what was intended as a reward for services, a disqualification for the office in which those services were rendered; that the statute alluded to, has always been construed to exempt the office of high sheriff from the operation of the common law principle; and assuming such construction to be the right one, there is no reason why the subordinate office of the same kind should not follow the nature of the principal: that, in point of fact, such has been the understanding and settled usage of the country, and it is now too late to disturb it, since the common error may, in this as in other cases, make the law. But a majority of the court is of opinion, that the office of deputy sheriff stands, under our law, upon a different footing from that of high sheriff, and that none of the reasons which are urged in favour of the latter, apply to the former office.—That the statute alluded to, embraces the case of the high sheriff alone; and if, as they agree, it must be so construed as to allow him to resume his office of justice of the peace, it is a personal privilege which ought not to be extended.—That the law casts the office of high sheriff upon a justice of the peace, but it is silent as to the deputy, and the high sheriff may select his deputy from any class of society; and if the latter voluntarily

805 accepts and *exercises an office clearly incompatible with the one he holds, there is no good reason for exempting him from the operation of a sound and acknowledged principle, which would go far to weaken and destroy the principle itself.—That, as to usage, it ought to have no weight unless it has been general,

uncontroverted and uniform.—That there is no evidence of any usage in this case, of which the court can judicially take notice; and so far as our information extends, there has been no uniform or unquestioned usage on the subject; on the contrary, it is believed (as the statute of 1821-2, ch. 26, declares) that “different practices in relation thereto, have prevailed in different parts of the commonwealth”—That that statute is merely, as appears upon its face, “a declaration of the law” in this case.—And that, as the common law is clear, indisputable, and founded upon wise principles of policy, and no act of the legislature, or uniform, recognized and acknowledged usage controlling it, is established, the second question propounded by the circuit court of Washington, ought to be answered in the affirmative.

In this opinion, nine of the other judges concurred.

SCOTT, J. The nearly equal division of the court upon one of the questions involved in this case, if it does not require, justifies me, in stating the grounds on which I dissent from the opinion of the majority.

The question is, whether prior to and independently of the statute of 1821-2, ch. 26, the acceptance and exercise of the office of deputy sheriff by a justice of the peace, *ipso facto*, vacated the latter office. According to the well settled principles of the common law, two offices the duties of which are incompatible, cannot be held by the same person at the same time; and the acceptance of one by a person holding the other vacates that other. It requires no argument to prove, that the duties of a justice of the peace, who is one of the judges of the county court, and

806 those of *sheriff of the same court, are incompatible, and consequently, by the rules of the common law, the acceptance of the office of sheriff, whether principal or deputy, by a justice of the peace, would vacate the office of justice of the peace.

“Until 1665, sheriffs were elected. An act was then passed, directing that the justices of the peace of each county (then called commissioners) should nominate three or more, out of which the governor and council should commission one as sheriff. In 1660, it was enacted, that the office should be conferred on the commissioners in succession; and so it remained until 1705, when it was enacted, that no person but a justice of the peace should be appointed sheriff”—per Green, J., in *Salleng v. M’Kinney*, 1 Leigh, 58. No material change has been made up to the present time. The act of 1705 does not declare, that the office of sheriff shall be conferred on the justices in succession; but such has been the practice under it. These statutes then, declare, that the possession of the office of justice of the peace, is a necessary qualification for the office of sheriff. It would be a strange state of things, to require the possession of one office as a necessary qualification for another, and by conferring that other to deprive the party of that which qualified him to receive it; to declare that the justices of the peace form a class so meritorious as to be exclusively entitled to the office of sheriff, and yet that the individual who receives this reward of merit, shall instantly lose his caste; that the law, which,

in a manner, casts upon him the office of sheriff because he is a justice, should take from him the office of justice because he is a sheriff. This would be to confer upon the two offices, by the same provision, the opposite qualities of attraction and repulsion. Again : by the requisition of the former law, and the practice under the statute of 1705, this office of sheriff is given to the justices in rotation. To give to it the disqualifying effect it had at common law, would make it the instrument of sweeping, one by one, every justice from the bench.

807 *This never could have been the intention of the legislature. It seems clear, then, that the principle of the common law, so far at least as the office of high sheriff is concerned, is repealed by these statutes. It is conceded, however, that none of the reasons which have brought us to this conclusion, apply to the case of a deputy sheriff. His office is not bestowed upon him because he is a justice : it is not given as a reward for former services : the office is in no sense cast upon him by the law. If then we were to construe these statutes, without reference to the usage of the country, we should probably have not much difficulty in deciding, that they do not extend to the case of a deputy sheriff. It may, however, be fairly insisted, that, as the legislature clearly meant to declare that the offices of the justices of the peace and sheriff are not incompatible, so far at least as the high sheriff is concerned ; as this intent is not declared by express words, but deduced by construction ; as there is nothing peculiar to the office of deputy sheriff, to induce a discrimination ; and as there is nothing in the statute from which an intent to make such a discrimination can be inferred ; therefore, no such discrimination exists, and the office of deputy sheriff stands on the same footing, in this respect, as that of high sheriff. This construction is sanctioned, so far as my observation and information extend, by the practice of the whole state, as far back, for aught that appears to the contrary, as the enactment of the statute conferring the office of sheriff on the justices of the peace.

It is said, however, that the preamble of the act of 1821-2, ch. 26, declares that the practice has been different in different parts of the state. The recital in that preamble does not necessarily embrace the case of deputy sheriff. If it did, it would certainly be a high authority. But I think, that it may be safely affirmed, that the practice, if not universal, has been very general.

It is said too, that this usage is not evidenced by any judicial decisions. If this kind of evidence is necessary, it must have a beginning, and why should we not

808 be the first *to furnish it ? It cannot, I think, be doubted that the court may take notice of a fact of general notoriety. That a particular construction has been placed on a statute, and long acquiesced in, is always considered a strong reason why a court should so construe it ; and if no evils will be produced by adhering to that construction, and evils will arise by departing from it, we have a stronger motive for adhering to it. No possible mischief can be perceived, as likely to arise from adhering

to the construction, which has hitherto been placed on these statutes. The only material effect of a change will be, to remove some old and worthy members of the county court bench, to the end that their younger brethren may obtain the office of sheriff a little sooner than in the ordinary course of things it would come to their turn. The party who is the object of the proceedings in this case, doubtless accepted the office of deputy sheriff, under the impression that he would not thereby divest himself of the office of justice of the peace. Under this impression, he returned to the bench, and has continued to perform the duties of a justice. To say to him now, that he is an usurper of the latter office, would be, at the least, harsh language. To deprive him of the office of high sheriff in his turn, the only reward for his services as justice, and confer it on a younger justice, would, I think, be unjust. A practice so general and long settled, known to and acquiesced in by every department of the government, has the force of law. I should hesitate before I gave to usage, the effect of repealing a statute, though I should not be without authority even for that. See the cases cited by Green, J. 1 Leigh, 60. The usage in question, is opposed to nothing but a principle of the common law, which itself has no other sanction.

It is said that the statute of 1821-2, ch. 26, declares the law to have been otherwise. Whatever efficacy the omnipotence of the british parliament may give to a declaratory statute, neither the old nor the new constitution authorizes that kind of legislation in Virginia. It belongs to the
809 *legislature to say what the law shall be ; to the courts to say, what the law is.

Upon the whole, I am of opinion that the incompatibility which existed at common law, between the offices of justices of the peace and sheriff, was removed by our statutes above alluded to, and that those statutes embrace both the deputy and the high sheriff.

Seven of the judges concurred in the opinion of SCOTT, J.

The Commonwealth v. Maclin.

July, 1831.

Criminal Law—Killing Dogs.—*The statute of 1822-3, ch. 34, § 1, does not authorize a criminal prosecution for killing dogs belonging to another.

Case adjourned from the circuit court of Greenville.

An information was filed against Maclin in the circuit court, for knowingly, wilfully, and without lawful authority, killing and destroying two dogs belonging to one Turner, against the form of the statute in such case made and provided.† The defend-

***Criminal Law—Killing Dogs.**—For the proposition that, the killing a dog of another is not an indictable offence, the principal case is cited and followed in Davis v. Com., 17 Gratt. 620. 621. 622. 623. 624. 625. See monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

†The statute on which the prosecution was founded (1822-3, ch. 34, § 1, Sess. Acts, p. 38,) is in the following words: "Any person who shall knowingly and wilfully, without lawful authority, cut down any tree growing on the land of another, or destroy or injure any such tree, or any building, fence, or other im-

ant demurred generally. And the circuit court adjourned to this court, the following question: What judgment ought the court to render on the demurrer put in to the information?

810 *LEIGH, J. This is a prosecution under the statute of 1822-3, ch. 34, and to sustain the prosecution, it must be held, that by the words "property real and personal" in the statute, the legislature intended to embrace dogs. Some of the judges are of opinion, that the act does not authorize a prosecution for the destruction of any kind of living domestic animals, and that by the words "property real and personal," the legislature intended property of the same kind as that before enumerated; for that it cannot be supposed, that the legislature intended to embrace our valuable domestic animals, by the general word "property," when in the preceding part of the act, it had specially named property of much less value. But, without expressing any opinion as to the correctness of this construction of the act, a majority of the court is of opinion, that a criminal prosecution cannot be sustained for the destruction of dogs. By the common law, the property in dogs and other inferior animals, is not such as that a larceny can be committed by stealing them, though the possessor has a base property in them, and may maintain a civil action for injuries done to them. And, in a penal act, like the one now under consideration, the word "property" standing alone ought to be considered to mean full and complete property, such as by the common law may be protected by a public prosecution for the larceny thereof. Therefore, the court is of opinion, that it ought to be certified to the circuit court, that the demurrer ought to be sustained, and judgment rendered for the defendant.

JUDGES SMITH, UPSHUR, SUMMERS, W. BROWNE, FIELD, LOMAX, and SCOTT, dissented.

811 *Rixey and Others v. The Justices of Fauquier.

July, 1831.

Negroes Committed by Court—Liability of County for Maintenance.—The expense of keeping and maintaining negroes committed by order of a county court to the custody of the sheriff, cannot in any case be a lawful charge upon the county.

Case adjourned from the circuit court of Fauquier.

The county court of Fauquier, at June term 1820, proceeded to make up, in its

minutes, an account of expenses incurred by the court and properly chargeable to the county and remaining unpaid, and to levy the amount due on the tytheables of the county; and among others, it admitted and made the following charges against the county, viz. "To E. D. late sheriff of Fauquier, per account, 240 dollars—To E. D. late sheriff, per account, 597 dollars—To W. S. late sheriff, per account, 77 dollars." The accounts of the sheriffs referred to in the charges, shewed that these allowances were made to them, respectively, for keeping certain negroes the property of one Nelson, for a considerable length of time, under orders of the county court.

Rixey and twenty three others, freeholders of the county, presented their petition to the circuit court, at July term 1829, complaining that the charges above mentioned were made by the sheriffs, for keeping certain negroes, who were suing in forma pauperis to recover their freedom, and that this constituted no legal charge upon the county, and praying, therefore, that the order of the county court laying the county levy should be superseded and reversed.*

812 *Writs of supersedeas and certiorari were accordingly awarded, and various proceedings had in the case, until December term 1830, when the circuit court adjourned to this court, many questions of law, for novelty and difficulty, the last of which was, What judgment ought to be given in the case?

PARKER, J., delivered the resolution of the court. The court, without deciding whether it would reverse an order laying a county levy, which did not shew on the face of it, for what the respective sums were charged, so as to make it appear, that the expenses incurred had been incurred under

*See the statute concerning tytheables and the mode of laying and collecting the county levy, 3 Rev. Code, ch. 191, § 6, 9.

The 6th section provides, that "the Justices of the several counties within this commonwealth, shall and they are hereby authorized and empowered, at their courts respectively to be held in the month of May or June, annually, or as soon after as may be if no court shall be held in either of those months, to proceed to make up, in their minutes, an account of all expenses incurred by the said court, under authority of any law chargeable on the county, and remaining unpaid, stating therein the sums due, for what, and to whom due, and all credits owing to the said county. When the balance due from the county is thus ascertained, by deducting the sums due to the county from those owing by the county, the said Justices shall proceed to levy and assess on the tytheable persons in their respective counties, the amount of that balance, in equal proportions. The sums due to the county, and the sum to be assessed on the tytheables, shall then be appropriated by the court, so as to shew the right of each county creditor and the amount of his demand."

The 9th section provides, that "if any county court shall lay any levy otherwise than is allowed by law, it shall be lawful for the judge of the superior court of law within whose jurisdiction such county may be, at any time within forty days after such levy shall have been laid, either in term time or in vacation, upon the petition of twenty four freeholders subject to such levy, to award a supersedeas to the order of the court whereby such levy was laid, if upon an inspection of the copy of such order, it shall appear that the levy has been laid contrary to law; and, at the same time, it shall be lawful to award a certiorari, to cause the record to be certified into the superior court of law having jurisdiction over such county: When such record shall be so certified, the superior court shall proceed, without delay, to reverse or affirm the order laying the said levy, as to them shall seem right."—Note in Original Edition.

the authority of some law, and were properly chargeable to the county,—is of opinion, that the sheriffs' accounts referred to in the account stated in the minutes of the county court, are to be considered as part of the order, and do shew for what the sums allowed to the two sheriffs respectively, were due. They were due for keeping certain negroes, the property of an individual, committed to the custody of the sheriff by order of the county court. Now, if (as is alleged in the petition of the twenty-four freeholders) these negroes were suing in forma pauperis for *their freedom, the person who claimed property in them, refusing to give bond and security for their forthcoming to answer the judgment of the court, as required by law, must bear the expense of keeping them. 1 Rev. Code, ch. 124, § 4, p. 481; Sarah v. Henry, 2 Hen. & Munf. 19. But, if that fact is not to be assumed, still the levy cannot be supported; since we cannot conceive a case in which the county can be made liable for the keeping of slaves, or persons claimed as slaves, committed to the custody of the sheriff. The only cases of such commitments that occur to us, are, when they are committed for criminal offences, or as runaways, or under execution for debt, or by their owners in certain cases, or when they are in the predicament above mentioned of paupers suing for freedom. In neither of these cases are the tytheables of the county liable for their support, and we believe that no case can be stated, in which they are so liable. Therefore, the levy of the 22d of June 1829, was laid otherwise than is allowed by law; and this court, without answering or deciding the other questions adjourned, directs that it be certified to the circuit court of Fauquier, that the order of the county court laying the levy should be reversed.

Tankersley v. Lipscomb.

July, 1831.

Certiorari—When Lies.—The county and corporation courts being courts of record, the writ of certiorari does not lie to a judgment of a corporation court affirming a judgment of a single magistrate, though his is not a court of record, for a fine imposed by a penal law, or in a civil case: if there be error in the judgment of such court affirming the judgment of a single magistrate for a fine, the writ of error lies.

Case adjourned from the circuit court of Henrico.

Upon the information and complaint of Moses Lipscomb, that Matilda Tankersley had harboured and employed his
814 *slave, knowing her to be a runaway, contrary to the statute in such case made and provided, the mayor of Richmond issued a warrant against Tankersley requiring her to appear before him or some other magistrate of the city, and shew cause, if any she could, why she should not be fined, and otherwise proceeded against, according to the statute.†

***Certiorari—When Lies.**—The Virginia reports show no case of a judgment of the county or circuit reviewed by writ of certiorari. This mode has been attempted in some such cases, but it has been disapproved. Dryden v. Swinburn, 15 W. Va. 254, citing Hay v. Pistor, 2 Leigh 707; Tankersley v. Lipscomb, 3 Leigh 813. See monographic note on "Appeal and Error" appended to Hill v. Salem, etc., Turnpike Co., 1 Rob. 283.

†The statute of 1823-4, ch. 85, § 1, Supplement to

And upon the return of the warrant, and a hearing of the parties, he rendered judgment against the defendant, for a fine of ten dollars, one half to Lipscomb the informer, and the other half to the commonwealth for the literary fund. The defendant appealed to the hustings court of Richmond, under the provision in the county court law, 1 Rev. Code, ch. 71, § 23. The mayor certified the proceedings and judgment to the court; and the court affirmed the judgment, with costs against the defendant and her surety in the appeal bond; Id. § 25.

The defendant then presented a petition to the circuit court of Henrico, alleging error in the proceedings; whereupon the circuit court awarded a certiorari to bring before it the proceedings and judgment of the mayor as well as those of the hustings court; and upon this process, the record of the proceedings and judgment of the hustings court, which contained those of the mayor, were certified to the circuit court.

And then the defendant by petition prayed the circuit court to award a writ of error to the judgment of the hustings court; assigning for error, 1. That the warrant was prosecuted for Lipscomb alone, instead of being a *qui tam* proceeding, for the commonwealth as well as himself; 2. that such warrant did not lie for owner of a runaway slave, he having an action for damages; 3. that it was no where stated in the proceedings, that the defendant was an inhabitant of the city of Richmond, and so it did not appear
815 *that the mayor or the hustings court had jurisdiction of the case; and 4. that the hustings court gave judgment for costs, which in such case could not be adjudged. Whereupon, the circuit court, with consent of the parties, adjourned the case to this court, as one of novelty and difficulty, upon the following points:

1. The judgment in this case being for a fine for the breach of a penal law, will the writ of certiorari lie in such a case, if there be error in the judgment? 2. Ought the circuit court to award a writ of error to the judgment of the hustings court? 3. What judgment ought the circuit court to render in the case?

PER CURIAM—This court is of opinion, and doth decide; 1. That as the judgment which was rendered by the mayor of Richmond was appealed from by Tankersley under the 23rd section of the county court law, and the mayor's judgment was affirmed by the hustings court against the said appellant and her surety under the 25th section of that statute, the case was taken out of the jurisdiction of the mayor; and that the court of hustings being a court of record, a certiorari does not lie to a judgment rendered in that court, and that this is true when the prosecution is for the breach of a penal law, as well as in a merely civil case.

2. That there is no error in the judgment of the hustings court; and therefore no writ of error should be awarded in this case.

3. That the circuit court ought to dismiss the certiorari as having been improvidently

Rev. Code, ch. 170, p. 236, imposing a fine of not less than ten nor more than twenty dollars for the offence. Of course, the prosecution is within the jurisdiction of a single magistrate.—Note in Original Edition.

awarded, refuse to award, the writ of error, and give judgment against the appellant Tankersley, for the costs of the appellee Lipscomb, in the circuit court.

816

***Ex Parte Povall.**

July, 1881.

Wills—Foreign Probate—Validity.*—A copy of a will proved in Louisiana according to the laws of that state, and offered for probate here, is not authenticated according to the act of congress of May 28, 1790, but is authenticated according to the rules of the common law: *Held*, the copy is duly authenticated, within the meaning of the statute of wills, 1 Rev. Code, ch. 104, § 16.

Seals—Foreign Court or State—Proof.—The seal of a court of a foreign country must be proved; the seal of a foreign state or nation proves itself.

Wills—Foreign Probate—Authenticated Copy—Validity.—When an authenticated copy of a will proved in another or foreign state, is offered for probate here, if the probat shew that the will has been so proved there, as that if proved in like manner here, it could only be admitted to probat here, as a will of personalty, it shall be so admitted; but if the proof in the foreign court of probat be such as if taken here would suffice to establish it as a will of lands, it shall be admitted to probat here also, as a will of lands.

A copy of the last will and testament of Richard Povall deceased, and of the proceedings had for the proof thereof in the court of probat for the parish of Ascension in the state of Louisiana, was offered by Francis Povall, for probat in this court. The process verbal contained the will, the depositions of two witnesses proving that it was written wholly in the hand writing of the testator himself, and the sentence of the court thereupon in the following words—"The said will being found clothed with all the requisites of the law, and the formalities for the probat of the same having been all duly complied with; it is, therefore, adjudged, ordered and decreed, that the said will be executed, recorded and deposited, according to law." The copy was certified to be a true copy from the original process verbal of the proof of the will, by Edward Duffet, the judge of the court of probat, under his hand and the seal of the court; and the governor of Louisiana certified under the seal of the state, that Mr. Duffet was the judge of the court of probat, and that full faith and credit were due to his signature as such.

And the questions were, 1. Whether this copy, not being authenticated according to the provisions of the act of congress of May 26, 1790, 2 Bior. p. 102, was yet duly authenticated *so as to be admitted to probat here? And 2. Whether the will could be admitted to probat here, upon the proofs contained in the process verbal of the court of probat of Louisiana, under the provisions of the statute of wills?†

***Wills—Foreign Probate—Authentication.**—The principal case is cited in *Foot-note* to *Wynn v. Harman*, 5 Gratt. 157; *Thrasher v. Ballard*, 38 W. Va. 290, 10 S. E. Rep. 412; *Foot-note* to *Rice v. Jones*, 4 Call 89. See monographic note on "Wills."

† 1 Rev. Code, ch. 104, § 16, p. 378. "Authenticated copies of wills, proved according to the laws of any of the U. States, or of the countries without the limits of the same, and relative to any estate within this commonwealth, may be offered for probat in the general court; or, where the estate so devised shall lie altogether in one county or corporation, the superiour or inferiour court of such county or corporation, respectively, may admit to record any such authenticated copies: but the bond and oath of the executor &c. shall be changed from the bond and oath required by law in other cases, in such

BROCKENBROUGH, J. The first question is, whether this is an authenticated copy? It is not authenticated according to the provisions of the act of congress. But, though that act precribes a convenient method for the authentication of copies of wills proved in other states, and offered for probat here, and this court has, in various instances, adjudged that copies of wills authenticated according thereto shall be admitted to record; yet the court is unanimously of opinion, that the act of congress does not furnish the exclusive rule in such cases, and that a copy of a will authenticated according to the rules of the common law should be held duly authenticated. In the present case, the copy of the will has the seal of the judge of probat; and the governor of the state, under the seal of the state, has certified that he was the judge, and that full faith and credit is due to his signature as such. The seal of the court of a foreign country requires proof; but the seal of the sovereign power of a nation proves itself, and gives authenticity to instruments certified under it. Therefore, this instrument is duly authenticated.

The next and most important question is, whether, under the statute of wills, an authenticated copy of a will, proved

818 *according to the laws of one of the United States, or of a foreign country, must, when produced and offered here for probat, still be proved by witnesses, in open court, or under a commission emanating from our court of probat, under the provision of the statute, that "the proof to be made by the witness shall be conformed to the nature of the case." If this were a new question, doubts might be entertained concerning the proper construction of the statute; and a difference of opinion has frequently manifested itself, and now exists in this court, on the subject. But that law, as it is now written, has existed for nearly forty-two years; and it is believed, there is not a single instance in which the testimony of witnesses in this court, or obtained by virtue of a *dedimus potestatem* issuing hence, has been required, to admit any will to probat. In one instance, after admitting the will to probat as a will of personal estate, the court did issue a commission to take the depositions of the subscribing witnesses; but the commission has never been executed, and the will (Bacon's will) has not been admitted as a will of real estate. It is, however, understood to be the settled construction of the statute, that when the authenticated copy is produced, if it shews that the will has been so proved in a foreign court, as that if proved in like manner by witnesses here, it could only be admitted as a will of personalty, it shall be so admitted here; but, if the evidence taken in the foreign court, be such that, if taken in this court, it would be sufficient to establish it as a will of lands, it shall be admitted to probat here also as a will of lands. It is not necessary to decide, whether, a certificate given by a foreign court (without spreading the evidence itself on the record) which shews that such was the evi-

manner as to the said court shall seem necessary, and the proof to be made by the witnesses shall be conformed to the nature of the case. But such will shall be liable to be contested and controverted. In the same manner as the original might have been."
—Note in Original Edition.

dence there, will be sufficient or not, for the admission of the will to probat here, as a will of lands. In this case, there is no doubt. This was an olograph will, proved as such by two witnesses in the court of probat of Louisiana, and their evidence is set forth. Such evidence given here to prove an original will, would be amply sufficient

819 to admit the will to probat, *generally: and while all of us are of opinion that this will should be admitted to probat as a will of personalty, a large majority are of opinion that it should be admitted to probat as a will of real estate also.

JUDGES UPSHUR, LOMAX, R. B. TAYLOR, and DUNCAN dissented from so much of the opinion as declared the will properly proved as a will of lands, and therefore from the sentence admitting it to probat and record generally: these judges held, that it ought to be admitted to probat and record, as a will of personal estate only.

Sentence—That the copy of the will should be admitted to probat and record generally.

Ex Parte Todd.

July, 1831.

Wills*—Foreign Probat—Authenticated Copy—Failure to State Substance of Proof—Effect.—Authenticated copy of a will and probat thereof in Kentucky. the probat shewing that it was proved by three subscribing witnesses, but not stating the substance of the proof there, admitted to probat here, only as a will of personals.

Same—Same—Same—Effect Where Laws Same—Quere.—Whether, if the law of Kentucky were ascertained to be the same with that of Virginia on the subject, the admission of a will to full probat there, would be sufficient to warrant the admission of it to full probat as a will of lands here, without the particulars of the proof there, appearing in the record of the probat.

A copy of the last will and testament of George Mutter late of Woodford county in the state of Kentucky deceased, and of the probat thereof in the county court of Woodford, was offered for probat in this court by Todd; and the copy was duly authenticated according to the provisions of the act of congress of May 26, 1790, 2 Bior. 102. But the record of the probat in Kentucky, only stated in general terms, that the will was proved by three subscribing witnesses thereto and was admitted to probat and record

820 ord generally, *without stating the substance of the testimony of the witnesses, and shewing that they either proved it to be an olograph will, or that it was attested by them, subscribing their names, in the testator's presence, so as to prove it a will duly executed to pass lands in Virginia, according to the statute of wills 1 Rev. Code, ch. 104, § 1. Todd, however, only asked that it should be admitted to probat and record here, as a will of personal estate.

BROCKENBROUGH, J. The copy is duly authenticated. The certificate of the probat in Kentucky, states that it was proved by the oaths of three subscribing witnesses: it does not shew, that it was an olograph will, or that the attesting witnesses subscribed their names in the testator's presence. But it is not asked, that the will shall be admitted to probat and record here, as a will of real estate, but only as a will of personal estate. We, therefore, waive the

inquiry, whether the law of Kentucky is the same with our's on this subject, and whether, if so and the will was admitted to probat there as a will of real estate, it would or would not be sufficient for us to admit the authenticated copy to probat here as a will of real estate.

Sentence—That the copy be admitted to probat and record as a will of personal estate.

821

*JULY TERM 1832.

JUDGES PRESENT.

*Brockenbrough,
Saunders,
Parker,
Summers,
Upshur,*

*May,
Lomax,
Thompson,
Estill,
Duncan.*

The Commonwealth v. Beeson.

July, 1832.

Roads—Established along River Bank—Right of Public to Take Additional Land without Condemnation Where Road is Washed Away.—If a public road be opened and established along the bank of a river, on land of an individual proprietor regularly condemned for the purpose, according to the statute, and the land on which the road was so opened and established, be washed away, in whole or in part, by high waters, the public has no right to take so much other adjoining land of the proprietor as may suffice for the highway, without a new view and condemnation thereof, and compensation for the same, according to the statute.

Same—Same—Same—Liability of Owner for Nuisance in Use of Land before Condemnation.—And if, in such case, the public be entitled to additional land for the road, the proprietor cannot be guilty of any nuisance in the use of the land for his own purposes, until the road shall have been actually laid out and opened by the public through the instrumentality of its agents.

Case adjourned from the circuit superiour court of Wood.

At April term 1832, the grand jury found an indictment against Agness Beeson for a nuisance. The indictment charged that the defendant, being the owner of certain lands in the county of Wood, contiguous to a public road there, on the 25th March 1832, and thenceforth till the 1st April following, permitted a fence of rails made across the road to remain and be continued, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the commonwealth.

The attorney for the commonwealth and the defendant agreed the following case: That for thirty years past, there had been a road and public highway leading from Parkersburg, along the bank of the Ohio river, to Marietta, being the same road described in the indictment: that the defendant

822 *was the owner of a small farm bounding on the river for some forty or fifty rods; and the road passed along the bank of the river, through the defendant's land, and was bounded on the one side by the river, and on the other by the defendant's fence: and that during a recent great and extraordinary fresh in the river, the ground on which the road ran, for its intire extent through the defendant's land, was washed away, nearly to the defendant's fence, whereby the road was rendered wholly impassable, unless the defendant's fence should be removed. And if upon this state of facts, the defendant was bound to set in her fence,

*See monographic note on "Wills."

*See monographic note on "Nuisances."

and give more ground for the road, without a new view and condemnation of the same, in the manner of condemning lands for public highways, then judgment should be entered for the commonwealth for an amercement of one dollar; but if the defendant was not bound so to set in her fence until the land should be regularly viewed and condemned for public use, then judgment should be entered for the defendant.

The circuit superior court, with the consent of the defendant, adjourned to this court all questions of law arising on the case agreed, as novel and difficult.

Attorney general for the commonwealth.

Leigh for the defendant.

THOMPSON, J., delivered the opinion of the court.

The record does not inform us how the highway mentioned in the indictment was established, whether on a writ of *ad quod damnum* in pursuance of the statute concerning roads and landings (2 Rev. Code, ch. 236, § 1, 2, p. 233,) or by express grant of or contract with the proprietor of the land, or by presumption of such grant or contract arising from the public use of the way for a great length of time: the indictment (as it well might) describes it, in general terms, as a public highway, without shewing how it became such. The case agreed, never-

823 theless, should have disclosed *how the public derived its right of way. Owing to this omission, the court, not exactly foreseeing how far its decision might depend on or be varied by the state of that fact or the omission to state it, would have remanded the cause, in order that the defect might be supplied, but for the suggestion of the counsel, that a speedy decision of the principal question intended to be adjourned, was interesting and important to a whole community, as it would be decisive of a numerous class of similar cases, arisen and likely to arise, and prevent and end much litigation; which suggestion was coupled with the concession both of the defendant's counsel and attorney general, that the court should consider the case, as if the record stated the road to have been established, (as most probably it was) in pursuance of the statute, upon the execution and return of a writ of *ad quod damnum*.

The charge in the indictment is, for permitting or continuing a nuisance in an existing public highway; existing actually and in fact, and not merely by implication of law, if such a thing could be, where no road had ever been laid out or opened. The case agreed states, that the highway described in the indictment, was washed away by a recent fresh in the Ohio, and did not exist at the date of the commission of the alleged nuisance; that the fence now complained of as an obstruction to the road and a nuisance, was legally and rightfully erected on the defendant's private property; that it now stands where it was so erected, forming no obstruction to the road mentioned in the indictment (for that is gone) nor to any public highway now actually existing or in use, or that ever existed or was used. but that it covers ground over which the public have a right to open a public highway, in lieu of the one destroyed by the floods, though as yet the public have taken no steps to open a road

upon the land where the fence stands. To say nothing, at present, of the variance between the case charged and the case agreed, and supposing that the indictment had been

so framed as to fit the case agreed; 824 conceding too, for the *sake of argument, that, in such a case as the present, the public have a right to take adjacent land without compensation, to the extent of the loss sustained by the flood, for the purpose of a public highway; still the question remains, whether an individual in the defendant's situation, is bound to remove a fence lawfully erected, and on failure to do so, is indictable as for a nuisance to a public highway? or, in such a case, would it be the duty of the public, by its agent the surveyor of the old highway, to remove fences, lay out and open the new road, and until the road were thus laid out and opened by him, could a nuisance be committed upon it? We are of opinion, that it was not the duty of the defendant to move in her fence, even though the right of the commonwealth be conceded, but on the contrary, it would be incumbent on the public to locate its right of way upon the particular land claimed for the highway. This it could and should do by the agency of the surveyor, by some such act as laying out and opening the road, removing fences &c., and until this were done, no nuisance could be said to be erected or continued upon this imaginary highway. But suppose this were otherwise, and that a nuisance could be committed on a road never in fact opened, and alleged to exist only in legal contemplation of law, yet we are of opinion, that the variance between the case charged and the case agreed, would be fatal to this prosecution: for the nuisance is charged to have been permitted or continued in the road as existing and established, whereas it appears by the case agreed, to have been continued on land never before used or condemned for a road, where none was ever laid out or opened, where in fact none ever actually existed, and where, if there be a right of way at all, it exists only in contemplation of law, the road designated in the indictment, having been actually swept away. The decision of both or either of these points, in favor of the defendant, would suffice to dispose of this particular case. But they are, confessedly, the minor and technical points in the cause, and do not touch the important question intended to be adjourned.

825 *That question is, Whether, in the case of a public highway regularly established according to the statute, along the bank of a water course, if the ground on which the road runs be destroyed by abrasion, overflow, or permanent change of the bed of the stream, the commonwealth is entitled, at its pleasure, to substitute a sufficient quantity of the adjacent land for the highway, in lieu of that destroyed, without view, condemnation and compensation, in the manner prescribed by the statute? It is contended, that she is: that she acquires by the judgment of the county court affirming the inquisition, and giving leave to lay out and open the road, a right of way, which, when it is bounded by a water course, varies and fluctuates with the fluctuations of the bed or banks of the stream; that the seisin and freehold is not divested by the judg-

ment of the county court, but remains with the original proprietor or his successors in interest; that upon an abandonment of the way by the public, it reverts to the proprietor of the land; that as, on the one hand, he continues riparian owner, entitled to the benefit of any acquisition of soil by alluvial accretion, or otherwise, and in addition to this benefit, has once received actual compensation, and is reverser of the land occupied by the public when the public easement ceases; so, on the other hand, he should bear the risk of loss incident to land thus situated. There is certainly, some plausibility in this argument; but we think when followed to its consequences, it will be found so utterly at war with the letter and spirit of our law, and indeed the general principles of justice, as to justify us in pronouncing the argument wholly untenable however specious. It will not be denied, that, in this commonwealth, private property can only be taken for public purposes, and then only upon making a just compensation to the party deprived. This is a sound principle of our fundamental law; and our road laws, in accordance with it, has certainly prescribed the mode in which the public right shall be exercised, as well as furnished the most guarded means by which this just compensation is to be ascertained

826 *and paid. A jury of freeholders is to view the identical land on which it is proposed to conduct the highway; to identify the land with reasonable certainty in its inquisition; and to assess the value of the very land thus viewed and identified, as well as the value of the additional fencing made necessary by the road. The jury is not called upon, nor is it at liberty, to value a general right of way, confined to no fixed and determinate part of the land, which may shift with the whim or caprice of the public, or with circumstances arising out of casualty or accident: if it were, it would be difficult, if not impossible, so to assess the value and damages as to constitute an equal and just measure of compensation; for it would depend upon contingent and subsequent events, whether its assessment would be too high or too low: if the road should be suffered to remain on sterile land, the estimate might be too high; if shifted from barren to fertile land, it might be too low. This same statute which has conferred the right upon the public (and imposed the conditions upon which the right may be exercised) to take private property for public uses in any case, has imposed this limit upon the right,—that in no case, without the consent of the owner, shall the mansion house, curtilage &c. be invaded for public purposes, whether with or without compensation.

Let us now illustrate, by a few supposable and by no means extreme cases, the consequences to which the argument for the affirmative of this question inevitably leads. A strip of sterile land bounded by a water course, is condemned by the public for a highway, and the value is assessed and paid; it is afterwards (as in this case) carried away by a flood: the commonwealth has the right to make reprisal of land of double, treble or quadruple value, without making any additional compensation. Suppose that by the

operation of the flood, or other natural causes, the road is not only swept away, but the bank has receded so as to bring the stream to the threshold of the mansion house or mill, or other valuable erec-

tion, or to the very verge of the
827 *curtilage: it would necessarily result from sustaining the right claimed for the commonwealth, that the mansion house, mill or curtilage, might be entered by the commonwealth, in virtue of this shifting right of way, notwithstanding the limitation of the right imposed upon the public in original applications to establish roads. They could not only be entered and prostrated by the public, but would become indictable nuisances, according to one of the hypotheses of law involved in this prosecution. Suppose again, that all the lands of the proprietor who received compensation upon the writ of *ad quod damnum*, be washed away, or so irreparably injured as to make a road upon them utterly impracticable: would not the doctrine contended for necessarily conduct us to this consequence, that the commonwealth would have a right to enter upon the land of an adjacent owner who had never received any compensation, and appropriate a sufficient quantity for the highway, without view, condemnation or compensation? If such be the legitimate consequences flowing from the positions assumed on the affirmative side of this question, (and they appear to the court inevitably and necessarily to follow) the positions themselves must be condemned and repudiated as untenable and unsound. They must be discarded, because when compared with our statute, they are found to conflict with the plain and obvious interpretation of its provisions, with its letter and its spirit. That statute does not authorize the public against the consent of the owner, by the exercise of the sovereign power, to acquire a general right of way over his land: it must condemn a particular part of his land to be ascertained and identified. Upon what principle then, should we be justified in holding, that the land condemned shall remain at the risk of the original proprietor, rather than at the risk of the public, and that if destroyed by the flood, the commonwealth may indemnify herself by taking the adjacent land.

We consider the question, upon our statute, a clear one against the right claimed
828 for the public: nor apart from the *statute, do we believe any authority in point can be adduced, either from the common or the civil law, to sustain the pretensions of the commonwealth: if any such exist, the court has not been referred to it. It is true that it is laid down by english commentators, and by the civilians, and ruled by the english judges in *Taylor v. Whitehead*, Doug. 744, as well as in cases before and subsequent, that if the usual tracks of a public way be rendered impassable, it is for the general good that the people should be allowed to pass over the adjacent land, and that such passage would not constitute a trespass: in this principle Blackstone says, the civil and the common law agree. The english authorities mentioned, expressly negative such a right in the case of private way. These authorities

are not understood by this court as touching such a case as the present. They are understood to affirm the right of the public to a temporary way of necessity, in case of a reparable injury, until the highway can be repaired, and nothing more; by no means to transfer and permanently fix the right of way in a new location in case of total and irreparable destruction of the ancient way. The mode at present existing of acquiring land for public purposes in England, is precisely or very nearly the same as that prescribed by our statute—by writ of *ad quod damnum*. We are not apprised of any civilized code that would sanction such a claim on the part of the public, except that of Pennsylvania, where it would be reasonable and proper (subject to the limitation, that the curtilage shall not be invaded, in consequence of the shifting of the highway) because the public makes no compensation for the land condemned for the purpose of highways, the proprietor there having taken the land charged with the general public servitude of highways, expressly reserved by law in the earliest periods of the commonwealth, and being compensated in advance for the reservation. That state, in every grant, throws in, with-

out compensation or price, six acres in the hundred, for which she reserves to herself the right of making as many roads through every man's land as the public interest requires, without compensation. Here, no such reservation is found in the grant or the law; no such compensation is made; and no man's freehold shall be taken but upon payment of a fair, a just, a full compensation.

Therefore, the court is of opinion and doth decide—1. That the defendant is not bound to set in her fence and give more land, without a new view and condemnation of the same, in the manner of condemning lands for public highways. 2. That, even if the public were entitled to the land without compensation, the defendant could not be guilty of a nuisance until the road had been actually laid out and opened by the public, through the instrumentality of its agents. 3. That the offence charged, and the facts appearing by the case agreed (if the court had not decided that they constituted no offence), are too variant, to warrant a judgment of conviction.

DUNCAN, J., concurred in the two last resolutions; but he declined the expression of any opinion on the first point.

STATEMENT [A.] REFERRED TO *ante* p. 362, IN BURWELL'S *ex'ors v. ANDERSON, adm'r &c.*
DR. The estate of Josiah Granberry dec'd, in account with Josiah Granberry his ex'or. CR.

Principal.		Interest.	Principal.		Interest.
1773, Dec. 31.			1773, Dec. 31.		
To commission on receipts,	6 3 8		By receipts this year,	123 6 2	
balance to credit,	117 2 11			£ 123 6 2	
	£ 123 6 2				
1774, Dec. 31.			1774, Dec. 31.		
To disbursements this year,	55 14 0		By balance per contra,	117 3 11	
commission on receipts,	48 4 11		receipts this year,	964 19 9	
balance to credit,	978 3 9		interest on bal. of 1773,		5 17 0
	£1082 2 8			£1082 2 8	
1775, Dec. 31.			1775, Dec. 31.		
To disbursements this year,	586 18 2		By balance per contra,	978 8 9	
commission on receipts,	217 7 7		receipts this year,	4347 11 8	
balance to credit,	4521 9 8		interest on bal. of 1774,		48 18 0
	£5325 15 5			£5325 15 5	
1776, Dec. 31.			1776, Dec. 31.		
To disbursements this year,	6726 10 1		By balance per contra,	4521 9 8	
commission on receipts,	183 17 9		receipts this year,	3677 15 5	
balance to credit,	1288 17 3		interest on bal. of 1775,		226 1 1
	£8199 5 1			£8199 5 1	
1777, Dec. 31.			1777, Dec. 31.		
To disbursements this year,	428 5 9		By balance per contra,	1288 17 3	
commission on receipts,	144 18 3		receipts this year,	2896 4 11	
balance to credit,	3613 18 2		interest on bal. of 1776,		64 8 10
	£4187 2 2			£4187 2 2	
1778, Dec. 31.			1778, Dec. 31.		
To disbursements this year,	483 15 0		By balance per contra,	3613 18 2	
commission on receipts,	66 18 6		receipts this year,	1833 14 10	
balance to credit,	4397 4 6		interest on bal. of 1777,		180 13 11
	£4947 13 0			£4947 13 0	
1779, Dec. 31.			1779, Dec. 31.		
To disbursements this year,	1 15 9		By balance per contra,	4397 4 6	
commission on receipts,	1 10 1		receipts this year,	30 2 0	
balance to credit,	4424 0 8		interest on bal. of 1778,		219 17 3
	£4427 6 6			£4427 6 6	
1780, Dec. 31.			1780, Dec. 31.		
To disbursements this year,	5 8 6		By balance per contra,	4424 0 8	
commission on receipts,	1 2 6		receipts this year,	22 10 11	
balance to credit,	4440 0 7		interest on bal. of 1779,		221 4 0
	£4446 11 7			£4446 11 7	
1782, Oct. 1.			1782, Oct. 1.		
To commission on receipts,	1 12 0		By balance per contra,	4440 0 7	
balance, viz. principal,	4470 8 7	1335 10 0	receipts,	32 0 0	
interest,			int. to date, on bal. of 1780,		888 10 0
	£4472 0 7	£1335 10 0		£4472 0 7	£1855 10 0
			By balance per contra, viz:		
			principal,	4470 8 7	
			interest to date,	1355 10 0	
				£5825 18 7	

STATEMENT [B.] REFERRED TO *ante* p. 364, IN *BURWELL'S ex'or v. ANDERSON, adm'r &c.*
The estate of A. B. in account with C. D. his ex'or. CR.

Principal.		Interest.	Principal.		Interest.
1820, Dec. 31.			1820, Dec. 31.		
To disbursements this year,	5000 00		By receipts this year,	4000 00	
	\$ 5000 00		balance due ex'or,	1000 00	
1821, Dec. 31.(a)				\$ 5000 00	
To balance per contra,	1000 00		1821, Dec. 31.		
interest thereon,	60 00		By receipts this year,	5000 00	
disbursements this year,	1940 00			\$ 5000 00	
balance due estate,	2000 00		1822, Dec. 31.		
	\$ 5000 00		By balance per contra,	2000 00	
1822, Dec. 31.(b)			interest thereon to date,	5000 00	120
To disbursements,	2000 00		receipts,		
balance due estate,	5000 00	120		\$ 7000 00	\$ 120
	\$ 7000 00	\$ 120	1823, Dec. 31.		
1823, Dec. 31.(b)			By balance per contra,	5000 00	120
To disbursements,	2000 00		interest on bal. of prin.,	5000 00	300
balance due estate,	8000 00	420	receipts,		
	\$10000 00	\$ 420		\$10000 00	\$ 420
1824, Dec. 31.(b)			1824, Dec. 31.		
To disbursements,	8000 00		By balance per contra,	8000 00	420
balance due estate,	8000 00	900	interest on bal. of prin.,	1000 00	480
	\$ 9000 00	\$ 900	receipts,		
1825, Dec. 31.(c)				\$ 9000 00	\$ 900
To disbursements,	8580 00		1825, Dec. 31.		
balance due estate, (all int.)	800 00		By balance per contra,	6000 00	
	\$ 9380 00		interest on bal. of prin.,	360 00	
1826, Dec. 31.			receipts,	2120 00	
To disbursements,	8000 00		balance of int. brought		
balance,	2000 00	800	into acc't of prin. to		
	\$10000 00	\$ 800	meet the disbursements,	900 00	
1827, Dec. 31.(d)				\$ 9380 00	
To disbursements,	4000 00		1826, Dec. 31.		
	\$ 4000 00		By balance per contra, (int.)		800
1828, Dec. 31.(a)			receipts,	10000 00	
To balance per contra,	1080 00			\$10000 00	\$ 800
interest thereon,	64 80		1827, Dec. 31.		
balance due estate,	10000 00		By balance per contra,	8000 00	
	\$11144 80		interest on above bal-		
1829, Dec. 31.			ance of principal,	120 00	
To disbursements,	10000 00		interest brought into ac-		
balance due estate, (all int.)		600	count of prin. to meet		
	\$10000 00	\$ 600	disbursements,	800 00	
1830, Dec. 31.			balance due ex'or,	1080 00	
To disbursements,	500 00			\$ 4000 00	
balance, (all interest)	100 00		1828, Dec. 31.		
	\$ 600 00		By receipts,	11144 80	
1831, Dec. 31.				\$11144 80	
To disbursements,	500 00		1829, Dec. 31.		
balance,	3500 00	100	By balance per contra,	10000 00	
	4000 00	\$ 100	interest thereon,		600
				\$10000 00	\$ 600
			1830,		
			By bal. per contra, (all int.)	600 00	
			brought into column of		
			principal to meet the		
			disbursements.		
				\$ 600 00	
			1831, Dec. 31,		
			By balance, (interest,)		100
			receipts,	4000 00	
				\$ 4000 00	\$ 100
			Balance due the estate,	3500 00	\$ 100
			with interest on the prin-		
			cipal sum from Dec. 31,		
			1831, till paid.		

NOTES.

(a) In the years marked (a), the executor being in advance, is not only allowed interest, but that interest is aggregated with the principal; for when he is in advance to the estate, he is to be treated as a common creditor.

(b) In the years marked (b), a balance being due to the estate, the interest on that balance for the year is calculated, but kept in a separate column; and all the disbursements are exclusively applied to sink the principal.

(c) In the year marked (c), the disbursements exceeding the receipts of the current year, together

interest on that balance is aggregated with the principal, in order to set off against the disbursements; and that aggregate being still insufficient to meet the disbursements, the interest of former years is brought into the aggregate, and set against the disbursements. A balance then appears due the estate of \$800; but this being all interest, is, in the account of the succeeding year, carried back again into the interest column on the credit side of the account.

(d) In the year marked (d), the disbursements discharge the whole of the principal and interest in arrears, and give a balance due to the executor in

INDEX.

ABSCONDING DEBTORS.

See Attachment No. 1, 2, 3, 4, and
Kyle & Co. v. Connelly.

719

ABSENT DEBTORS.

1. In a bill in chancery, against a debtor as an absent debtor or defendant, and other defendants resident, holding lands by voluntary or fraudulent conveyances from the debtor, to have a decree against the debtor for the debt, and against the home defendants to subject the lands to the debt; the bill, in order to give the court jurisdiction, under the statute concerning attachments and suits against absent defendants, 1 Rev. Code, ch. 123, must distinctly aver the non-residence of the debtor; and, if the home defendants in their answers say that the debtor is a resident, though they do not plead that matter in abatement to the jurisdiction, the plaintiff, to sustain the jurisdiction, must prove the fact of the debtor's residence abroad; and if his non-residence be not distinctly averred in the bill, or, if so denied by the home defendants, be not proved, the court has no jurisdiction, and a decree for the plaintiff will be reversed on that ground.

Kelso v. Blackburn,

299

2. In the case of a foreign attachment in chancery, to attach a debt alleged to be due from a home defendant to the absent defendant, to satisfy a debt due from the absentee to the plaintiff, the garnishee may set up any equitable defence which shews that in equity he owes no debt to the absent defendant.

Glassell v. Thomas,

113

3. Upon a foreign attachment in chancery, to subject lands of the absent debtor, to a debt claimed by the attaching creditor, payable in instalments, some of which have, and others have not, fallen due, at the time of the decree: **Held**, the court ought not to direct the sale of the subject, to satisfy more than the instalments already due; but should order a sale to satisfy what is due, and hold the creditor's attachment a lien on the subject, for the instalments afterwards to fall due.

Watts and others v. Kinney and wife,

272

ACTION.

1. See Contract No. 7, and
Carthrae v. Brown. 98
2. See Executors and Administrators No. 12 to 17,
and pages 89, 395

ACTS OF ASSEMBLY.

See Statutes cited and construed.

ADMINISTRATION.

See Executors and Administrators.

AD QUOD DAMNUM.

1. See Roads No. 1, 2, 3, and
Carpenter and others v. Sims, 675
2. See Roads No. 4, 5, and
Commonwealth v. Beeson, 821

ADVANCEMENT.

See Hotchpot, and
Christian and wife &c. v. Coleman's adm'r
and others, 30

AGREEMENT.

See Contract.

ALIEN.

See Escheat.

APPELLATE JURISDICTION.

1. In cases before courts of law.

1. The county and corporation courts being courts of record, the writ of certiorari does not lie to a judgment of a corporation court affirming a judgment of a single magistrate, although his is not a court of record, for a fine imposed by a penal law, or in a civil case.

Tankersley v. Lipscomb,

813

836 *2. One supersedeas to five judgments, though between the same parties, and upon claims of the like nature, and though the question

be the same in all the cases, is irregular, and ought to be quashed as improvidently allowed.

Ayres v. Lewellin,

609

3. A. recovers five judgments for debt against L. in the county court; at the instance of L., the circuit court awards one supersedeas to the five judgments, and reverses them by a single judgment; to this judgment the court of appeals, at the instance of A. awards a supersedeas, reverses the judgment of the circuit court, and orders the supersedeas awarded by the circuit court to be quashed as improvidently allowed: **Held**, A. is entitled to his costs in the circuit court as well as in the court of appeals, but not to damages.

Ibid., 609

4. Judgment for H. against J. in the circuit court, from which J. appeals to court of appeals; circuit court requires an appeal bond, and J. gives one, which though defective is accepted by circuit court, and the appeal brought up; pending the appeal J. dies and the appeal is revived by his administrator; after lapse of five years from date of judgment, which is the limitation to a writ of error or supersedeas, appellee objects that the appeal bond is defective and naught, and moves that the appeal shall be dismissed unless the appellant's administrator shall give a good bond: Motion overruled.

Jackson's adm'r v. Henderson &c., 196

5. In a controversy concerning the probat of a will of real as well as personal estate, in a circuit court, the evidence of the witnesses as noted by the judge, is, by consent, spread on the record; the evidence thus stated is wholly silent as to the execution of the will by the testator, and attestation by the witnesses; but it is clearly to be collected from the record, that the only point in controversy was, whether the testator was of sound mind, and that the due execution of it, supposing him sane, was not disputed; the circuit court, being satisfied that the testator was of sound mind, and, therefore, admitting the will to probat, the court of appeals, concurring in the opinion of the circuit court as to the sanity of the testator, affirmed the sentence — Dissentiente **TUCKER, P.** who thought that the cause ought to be remanded to the circuit court for a new hearing, on which the evidence of due execution, now wanting, might be supplied.

Duff v. Duff's ex'rs,

523

II. In suits in equity.

6. On a bill by vendee against vendor for specific execution, if no objection to the vendor's title be made in the court of chancery, in any form, he cannot be heard to make such objection in the court of appeals.

Brockenbrough &c. v. Blythe's ex'rs and others,

619

7. Upon a bill and supplemental bill against two executors, there is a decree against one of them, on one of the grounds of complaint in the original bill, and the original bill as to all things else dismissed, and the supplemental bill reversed for future consideration; the executor against whom the decree is, appeals; the plaintiff does not appeal from the residue of the decree dismissing the other executor from the court as to the matters in the original bill; the court of appeals, finding errors in the decree, injurious to the appellee, both as to the executor who appealed, and as to the executor as to whom the original bill was dismissed, and that the transactions of the two executors are indissolubly blended with each other, will correct the errors as to both executors, especially as the decree is interlocutory.

Garrett, ex'r of Allen v. Carr &c.,

407

ASSENT TO LEGACY.

See Legacy.

ASSIGNMENT.

I. Construction of instrument.

1. T. C. by his will dated 17th of May, gives one third of his whole estate to his wife for life, remainder to his two children T. and E. and the other two thirds to T. and E. presently; then, by deed dated 26th May, he assigns "all debts now due to him" to a trustee for his son T. **Held**, this deed assigns all debts due and payable to the donor at the date of the deed, but not such debts as though

contracted had not become payable at the date of the deed.

Collins's adm'r &c. v. Janey &c., 389
And, it seems, T. may elect to claim, either under the will, or under the deed; he cannot claim the subject given by the deed, and then claim his moiety of two thirds of the estate as legatee or devisee under the will. Ibid., 389

2. A deed of trust and assignment of effects, made by a debtor to trustees, for the benefit of his creditors, in 1809, conveys and assigns to the trustees, all the debtor's estate real and personal in 887 Virginia *or elsewhere, upon trust, that the trustees shall collect all the debts due or to become due to the grantor, on account of transactions prior to the deed, and shall sell the real and personal estate, and institute suits at law or in equity for the recovery of the debts due the grantor to be applied to the purposes of the trust: the board of commissioners sitting under the treaty between the U. States and Spain of February 1819, award a sum of money to the administrator of the grantor, for and on account of claims on the spanish government for spoillations before the date of the deed of trust: HELD, this money passed by the deed to the trustees for the purposes of the trust.

Maitland &c. v. Newton, adm'r &c., 714

II. Rights and liabilities of assignee.

3. Though the assignee of a bond takes it subject to any equity of the obligor, that attached to it in the hands of the obligee, he does not take it subject to any equity of a third person, not party to the bond, of which he has no notice: Therefore, where H. sold land to M. and took no security for the purchase money; and M. then sold the same land to F. took his bonds for the purchase money, and assigned those bonds for valuable consideration, the assignees having no notice of H.'s claim to a lien on the land for the purchase money due him by M.—though H. might have been entitled to payment of the purchase money due him from M. out of the purchase money due from F. to M. If F.'s bonds for the same had remained in M.'s hands, yet H. cannot assert any such equity as against the bona fide assignees of the bonds.

Moore & another v. Holcombe & others, 597

4. See Guardian and Ward No. 2, and

Broadus & others v. Rosson & wife & others, 12

ATTACHMENT.

I. Against absconding debtors.

1. One member of a mercantile house to which a debt has been contracted but has not yet fallen due, is competent to make complaint on oath and to sue out an attachment against the debtor, under the provisions of the statute, 1 Rev. Code, ch. 123, § 14.

Kyle & Co. v. Connelly, 719

2. Though the statute requires that such complaint shall be made on oath as the foundation of the process, it does not require that the fact of the complaint having been verified by oath shall be certified by the justices, and made part of the record: if, on the trial, objection be made that the attachment was issued without complaint verified by oath, the fact that the oath was administered may be proved; if no objection be then made on that ground, it is too late to take such objection in an appellate court. Ibid., 719

3. As one member of a mercantile house to which a debt has been contracted is competent to sue out an attachment for the house against the debtor, so that member is the proper person to execute the attachment bond required by the statute, 1 Rev. Code, ch. 123, § 7. And the bond of the partner suing out the attachment, with surety, conditioned that that partner shall pay all costs, in case the house shall be cast in the suit, and all damages that shall be adjudged against him for suing out the attachment is a good bond. Ibid., 719

4. How judgment shall be rendered for the plaintiffs upon an attachment for a debt contracted but not due, when the attachment has been laid on goods of the debtor, and on moneys due him in the hands of garnishees, where the value of the effects attached is uncertain, and may exceed the plaintiffs' claim. Ibid., 719

II. Absent debtors.

5. Concerning foreign attachment against absent debtors, see that title and 113, 272, 299

BANK.

Concerning right of a bank to retain a debt due to it, out of debtor's money on deposit, see Set-off No. 1, and

Ford's adm'r v. Thornton, 695

BEQUEST.

See Wills and Legacy.

BILL OF EXCEPTIONS.

1. Upon a motion to set aside a verdict, and for a

new trial, on the ground that the verdict is contrary to evidence, the motion is overruled, but the circuit court refuses to certify the facts proved by the evidence, and only certifies the evidence, and that nothing appeared to impeach the credit of any part of it: bill of exceptions states the evidence at large, which is, in some respects, variant and conflicting: HELD, this bill of exceptions is not well taken, and the appellate court cannot review the judgment of the circuit court overruling the 888 motion for a new trial.

Jackson's adm'r v. Henderson &c., 196

2. Quære, what is the party's remedy, in such case, when the court refuses to certify the facts proved in evidence? Ibid., 196

BILL OF EXCHANGE.

See Declaration No. 1, 2, 3, and

Jackson's adm'r v. Henderson &c., 197

BOND.

I. Sealing and delivery.

1. See Partnership No. 1, and

Sale v. Dishman's ex'rs, 548

II. Construction of the instrument.

2. The condition of an appeal bond misrecites the judgment appealed from, as being for \$3900, when in truth it was for \$3957, but recites the judgment correctly in all other respects: Quære, whether such misrecital renders the appeal bond naught? Jackson's adm'r v. Henderson &c., 196

III. Statutory bonds.

3. See Clerk, and

Auditor v. Dryden &c., 708

BREACH OF TRUST.

See Guardian and Ward No. 2, and

Broadus & others v. Rosson & others, 12

CASE AGREED.

The parties to an action agree the case, by detailing the evidence, and then admitting the facts stated in the evidence: the evidence detailed is in some respects variant and conflicting: HELD, the court can give no judgment on such a case agreed. Jackson's adm'r v. Henderson &c., 196

CERTIORARI.

See Appellate Jurisdiction No. 1, and

Tankersley v. Lipscomb, 813

CHARITIES.

1. Testator directs his executors to lay by \$2000, to be distributed among needy, poor and respectable widows; and, in case the Roman catholic chapel shall be continued at time of his death, to pay \$1000 towards its support; and, if the Roman catholic congregation shall come to a determination to build a chapel at Richmond, to pay \$3000 towards its accomplishment; and he devises a lot in Richmond, to four trustees in fee, upon trust to permit all and every person belonging to the Roman catholic church as members thereof, or professing that religion, and residing in Richmond at the time of his death, to build a church on the lot, for the use of themselves and of all others of that religion who may hereafter reside in Richmond: Upon information filed by the attorney general, in chancery, to enforce the charitable bequests and devise: HELD, that the bequests and devise are uncertain as to the beneficiaries, and therefore void.

Gallego's ex'rs v. The attorney general, 450

2. The english statute of charitable uses (43 Eliz.) having been repealed in Virginia, the courts of chancery have no jurisdiction to decree charities, where the objects are indefinite and uncertain. Ibid., 450

CLERICAL ERRORS.

Upon an appeal from a judgment of a circuit court, the court of appeals cannot inspect the minutes of the proceedings taken by the clerk, for the purpose of correcting a mistake in the entry of the judgment on the order book; alter, in the case of a judgment of a county court.

Christian &c. v. Miller, 78

CLERK.

The official bond of a clerk of a county or circuit court, with condition for the faithful execution of the office, required by the statutes of 1792, ch. 66, § 13, and ch. 70, § 3, was not intended to secure the collection of taxes on law process &c. though it has been made the duty of the clerk ex officio to collect and account for such taxes, nor are the clerk and his sureties liable upon this bond, for his failure to collect, account for and pay such taxes into the treasury: the bond required by those statutes, extends only to those duties of the office that are properly clerical.

Auditor v. Dryden &c., 708

COMMONWEALTH.

As to remedy against public debtor, see Motion No. 3, and
Auditor v. Dryden &c., 703

COMPETENCY OF WITNESS.

See Evidence.

839 *CONFESSION OF JUDGMENT.

A confession of judgment on a forthcoming bond is a release of all errors in the previous proceedings.

Stanard v. Timberlake, 681

CONSTRUCTION OF PENAL STATUTES.

The statute of 1822-3, ch. 34, § 1, does not authorize a criminal prosecution for killing dogs belonging to another.

Commonwealth v. Maclin, 809

CONTINGENT REMAINDER.

See Wills No. 14, 15, and pages 64, 108

CONTRACT.

I. Where void for fraud.

1. A person reduced to a state of mental imbecility by habitual intoxication, makes a voluntary and irrevocable deed of gift of his whole estate, to a cousin german, to the disherison of his half sisters, reserving the use to the donor for life, without any reasonable motive assigned for such an act: HELD, fraud and imposition may be inferred from the circumstances, and from the very nature of the contract; and this deed of gift is fraudulent and void.

Samuel v. Marshall & wife & others, 567

2. In such cases, drunkenness, if produced by the donee, or if so extreme that the party did not know what he was about, is a material circumstance in deciding on the validity of the contract; and imbecility of mind, however produced, combined with other ingredients, and particularly with the absence of consideration, has always an important influence on the question of the validity of contracts. Ibid., 567

3. If a written agreement not under seal, be altered by the party claiming under it in a material part: HELD, he can never recover upon the agreement so altered, nor can he avall himself of the contract in its original and true form: there is no distinction between deeds and other written instruments in this respect.

Newell v. Mayberry, 250

II. When it may be rescinded for mistake.

4. Where, in an agreement, a mutual mistake is made, by both parties, in a matter which is the cause and subject of the contract, that is, in the substance of the thing contracted for, no fraud being imputable to either party; such mistake is good ground in equity for rescinding the agreement, even after it has been fully executed by conveyances by both parties.

Glassell v. Thomas, 113

5. And where an agreement is rescinded, it must be entirely rescinded. Ibid., 113

III. Where one party being in default, the other disaffirms.

6. Where one purchases goods deliverable at a future day, and presently binds himself by deed to pay the purchase money, or pays it in cash; the purchaser, in case the goods be not delivered, cannot disaffirm the contract, and claim the stipulated price paid, or contracted to be paid, but can only recover damages against the vendor for breach of his contract.

Christian & wife & another v. Miller, 78

IV. Construction of contract.

7. Covenants with B. and J. that he will pay them \$300. to wit, to each of them one moiety thereof, and also the sum of \$400. upon a certain condition: HELD, this is a covenant to B. and J. severally, to pay each a moiety of each sum: so that J. being dead, B. cannot maintain an action to recover the whole.

Cartthrae v. Brown, 98

8. Agreement between M. and N. that if N. can get possession of a runaway slave belonging to M. before a certain day, N. shall have the slave at a stipulated price, and that the agreement shall continue in force only till that day: N. gets possession of the slave, after the appointed day, and continues to hold him: HELD, M. may maintain an action for the slave, but not for the stipulated price.

Newell v. Mayberry, 250

9. A. and B. holding the legal title of an undivided moiety of land, by purchase and conveyance from C. the title of the other moiety being in D. an infant, and C. having covenanted to sell them the infant's moiety also, and A. and B. having under C.'s con-

veyance and covenant, taken possession of the whole and made improvements; they sell and convey the moiety they had purchased of C. to E. for \$12,750; and they covenant with E. to use their best endeavours to get in the legal title of the infant's moiety, and if procured, to sell and convey that also to E. for \$6750; but if the legal title of the infant's moiety cannot be got in within a year, then E. shall be at liberty, in their name or his own, to institute any legal proceedings against their vendor C. for his E.'s own benefit and advantage; and if they shall not be able to get in the legal title of the infant's moiety, then E. shall pay them the first mentioned sum of \$12,750 only—A. and B. use their best endeavours to get in the legal title of the infant's moiety within the year, by procuring the infant's friends to make application to the legislature, upon a full state of the facts, to authorize her guardian to sell and convey it, in which they fail: HELD, that after the expiration of the year, the contract of A. and B. with E. with respect to the sale of the infant's moiety, was at an end; and though E. had a right to prefer a bill against C. and the infant D. for specific execution, in the name of A. and B. yet he was to prosecute that suit for his own benefit and at his own risque, and as between him and A. and B. was bound to bear the burden of paying the purchase money with interest, to the infant D. upon her conveyance of her moiety, after her full age, in conformity with C.'s contract.

Brockenbrough and Taylor v. Blythe's ex'rs and others, 619

CONVEYANCE.

See Assignment or Deeds, and pages, 889, 714

COSTS.

See Appellate Jurisdiction No. 3, and
Ayres v. Lewellin, 609

COUNTY LEVY.

The expense of keeping and maintaining negroes committed by order of a county court to the custody of the sheriff, cannot in any case be a lawful charge upon the county.

Rixey and others v. Justices of Fauquier, 811

CRIMINAL PROCEEDINGS.

See Indictments, Informations and Presentments.

DAMAGES.

1. Upon a bill in chancery by vendee against vendor of land, after the contract fully executed by conveyance of the land and securities given for the purchase money, alleges fraud practised by vendor's agents on the vendee, in the original agreement, and praying that the contract may be rescinded for the fraud, and general relief: the court having held that plaintiff, under the circumstances of the case, was not entitled to a rescission of the contract, held further, that he was not entitled to ask, that the damages he had sustained by reason of the alleged fraud, should be ascertained by the court of chancery, and decreed to him in abatement from the purchase money.

Robertson v. Hogsheads, 667

2. A bill, in any form, claiming damages for breach of contract, cannot be entertained in equity; neither can unliquidated damages be set off in equity. Ibid., 667

DECLARATION.

1. A declaration in assumpsit on a bill of exchange, by holder against endorser, alleges that "when the bill became due and payable according to the tenour and effect thereof, to wit: on the 27th December 1816, at the bank of Marietta in Ohio" (where it was payable) it was presented for payment and dishonoured; the 27th December was not the third but the fourth day after the time appointed for the payment of the bill: HELD, that, as it was averred that the bill was presented when it became due and payable according to its tenour and effect, and the date of the presentment was stated under a scilicet, the date so stated was not material, and the plaintiff might have proved presentment on the third day of grace.

Jackson's adm'x v. Henderson &c., 197

2. It seems, that when a bill is made payable at a place or bank, at which there is a special established usage, that bills there payable shall be presented on the fourth and not on the third day of grace, such special usage must be alleged in the declaration upon such bill, otherwise proof of presentation on the fourth day of grace is not admissible. Ibid., 197

3. In assumpsit on a bill of exchange, drawn in Virginia, payable at the bank of Marietta, Ohio: the declaration counting on the general law merchant, and the general issue being joined: HELD, that as the general law merchant requires presentation on the third day of grace, proof of presentation

on the fourth day of grace does not support the issue on the plaintiff's part. *Ibid.*, 197

4. For other cases where there is a variance between declaration and evidence, see *Variance*.

5. Concerning declaration on bond of executor or administrator, see *Executors and Administrators* No. 12 to 17, and pages 89, 395

841 *6. For general rules as to sufficiency of declaration, in law, see *Demurrer*.

DECREES IN CHANCERY.

See *Practice in suits in equity* No. 5, and *Hubbard v. Goodwin &c.*, 492

DEEDS.

1. See *Assignment No. 1.* and *Collins's adm'r &c. v. Janey and another.*, 389

2. See *Assignment No. 2.* and *Maitland &c. v. Newton, adm'r &c.*, 714

3. See *Mortgages and Trusts*.

DEMURRER.

1. On general demurrer to a declaration, the court looks always to the substantial meaning of its allegations, to ascertain whether it states good cause of action.

Mowry v. Miller., 561

2. Upon an appeal from a judgment in covenant, the covenant not being set out in the pleadings upon oyer, and the question being whether the declaration shewed good cause of action; the court can only look at the covenant as pleaded in the declaration; and though the instrument be set out in a bill of exceptions taken at the trial, the court can pay no regard to it, in deciding on the sufficiency of the declaration.

Carthrae v. Brown., 96

DEMURRER TO EVIDENCE.

1. It is the settled practice in Virginia, on demurrer to evidence, that the demurrant shall set out the whole evidence, and that the court may compel the other party to join in the demurrer, without requiring the demurrant to make a formal admission on the record, of all the inferences of fact which the court may thing fairly deducible from the evidence demurred to.

Hansbrough's ex'ors v. Thom., 147

2. By demurring to evidence, the demurrant waives all evidence on his own part that conflicts with that of the other party, admits the credit of the evidence demurred to, admits all inferences of fact that may be fairly deduced from the evidence, but only such facts as are fairly deducible, and refers it to the court to deduce the fair inferences from the evidence. *Ibid.*, 147

3. The English practice, and that which prevails in Virginia, in respect to demurrers to evidence, compared. *Ibid.*, 147

4. In detinue for slaves, the question being whether a contract between plaintiff and defendant's testator, was a gift or a sale of the slaves by the latter to the former, the defendant demurs to the plaintiff's evidence: *Held*, the evidence states facts, from which it may fairly be inferred, that the contract was a sale, though there was no express proof of any valuable consideration paid or stipulated, and that therefore it was a sale. *Ibid.*, 147

DEPOSITIONS.

When depositions may be read at law, see *Practice in actions at law* No. 2, 3, and *Lynch v. Thomas.*, 682

DETINUE.

If in detinue for chattels, the plaintiff prove that he had title at the time of the action brought, and that defendant then had the possession, defendant to defeat the action, must shew that he had been divested of the property by due course of law.

Lynch v. Thomas., 682

DETESTAVIT.

See *Executors and Administrators* No. 12 to 17, and pages 89, 395

DEVISE.

See *Wills*.

DISCOUNT.

See *Set-off*.

DYING DECLARATIONS.

See *Evidence* No. 2, and *Vass v. The Commonwealth.*, 786

EASEMENT.

The use of the water of a river, or other easement, claimed on the ground of twenty years possession and enjoyment: *Held*, such possession and enjoyment, to give the right claimed, must be adversary. *Stokes & Smith v. The Upper Appomattox Company.*, 818

ELECTION.

See *Assignment No. 1.* and *Collins's adm'r &c. v. Janey & another.*, 389

ELEGIT.

See *Lien by judgment or decree*.

EMANCIPATION.

I. How instrument of emancipation must be executed.

1. Quære, whether slaves can be emancipated by nuncupative will, under the provisions of the statute, 1 Rev. Code ch. 111 § 53; and it seems they cannot: per *TUCKER, P.* and *BROOKE, J.*

Winn v. Bob and others., 140

II. Construction of instrument.

2. Testator expresses his will and desire, that his slave J. Gilbert should be free, but finding it would be difficult for it to be so, and for him to remain in Virginia, he directs his executors to lay off three acres of land for him, and to let him settle on it and have the use of it during his life and good behaviour, and that he wished Gilbert to enjoy the benefit of his own labour, but to be always under control and direction of his executors; and Gilbert is carefully excepted out of every disposition of testator's slave property in the will: *Held*, this slave is not hereby emancipated.

Rucker's adm'r &c. v. Gilbert., 8

III. Suits for freedom.

3. See *Freedom*.

ESCHEAT.

1. Land is purchased by or for an alien, and paid for by him or with money furnished by him, but the conveyance is taken to a citizen, upon express trust that he shall hold for the benefit of the alien and his heirs: *Held*, this trust estate of the alien can only be so acquired by him for the commonwealth, and a court of equity will compel the trustee to execute the trust for her benefit.

Hubbard v. Goodwin; and Kennedy &c. v., 492

2. The court of equity, in such case, follows the law in relation to escheats of legal estates purchased by aliens; and as the law does not, in cases of escheat, give the commonwealth the profits received by the alien or any other person before office found, so neither will equity, in the case of the trust estate, give the commonwealth the profits thereof accrued before decree. *Ibid.*, 492

3. Quære, whether in the case of a purchase of land by a citizen, and the payment of the purchase money by, or with the money of, an alien, a resulting trust may be implied in equity for the alien, and such implied trust executed for the commonwealth? and, per *TUCKER, P.*, equity will not, in such case, imply a trust for the alien, in order to forfeit it to the commonwealth. *Ibid.*, 492

ESTATES TAIL.

See *Wills* No. 15, and *Callava, lessee of Bryant &c. v. Pope.*, 108

EVIDENCE.

I. Records of foreign courts.

1. The seal of a court of a foreign country must be proved; the seal of a foreign state or nation proves itself.

Ex parte Povall., 816

II. Declarations of a dying man.

2. A person, having received a mortal wound, and being unable, in consequence of the wound, for the greater part of the interval that elapsed before his death, to speak at all, and when able to speak, only able to utter a short word or two, yet retaining his perfect senses and understanding, and being under apprehension of his approaching death,—is asked, Did P. V. strike you first? to which he answered, Yes, sir: Did P. V. stab you? to which he also answered, Yes, sir: Do you think you are going to die? to which he again answered, Yes, sir: and is asked a fourth question, which he is unable to answer, but it does not appear what this fourth question was, or whether it had any relation to the subject, or at what interval after the three first it was put to the dying man: *Held*, these are such death-bed declarations, being distinct and complete in themselves, as were competent evidence on the trial of P. V. on an indictment for the homicide.

Vass v. The Commonwealth., 786

3. But, if it had appeared, that the declarations were designed by the dying man, to be connected with and qualified by other statements, and with them to form an entire complete narrative, and before the purposed disclosure was fully made, it had been interrupted, and the narrative left unfinished; such partial declarations would not have been competent evidence. *Ibid.*, 786

4. The objection, that the questions to which the answers of the dying man were given, were leading questions, is not properly applicable in such a case. *Ibid.*, 786

III. Competency of witness.

5. The obligee and assignor of a bond is not a competent witness for the obligor, *in any controversy between the obligor and assignee, to prove that the contract was founded in a usurious transaction between the assignee and obligor. *Gilliam v. Clay & others*, 590

EXCEPTIONS.

See Bill of Exceptions.

EXECUTIONS.

I. What may be taken under a fieri facias.

1. See Fraudulent Deeds No. 4, and *Shields, adm'r &c. v. Anderson, adm'r &c.*, 729

II. When levy may be made.

2. Robertson, executor of Cole, recovers judgment against Claiborne, and sues out execution thereon; before the execution is delivered to the sheriff, Robertson dies; the execution being then delivered to the sheriff, he levies it on property of defendant, and takes a forthcoming bond payable to Robertson, executor of Cole: *Held*, the execution was properly levied, though Robertson was dead before it was delivered, and the forthcoming bond was rightly taken to Robertson as executor, and was good.

Turnbull, ex'r &c. v. Claibornes, 392

III. Remedy where execution issues irregularly.

3. See Injunction No. 1, and *Crawford v. Thurmond & others*, 85

EXECUTORS AND ADMINISTRATORS.

I. Bond required of executor or administrator.

1. Under the former provisions of the statute concerning executor's bonds, 1 Rev. Code, ch. 104, § 21, the sureties of an executor are not responsible for the proceeds of land sold by him under a power in the testator's will.

Burnett & others v. Harwell & others &c., 89

II. Power of executor to sell lands.

2. Testator, after making provision for his wife by his will, devises, that after his wife's death or marriage, his land shall be sold, and the money arising from the sale equally divided among all his children; widow renounces the will and dower is assigned her: *Held*, executor has no power to sell during widow's life and widowhood, or to sell part of the subject.

Jackson v. Ligon, 161

3. Testator, being about to leave the country, makes his will, and devises that in case of his death, or if he should not be heard of for ten years, his land should be sold for the best price that could be got, as was directed by letter of attorney to J. H. of same date with the will, and proceeds divided among his four sisters: *Held*, the administrator with the will annexed has power to sell the land, under the statute, 1 Rev. Code, ch. 104, § 52.

Broadus & others v. Rosson & wife & others, 12

4. See Guardian and Ward No. 1, and *S. C.*, 12

III. Assent to legacy.

5. See Legacy.

IV. Mode of stating account of executor or administrator.

6. Though there may be circumstances, which ought to exempt an executor from being charged with interest on balances in his hands, yet, in general, an executor is chargeable with interest on such balances; and where, in an ex parte settlement by commissioners, of an executor's accounts, the commissioners improperly omit to state an interest account, and charge the executor with interest, that is cause for surcharging and falsifying the account.

Burwell's ex'rs v. Anderson, adm'r &c., 348

7. The rule of *Granberry v. Granberry*, 1 Wash. 249, as to mode of stating and charging interest in executor's accounts, examined, explained and settled. *Ibid.*, 348

8. Testator devises, that his lands shall be sold, and the proceeds invested in bank stock, or in such other property as his executors shall think most advantageous to his children; the executors sell the land, but do not invest the proceeds in bank stock, and afterwards account for the proceeds in money: *Held*, they ought to be charged with interest on the balances in their hands annually, and their disbursements for the maintenance of the children, and on all other accounts, ought to be defrayed out of the interest accruing on the balances.

Garrett, ex'r of Allen v. Carr & wife & another, 407

V. Right to surcharge and falsify account.

9. Executor's accounts are audited before commissioners of the county court, the legatees being present at such settlement thereof; these accounts are returned to the court, approved and recorded: *Held*, the presence of the legatees at the settlement, is no objection to a bill in chancery to surcharge and falsify the accounts so settled.

Ibid., 407

10. Upon a bill to surcharge and falsify an executor's account, though plaintiff is held to specification of items of surcharge and falsification, yet it is always competent to him to shew, that the account is erroneous upon its face, and (without controverting the items themselves) to shew that they have been so arranged as to produce results injurious to him. *Ibid.*, 407

11. Within what time account may be surcharged.

See Lapse of Time No. 1, and

Burwell's ex'rs v. Anderson, adm'r &c., 348

VI. Remedy on bond of executor or administrator.

12. M. H. administrator of R. H. recovers a judgment against E. B. administratrix of R. B. for debt due plaintiff's intestate, and sues out a fi. fa. thereon, which is returned nulla bona; then, M. H. the plaintiff dies; and administration de bonis non of R. H.'s estate is granted to A.: *Held*, the action of debt on the administration bond of E. B. against her and her sureties, lies at the relation of A. the administrator de bonis non of R. H. and not at the relation of the representative of M. H. the first administrator of R. H. upon the construction of the statute of 1813-14, ch. 13, § 2. 1 Rev. Code, ch. 104, § 63.

Allen & others v. Cunningham & others, 395

13. And the administrator de bonis non need not, in order to entitle himself to put the administration bond in suit, bring sci. fa. or action of debt on the judgment recovered by the first adm'r.

Ibid., 395

14. The fi. fa. sued out by M. H. the first administrator, was sued out and returned before the statute of 1813-14 was passed; yet *Held*, the statute applies and gives the action in such case, being retrospective as to the issuing and return of the execution, as well as the recovery of judgment. *Ibid.*, 395

15. A fi. fa. on judgment against an administrator is returned "no unadministered or unincumbered effects found" &c. *Held*, this is a return of nulla bona, to entitle the plaintiff to an action on the administrator's bond. *Ibid.*, 395

16. An action cannot be maintained on an executor's bond at the relation of an assignee of a legatee who has obtained a decree for a legacy; such action can only be maintained at the relation of the person who has the legal right to the debt.

Burnett & others v. Harwell & others, 89

17. In such an action, the declaration must aver that assets sufficient to pay the debt came to the executor's hands, or the amount of assets that came to his hands, and the devastavit thereof; and if the declaration contain no such averment, it is bad on general demurrer: per *TUCKER*, *Ibid.*, 89

EXECUTORY LIMITATIONS.

1. See Wills No. 14, and *Henderson's ex'rs &c. v. Peachy*, 64

2. See Wills No. 15, and *Callava, lessee of Bryant &c. v. Pope*, 103

FOREIGN ATTACHMENT.

See Absent Debtors.

FORTHCOMING BOND.

1. Robertson, executor of Cole, recovers judgment against Claiborne, and sues out execution thereon; before the execution is delivered to the sheriff, Robertson dies; the execution being then delivered to the sheriff, he levies it on property of defendant, and takes a forthcoming bond payable to Robertson, executor of Cole: *Held*, the execution was properly levied, though Robertson was dead before it was delivered, and the forthcoming bond was rightly taken to Robertson as executor, and was good.

Turnbull, ex'r &c. v. Claibornes, 392

2. A motion for award of execution on the forthcoming bond was made by Turnbull, executor of Robertson, who was executor of Cole: *Held*, the forthcoming bond belonged to Cole's estate, and Turnbull was entitled to the motion, and to award of execution on the bond, as the representative of Cole, not as the representative of Robertson.

Ibid., 392

3. A confession of judgment on a forthcoming bond is a release of all errors in the previous proceedings.

Stanard v. Timberlake, 661

FRAUD, MISTAKE AND SURPRISE.

1. See Contract No. 4, 5, and *Glassell v. Thomas*, 113

2. See Damages, and *Robertson v. Hogsheads*, 667

FRAUDULENT DEEDS.

I. As between grantor and grantee.

1. See Contract No. 1. 2, and Samuel v. Marshall & wife & others. 567

845 *II. As between grantee and administrator of grantor.

2. An absolute bill of sale of slaves being executed for valuable consideration, the vendor notwithstanding the deed retains uninterrupted possession and dies in possession of the slaves, and the vendee takes possession after his death, and then a creditor of the vendor takes administration of his estate: on a bill in equity by the administrator of the vendor against the vendee, to subject the slaves to the debt due to the administrator. *HELD*, the bill of sale was fraudulent and void as against the administrator, being also a creditor, of the vendor; and that the rights of vendor's creditors attached on the subject immediately on vendor's death, and therefore before vendee's possession commenced.

Shields adm'r &c. of Waller, and others v.

Anderson, adm'r of Byrd &c., 729

III. As between grantee and creditors of grantor.

3. A bill of sale of chattels, absolute in form, is executed by debtor to creditor, but the transaction is really a mortgage to secure debt: such absolute bill of sale tends to deceive and injure others, and is fraudulent and void—*Per TUCKER, P.* in

Shields, adm'r &c. of Waller, and others v.

Anderson, adm'r of Byrd &c., 729

IV. Remedy of creditors at law to subject property fraudulently conveyed.

4. Quære, whether, in general, if there be an absolute bill of sale of chattels, and possession do not accompany and follow the deed at the time, but the vendee afterwards gets the possession, before a creditor recovers judgment and sues out execution, or the creditor's rights otherwise attach on the subject, the bill of sale is, in such case, fraudulent and void, or good, as against such creditor

S. C., 729

V. When creditors may come into equity.

5. A creditor at large, not having obtained judgment or decree against his debtor, cannot resort to equity, to set aside a fraudulent conveyance of his debtor.

Kelso v. Blackburn, 299

6. See Absent Debtors No. 1. and S. C., 299

VI. When creditor will be barred by act of limitations.

7. To a bill in equity by a creditor, for relief against a fraudulent conveyance of his debtor, the act of limitations if well pleaded in bar, would (it seems) run only from the time when the fraud was discovered

Shields, adm'r &c. of Waller, and others v.

Anderson, adm'r of Byrd &c., 729

FREEDOM—Suits for.

I. How emancipation may be effected.

1. See Emancipation.

II. How person emancipated is to sue.

2. Quære, whether slaves claiming to be emancipated by will, can properly be allowed to prosecute, in forma pauperis, a suit to have the will proved and recorded in a court of probat, under the provisions of the statute, 1 Rev. Code, ch. 124, § 4. 5?

Winn v. Bob and others, 140

III. How expense of keeping paupers is borne.

3. See Rixey and others v. Justices of Fauquier, 811

GENERAL COURT.

Concerning its jurisdiction, see Indictments, Informations and Presentments No. 7, and Commonwealth v. Garth, 761

GLEBE LANDS.

See Injunction No. 2, and

Overseers of Poor v. Hart, 1

GUARDIAN AND WARD.

1. The administrator with the will annexed is guardian of testator's four sisters: he sells the land under power given by testator's will; and takes bonds for the proceeds, payable to himself as guardian: *HELD*, he is chargeable in his character of guardian, and his sureties for the guardianship responsible.

Broadbuss and others v. Rosson and wife and others, 12

2. The purchaser of the land executes bonds for the purchase money in such proportions as the guardian requires, with a view to enable him to transfer bonds to others, for his own purposes; the guardian assigns one bond to T. and another to N.

(who are both apprised of the right in which he held them, and that he is in failing circumstances) partly for his own individual debts and for cash advanced him: the guardian dies insolvent: *HELD*, the sureties of the guardian are primarily responsible to the wards, for so much of these bonds as the guardian misapplied to his own use: the assignees are bound to reimburse the sureties, the debt and costs recovered of them by the wards: each assignee is severally liable for what he received: if assignees prove unable to pay, the purchaser is bound to reimburse the sureties; and if sureties fail, the wards may have recourse against the assignees first, and then the purchaser, they being apprised of, and aiding in the guardian's breach of his trust. *Ibid.*, 13

3. Though a guardian has no right to expend the principal of his ward's estate, yet if he take up goods for his ward, the merchant who furnishes them, is not bound to see that the profits of ward's estate are sufficient to pay for them, and that the principal is not applied to pay for them. *Ibid.*, 12

HOTCHPOT.

A mother tenant for life of lands gives possession of several parcels thereof, to four of her children, respectively, to be cultivated by them for their own use, but makes them no conveyance: these children hold the respective parcels of land, as tenants at will of their mother, till her death, taking the profits to their own use, no rents being rendered or demanded: *HELD*, they are not bound to account for these profits, and bring them into hotchpot as an advancement, real or personal, in the division and distribution of the mother's estate, under the statutes 1 Rev. Code, ch. 90, § 17; ch. 104, § 29.

Christian and wife and another v. Coleman's adm'r and others, 30

HUSBAND AND WIFE.

I. Marital rights of husband.

1. Testatrix devises land to be sold by her executors, and the proceeds of sale to be equally divided between her daughter F. A. and her grand daughter L. T. H. but if her daughter, when of age or married, shall choose, she may take the land in fee, on paying half the value thereof to the grand daughter, according to valuation to be made by two of the executors on oath: F. A. the daughter, marries while yet an infant; at the instance of her husband, two of the executors value the land: the husband pays half the value to the grand daughter, takes the land, and sells it as his own: the daughter never exercises, or attempts to exercise, the right of election given her by the will, and dies leaving her husband her surviving, and issue: *HELD*, the character of money was impressed upon the subject by the will, and the husband was entitled to it, as personality of his wife jure mariti.

Pratt v. Tallafiero, 419

II. Effect of marriage articles.

2. By marriage articles, it is agreed, that, during the coverture, husband and wife shall enjoy their respective estates jointly, but that their estates shall be kept separate and distinct from each other, and that the property then belonging to each, shall remain under the control of each, and that the husband shall claim no part of the wife's estate, and the wife no part of the husband's estate by virtue of the marriage; but no trustee is appointed to hold the wife's estate for her separate use: during the coverture, a sum of money belonging to the wife before the marriage, came to the husband's hands; he laid it out in chattels, which he declared were his wife's property: the husband dies: *HELD*, the legal estate in the chattels so purchased, vested in the husband, and at his death devolved to his executors, so that they may maintain detinue for them against the widow.

Faulkner v. Faulkner's ex'rs, 255

III. Where husband sells wife's land, and seeks to enforce the contract.

3. See Specific Execution No. 1. and Watts and others v. Kinney and wife, 273

ILLEGAL CONTRACT.

See Contract.

INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

I. Process upon presentment.

1. Upon a presentment for unlawful gaming at cards at a particular place within six months next preceding, process is issued summoning the defendant to answer a presentment for unlawful gaming at cards, generally, without specifying place or time: *HELD*, such process is good and sufficient.

Word v. The Commonwealth, 743

II. How defence is made by infant.

2. Upon a presentment against an infant for a

847 misdemeanour, the infant has a right to appear and defend himself in *person or by attorney, and it is error to assign him a guardian and to try the case on a plea pleaded for him by the guardian. *Ibid.* 743

III. Impanelling Jury.

3. See Jurors.

IV. Evidence at the trial.

4. See Evidence.

V. Argument before the jury.

5. Upon the trial of a question of fact in a criminal case, the accused has a right to be heard by counsel before the jury, and the court has no right to prevent him from being so heard, however simple, clear, unimpeached and conclusive, the evidence in its opinion may be; but the court has a superintending control over the course of the argument to prevent the abuse of that or any other right of counsel.

Word v. The Commonwealth. 748

6. Quere, whether in a criminal prosecution for misdemeanour, after the court at the trial, has, on the motion of the attorney for the commonwealth, given an instruction to the jury on a point of law involved in the general issue, and the defendant's counsel has filed exceptions to such instruction, he has a right to controvert the opinion of the court, so given and excepted to, in argument before the jury?

The Commonwealth v. Garth, 761

VI. How case may be adjourned to general court.

7. Under the provision of the statute 1 Rev. Code, ch. 9, § 14, a circuit court cannot, in any criminal case, adjourn a question of law arising there, to the general court without the consent of the person accused, and such consent must be stated in the record; otherwise the general court cannot take jurisdiction of the case. *Ibid.* 761

INFORMATION.

See Indictments, Informations and Presentments.

INJUNCTION.

1. A. recovers a judgment against B. and C. who had prosecuted the suit to judgment as A.'s agent, sues out a f. fa. upon it, and endorses on the execution, that it is partly for C.'s own benefit; before this execution is delivered to the sheriff, B. the debtor makes satisfaction to A. of the full amount of the debt, and A. gives him a receipt in full and discharge: HELD, though B. the debtor might have made a motion to quash the execution, and thus had remedy at law, yet a court of equity has jurisdiction to give him relief by way of injunction to inhibit further proceedings on the execution. *Crawford v. Thurmond and others*, 85

2. The rector of the protestant episcopal church of the parish of H. insisting that the glebe land of that parish was a private donation to the church made before the revolution, and so reserved to the church within the exception of the statute of 1802 for the resumption of glebe lands, 1 Rev. Code, ch. 32, b. and therefore claiming the legal estate of this glebe land, files a bill in chancery, praying an injunction to inhibit the overseers of the poor of the county from selling the same under the general provisions of the statute: HELD, the court of chancery has no jurisdiction of such a case. *Overseers of Poor v. Hart*, 1

INTEREST.

1. Interest upon estimated hires and profits of slaves, should be allowed only from the date of the decree, and it is error to allow interest from the date of the report ascertaining the amount of such hires and profits.

Shields, adm'r &c. of Waller, and others v. Anderson, adm'r of Byrd &c., 729

2. See Vendor and Vendee No. 3, and *Brockenbrough and Taylor v. Blythe's ex'rs and others*, 619

3. See Executors and Administrators No. 6, 7, and *Burwell's ex'rs v. Anderson, adm'r &c.*, 846

4. A claim against the commonwealth is presented to the auditor, which though just is yet doubtful, and therefore the auditor disallows it; and an appeal is taken from the auditor to a court of justice, which adjudges the claim against the commonwealth: HELD, in such case, the court ought not to allow interest.

Auditor v. Dugger, &c., 241

5. Quere, whether, in any case of a claim adjudged against the commonwealth, interest should be given? *Ibid.*, 241

INTOXICATION.

See Contract No. 1, 2, and *Samuel v. Marshall & wife & others*, 567

ISSUE IN CHANCERY.

See Practice in suits in equity No. 4, and *Samuel v. Marshall and wife and others*, 567

*JEOFAILS.

1. In cases of judgments by default, the statute of jeofails does not apply to cure errors and defects in the proceedings.

Wainwright & others v. Harper, 270

2. In such cases, the writ is part of the record; and writ being in assumptit and declaration in covenant, the variance is fatal. *Ibid.*, 270

JUDGMENTS.

See Lien.

JURISDICTION.

I. Cases in which equity will not take jurisdiction.

1. See Absent Debtors No. 1, and *Kelso v. Blackburn*, 299

2. See Charities No. 2, and *Gallego's ex'rs v. The attorney general*, 540

3. See Damages No. 2, and *Robertson v. Hogsheds*, 667

4. See Fraudulent Deeds No. 5, and *Kelso v. Blackburn*, 299

5. See Injunction No. 2, and *Overseers of Poor v. Hart*, 1

6. See Lost Deed, and *Talliaferro v. Foote*, 58

II. Jurisdiction of general court.

7. See Indictments, Informations and Presentments No. 7, and *Commonwealth v. Garth*, 761

III. Jurisdiction of appellate courts.

8. See Appellate Jurisdiction.

JURORS.

1. A person called as a juror in a criminal case, and examined as to his indifference on his voir dire, declared, he had heard reports concerning the case in the country, and a state of the circumstances from one of the witnesses, and had formed a hypothetical opinion, but he believed it would not influence his mind as a juror: he believed the account he had heard of the case at the time he heard it, (and he did not now express any doubt of its truth); if the evidence at the trial should correspond with the account he had heard, his former opinion would remain, but if it should be different, he felt satisfied he should be able to decide the cause without being influenced by what he had before heard, and without prejudice; and it did not appear, that the witness had ever before expressed the opinion he had so formed: HELD, such preconceived hypothetical opinion did not constitute good cause of challenge to the juror.

Oslander v. The Commonwealth, 780

2. To constitute good cause of challenge to a juror, on the ground of preconceived opinion of the case formed by him, it must appear, that such preconceived opinion was a decided one. *Ibid.*, 780

3. Quere, if a person called as a juror has formed a decided opinion of the case out of doors, is it necessary that he should have also expressed such opinion, to constitute it good cause of challenge to him as a juror? *Ibid.*, 780

JUSTICES OF THE PEACE.

The office of deputy sheriff is incompatible with the office of justice of the peace, though by the statute law of Virginia the office of high sheriff is not so; and the acceptance of the office of deputy sheriff vacates the office of justice.

Commonwealth v. Tate, 802

LAPSE OF TIME.

1. An executor qualifies in hustings court of W. in 1791; he settles his account of hustings court, ex parte, in 1810, the distributee of a deceased legatee, whose legacy has never been paid, living in the town of W. at the time of settling the account; the distributee of the legatee dies in 1818; then the executor dies; no one takes administration of the legatee's estate till 1822; then, the executor of her distributee takes the administration; and then, the administrator of the legatee, and executor of her distributee, files a bill against the executors of the executor, to surcharge and falsify his account, settled in 1810: HELD, the lapse of time is no objection to such a bill.

Burwell's ex'rs v. Anderson, adm'r &c., 848

2. See Presumption of Payment, and *S. C.*, 348

LEGACY.

Testator, having by his will, bequeathed legacies to amount of \$60,000, directs the whole residue of his estate, real and personal, shall be sold by his executors, and out of the proceeds of such residue, he bequeaths 26 pecuniary legacies to 26 legatees,

amounting to \$114,000; and he charges on the 840 same funds, such other legacies as he shall bequeath by any codicil; and gives the residue of the fund to residuary legatees; then by codicils, he bequeaths other pecuniary legacies to amount of \$47,550; as to one of the legatees mentioned in the will, he directs the legacy "to be paid as soon as possible, knowing the legatee is in need," and as to another, that it be paid "if possible as soon as it may be convenient for the legatee to receive it;" by one codicil he "leaves it to the judgment of his executors to begin paying the legacies to those legatees they may think most in need;" and by another codicil, "he desires his executors to use their best judgment in making sales of his real estate (on which the legacies are charged) without hurrying the states, which might cause sacrifices, and be to the detriment of his residuary legatees, he thinking the time unfavorable;" owing to depreciation of the property, the fund proves inadequate to pay the amount of the legacies charged thereon, without any fault of the executors; the executors, before any deficiency of the fund was apprehended, paid some of the legatees, whom they thought most in need, the whole amount of their legacies: **Held**, 1. The legacies bequeathed by the codicils stand on the same foot with those bequeathed by the will;

2. All the legacies shall abate in proportion;

3. The unpaid legatees have a right to look to the executors for their rateable proportions of the fund, and are not bound to have recourse to the legatees who have been fully paid, to compel them to refund the excess by them received above their just proportions; nor

4. The executors being quite solvent, have the unpaid legatees any right to call on the other legatees to refund.

Gallego's ex'rs v. Lambert & wife & others, 451
5. **Quære**, whether the executors have a right to require the legatees whose legacies they have fully paid, to refund? It seems they have; per **TUCKER**, P. **Ibid.**, 451

6. Testator bequeaths a slave to an infant son, and then that his wife shall hold the slave bequeathed to his son till he shall attain to full age; the executor delivers the slave to the wife, and never resumes possession: **Held**, this is an assent of the executor to the legacy to the son, and that, whether the will be understood to give a present estate in the slave to the son, with a direction that the wife shall hold it for him, or an estate to the wife during the minority of the son, with remainder to the son.

Lynch v. Thomas, 682

7. The act of limitations never could begin to run against the claim and title of the son to the slave and her increase, till he attained to full age.

Ibid., 682

LIEN.

I. By judgment or decree.

1. A judgment is recovered against a principal and his sureties: the judgment creditor sues out no *elegit*, or other execution, within the year; the sureties discharge the judgment: **Held**, the sureties have a right to be subrogated, in equity, to the benefit of the lien of the creditor's judgment upon the lands of the principal, in preference to a foreign attachment sued out by another creditor of the principal, after the judgment.

Watts & others v. Kinney & wife, 272

II. By deed.

2. See Mortgages and Trusts.

III. By particular statutes.

3. By the statutes relative to The Mutual Assurance Society against fire on buildings, and the constitution and rules of the society, the society has a lien on property insured, for all quotas called for under the original act of incorporation of 1794, and for additional premiums upon revaluation and reassurance under the act of 1806, and for all contributions required under the act of 1800 or 1819; and this lien attaches to, and follows, the property in the hands of a subsequent bona fide purchaser without notice of the lien or of the insurance.

Mutual Assurance Society v. Stone & another, 218

IV. Implied lien.

4. See Vendor and Vendee.

LIMITATION OF ACTIONS.

1. Testator bequeaths a slave to an infant son, and then that his wife shall hold the slave bequeathed to his son till he shall attain to full age; the executor delivers the slave to the wife, and never resumes possession: **Held**, the act of limitations never could begin to run against the claim and title of the son to the slave and her increase till he attained to full age.

Lynch v. Thomas, 682

2. To a bill in equity by a creditor, for relief against a fraudulent conveyance of his debtor, the act of limitations if well "pleaded in bar, would (it seems) run only from the time when the fraud was discovered.

Shields, adm'r &c. of Waller, & others v. Anderson, adm'r of Byrd &c., 729

LOST DEED.

1. Where a plaintiff resorts to a court of equity for relief, on the ground that a deed on which his claim depends has been lost or destroyed, the claim being such, that if he had the deed he would have complete remedy by action upon it at law; the bill must distinctly aver the loss or destruction of the deed, and it must be shewn that it could not be found upon due search; otherwise the court of equity has no jurisdiction of the case.

Tallaferro v. Foote, 58

2. And such a bill must be accompanied with an affidavit of the loss or destruction of the deed; the want of such affidavit is good cause of demurrer.

Ibid., 58

MALICIOUS PROSECUTION.

1. Action on the case, for defendant having advised and procured a third person to institute a malicious prosecution against plaintiff for felony: **Held**, the action lies against defendant for advising and procuring such prosecution.

Mowry v. Miller, 561

2. In every such action, the declaration must allege that the prosecution was without probable cause; but that allegation relates to the state of the fact, that the prosecution was without probable cause, not to the state of the defendant's knowledge that there was no probable cause. **Ibid.**, 561

MANDAMUS.

The statute of 1825-6, ch. 15, was intended to prevent unreasonable and causeless delays in suits in chancery; and, with that view, the 14th section authorizes the court of appeals to award a mandamus to the courts of chancery, to compel them to hear causes at the first term at which they are prepared for hearing, when no special cause appears for the refusal of the court to hear them; but the statute does not authorize a mandamus to compel a hearing of a cause, which the court of chancery, in its discretion for reasons satisfactory to it, thinks proper to continue.

Ex parte Richardson, 343

MARITAL RIGHTS.

See Husband and Wife.

MARRIAGE SETTLEMENT.

See Husband and Wife No. 2, and Faulkner v. Faulkner's ex'rs, 265

MASTER AND SLAVE.

See Emancipation and Freedom.

MILLS.

W. being the owner of an island situate in the falls of the Appomattox, a navigable river, applies to the county court for leave to erect a mill on his island, and to condemn an acre of land on the main, belonging to T. for an abutment for his mill dam; the acre of land is condemned, and leave is given to W. to build his mill on his island; W. abuts his dam against the condemned acre, but does not build his mill on his island, but builds it on the mainland belonging to T. below the condemned acre, on a canal conducted from a point above the dam, through T.'s land; and he cuts his canal through, and builds his mill on, T.'s land, with T.'s consent: **Held**, this mill is not established according to law, so as to entitle W. and those claiming the mill rights under him, and T.'s land under him, to take the water from the river to work the mill, as against the public right of navigation, and a company incorporated by law to improve the navigation.

Stokes & Smith v. Upper Appomattox Company, 318

MISDEMEANOUR.

The statute of 1822-3, ch. 34, § 1, does not authorize a criminal prosecution for killing dogs belonging to another.

Commonwealth v. Maclin, 809

MISTAKE.

See Contract No. 4, 5, and Glassell v. Thomas, 113

MORTGAGES AND TRUSTS.

I. How creditor is to claim after becoming mortgagee.

1. The opinion, in Tate v. Liggatt, 2 Leigh, 84, that "a creditor at large procuring a mortgage of his

debtor's property, cannot claim as a creditor, or in the double character of creditor and purchaser, but "only as purchaser,"—doubted and disapproved.

Watts & others v. Kinney & wife, 272

II. Where three mortgages, the first of whole tract, second of part and third of whole.

2. S. mortgages a parcel of 360 acres of land to B. to secure a debt due to him; then S. mortgages all of the same land, except 75 acres, to H. to secure debt due to him, these 75 acres being excepted and reserved out of this second mortgage, because the mortgagor was then in treaty with a third person for the sale thereof to him, which treaty was afterwards broken off; and then S. mortgages the whole parcel of 360 acres to C. to secure a debt due to him: **Held**, 1. that H. the second mortgagee, has a right, as against Sisson the mortgagor, B. the first mortgagee, and C. the third mortgagee, to insist that the debt due to B. shall be satisfied out of the parcel of 75 acres reserved out of the second mortgage to H. so as to leave that part of the subject mortgaged to H. untouched and applicable to the satisfaction of the debt due him; and 2. that C. the third mortgagee, has no right to call on H. the second mortgagee, to contribute, pro rata, to the satisfaction of the debt due to B. the first mortgagee.

Conrad v. Harrison & others, 582

3. The proposition, that where "a judgment is recovered against a debtor, and then the debtor alienes his lands to divers alienees by divers conveyances, all the debtor's lands, in the hands of his several alienees, are alike liable to the judgment creditor, and the lands in the hands of the several alienees must contribute pro rata to satisfy the judgment," stated by the court in *Beverley v. Brooke*, 3 Leigh, 426, doubted, but held not applicable to the preceding case. *Ibid.*, 582

III. Where two mortgages, the first when grantor had but an equitable estate, and second after he acquired legal title.

4. H. having only an equitable estate in land, conveys the land by deed of bargain and sale, without any warranty, to M. and F. in trust to secure a debt to B. and this deed of trust is duly recorded; afterwards, H. acquires the legal title; and then he sells the land to D. and conveys it to him with warranty: **Held**, 1. That as the deed of trust executed by H. to M. and F. to secure the debt to B. was executed when H. had not the legal estate, and as that deed contained no clause of warranty, the legal estate subsequently acquired by H. did not enure to the trustees M. and F. to secure the debt to B. so that B. had only a lien on the equitable estate; and 2. That the recording of the deed mortgaging H.'s equitable estate to secure the debt to B. was not constructive notice of that deed to D. the subsequent purchaser from H. For 3. The statute requiring deeds to be recorded, makes them void as to subsequent purchasers without notice, if not recorded, but gives them no additional validity if recorded.

Doswell v. Buchanan's ex'rs, 365

IV. How sale of mortgaged subject is to be effected.

5. Though if a mortgage be made to secure a debt, and power be thereby given to the mortgagee to sell the subject to pay the debt, the mortgagee cannot execute the power, the character of creditor and trustee, in such case, being incompatible; yet, if the mortgagee in fact execute the power fairly, and make sale of the subject for cash, and if the mortgagor be apprised of the sale and present at it, and make no objection to the mortgagee's proceedings, but on the contrary acquiesce in them, he shall be regarded as waiving his objection to the defect of the mortgagee's power to sell, so far as the purchaser is concerned, and shall not be allowed in equity to redeem, as against the purchaser. Taylor's adm'r's and devisees v. Chowning, 654

MOTION.

I. By surety against principal.

1. A surety having paid five several sums of money for his principal may maintain five several motions, and recover several judgments for the debts and for the costs of each motion.

Ayres v. Lewellin, 609

II. By Commonwealth against public debtor.

2. Quære, whether under the provision of the statute, 2 Rev. Code, ch. 189, § 4, the summary remedy by motion lies for the commonwealth, on any bond but such as are required and taken for the benefit or security of the commonwealth exclusively?

Auditor &c. v. Dryden &c., 708

III. Practice upon motions.

3. See that title.

MUTUAL ASSURANCE SOCIETY.

See Lien No. 3, and Mutual Assurance Society v. Stone & another, 218

852 *NAVIGATION.

1. See Easement, and Stokes & Smith v. Upper Appomattox Company, 318
2. See Mills, and S. C., 318

NEW TRIAL.

1. Upon a motion to set aside a verdict, and for a new trial, on the ground that the verdict is contrary to evidence, the motion is overruled, but the circuit court refuses to certify the facts proved by the evidence, and only certifies the evidence, and that nothing appeared to impeach the credit of any part of it; bill of exceptions states the evidence at large, which is, in some respects, variant and conflicting: **Held**, this bill of exceptions is not well taken, and the appellate court cannot review the judgment of the circuit court overruling the motion for a new trial.

Jackson's adm'r v. Henderson &c., 196

2. Quære, what is the party's remedy, in such case, when the court refuses to certify the facts proved in evidence? *Ibid.*, 196

NOTICE.

1. See Practice upon Motions, and Ayres v. Lewellin, 609
2. See Purchaser without Notice.

NUISANCE.

See Roads No. 4, 5, and Commonwealth v. Beeson, 821

NUNCUPATIVE WILL.

See Wills No. 5, 6, and Winn v. Bob and others, 140

OFFICE JUDGMENTS.

See Practice in actions at law No. 1, and Powell v. Watson, 4

PARTIES IN CHANCERY.

See Practice in suits in equity No. 1, and Samuel v. Marshall &c., 567

PARTNERSHIP.

1. Though a bond or covenant executed by one partner of a mercantile house, in the name of the firm, for a debt of the partnership, is not binding on his co-partner who did not seal the instrument, yet the debt being originally a debt of the concern, both partners are liable for it to the creditor.

Sale v. Dishman's ex'rs, 548

2. And though the surviving partner of a mercantile house is alone liable at law to the creditors of the house, yet if the surviving partner prove insolvent, the estate of the deceased partner is liable, in equity, for the debts of the partnership.

Ibid., 548

3. Quære, what degree or kind of laches of the creditor, or dealing between him and the surviving partner, in respect of the debt claimed of the partnership, will suffice to exonerate the estate of the deceased partner from the debt? *Ibid.*, 548

4. It seems, mere delay of the creditor to assert and prosecute his demand against the surviving partner, will not suffice to exonerate the estate of the deceased partner. And there is no analogy between the duty of a creditor in such case to assert and prosecute his claim against the surviving partner, and the due diligence which the assignee of a bond is bound to exert against the obligor, in order to entitle him to recourse against the assignor.

Ibid., 548

PENAL STATUTES.

See Construction of Penal Statutes.

PENALTY.

See Damages, and Robertson v. Hogsbreads, 667

POWER.

1. See Executors and Administrators No. 2, 3, and pages 12, 161
2. See Wills No. 17, and Burwell's ex'rs v. Anderson, adm'r &c., 348

PRACTICE IN ACTIONS AT LAW.

I. As to putting cause on court docket.

1. Capias ad respondendum, in debt on bond, returnable to August rules, being returned executed, and defendant not appearing, clerk enters the common order; at September rules defendant appears, and puts in special bail, but does not plead; plaintiff insists that clerk shall enter a confirmation of the common order, so as to put the case on the office judgment list of the next term, which

868 clerk refuses to do; at next term *court orders case to be put on office judgment list, and then defendant puts in a plea to the action; and, at the ensuing term, there is a trial, verdict and judgment for plaintiff:

Quære, whether regular to order the case to be put on office judgment list? But *Held*, if not regular, defendant's pleading to the action was a waiver of objection to the regularity of the order. Powell v. Watson, 4

II. As to reading depositions.

2. Plaintiff having taken the deposition of an aged and infirm witness, to be read de bene esse, fails to take out a subpoena and have it served on the witness to attend at the trial; yet *Held*, that upon satisfactory proof of the witness's inability to attend the trial by reason of ill health, the deposition shall be read—*Dissentiente BROOKE, J.*

Lynch v. Thomas, 682

3. Quære, whether upon the question of the witness's inability to attend in such case, hearsay evidence as to the state of his health may properly be heard by the court? *Ibid.*, 682

PRACTICE IN CRIMINAL CAUSES.

See Indictments, Informations and Presentments.

PRACTICE IN SUITS IN EQUITY.

I. Parties and process.

1. The distributees of a deceased person may maintain a bill in equity, to impeach and set aside a deed of gift of personal estate made by the decedent in his lifetime, as fraudulent; and the court may, at their suit, declare the deed fraudulent, and annul it; but the subject itself can only be decreed to the personal representative of the decedent, or to the distributees in a case in which the personal representative is a party.

Samuel v. Marshall and wife and others, 567

II. When defence must be made.

2. On a bill by vendee against vendor for specific execution, if no objection to the vendor's title be made in the court of chancery, in any form, he cannot be heard to make such objection in the court of appeals.

Brockenbrough and Taylor v. Blythe's ex'rs and others, 619

III. Reference to commissioner.

3. See Specific Execution No. 6, 7, and Jackson v. Ligon, 161

IV. When an issue will be directed.

4. If the evidence on a question of fact in a suit in chancery, though various and conflicting, be such as ought to satisfy the chancellor's conscience as to the truth of the case, he need not direct an issue to try the fact.

Samuel v. Marshall and wife and others, 567

V. Decrees between co-defendants.

5. It seems, there cannot properly be a decree between co-defendants in equity, in any case, in which the plaintiff is not entitled to a decree against both or either; and it would be inconvenient to extend that practice further.

Hubbard v. Goodwin; and Kennedy &c. v. Same, 492

VI. What will be reviewed by appellate court.

6. See Specific Execution No. 7, and Jackson v. Ligon, 161

7. See Appellate Jurisdiction No. 7, and Garrett, ex'r of Allen v. Carr &c., 407

PRACTICE UPON MOTIONS.

In the case of a summary motion by surety against principal, to recover money paid by the surety, under the statute 1 Rev. Code, ch. 116, if the defendant appear, and judgment be rendered on a hearing of the parties, the notice of the motion is not a part of the record, unless it be made so by a bill of exceptions to the opinion of the court.

Ayres v. Lewellin, 609

PRESENTMENTS.

See Indictments, Informations and Presentments.

PRESUMPTION OF PAYMENT.

Payment of a legacy by an executor cannot be presumed from mere lapse of time, during which there is no representative of the legatee entitled to demand and receive it; especially where, though there have been dealings between the executor and the distributee of the legatee, yet the executor in settling his accounts has not claimed credit for payment of the legacy.

Burwell's ex'rs v. Anderson, adm'r &c., 348

PRINCIPAL AND SURETY.

1. Concerning surety's summary remedy, see Motion No. 1, and

Ayres v. Lewellin, 609

854 *2. See Practice upon Motions, and S. C., 609

PRIORITY OF LIEN.

See Lien.

PROCESS.

1. In suits in equity. See Practice in Suits in Equity.

2. In criminal causes. See Indictments, Informations and Presentments.

PURCHASER WITH NOTICE.

1. To sustain a plea of purchaser without notice, the party must be a complete purchaser before notice; that is, must have obtained a conveyance and paid the whole purchase money.

Doswell v. Buchanan's ex'rs, 365

2. Upon a plea of purchaser without notice, if the purchaser has paid the whole purchase money, though he has not got a conveyance of the legal estate, yet if he has acquired the preferable right to call for the legal estate, he is a complete purchaser entitled to avail himself of this defence: per TUCKER, P., in

Mutual Assurance Society v. Stone and another, 213

3. Concerning constructive notice to purchaser, see Mortgages and Trusts No. 4, and

Doswell v. Buchanan's ex'rs, 365

RECORD.

What will constitute part of the record. See Practice upon Motions, and

Ayres v. Lewellin, 609

RECORDING OF DEEDS.

See Mortgages and Trusts No. 4, and

Doswell v. Buchanan's ex'rs, 365

RELEASE OF ERRORS.

A confession of judgment on a forthcoming bond is a release of all errors in the previous proceedings.

Stanard v. Timberlake, 681

RELIEF IN EQUITY.

See Jurisdiction.

RENTS AND PROFITS.

See Hotchpot, and Christian and wife and another v. Coleman's adm'r and others, 30

REVERSAL OF DECREE.

See Appellate Jurisdiction in suits in equity.

REVOCATION OF WILL.

See Wills No. 4, and

Boyd &c. v. Cook, ex'r of Vass, 32

ROADS.

I. Petition for road.

1. Though authority is given to the county courts to open only such new roads as may be wanting for a public right of way to some one or more of the places mentioned by the statute 2 Rev. Code, ch. 236, § 1, yet the purpose for which the road is wanting, need not be stated in the petition of the applicant, if it appear in any other part of the record, or be proved to the court; and if this was a defect in the petition, the party opposed to the application having appeared, and prayed an ad quod damnum, waived the objection.

Carpenter and others v. Sims, 675

II. Award of writ of ad quod damnum; and inquisition thereupon.

2. The party opposed to opening a new road appears and prays an ad quod damnum, which the court awards, and appoints a day for holding the inquest; the defendant shall be presumed to be present in court at the time the writ is awarded and the day of inquest appointed; so that the sheriff need not give him notice of the day of holding the inquest. *Ibid.*, 675

III. Order allowing road.

3. The authority of the county courts to allow gates to be erected on a public road, to save fencing to the owners of lands through which the road passes, applies to cases of roads already established: the courts have no authority to order gates to be erected on a road ordered to be opened, to save the county the expense of making compensation to the owners for the additional fencing which such new road will render necessary. *Ibid.*, 675

IV. Legal consequences of establishing road.

4. If a public road be opened and established along the bank of a river, on land of an individual proprietor, regularly condemned for the purpose, according to the statute, and the land on which the road was so opened, and established, be washed away, in whole or in part, by high waters, the public has no right to take so much other adjoining land of the proprietor as may suffice for the highway, without a new view and condemnation thereof, and compensation for the same, according to the statute.

Commonwealth v. Beeson. 821

5. And if, in such case, the public be entitled to additional land for the road, the proprietor cannot be guilty of any nuisance in the use of the land for his own purposes, until the road shall have been actually laid out and opened by the public through the instrumentality of its agents. Ibid., 821

SET-OFF.

1. W. G. having contracted a debt to a bank, by note payable sixty days after date, discounted by the bank for his accommodation, dies before the note comes to maturity, having on deposit in the bank, at the time of his death, a sum of money exceeding the amount of the note: HELD, that in case W. G.'s estate prove insolvent, the bank has a right in equity to retain the amount of his note out of the money it held for him on deposit, whether there be debts of W. G. of superiour dignity to the debt he owed the bank, or not; equity, in such case, regarding the bank as debtor to W. G. only for the excess of his money on deposit above the contents of his note—Dubitante BROOKS, J. if it appeared that the decedent's estate owed debts of superiour dignity.

Ford's adm'r v. Thornton. 696
2. A. and B. execute a joint bond to C. part of the consideration of which is the price of a parcel of corn sold by C. to A. deliverable at a day subsequent to the date of the bond: the corn is not delivered according to contract: in debt on the bond by C. against A. and B. the defendants cannot set off the value or price of the corn.

Christian and wife and another v. Miller. 78
3. A bill, in any form, claiming damages for breach of contract, cannot be entertained in equity: neither can unliquidated damages be set-off in equity.

Robertson v. Hogsheds. 667

SPECIFIC EXECUTION.

I. Where husband contracts for sale of wife's land.

1. A husband contracts to sell his wife's land: upon a bill in chancery, by the husband and wife against the purchaser, to compel specific execution of the agreement, it seems, specific execution shall not be decreed, because specific execution could not be decreed at the suit of the purchaser, upon a bill against the husband and wife, to compel her to convey her land, and so the remedies are not mutual. At any rate, upon such a bill for specific execution of such a contract, preferred by husband and wife against the purchaser, a decree for specific execution against the purchaser, before the wife shall have executed a deed conveying the land, though the decree be suspended till she shall execute such a deed, is erroneous.

Watts and others v. Kinney and wife. 372

II. Where title is defective only as to part of land sold.

2. Upon bill for specific execution of agreement for sale and purchase of a tract of 686 acres of land for cultivation, vendor's title to 209 acres of tract is defective: this is separated from the residue by a public road, and all the improvements are on the residue, in which vendor has a perfect title: HELD, vendee shall not be compelled to take the residue.

Jackson v. Ligon. 161

III. Where defect in title was known to vendee.

3. If, in an agreement for sale and purchase of land, vendee is apprised that vendor's title is defective, and agreement stipulates that vendor shall convey to vendee a good and lawful right by a given day: at appointed day, vendor insists that his title is perfect, though in truth it is defective: upon which vendee, having received possession under the contract, abandons the possession, and refuses to proceed with the purchase: upon a bill for specific execution, by vendor against vendee, HELD, vendee's previous knowledge of defects in the title is no reason for compelling him to take such title as vendor can convey, that being defective. Ibid., 161

IV. Where either party fails to perform contract within appointed time.

4. In the case of an executory agreement, though

the time appointed for performance may not be made (originally, by the terms of contract) of the essence thereof, yet it may be made material by the conduct of parties or circumstances afterwards; and, if so made material, the party in default is not entitled to demand specific execution against the other. Ibid., 161

856 *V. When contract will be rescinded for mistake.

5. See Contract No. 4. 5. and

Glassell v. Thomas. 113

VI. Practice in suit for specific execution.

6. Bill in county court, by vendor against vendee, for specific execution of agreement for sale and purchase of land: vendor insisting he has a good title to convey, and vendee that title is defective, and both parties, by the pleadings referring the question (which is a question of law on the construction of a will) to the court; and the cause is brought to hearing by consent, neither party asking a reference of title to a commissioner: HELD, in such case, the court ought not to refer the title to a commissioner, nor, if title be defective, to give vendor time to perfect it, but should proceed to decide the question.

Jackson v. Ligon. 161

7. County court, in such case, though the title is, in truth, defective, without reference of the title, decrees specific execution: vendee appeals to superiour court of chancery: HELD, the chancellor ought to review the decree of the county court, upon the actual state of case at time of the decree there; and as the decree was erroneous in compelling vendee to take defective title, to reverse it, and dismiss vendor's bill: and he ought not to open the proceedings, refer the title, give the vendor time to perfect it, and in case he succeed in doing so, decree specific execution. Ibid., 161

8. On a bill by vendee against vendor for specific execution, if no objection to the vendor's title be made in the court of chancery, in any form, he cannot be heard to make such objection in the court of appeals.

Brockenbrough & Taylor v. Blythe's ex'rs & others. 619

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES OF VIRGINIA, OF A GENERAL NATURE, CITED AND CONSTRUED.

I. Statutes relating to religious freedom.

1. Ch. 32, b. p. 79 of 1 R. C. concerning glebe lands, cited.

Overseers of Poor v. Hart, 1
2. Former statutes concerning the purchase of glebes, cited. Ibid., 1

II. Declaring laws which are in force.

3. Ch. 40, § 3, p. 137 of 1 R. C. concerning repeal of british statutes, construed.

Gallego's ex'rs v. Attorney general. 462, 476
4. Ch. 41, § 2, p. 138 of 1 R. C. concerning repeal of law which repealed another, cited. Ibid., 477

III. Courts and their members and officers.

5. Ch. 66, § 86, p. 214 of 1 R. C. regulating objections to jurisdiction of court of chancery, construed.

Kelso v. Blackburn. 399
6. Sess. acts of 1825-6, ch. 15, § 14, p. 18, concerning mandamus to compel hearing of suit in chancery, construed.

Ex parte Richardson. 343
7. Ch. 60, § 14, pp. 231, 2 of 1 R. C. concerning adjournment of cases to general court, construed.

Commonwealth v. Garth. 761
8. Same chapter, § 46, p. 237, concerning orders of circuit court, cited.

Christian & c. v. Miller. 83
9. Sess. acts of 1821-2, ch. 26, § 2, p. 27, concerning disqualification of justices, construed.

Commonwealth v. Tate. 802
10. Ch. 71, § 23, 25, p. 253 of 1 R. C. concerning appeals from judgments of justices, cited.

Tankersley v. Lipscomb. 814
11. Former statutes concerning clerk's bond, cited.

Auditor v. Dryden & c., 705, 707
12. Former statutes concerning appointment of sheriffs, cited.

Commonwealth v. Tate. 806
13. Former statutes prescribing bonds of sheriff, cited.

Auditor v. Dryden & c., 705, 711, 712

IV. Rights.

14. Ch. 96, § 12, p. 856 of 1 R. C. concerning descents, cited.

Henderson's ex'rs & c. v. Peachy. 75

15. Same chapter, § 17, p. 357, concerning hotchpot, construed.

Christian &c. v. Coleman's adm'r and others, 80

16. Statutes of 1705 and 1734, concerning the recording of deeds, cited, and that of 1792 construed, Doswell v. Buchanan's ex'rs, 365

17. Ch. 99, § 13, p. 365 of 1 R. C. declaring record of contract in relation to land shall be notice, cited, Ibid., 375

18. Ch. 104, § 1, p. 375 of 1 R. C. concerning will of lands, cited.

Ex parte Todd, 320

19. Same chapter, § 3, p. 376, concerning revocation of written wills, construed.

Boyd &c. v. Cook, ex'r of Vass, 32

20. Same chapter, § 7, p. 377, concerning nuncupative wills, construed.

Winn v. Bob and others, 140

857 *21. Same chapter, § 16, p. 378, concerning authenticated copies of wills, construed.

Ex parte Povall, 816

22. Same chapter, § 21, pp. 379, 80, concerning executor's bond, construed.

Burnett & others v. Harwell &c., 80

Allen and others v. Cunningham & others, 395

23. Same chapter, § 63, p. 390, concerning suit on executor's bond, construed.

Allen & others v. Cunningham & others, 395

24. Same chapter, § 29, p. 382, concerning distribution of intestate's estate, cited.

Christian &c. v. Coleman's adm'r and others, 30

25. Same chapter § 62, p. 388, concerning lands devised to be sold, construed.

Broadus &c. v. Rosson &c., 12

26. Same section cited, with former statutes on the subject.

Pratt v. Tallafarro, 488

27. Ch. 111, § 51, p. 432 of 1 R. C. concerning gifts of slaves, cited.

Hansbrough's ex'rs v. Thom., 147

28. Same chapter, § 53, p. 433, concerning mode of emancipation, construed.

Winn v. Bob and others, 140

V. Remedies.

29. Ch. 116, § 1, p. 460 of 1 R. C. giving motion to surety against principal, cited.

Ayres v. Lewellin, 460

30. Same chapter, § 6, p. 461, giving surety right to require creditor to sue, cited.

Sale v. Dishman's ex'rs, 554

31. Ch. 123, p. 474 of 1 R. C. concerning attachments against absent debtors, construed.

Glassell v. Thomas, 113

Watts & others v. Kinney & wife, 277

Kelso v. Blackburn, 399

32. Former statutes on same subject, cited.

Kelso v. Blackburn, 302, 306

33. Ch. 123, § 14, p. 478 of 1 R. C. concerning attachments against absconding debtors, construed.

Watts & others v. Kinney & wife, 283

Kyle & Co. v. Connelly, 719

34. Same chapter, § 7, p. 477 of 1 R. C. concerning attachment bond, construed.

Kyle & Co. v. Connelly, 719

35. Ch. 124, § 4, 5, p. 481 of 1 R. C. concerning suits for freedom, cited.

Winn v. Bob and others, 140

And § 5, construed.

Rixey, and others v. Justices of Fauquier, 813

36. Sess. acts of 1819-20, ch. 28, § 2, p. 24, giving remedy on bond taken to obligee who is dead, construed.

Turnbull, ex'r v. Claibornes, 392

37. Ch. 128, § 72, 73, 77, pp. 507, 508 of 1 R. C. concerning proceedings at rules, cited.

Powell v. Watson, 4

38. Ch. 127, p. 487 of 1 R. C. concerning discounts, cited.

Ford's adm'r v. Thornton, 698

39. Ch. 128, § 87, p. 510 of 1 R. C. which requires account or set-off to be filed, cited.

Christian &c. v. Miller, 78

40. Ch. 131, § 15, p. 519 of 1 R. C. concerning deposition of witness unable to attend, construed.

Lynch v. Thomas, 682

41. Ch. 128, § 103, p. 511 of 1 R. C. (statute of jeofails) cited.

Jackson's adm'r v. Henderson &c., 207

42. Same chapter, § 10, p. 492, concerning limitation of writs of error and supersedeas, cited.

Ibid., 198

43. Ch. 64, § 11, p. 192, and ch. 60, § 61, p. 240 of 1 R. C. concerning damages on appeals, construed.

Ayres v. Lewellin, 615

44. Ch. 64, § 13, p. 194 of 1 R. C. concerning appeals in cases of mills, wills and the like, cited.

Duff v. Duff's ex'rs, 538

Carpenter and others v. Sims, 977

VI. Crimes, prosecutions and punishments.

45. Ch. 147, § 29, p. 570 of 1 R. C. concerning construction of statutes against gaming, cited.

Commonwealth v. Garth, 769

46. Same chapter, § 3, 6, pp. 562, 3, concerning playing and betting, cited. Ibid., 761, 768

47. Same chapter, § 5, p. 563, concerning playing and betting, cited; and § 20, 21, pp. 567, 568, concerning presentments and process, construed.

Word v. Commonwealth, 743, 746

48. Sess. acts of 1822-3, ch. 34, § 1, p. 36, concerning trespasses, construed.

Commonwealth v. Maclin, 809

49. Sess. acts of 1823-4, ch. 35, § 1, p. 37, concerning harbouring runaways, cited.

Tankersley v. Lipscomb, 814

50. Ch. 169, § 27, p. 607 of 1 R. C. as to allowing accused benefit of counsel, cited.

Commonwealth v. Garth, 771

VII. Revenue.

51. Ch. 191, § 6, 9, pp. 63, 64 of 2 R. C. concerning county levy, construed.

Rixey and others v. Justices of Fauquier, 811

52. Former statutes concerning taxes collected by clerks, cited.

Auditor v. Dryden &c., 705, 707, 709, 713

53. Ch. 189, § 4, p. 50 of 2 R. C. concerning motion by commonwealth, cited. S. C., 703

54. Ch. 174, § 6, p. 2 of 2 R. C. concerning appeals from the auditor, cited.

Auditor v. Dugger &c., 241

*VIII. Inspection of tobacco.

55. Ch. 220, § 67, p. 166 of 2 R. C. concerning tobacco burnt in warehouse, construed.

Auditor v. Dugger &c., 241

56. Same chapter, § 3, p. 137, concerning discontinuance of warehouse, construed. Ibid., 241

IX. Mills and Roads.

57. Statutes concerning mills and milldams, referred to in ch. 235, p. 225 of 2 R. C. cited.

Stokes and Smith v. Upper Appomattox Company, 333

58. Ch. 236, § 1, p. 233 of 2 R. C. concerning application for a road, construed.

Carpenter and others v. Sims, 676

59. Same section, and also § 2, cited.

Commonwealth v. Beeson, 822

Carpenter and others v. Sims, 679

60. Same chapter, § 21, p. 240, concerning erection of gates across roads, construed.

Carpenter and others v. Sims, 675

SUBSEQUENT PURCHASER.

See Mortgages and Trusts No. 4, and Doswell v. Buchanan's ex'rs, 365

SUMMARY REMEDY.

See Motion.

SUPERSEDEAS.

See Appellate Jurisdiction.

SURETY.

See Principal and surety.

TOBACCO INSPECTION.

Though a tobacco warehouse established by law shall not yield a sufficient amount of duties to pay the inspectors' salaries and rents to the proprietor, for three years in succession, yet such warehouse is not thereby ipso facto discontinued, under the third section of the statute, 2 Rev. Code, ch. 220, and if inspectors continue to be duly appointed, and so the inspection be in fact kept up, and such warehouse be burnt, the commonwealth is liable to make good the loss to the owners of tobacco there inspected and deposited within the year preceding the loss, under the 67th section of the statute.

Auditor v. Dugger &c., 241

TRESPASS.

The statute of 1822-3, ch. 34, § 1, does not authorize a criminal prosecution for killing dogs belonging to another.

Commonwealth v. Maclin, 809

TRUSTS AND TRUSTEES.

1. In relation to breach of trust, see Guardian and Ward No. 2, and Broadus &c. v. Rosson &c., 13

2. See Mortgages and Trusts.

USURY.

1. Question, whether, under the circumstances of the transaction, a sale of bank stock upon a credit, at par, the cash value of the stock at the time of sale being twenty per cent. below par, was a bona

fide sale, or an usurious loan under cover of a pretended sale.

Selby v. Morgan. 577
2. S. being under an urgent necessity to raise a sum of money, requests M. to assist his agent in negotiating a loan thereof at bank; M. lends his assistance, but the bank refuses to lend the money; then M. proposes to S. to sell him bank stock at par upon a credit, the stock being then twenty per cent. below par in the market; and M. enters into a negotiation with the bank to borrow the money S. wanted, for S. upon a pledge of the stock; the bank offers to lend the money upon a pledge of the stock and S.'s note indorsed by M. and M. having thus settled the terms of the loan with the bank, sells his stock to S. at par on a credit, and immediately, the bank lends S. a sum equal to 4-fths of the par value of the stock, on a pledge of the stock, on a pledge of the stock and on S.'s note indorsed by M. HELD, this is a fair sale of bank stock by M. to S. and not a device to cover an usurious loan of money. Ibid., 577

VARIANCE.

I. Between writ and declaration.

1. In cases of judgments by default, the writ is part of the record; and writ being in assumpsit and declaration in covenant, the variance is fatal. Wainwright and others v. Harper. 270

II. Between declaration and evidence.

2. Declaration in assumpsit on a written agreement takes no notice of a note subjoined to the agreement, limiting its continuance to a day certain; the agreement offered in evidence on the general issue, has such note subjoined thereto: HELD, this is a fatal variance between the agreement laid in the declaration and the agreement offered in evidence; and the agreement is not admissible evidence, unless it appear that the note was subjoined without the plaintiff's knowledge or consent, and so was no part of the agreement. Newell v. Mayberry. 250

3. In an action on the case for advising and procuring a malicious prosecution, it is not material for the plaintiff to prove the exact day of his acquittal as laid in the declaration, so that it appears to be before the action brought; and, therefore, a variance in that respect, between the day laid, and the day stated in the record produced to prove the acquittal, is not material; the day not being laid in the declaration, as part of the description of such record of acquittal, and being laid under a scilicet. Mowry v. Miller. 561

4. See Declaration No. 1, 2, 3, and Jackson's adm'x v. Henderson &c., 197

VENDOR AND VENDEE.

I. Construction of contract.

1. See Contract No. 9, and Brockenbrough and Taylor v. Blythe's ex'rs and others. 619

II. Lien of vendor for purchase money.

2. Where H. sold land to M. and took no security for the purchase money; and M. then sold the same land to F. took his bonds for the purchase money, and assigned those bonds for valuable consideration, the assignees having no notice of H.'s claim to a lien on the land for the purchase money due him by M.—though H. might have been entitled to payment of the purchase money due him from M. out of the purchase money due from F. to M. if F.'s bonds for the same had remained in M.'s hands, yet H. cannot assert any such equity as against the bona fide assignees of the bonds. Moore and another v. Holcombe and others. 507

III. Liability of vendee for interest.

3. A vendee of land let into possession, and the purchase money remaining unpaid, shall pay interest thereon, though the vendor be in default, unless he has not only kept the purchase money idle, but given the vendor notice that he has so kept it. Brockenbrough and Taylor v. Blythe's ex'rs and others. 619

IV. Other matters arising out of sale.

4. See Specific Execution.

WILLS.

I. Probate of written will.

1. Testator's will is written for him by R. P. who testifies, that he also signed testator's name thereto, in the presence and at the request of the testator, and then subscribed his own name as a witness in the testator's presence; and another witness, B. H. testifies, that some years afterwards, the witness being at testator's house; it was suggested to testator that that was a favourable time to have that will witnessed; testator assented; the paper in

question was produced; witness took it near to testator and enquired whether he acknowledged it; testator said he did; upon which, this witness subscribed as a witness in testator's presence: HELD, the acknowledgment of the paper by testator to the second witness, was a recognition of the signature thereto as his own, and evidence from which a court of probat may well infer, that the testator's signature to the will was written by his authority; and so here are two witnesses to the execution of the will as required by the statute: dissentiente BROOKS, J.

Dudleys v. Dudleys. 436

2. The authority of Burwell v. Corbin. 1 Rand. 181, doubted. Ibid., 436

3. The will of a blind man shall be admitted to probat and record, as a will of real as well as personal estate, if attested at his request in the same room with him; though it be not proved that the will was read to him in the presence of the attesting witnesses, or that it was ever read to him, provided it appears satisfactorily to the court, that he was acquainted with its contents, and intended to make the testamentary dispositions therein contained. Boyd and another v. Cook, ex'r of Vass. 82

4. A blind testator orders a will made by him to be destroyed, and believes it is destroyed accordingly, but it is not destroyed, and no act towards destruction done: this is not a revocation by destruction or cancellation, within the statute 1 Rev. Code, ch. 104, § 3. At least, a court of probat cannot consider this as amounting to a revocation. Ibid., 82

II. Probate of nuncupative will.

5. It is essential to the validity of a nuncupative will, that it should appear that the deceased, at the time he spoke the alleged testamentary words, had a present intention to make his will, and spoke the words with such intention, and should distinctly indicate that intention, by calling upon persons present to take notice or bear testimony that such is his will, or by saying or doing something tantamount in substance, indicating plainly that the words spoken were designed to be testamentary. Winn v. Bob and others. 140

6. Quære, whether slaves claiming to be emancipated by will, can properly be allowed to prosecute, in forma pauperis, a suit to have the will proved and recorded in a court of probat, under the provisions of the statute, 1 Rev. Code, ch. 124, § 4, 5? Ibid., 140

III. Probate of authenticated copy of will.

7. A copy of a will proved in Louisiana, according to the laws of that state, and offered for probat here, is not authenticated according to the act of congress of May 26, 1790, but is authenticated according to the rules of the common law: HELD, the copy is duly authenticated, within the meaning of the statute of wills, 1 Rev. Code, ch. 104, § 16. Ex parte Povall. 816

8. When an authenticated copy of a will proved in another or foreign state, is offered for probat here, if the probat shew that the will has been so proved there, as that if proved in like manner here, it could only be admitted to probat here, as a will of personality, it shall be so admitted; but if the proof in the foreign court of probat be such as if taken here, would suffice to establish it as a will of lands, it shall be admitted to probat here also, as a will of lands. Ibid., 816

9. Authenticated copy of a will and probat thereof in Kentucky, the probat shewing that it was proved by three subscribing witnesses, but not stating the substance of the proof there, admitted to probat here, only as a will of personals. Ex parte Todd. 819

10. Quære, whether if the law of Kentucky was ascertained to be the same with that of Virginia on the subject, the admission of a will to full probat there, would be sufficient to warrant the admission of it to full probat as a will of lands here, without the particulars of the proof there, appearing in the record of the probat. Ibid., 819

IV. Rules applicable to probats generally.

11. A court of probat occupies the place of a jury as to questions of fact, and its province is, like that of a jury, to draw all just inferences from the evidence. Boyd & another v. Cook, ex'r of Vass. 82

12. Upon a question of probat of a will, the testimony of one of the attesting witnesses is directly contradicted by that of another; the county and circuit courts both give credit to the witness for the will; on appeal from the sentence of probat, HELD, that the court of appeals, on a mere question of credibility of witnesses, will always presume that the inferior courts which saw and heard the witnesses examined, decided correctly. Dudleys v. Dudleys. 436

13. See Appellate Jurisdiction No. 5, and
Duff v. Duff's ex'rs,

533

V. Construction of will.

14. Testator devises real and personal estate "to his two daughters, viz. the one moiety thereof to M. and the other moiety thereof to J. for their lives; remainder to their children, who shall be living at the time of the decease of either of his said daughters; which remainder to the children, to be per capita and not per stirpes; so that upon the death of either daughter, her moiety shall go in remainder, not to her children, but to them and the children of the surviving daughter, in fee."

Held, this was not a limitation of the whole remainder of the whole estate, to take effect on the death of the daughter first dying, and to vest in children of both then in esse, liable to open and let in children of the survivor after born; but, as it was a devise of the estate to the two daughters in several moieties for life, so the limitation was of the remainder in several moieties also; a limitation of the remainder of each moiety, expectant on each life estate, upon the death of each daughter, to children of both living at the death of each; so that, upon the death of the daughter first dying, the remainder of her moiety only should vest in children of both then in esse; and upon the death of the survivor, the remainder of her moiety should vest in children of both then in esse; a base fee in the real estate, and the undisposed of remnant of interest in the personal, descending and passing to the two daughters, the testator's heirs at law and distributees, and awaiting the contingencies on which the contingent remainder of the real and executory bequest of the personal, were limited.

Henderson's ex'rs &c. v. Peachy,

64

15. Testator devises all his land and slaves to his wife D. P. during life or widowhood, *for her and his son M. P.'s support; and if his wife should be then pregnant, and with a boy, he should have same benefit of the property with the son M. P. and at the wife's death or marriage, both land and slaves should be sold, and the proceeds equally divided between the two sons; if with a girl, she should share equal benefit of the property with the son M. P. while in the mother's hands, but, at her death or marriage, should have only an equal share of the slaves; and if the son M. P. should die without lawful issue, then the whole estate to go to his brother or sister, and if he should have neither, to testator's wife's brothers and sisters: the testator's wife was not ensettled, so that he left only one child, the son M. P. Held, that if the land, in conse-

quence of the direction to sell, were considered as money, the son took the remainder expectant on his mother's estate for life or widowhood in absolute property, and the ulterior executory limitation was void; and considering it as real, he took an estate tail in the remainder, with a contingent remainder limited on his estate tail, upon the failure of his issue.

Callava, lessee of Bryant and wife and others
v. Pope,

103

16. Testator bequeaths three slaves and \$1000, to trustees; and directs the profits of the slaves and the interest of the money, to be applied to the maintenance and support of his daughter M. and her child (M. being at the time a married woman); and on the death of his daughter, the slaves and money to be given to her child, or children, if she shall have more than one; the above advances to be made to his said daughter M. independently of any claim testator might have against her husband: Held, upon the construction of the clause, compared with context and general scheme of the will, the testator's daughter was entitled to the whole profits during her life, and the daughter's child had no right to demand a share of them for her support and maintenance—dissentiente TUCKER, P.

Wallace and wife v. Dold's ex'rs and others,

258

17. Testator, after directing the sale of certain property to raise a fund to pay debts, and after giving all the residue of his estate to his wife for life, directs, that at her death, all his estate, real and personal, shall be turned into money, to be distributed as follows—first, he desires, that his wife, by will or otherwise, may have the absolute disposal of £500—then, he bequeaths to his nephew W. P. £200—and, after deducting these two sums, he bequeaths two-thirds of the balance, to his niece A. S. and the other one-third to his sister A. C.; and he directs, that if the fund provided for debts prove inadequate, the sum to make up the deficiency shall be deducted in equal proportions from the sums bequeathed to his wife, his nephew, his niece and his sister: Held, the wife took by the will, the absolute property in the £500 bequeathed to her, and not a mere power to dispose of that sum.

Burwell's ex'rs v. Anderson, adm'r &c.,

348

18. See Charities No. 1, and
Gallego's ex'rs v. Attorney General,

450

19. See Executors and Administrators No. 2, 3,
and pages

12, 161

WITNESS.

See Evidence.

REPORTS OF CASES

ARGUED AND DETERMINED
IN THE

COURT OF APPEALS,

AND IN THE

GENERAL COURT,

OF

VIRGINIA.

BY BENJAMIN WATKINS LEIGH.

VOLUME IV.

Entered according to the act of congress, this fifteenth day of October, eighteen hundred and thirty-four, by BENJAMIN WATKINS LEIGH, for the commonwealth of Virginia, in the clerk's office of the district court of the eastern district of Virginia.

JUDGES
OF THE
COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

HENRY SAINT GEORGE TUCKER, PRESIDENT.
FRANCIS T. BROOKE. WILLIAM H. CABELL.
JOHN W. GREEN.* DABNEY CARR.

Attorney General: JOHN ROBERTSON.

*Judge GREEN did not sit in any of the cases reported in this volume, having been prevented from attending to his judicial duties by long continued ill health.

JUDGES
OF THE
GENERAL COURT

DURING THE TIME OF THESE REPORTS.

WILLIAM BROCKENBROUGH.	ROBERT B. TAYLOR.
DANIEL SMITH.	JOHN SCOTT.
FLEMING SAUNDERS.	WILLIAM LEIGH.
WILLIAM DANIEL.	LUCAS P. THOMPSON.
RICHARD E. PARKER.	BENJAMIN ESTILL.
LEWIS SUMMERS.	JAMES E. BROWN.
WILLIAM BROWNE.	EDWIN S. DUNCAN.
ALLEN TAYLOR.	JOSEPH L. FRY.
ABEL P. UPSHUR.	JAMES SEMPLE.*
RICHARD H. FIELD.	JOHN B. CLOPTON.†
JOHN F. MAY.	RICHARD H. BAKER.‡
JOHN T. LOMAX.	

*Appointed September 8, 1832, *vice* judge WILLIAM BROWNE, resigned.

†Appointed February 27, 1834, *vice* judge BROCKENBROUGH, appointed a judge of the court of appeals.

‡Appointed April 21, 1834, *vice* judge ROBERT B. TAYLOR, deceased.

TABLE OF CASES REPORTED.

Alcock v. Hill,	622	Drummond, Newcomb v.,	57	M'Cann and others, Butler v.,	681
Anderson v. Commonwealth,	698	Dudley, Epes's adm'r's v.,	145	M'Keown, Foley v.,	627
Andersons, Thomason v.,	118	Dunlop & Buchanan &c., Flem-	338	Melson v. Cooper,	408
Archer, Roanes v.,	550	ing's ex'or v.,	564	Mercer's adm'r v. Beale and	189
Arthur v. Crenshaw's adm'r,	394	Dupuy v. Hardaway,	338	others,	569
Baker, Roe v., reported in note,	416	Elam v. Keen,	352	Miller v. Trueheart and others,	168
Bargamin v. Pottiaux ex'or &c.,	412	Elder v. Elder's ex'or,	145	Mingo and others, Paup's adm'r	30
Barrett v. Wills,	114	Epes's adm'r's v. Dudley,	308	and others v.,	61
Baylor, Tod v.,	498	Eubank and others v. Ralls's	608	Montgomery, M'Alexander v.,	35
Bayse, Rixey v.,	350	ex'or,	30	Moon v. Pasteur's adm'r,	30
Beale and others, Mercer's	189	Eubank and others v. Sandige	223	Moore, Gilliam v.,	69
adm'r v.,	349	assignee &c.,	608	Mutual Assurance Society &c.	57
Beck's adm'r v. De Baptists and	223	Evans and others, Berkshire v.,	308	and others, Farmers Bank v.,	359
others,	349	Farmers Bank v. Clarke,	300	Newcomb v. Drummond,	239
Berkshire v. Evans and others,	192	Farmers Bank v. Mutual As-	60	Niblo, Hare v.,	35
Billups, Bramble v.,	266	surance Society &c. and oth-	37	Nicholas v. Burruss,	436
Binford, Tabb's adm'r v.,	689	ers,	648	Pasteur's adm'r, Moon v.,	436
Bird v. Wilkinson,	377	Ferguson, Brown & Sons v.,	300	Patillo, Lee v.,	436
Blunt v. Commonwealth,	90	Fields, Commonwealth v.,	338	Peas, Commonwealth v.,	604
Boardman, Hardman v.,	21	Fitzhugh, Thorntons v.,	627	Pendleton v. Commonwealth,	5
Bowyer v. Chestnut,	484	Fleming's ex'or v. Dunlop &	429	Pennybacker's ex'ors, Buck v.,	686
Bramble v. Billups,	579	Buchanan &c.,	321	Percavil, Commonwealth v.,	412
Bream v. Marsh,	289	Foley v. M'Keown,	638	Pierce v. Massenburg,	308
Briggs v. Hall,	519	Fox's adm'r v. Rootes and oth-	612	Pottiaux ex'or &c., Bargamin	412
Brooks v. Commonwealth,	681	ers, reported in note,	308	v.,	412
Brown & Sons v. Ferguson,	231	Garland v. Marx, reported in	638	Ralls's ex'or, Eubank and oth-	308
Buck v. Pennybacker's ex'ors,	579	note,	535	ers v.,	579
Burruss, Nicholas v.,	403	Garnett v. Jones,	612	Raymond and another, Car-	276
Burton, Commonwealth v.,	482	Gee sheriff &c., Sydnor v.,	688	aigne v.,	330
Butcher v. Hixton,	608	Gholson v. Kendall & Co.,	410	Reynolds v. Gore,	643
Butler v. M'Cann and others,	484	Gilliam v. Moore,	635	Reynolds, Commonwealth v.,	474
Buzzard's adm'r's, Gore v.,	276	Gilliam v. Commonwealth,	231	Rice v. White,	330
Cartigne v. Raymond and an-	608	Godwin's adm'r v. Godwin's	276	Rixey v. Bayse,	550
other,	482	adm'r &c.,	484	Roanes v. Archer,	236
Catlett's ex'or, Cloud v.,	482	Goode v. Love's adm'r's,	452	Robertson, Watson v.,	416
Chestnut, Bowyer v.,	608	Gore v. Buzzard's adm'r's,	484	Roe v. Baker, reported in note,	416
Clarke, Farmers Bank v.,	482	Gore, Raynolds v.,	452	Rogers & Brothers v. Marshall	425
Cloud v. Catlett's ex'or,	608	Guerrant and Watkins, Mark-	564	and others,	429
Colner v. Harshbarger,	482	ham v.,	377	Rootes and others, Fox's adm'r,	429
Commonwealth, Anderson v.,	689	Hall, Briggs v.,	359	v., reported in note	308
Commonwealth, Blunt v.,	689	Hansbarger, Colner v.,	346	Sandige assignee &c., Eubank	30
Commonwealth, Brooks v.,	608	Hardaway, Dupuy v.,	371	and others v.,	90
Commonwealth v. Burton,	645	Hardman v. Boardman,	643	Seekright v. Moore,	643
Commonwealth v. Deskins and	688	Hare v. Niblo,	458	Seekright v. Billups,	346
another,	648	Harrison and another, Sims v.,	373	Sherrard, Commonwealth v.,	346
Commonwealth v. Fields,	648	Harrison v. Harrison's adm'r	458	Sims v. Harrison and another,	590
Commonwealth, Gilliam v.,	688	and others,	373	Smith & Rickard v. Triplett &	14
Commonwealth, Hord v.,	674	Hawkins' adm'r, Waddy's	622	Neale,	650
Commonwealth v. Israel,	674	ex'or v.,	519	Snidow, Williams v.,	152
Commonwealth v. Lewis,	662	Heywood v. Covington's heirs,	224	Sprinkles, Commonwealth v.,	650
Commonwealth v. Marks,	602	Hill, Alcock v.,	674	Stephen, Toole v.,	581
Commonwealth v. Peas,	604	Hixton, Butcher v.,	674	Stephen, Commonwealth v.,	679
Commonwealth, Pendleton v.,	686	Hobson, Langhorne v.,	675	Stevens v. Commonwealth,	662
Commonwealth v. Percavil,	608	Hord v. Commonwealth,	327	Sunket, Commonwealth v.,	535
Commonwealth v. Reynolds,	648	Israel, Commonwealth v.,	633	Sydnor v. Gee sheriff &c.,	132
Commonwealth v. Sherrard,	679	Janey's ex'or v. Latane and	612	Tabb's adm'r v. Binford,	118
Commonwealth v. Sprinkles,	662	others,	224	Thomason v. Andersons,	662
Commonwealth v. Stephen,	662	Jones, Garnett v.,	327	Thompson v. Commonwealth,	662
Commonwealth, Stevens v.,	662	Keen, Elam v.,	436	Thompson v. Winston,	152
Commonwealth v. Sunket,	662	Kendall & Co., Gholson v.,	604	Thorntons v. Fitzhugh,	209
Commonwealth, Thompson v.,	662	Langhorne v. Hobson,	308	Tod v. Baylor,	498
	662	Latane and others, Janey's	336	Toole v. Stephen,	581
	662	ex'or v.,	336	Triplett & Neale, Smith & Rick-	590
	662	Lee v. Patillo,	336	ard v.,	590
	662	Lewis, Commonwealth v.,	336	Trueheart and others, Miller v.,	590
	662	Lipscomb's adm'r v. Davis's	336	Waddy's ex'or v. Hawkins's	458
	662	adm'r,	336	adm'r,	458
	662	Love's adm'r's, Goode v.,	336	Watson v. Lyle's adm'r,	236
	662	Lyle's adm'r, Watson v.,	336	Watson v. Robertson,	236
	662	Markham v. Guerrant and	336	Watts, Commonwealth v.,	672
	662	Watkins,	336	Weldon, Commonwealth v.,	662
	662	Marks, Commonwealth v.,	336	White, Rice v.,	474
	662	Marsh, Bream v.,	336	Wilkinson, Bird v.,	236
	662	Marshall and others, Rogers &	336	Williams v. Snidow,	114
	662	Brothers v.,	336	Wills, Barrett v.,	680
	662	Marsteller and wife and others	336	Windsor v. Commonwealth,	152
	662	v. Coryell,	336	Winston, Thornton v.,	308
	662	Marx, Garland v., reported in	336	Yancey, May v.,	308
	662	note,	336		
	662	Massenburg, Pierce v.,	336		
	662	May v. Yancey,	336		
	662	M'Alexander v. Montgomery,	336		

TABLE OF CASES CITED.

Abby, Woodley v., 5 Call 336.	301	Blazer v. Baldwin, 2 Wils 82.	340, 342, 3
A Court v. Cross, 3 Bing. 329.	521, 4, 530, 533	Blount v. Blount, 3 Atk. 636.	376
Adair v. New River Company, 11 Ves. 429.	9	Blundell v. Baugh, Cro. Car. 302.	19
Adams v. St. Leger, 1 Ball & Beat. 181.	11	Bogle v. Conway's ex'ors, 3 Call 1.	483, 523
Adams, Dow v., 5 Munf. 21.	78, 198	Boisselet, Fries v., 9 Serg. & Rawle 123.	607
Adams, Miller v., 16 Mass. Rep. 456.	478	Bolt, Mayor of London v., 5 Ves. 129.	576
Alder, Hopes v., 6 East 16, in notes.	455	Bolton v. Bishop of Carlisle, 2 H. Black. 263.	563
Alexander v. Coleman, 6 Munf. 339.	213	Booker's adm'r. Branch's adm'r v., 3 Munf. 43.	8
Alexander, Crookford v., 15 Ves. 138.	578	Boone v. Eyre, 1 H. Black. 273, note.	25, 7, 8
Alford v. Lea, 2 Leon. 111, Cro. Eliz. 54.	567	Booth v. Wilson, 3 East 311.	523
Allen v. Freeland, 3 Rand. 170.	347	Booth v. Earl of Warrington, 4 Bro. P. C. 163.	453
Ambler v. Wyld, 2 Leigh 36.	613	Bordon, Harvey v., 2 Wash. 156.	508, 513
Amey, Dunn v., 1 Leach 465.	171, 397, 8	Bosanquet, Williams v., 1 Brod. & Bing. 238.	77, 9, 85
Anderson, Shields v., 3 Leigh 729.	370, 549	Boulnois, Huttman v., 2 Carr. & Payne 510.	39
Anderson, Guerrant v., 2 Rand. 206.	562	Bowyer v. Creigh, 3 Rand. 25.	347
Anderson's case, 1 Salk. 389.	555	Boycott, Keane v., 2 H. Black. 511.	495, 6
Anson v. Towgood, 1 Jac. & Walk. 619.	376, 7	Bradley, Porter v., 3 T. R. 146.	96
Anthony, Claytor v., 6 Rand. 304.	268, 549	Branch's adm'r v. Booker's adm'r, 3 Munf. 43.	8
Applin, Doe v., 4 T. R. 82.	107, 9	Branson, Harvey v., 1 Leigh 108.	170, 213, 218, 19, 20
Apsley, Roe v., 1 Sid. 442.	199	Braxton v. Gaines, 4 Hen. & Munf. 151.	545
Archbishop of York, Roe v., 6 East 86.	563	Bray v. Dudgeon, 6 Munf. 182.	156, 8, 163
Archer v. Sadler, 2 Hen. & Munf. 370.	380, 81, 84, 5	Bream v. Cooper's heirs, 5 Munf. 7.	17
Arden, Grangiac v., 10 Johns. Rep. 293.	335	Bree v. Holbeck, 2 Doug. 555.	473, 483
Arnesby, The King v., 3 Barn. & Ald. 563.	494, 6	Brett v. Levitt, 13 East 214.	54
Arnott, Spain v., 3 Stark. Rep. 256.	29	Brett, Mantel v., Hob. 307.	491
Ashby v. Kiger, Gilm. 158.	148	Briggs, Lacon v., 3 Atk. 108.	523
Atherton v. Pye, 4 T. R. 710.	108	Brisbane v. Dacres, 6 Taunt. 144.	437
Atkinsons, Colquhoun v., 6 Munf. 550.	550, 5	Bristow v. Wright, 2 Doug. 605.	24
Atkins's ex'ors v. Tredgold, 2 Barn. & Cress. 23.	532, 610	Broker v. Charter, Cro. Eliz. 92.	155, 9, 160
Atlantic Insurance Company, Conrad v., 1 Peters 449.	267	Brookings, Crook v., 2 Vern. 108.	127
Attorney general v. Ryder, 3 Ch. Ca. 178.	9	Brown v. Rickett's ex'ors &c., 3 Johns. Ch. Rep. 555.	12, 13
Attorney general, Gallego's ex'ors v., 3 Leigh 450.	329	Brown, Consdale v., 3 Wash. C. C. R. 404.	51, 2
Attorney general v. Nichol, 16 Ves. 341.	578	Brown, Pells v., Cro. Jac. 560.	398
Auditor, Moore v., 3 Hen. & Munf. 232.	560, 564, 5	Brown, Johnson v., 3 Call 267.	256
Austin's ex'or v. Jones, Gilm. 341.	472	Brown v. Ross, 6 Munf. 391.	456
Bagby, Guerrant v., 6 Munf. 160.	392	Brown v. Ross, 2 Brod. & Bing. 73.	478
Bailey, Snellgrove v., 3 Atk. 214.	334	Brown, Steel v., 1 Taunt. 380.	540
Baird, Tabb v., 3 Call 475.	17	Brown v. Campbell, 1 Serg. & Rawle 174.	607
Baird, McNeil v., 6 Munf. 316.	320	Brown & Rives v. Ralston & Pleasants, 4 Rand. 504.	56
Bake et al., The King v., 3 Burr. 1731.	677	Bryan v. Horseman, 4 East 569.	531
Baker, Roe v., reported in note, p. 416, cited.	416, 424	Brymer, Reeves v., 4 Ves. 692, 8.	127
Baker's case, 2 Virg. Cas. 353.	689	Buckley, Radcliffe v., 10 Ves. 201.	124
Baker and Butler's case, 3 Co. 26.	567	Bullythorpe v. Turner, Willes 435.	423
Baldwin, Blazer v., 2 Wils. 82.	340, 342, 3	Bunn v. Markham, 7 Taunt. 244.	334
Ball v. Payne, 6 Rand. 73.	95, 6, 7, 9, 112	Burnley v. Duke, 1 Rand. 108.	154, 5, 7
Bangs v. Hall, 3 Pick. 368.	607	Burnley v. Lambert, 1 Wash. 308.	306
Bank of Columbia, Moore v., 6 Peters 92.	607	Burnall v. Davy, 1 Bos. & Pul. 221.	109
Bank of England, Morice v., Ca. Temp. Talbot 218, 2 Bro. P. C. 465.	215	Burrow, Hill v., 3 Call 297.	123
Bank of United States v. Smith, 11 Wheat. 171.	116	Burtis, Smith v., 6 Johns. Rep. 198.	19
Bank of Utica v. Childs, 6 Cowen 238.	478	Burton v. Knight, 2 Vern. 514.	367
Barber v. Barber, 18 Ves. 226.	249	Bury, Taw v., Dyer 167, 1 Anders. 4.	567
Barber, Davy v., 3 Atk. 489.	376	Busby v. Watson, 2 W. Black. 1050.	400
Barker, Lawson v., 1 Bro. C. C. 303.	9	Bush, Havens v., 3 Johns. Rep. 337.	25
Barksdale v. Fenwick, 2 Hen. & Munf. 113, note.	597, 600	Bussard, Wetzel v., 11 Wheat. 314.	606, 9
Barnesley v. Powell, 1 Ves. sen. 119, 284.	148	Butcher v. Hixton, reported 519, cited.	607, 8, 9
Barnsall, Doe v., 6 T. R. 30.	109	Butler, Geddy v., 3 Munf. 345.	154, 5, 7
Barny, Hardisty v., Salk. 598, 2 Wms. Saund. 72, f.	340	Butler v. Stovell, 1 Bing. 308, 8 Moore 412.	200
Bartlett v. Williams, 1 Pick. 283.	542	Butler and Baker's case, 3 Co. 23.	557
Bass v. Smith, 12 Vin. Abr. 229.	523	Butts v. Swartwood, 2 Cowen 431.	228
Battle v. Faulkner, 3 Barn. & Ald. 288.	477, 482	Butt's case, 2 Virg. Cas. 18.	681
Batton v. Glasscock, 6 Rand. 78.	549	Cadogan v. Kennett, Comp. 432.	545
Baugh, Blundell v., Cro. Car. 302.	19	Caley, Waldo v., 16 Ves. 501.	214
Bayard v. Hoffman, 4 Johns. Ch. Rep. 460.	207	Callis v. Waddy, 2 Munf. 511.	479
Beall v. Silver, 2 Rand. 401.	196	Campbell, Brown v., 1 Serg. & Rawle 176.	607
Beals v. Guernsey, 8 Johns. Rep. 348.	268	Carlisle (bishop of), Bolton v., 2 H. Black. 263.	563
Beard, Right v., 13 East 216.	18	Carrington, Nelson v., 4 Munf. 352.	154, 5, 7
Beattie v. Tabb's adm'r's, 2 Munf. 254.	528	Carter v. Murray, 5 Johns. Ch. Rep. 523.	249
Beaver, Bishop of Winchester v., 3 Ves. 314.	528	Cartwright v. Vawdry, 5 Ves. 530.	120
Bedell v. Constable, Vaugh. 177.	585, 6	Cary, Ware v., 2 Wall 363.	239, 503, 514
Belches, West v., 5 Munf. 187.	216, 220	Catling, Skoulding, 6 T. R. 189.	350
Bell v. Morrison, 1 Peters 371.	351, 525, 606	Caton & Veale v. Lenox, 5 Rand. 31.	597, 600, 603
Bellows v. Hallowell and Augusta Bank, 2 Mass. 31.	56	Chamberlayne v. Temple, 2 Rand. 384.	193
Bells v. Gillespie, 5 Rand. 291.	110, 11	Chamley v. Lord Dunsany, 1 Scho. & Lef. 669.	569
Bennett, Gale v. Amb. 681.	127	Champion, Newland v., 1 Ves. sen. 105.	125
Bent v. Patten, 1 Rand. 25.	313, 320	Chapman, Smith v., 1 Hen. & Munf. 298.	542
Bere, Partridge v., 5 Barn. & Ald. 604.	18	Charter, Newman v., 2 Rand. 93.	155, 9, 160
Best, Bishop v., 3 Barn. & Ald. 275.	59	Cherry's case, 2 Virg. Cas. 20.	603
Beverly v. Holmes, 4 Munf. 95.	610	Childers v. Smith, Gilm. 200.	31
Bibb, Duval v., 3 Call 362.	17	Childs, Bank of Utica v., 6 Cowen 238.	478
Bibbie v. Lumley, 2 East 469.	457	Chillesford, The King v., 4 Barn. & Cress. 94.	466
Bingham, Doe v., 4 Barn. & Ald. 672.	563	Chowning, Taylor v., 3 Leigh 654.	437
Birks, Haynes v., 3 Bos. & Pul. 569.	43	Churchill, Earl of Orford v., 3 Ves. & Beames 59.	127
Bishop v. Best, 3 Barn. & Ald. 375.	59	Cibell v. Hills, 18 Vin. Abr. 613, pl. 2, Leo. 110.	326
Bishop of Carlisle, Bolton v., 2 H. Black. 263.	563	Claridge v. Dalton, 4 Mau. & Selw. 226.	45
Bishop of Winchester v. Beaver, 3 Ves. 314.	9	Clark, Kirk v., Prec. in Ch. 375.	11
Bland, Robinson v., 2 Burr. 1085.	197	Clark v. Long, 4 Rand. 451.	11
		Clark v. Munroe, 14 Mass. Rep. 351.	31

Clark v. Hougham, 2 Barn. & Cress. 149.....	478, 483	Doe v. Sayer, 3 Camp. 8.....	18
Clason v. Morris, 10 Johns. Rep. 524.....	580	Doe v. Smith, 7 T. R. 531.....	107, 8
Clay v. White, 1 Munf. 162.....	17	Dolley, Goodall v., 1 T. R. 712.....	455
Claytor v. Anthony, 6 Rand. 304.....	268, 549	Donaghe v. Rankin, 4 Munf. 261.....	610
Clegg v. Cotton, 3 Bos. & Pul. 239.....	48	Donald, Currie v., 2 Wash. 58.....	566
Clementson v. Williams, 8 Cranch 72.....	606, 8	Dormer v. Fortescue, 3 Atk. 124.....	517
Cockburn v. Thompson, 16 Ves. 321.....	9	Dow v. Adams, 5 Munf. 21.....	78, 198
Cocke v. Pollock, 1 Hen. & Munf. 499.....	613, 17	Dowthwaite v. Tibbut, 5 Mau. & Selw. 75.....	523, 531
Codrington, Williamson v., 1 Ves. sen. 516.....	134, 7, 142	Draper v. Glassop, Salk. 278.....	528
Cohoon, Riddick v., 4 Rand. 547.....	409	Drury v. Smith, 1 P. Wms. 404.....	334
Cole, Eppes v., 4 Hen. & Munf. 161.....	492	Dudgeon, Bray v., 6 Munf. 132.....	156, 8, 162
Coleman v. Dick, 1 Wash. 233.....	185	Dudley, Eppes's adm'r v., reported 145, cited.....	613, 18
Coleman, Alexander v., 6 Munf. 339.....	213	Duff v. East India Company, 15 Ves. 198.....	249
Colgin, Hendren v., 4 Munf. 237.....	156, 8, 177	Dumfeld v. Elwes, 1 Sim. & Stu. 239.....	384
Colin, Patty v., 1 Hen. & Munf. 519.....	297, 8	Duke, Burnley v., 1 Rand. 108.....	154, 5, 7
Colley, Eppes's ex'ors v., 2 Munf. 523.....	305	Duke of Queensberry, Cullen v., 15 Ves. 14, note.....	9
Colquhoun v. Atkinsons, 6 Munf. 550.....	550, 65	Dunbar v. Long's adm'r, 4 Hen. & Munf. 212.....	360, 361
Colt v. Noble, 6 Mass. Rep. 167.....	43	Dunham, Dey v., 2 Johns. Ch. Rep. 182.....	269
Columbia Bank, Moore v., 6 Peters 92.....	607	Dunn v. Amey, 1 Leigh 455.....	171, 297, 8
Commonwealth v. Hooper, 2 Virg. Cas. 223.....	651	Dunn's ex'or, Digges's ex'or v., 1 Munf. 56.....	318
Commonwealth v. Israel, reported 675, cited.....	686	Dunsany (lord), Chamley v., 1 Scho. & Lef. 689.....	583
Commonwealth v. Selden, 5 Munf. 160.....	566, 7	Dutchess of Buckinghamshire, Sheffield v., 1 Atk. 628.....	148
Commonwealth v. Snell, 3 Mass. Rep. 82.....	698	Duval v. Bibb, 3 Call 363.....	17
Commonwealth v. Weldon, reported 652, cited.....	693	Dwight, Pearsal v., 2 Mass. Rep. 87.....	528
Commonwealth v. Winstons, 5 Rand. 546, 513, 17, 19, 20	417	Dwyer, Jones v., 15 East 27.....	549
Concannon, Jones v., 3 T. R. 661.....	417	Earl of Orford v. Churchill, 3 Ves. & Beames 59.....	127
Connelly, Kyles v., 3 Leigh 719.....	381, 3	Earl of Warrington, Booth v., 4 Bro. P. C. 168.....	483
Conrad v. Atlantic Insurance Company, 1 Peters 449.....	287	Earl v. Stocker, 2 Vern. 251.....	387
Constable, Bedell v., Vaughn, 177.....	585, 6	East India Company, Duff v., 15 Ves. 198.....	249
Conway's ex'ors, Bogle v., 3 Call 1.....	483, 528	Eaton v. Jaques, 2 Doug. 455.....	77, 86
Cook v. Harris, 1 Ld. Raym. 308.....	375	Edwards v. Harden, 2 T. R. 587.....	207, 8, 270, 535, 8, 539, 541, 2, 3, 6, 8
Cook v. Husted, 12 Johns. Rep. 188.....	73	Eggleston v. Smart, 1 W. Black. 375.....	411
Cook v. Darby, 3 Munf. 444.....	481, 2	Elvey, Doe v., 4 East. 313.....	107
Cooke v. Wise, 3 Hen. & Munf. 463.....	78	Else, Upton v., 12 Moore 303.....	530, 539
Cooke v. Sims, 2 Cal. 99.....	606	Elweld, Ufield v., 1 Sim. & Stu. 239.....	384
Cooper, Doe v., 1 East 229.....	108	Emerton, Fisher v., 1 Stra. 526.....	59
Cooper, Stokes v., 3 Camp. 514, note.....	487, 8	England, Quatock & Co. v., 5 Burr. 2008.....	245
Cooper v. Saunders, 1 Hen. & Munf. 412.....	567	Entwistle v. Shepherd, 2 T. R. 79.....	197
Cooper's heirs, Bream v., 5 Munf. 7.....	17	Eppes's adm'r v. Dudley, reported 145, cited.....	613, 18
Coryton, Smith v., cited in 2 Vern. 251.....	387	Eppes's ex'ors v. Colley, 2 Munf. 523.....	305
Cotterell v. Purchase, Ca. Temp. Talbot 61.....	269	Eppes v. Cole, 4 Hen. & Munf. 161.....	492
Cotteen v. Missing, 1 Madd. Ch. Rep. 173.....	334	Eppes v. Randolph, 2 Call 103, 557, 8, 560, 1, 3, 564, 5, 615	5, 615
Cotton, Clegg v., 3 Bos. & Pul. 239.....	48	Esdalle v. Sowerby, 11 East 114.....	48, 9, 54
Crane, Green v., 2 Ld. Raym. 1101.....	524, 5, 532	Esbridge, Dimmett v., 6 Munf. 308.....	577
Creigh, Bower v., 3 Rand. 25.....	347	Ewing v. Ewing, 2 Leigh 337.....	334, 8
Crenshaw v. Slate River Company, 6 Rand. 245.....	578	Eyre, Boone v., 1 H. Black. 273, note.....	25, 7, 8
Crockford, The King v., 8 East 25.....	494, 6, 7	Farley, Williamson v., Gilm. 15.....	543, 7
Crook v. Brookings, 2 Vern. 106.....	127	Farrington v. Knightly, 1 P. Wms. 560.....	178
Crooker, Smith v., 5 Mass. Rep. 538.....	279	Faulkner, Battley v., 3 Barn. & Ald. 238.....	477, 482
Cross, A. Court v., 3 Bing. 329.....	521, 4, 530, 383	Fenwick, Barksdale v., 2 Hen. & Munf. 113, note.....	507, 600
Crowder v. Tinkler, 19 Ves. 617.....	578	Field, First Massachusetts Turnpike v., 3 Mass. Rep. 201.....	478
Crowdhill, Wilson v., 2 Munf. 302.....	609	Field, Twigg v., 13 Ves. 517.....	376, 7
Crummey, Norris v., 2 Rand. 223.....	454	Finch, Nourse v., 1 Ves. Jun. 344, 2 id. 78.....	178
Cue, Mitchell v., 2 Burr. 660.....	149	Finch, Holbrook v., 4 Mass. Rep. 566.....	31
Cullen v. Duke of Queensberry, 15 Ves. 14, note.....	9	First Massachusetts Turnpike v. Field, 3 Mass. Rep. 201.....	478
Culver, Danforth v., 11 Johns. Rep. 146.....	534	Fisher v. Emerton, 1 Stra. 526.....	59
Cunningham v. Mitchell, 4 Rand. 192.....	4	Fitzhugh, Threlkelds v., 2 Leigh 451.....	133, 143, 500, 511
Currie v. Donald, 2 Wash. 58.....	566	Fitz Randolph, Hite v., 1 Virg. Cas. 269.....	613, 621
Curtis v. Curtis, 2 Bro. C. C. 630.....	502, 7, 517, 18	Footes's ex'ors, Henderson v., 3 Call 248.....	481
Cutchin v. Wilkinson, 1 Call 1.....	156, 8	Foot's case, 1 Salk. 98.....	422
Cutter v. Powell, 6 T. R. 320.....	29	Ford v. Gardner, 1 Hen. & Munf. 72.....	613
Dacres, Brisbane v., 5 Taunt. 144.....	457	Foreman v. Loyd, 3 Leigh 284.....	432
Dale, Westerdell v., 7 T. R. 310.....	497	Fortescue, Dormer v., 3 Atk. 124.....	517
Dalton v. Reeve, 1 Ld. Raym. 77.....	488	Foster v. Hodgson, 19 Ves. 179.....	399
Dalton, Claridge v., 4 Mau. & Selw. 226.....	45	Foster, Pope v., 4 T. R. 500.....	899
Danforth v. Culver, 11 Johns. Rep. 146.....	534	Foster, Pittam v., 1 Barn. & Cress. 248.....	524, 533
Darby Cook v., 4 Munf. 444.....	481, 2	Foster v. Denny, 2 Ch. Ca. 257, 1 Eq. Ca. Abr. 260, ca. 3.....	586
Davis, Jiggetts v., 1 Leigh 388.....	97, 8, 111, 124	Fouraker, Yea v., 2 Burr. 1099.....	531
Davis, Godfrey v., 6 Ves. 43.....	120	Fowler, Seers v., 3 Johns. Rep. 273.....	25
Davis, Mackie v., 3 Wash. 219.....	507, 9	Fox, Graysbrook v., Plowd. 281.....	158
Davy, Burnall v., 1 Bos. & Pul. 221.....	109	Fox's adm'r v. Rootes and others, reported in note, p. 429, cited.....	423, 9, 433, 3, 4, 5
Davy v. Barber, 3 Atk. 489.....	376	Freeland v. Heron & Co., 7 Cranch 147.....	249
Dawney, Moore v., 3 Hen. & Munf. 127.....	609	Freeland, Allen v., 3 Rand. 170.....	347
Day v. Pickett, 4 Munf. 104.....	203, 5	Fries v. Boisselet, 9 Serg. & Rawle 128.....	607
Day, Tomlinson v., 3 Brod. & Bing. 680.....	492	Frobisher, Walker v., 6 Ves. 70.....	367, 8
Deck, Kirtley v., 3 Hen. & Munf. 388.....	481	Gaites, Braxton v., 4 Hen. & Munf. 151.....	545
Deck, Kirtley v., 2 Munf. 10.....	609	Gale v. Bennett, Amb. 681.....	127
Dempsey v. Laurence, Gilm. 333.....	298	Gallego's ex'ors v. Attorney general, 3 Leigh 450.....	329
Denny, Foster v., 2 Ch. Ca. 237, 1 Eq. Ca. Abr. 260, ca. 3.....	586	Gandolfi, Pagani v., 2 Carr. & Payne 370.....	29
Deschamps v. Vanneck, 2 Ves. Jun. 716.....	198	Gardner v. Howland, 3 Pick. 599.....	297
Dewdney's case, 15 Ves. 498.....	247	Gardner, Lindo v., 1 Cranch 343, append. 465.....	528
Dey v. Dunham, 2 Johns. Ch. Rep. 182.....	269	Gardner v. Newburg, 2 Johns. Ch. Rep. 164.....	578
Dick, Coleman v., 1 Wash. 233.....	185	Gardner, Ford v., 1 Hen. & Munf. 72.....	613
Digges's ex'or v. Dunn's ex'or, 1 Munf. 56.....	318	Garland v. Marx, reported in note, p. 321, cited.....	308, 13
Dimmett v. Esbridge, 6 Munf. 308.....	577	Garner, Southall v., 2 Leigh 372.....	415, 421
Dixon v. Thompson, 2 Show. 126.....	523	Geddy v. Butler, 8 Munf. 345.....	154, 5, 7
Dixon, Kerr v., 2 Call 319.....	481	Gee v. Hamilton, 6 Munf. 32.....	204
Doe v. Applin, 4 T. R. 82.....	107, 8	Gelston, Sands v., 15 Johns. Rep. 511.....	534, 607
Doe v. Barnsall, 6 T. R. 30.....	109	George, Granger v., 5 Barn. & Cress. 149.....	478
Doe v. Bingham, 4 Barn. & Ald. 672.....	563	Gibbon, Scott v., 5 Munf. 86.....	508
Doe v. Cooper, 1 East 229.....	108	Gillespie, Bells v., 5 Rand. 291.....	110, 111
Doe v. Ellvey, 4 East 313.....	109	Gilliam, Moore v., 5 Munf. 346.....	80
Doe v. Goldsmith, 7 Taunt. 209.....	95, 6, 9, 108	Glasscock, Batton v., 6 Rand. 78.....	549
Doe v. Knight, 5 Barn. & Cress. 671.....	566	Glassop, Draper v., Salk. 278.....	528
Doe v. Laming, 2 Burr. 1100.....	104, 8, 9		
Doe v. Morgan, 3 T. R. 763.....	423		
Doe v. Prestwidge, 4 Mau. & Selw. 178.....	138		

Godfrey v. Davis, 6 Ves. 48.....	180	Humphreys v. West, 3 Rand. 518.....	489
Goldsmith, Doe v., 7 Taunt. 209.....	95, 6, 9, 108	Hunter v. Hall, 1 Call 206.....	392
Goodall v. Dolley, 1 T. R. 712.....	455	Hunter v. Jett, 4 Rand. 104.....	454
Goodall, Stuart v., 2 Hen. & Munf. 105, 596, 7, 8, 600, 1.....	111	Hunter, Ward v., 6 Taunt. 210.....	524, 5, 6, 532
Goodrich v. Harding, 3 Rand. 280.....	111	Hurst v. Parker, 1 Barn. & Ald. 92.....	524, 5, 6, 533
Goodwin, Hubbard v., 3 Leigh 492.....	220, 583	Husted, Cook v., 12 Johns. Rep. 188.....	326
Gouthit, Nicholson v., 2 H. Black. 609.....	48, 9, 54, 6	Huttman v. Boulinois, 2 Carr. & Payne 510.....	29
Graham's adm'r v. Pence, 6 Rand. 529.....	367, 8	Hyleing v. Hastings, 1 Ld. Raym. 389, 421, Com. Rep. 54.....	523, 530, 611
Granger v. George, 5 Barn. & Cress. 149.....	478	Irons v. Smallpiece, 2 Barn. & Ald. 552.....	334
Grangiac v. Arden, 10 Johns. Rep. 293.....	335	Isaac v. West, 6 Rand. 652.....	260
Grays v. Hines, 4 Munf. 487.....	116, 17	Israel, Commonwealth v., reported 675, cited.....	656
Graysbrook v. Fox, Plowd. 281.....	158	Ives v. Legge, 3 T. R. 488, note.....	128
Great Wigston, The King v., 3 Barn. & Cress. 484.....	496	Jackson v. Sharp, 9 Johns. Rep. 163.....	18, 30
Green, Grescot v., 1 Salk. 199.....	77	Jackson v. Todd, 2 Caines 185.....	20
Green v. Judith, 5 Rand. 1.....	293	Jackson, Stout v., 2 Rand. 132, 133, 4, 6, 7, 143, 4, 509, 511	429, 433
Green v. Harrington, 1 Brownl. 14.....	491	Jackson v. Helskell, 1 Leigh 257.....	523, 531, 3, 611
Green v. Crane, 2 Ld. Raym. 1101.....	524, 5, 532	Jacob, Scales v., 3 Bing. 638.....	523, 531, 3, 611
Greenwood, Skyring v., 4 Barn. & Cress. 272.....	165	James v. Johnson and Morey, 6 Johns. Ch. Rep. 417.....	269
Gregorie, Young v., 3 Call 446.....	609	James v. Morey, 2 Cowen 346.....	269
Grescot v. Green, 2 Salk. 199.....	77	James, Hale v., 6 Johns. Rep. 258.....	506, 9, 517
Grew, Roe v., 2 Wils. 322.....	100	Jacques, Eaton v., 2 Doug. 455.....	77, 85
Griffin, Sym v., 3 Hen. & Munf. 277.....	109	Jeffery, Roe v., 1 R. 583.....	97, 8, 100
Guernsey, Beals v., 8 Johns. Rep. 348.....	268	Jeffrey, Land v., 2 Rand. 216, id. 603.....	268, 272
Guerrant v. Bagby, 6 Munf. 60.....	392	Jett, Hunter v., 4 Rand. 10.....	454
Guerrant v. Anderson, 2 Rand. 208.....	213	Jiggets v. Davis, 1 Leigh 368.....	97, 8, 111, 124
Gwynn v. Lethbridge, 14 Ves. 585.....	506, 9, 517	Johnson, Royalls v., 1 Rand. 421.....	213, 219, 221
Hale v. James, 6 Johns. Rep. 258.....	506, 9, 517	Johnson and Morey, James v., 6 Johns. Ch. Rep. 417.....	269
Hall v. Hall, 3 Call 488.....	17	Johnson, Ward v., 1 Munf. 45.....	332
Hall, Pantou v., Carth. 107.....	305	Johnson v. Brown, 3 Call 267.....	338
Hall, Hunter v., 1 Call 204.....	392	Jones v. Concannon, 3 T. R. 661.....	417
Hall, Bangs v., 2 Pick. 368.....	607	Jones, Austin's ex'or v., Gilm. 341.....	472
Hall v. Smith, 3 Munf. 560.....	609	Jones v. Dwyer, 15 East 27.....	549
Hallowell and Augusta Bank, Bellows v., 2 Mason 31.....	56	Jones v. Moore, 5 Binney 576.....	531, 4
Hamilton, Royle v., 4 Ves. 437.....	127	Jones, Moseley v., 5 Munf. 23.....	610
Hamilton, Gee v., 6 Munf. 32.....	204	Jones v. Pengree, 6 Ves. 580.....	249
Hamilton v. Russell, 1 Cranch 309.....	267	Jones v. Selby, Prec. in Ch. 300.....	334, 5, 8
Hammond, Ramchander v., 2 Johns. Rep. 200.....	243	Jones, Taylor v., 1 Salk. 389.....	554
Hankey, Morrice v., 3 P. Wms. 146.....	149	Joyse, Ringer v., 1 Marsh. 404.....	306
Hansbrough's ex'ors v. Thom, 3 Leigh 147.....	293	Judith, Green v., 5 Rand. 1.....	298
Harben, Edwards v., 3 T. R. 587.....	267, 8, 370, 535, 8, 9, 541, 2, 3, 6, 8	Keane v. Boycott, 2 H. Black. 511.....	405, 6
Hardaway v. Manson, 2 Munf. 230.....	546	Kennett, Cadogan v., Cowp. 432.....	545
Harding, Goodrich v., 3 Rand. 280.....	111	Kerr v. Dixon, 2 Call 319.....	481
Hardisty v. Barny, Salk. 598, 2 Wms. Saund. 73, f. 491.....	491	Kidd v. Rawlinson, 2 Bos. & Pul. 59.....	540, 542
Harrington, Green v., 1 Brownl. 14.....	293	Kiger, Ashby v., Gilm. 158.....	148
Harris, Cook v., 1 Ld. Raym. 368.....	77	Kime, Luddington v., 1 Ld. Raym. 203.....	139
Harris v. Mitchell, 2 Vern. 485.....	367	Kinder v. Paris, 2 H. Black. 551.....	532
Harrison v. Tjernans, 4 Rand. 177.....	278, 9	King, Urquhart v., 7 Ves. 235.....	178
Harrison v. Raine, 5 Munf. 456.....	507, 600	The King v. Arnesby, 3 Barn. & Ald. 563.....	494, 6
Harvey v. Branson, 1 Leigh 108.....	170, 213, 18, 19, 30	The King v. Bake et al., 3 Burr. 1731.....	677
Harvey, Preston v., 3 Call 427, 2 Hen. & Munf. 55.....	380, 381, 4, 5	The King v. Chillesford, 4 Barn. & Cress. 94.....	496
Harvey v. Borden, 2 Wash. 156.....	503, 513	The King v. Cromford, 8 East 35.....	494, 6, 7
Hastings, Hyleing v., 1 Ld. Raym. 389, 421, Com. Rep. 54.....	523, 530, 611	The King v. Great Wigston, 3 Barn. & Cress. 484.....	496
Hatch v. Hatch, 9 Mass. Rep. 307.....	566	The King v. Mountsorrel, 3 Mau. & Selw. 497.....	496
Havens v. Bush, 3 Johns. Rep. 387.....	35	The King v. Ripon, 9 East 295.....	494
Haycock v. Haycock, 2 Ch. C. 124.....	9	The King v. Storr, 3 Burr. 1698.....	677
Haynes v. Birks, 3 Bos. & Pul. 599.....	43	Kirk v. Clark, Prec. in Ch. 275.....	11
Heath v. Heath, 1 Bro. C. C. 147.....	129, 130	Kirtley v. Deck, 3 Hen. & Munf. 388.....	481
Helskell, Jackson v., 1 Leigh 257.....	429, 432	Kirtley v. Deck, 2 Munf. 10.....	600
Hellings v. Shaw, 5 Taunt. 608.....	523	Knight, Burton v., 2 Vern. 514.....	367
Henderson v. Foote's ex'ors, 3 Call 248.....	481	Knight, Doe v., 5 Barn. & Cress. 671.....	566
Hendren v. Colgin, 4 Munf. 235.....	156, 8, 177	Knightly, Farrington v., 1 P. Wms. 550.....	178
Hensloe's case, 9 Co. 37, 8, 40.....	155, 8	Kyles v. Connolly, 3 Leigh 719.....	381, 3
Herndon's ex'ors, Murdock v., 4 Hen. & Munf. 200.....	528	Lacon v. Briggis, 3 Atk. 105.....	523
Heron & Co., Freeland v., 7 Cranch 147.....	249	Lady Anderson's case, 1 Salk. 389.....	555
Hickman's ex'ors v. Walker, Willes 27.....	533	Lady Tenham, Reynolds v., 9 Mod. 40, 2 Eq. Ca. Abr. 486, ca. 16, 4 Bro. P. C. 302.....	566
Higgins v. Sargeant, 2 Barn. & Cress. 348.....	200	Lambert v. Nanny, 2 Munf. 196.....	9
Hill v. Burrow, 3 Call 297.....	123	Lambert, Burnley v., 1 Wash. 306.....	303
Hill v. Turner, 1 Atk. 515.....	148	Laming, Doe v., 2 Burr. 1100.....	104, 8, 9
Hills, Cibell v., 18 Vin. Abr. 513, pl. 2, Leo. 110.....	486	Land v. Jeffries, 5 Rand. 216, id. 603.....	268, 273
Hines, Grays v., 4 Munf. 437.....	116, 17	Lane, Nadenbush v., 4 Rand. 413.....	422
Hite v. Fitz Randolph, 1 Virg. Cas. 209.....	613, 621	Langhorne v. Hobson, reported 224, cited.....	500, 503, 4, 5, 514
Hixton, Butcher v., reported 519, cited.....	607, 8, 9	Laurence, Dempsey v., Gilm. 333.....	298
Hobson, Langhorne v., reported 224, cited.....	500, 503, 4, 5, 514	Laurence v. Hopkins, 13 Johns. Rep. 288.....	534
Hockley v. Mawbey, 3 Bro. C. C. 83.....	104, 9	Law, Ray v., 3 Cranch 179.....	216
Hodgkinson v. Snibson, 3 Bos. & Pul. 603.....	417	Lawson v. Barker, 1 Bro. C. C. 303.....	9
Hodgson, Foster v., 19 Ves. 179.....	219	Lawson v. Sherwood, 1 Stark. Rep. 314.....	55
Hoffman, Bayard v., 4 Johns. Ch. Rep. 450.....	207	Lea, Alford v., 2 Leon. 111, Cro. Eliz. 54.....	507
Holbeck, Bree v., 2 Doug. 666.....	478, 483	Leaper v. Tatton, 16 East 420.....	529, 531
Holbrook v. Flinn, 4 Mass. Rep. 566.....	31	Lee, Stuart v., 2 Leigh 77.....	457
Holliday, Rootes v., 6 Munf. 258.....	559, 564	Leech, Turner v., 4 Barn. & Ald. 451.....	47
Holmes, Plunket v., 1 Lev. 11.....	129	Legge, Ives v., 3 T. R. 488, note.....	128
Holmes, Sexton v., 3 Munf. 566.....	600, 10	Lennard, Lady Trencham v., 4 Bro. P. C. 303.....	566
Holmes, Beverley v., 4 Munf. 95.....	610	Lenox, Caton & Veale v., 5 Rand. 31.....	597, 600, 608
Hooper, Commonwealth v., 2 Virg. Cas. 223.....	651	Leonard v. Pitney, 5 Wend. 30.....	479
Hopes v. Alder, 6 East 16, in notes.....	455	Lethbridge, Gwynn v., 14 Ves. 585.....	214
Hopkins v. Ward, 6 Munf. 38.....	17	Levitt, Brett v., 13 East 214.....	54
Hopkins, Laurence v., 13 Johns. Rep. 288.....	534	Lewis v. Weldon, 3 Rand. 71.....	26, 9
Horde, Taylor v., 1 Burr. 60, 111.....	19	Light, Maxwell v., 1 Call 117.....	419
Horseman, Bryan v., 4 East 599.....	581	Lindo v. Gardner, 1 Cranch 343, append. 465.....	528
Hougham, Clark v., 2 Barn. & Cress. 149.....	478, 483	Lombe, Steward v., 1 Brod. & Bing. 508.....	267
House v. Lord Petre, 1 Salk. 311.....	156	London (mayor of) v. Bolt, 5 Ves. 129.....	578
Howard, Brown v., 2 Brod. & Bing. 73.....	478	Long, Clark v., 4 Rand. 451.....	11
Howell v. Young, 5 Barn. & Cress. 259.....	67, 478, 482	Long, Reeve v., 4 Mod. 259.....	123
Howland, Gardner v., 2 Pick. 599.....	267	Long, Waller v., 6 Munf. 61.....	513, 14
Hubbard v. Goodwin, 3 Leigh 492.....	220, 583	Long's adm'r, Dunbar v., 4 Hen. & Munf. 212, 300, 361	51, 2
Humphrey v. Phinney, 2 Johns. Rep. 484.....	509	Lonsdale v. Brown, 3 Wash. C. C. R. 404.....	51, 2

Lorraine, Scott v., 6 Munf. 117.	285	Paris, Kinder v., 2 H. Blac. 561.	582
Lord Dunsany, Chamley v., 1 Scho. & Lef. 669.	563	Parker, Hurst v., 1 Barn. & Ald. 92.	524, 5, 6, 583
Lord Petre, House v., 1 Salk. 311.	155	Patridg v. Bere, 5 Barn. & Ald. 504.	155
Loyd, Foreman v., 2 Leigh 284.	435	Patten, Bent v., 1 Ran. 36.	318, 320
Luddington, R. Kime, 1 Ld. Raym. 208.	129	Patty v. Collin, 2 Hen. & Munf. 519.	297, 6
Lumley, Bible, 2 East 460.	457	Paul v. Paul, 2 Hen. & Munf. 525.	613
Lundie v. Robertson, 1 East 231.	455	Paul's adm'r & c. v. Mingo & c., reported 163.	163
Lynch, Stephens v., 13 East 38.	458, 7	Pealed.	259, 264, 297
M. & B. Manufacturing Company, Powell v. 3.	506	Payne, Ball v., 6 Rand. 73.	95, 6, 7, 9, 115
Mason 347.	506	Peacock v. Monk, 1 Ves. sen. 181.	9
Mackie v. Davis, 1 Wash. 219.	507, 9	Peasall v. Dwight, 2 Mass. Rep. 87.	528
Mallin v. Mallin v. c., 2 Johns. Ch. Rep. 238.	11	Pella v. Brown, Cro. Jac. 590.	99
Mandeville v. Union Bank, 9 Cranch 11.	116, 17	Pence, Graham adm'r v., 6 Rand. 529.	367, 8
Mandeville v. Willson, 5 Cranch 15.	249	Pendleton, Pleasants v., 6 Rand. 473.	272, 334, 5, 406
Mann, M'Clintic v., 4 Munf. 323.	249	Pengree, Jones v., 6 Ves. 580.	249
Manson, Hardaway v., 2 Munf. 220.	546	Perham v. Raynal, 2 Bing. 306.	610
Mantel v. Brett, Hob. 397.	491	Perine, Swaine v., 5 Johns. Ch. Rep. 492.	517
Markham, Bunn v., 7 Taunt. 244.	334	Perry v. Phelps, 10 Ves. 84.	215
Marx, Roosevelt v., 6 Johns. Ch. Rep. 266.	584, 607	Petre (lord), House v., 1 Salk. 311.	155
Marx, Maxwell, 2 Camp. 210.	47	Phelps, Perry v., 10 Ves. 84.	215, 19
Marx, Garland v., reported in note, p. 321, cited 308.	313	Philips v. Shaw, 4 Barn. & Ald. 435.	399
Massachusetts Turnpike v. Field, 3 Mass. Rep. 201.	478	Philips's ex'or, Raines v., 1 Leigh 483.	1
Mauro, Ritchie v., 2 Peters 243.	587	Phinney, Humphrey v., 2 Johns. Rep. 484.	509
Mayer & c. v. Pine, 2 Carr. & Payne 19.	245	Pickett, Day v., 4 Munf. 104.	203, 5
Mawbey, Hockley v., 8 Bro. C. C. 82.	104, 9	Pierson v. Pierson, 7 Johns. Rep. 26.	334, 5
Maxwell, Marsh v., 2 Camp. 210.	47	Pikington v. Shaller, 2 Vern. 374.	77
Maxwell v. Light, 1 Call 117.	419	Pincombe v. Rudge, Hob. 8, 28.	135, 142
Mayo v. Murchie, 3 Munf. 358.	9, 11	Pine, Mayor & c. v., 2 Carr. & Payne 91.	245
Mayo v. Turner, 1 Munf. 405.	574	Pitcher, Tovey v., 1 Salk. 80.	77
Mayor of London v. Bolt, 5 Ves. 129.	578	Pitney, Leonard v., 5 Wend. 30.	479
M'Carthy, Short v., 3 Barn. & Ald. 626.	67, 477, 482	Pittam v. Foster, 1 Barn. & Cress. 248.	524, 583
M'Clintic v. Manns, 4 Munf. 828.	9	Pleasants v. Pleasants, 2 Call 319.	173, 6, 184
M'Donnell, Robinson v., 2 Barn. & Ald. 134.	268, 370, 540, 542	Pleasants v. Pendleton, 6 Rand. 473.	272, 334, 5, 406
M'Kinney v. Waller, 1 Leigh 434.	454, 635	Plummer's ex'ors, Wilcox v., 4 Peters 172.	67, 478
M'Leamore v. Powell, 12 Wheat. 554.	454	Plunket v. Holmes, 1 Lev. 11.	129
M'Murdo, Wernick v., 5 Rand. 51.	174, 7, 182, 3, 461, 2	Pollock, Cocke v., 1 Hen. & Munf. 490.	618, 17
M'Namara, Purcell v., 9 East 157.	399	Pope v. Foster, 4 T. R. 590.	399
M'Neil v. Balrd, 6 Munf. 316.	230	Porter v. Bradley, 3 T. R. 146.	989
M'Williams v. Willis, 1 Wash. 199.	529	Potter v. Rayworth, 13 East 417.	455
Meagoe v. Simmons, 1 Mood. & Malk. 121.	584	Powell, Catter v., 6 T. R. 320.	29
Michie v. Wood, 5 Rand. 571.	78	Powell, Barnesley v., 1 Ves. sen. 119, 284.	148
Miller, Mowry v., 3 Leigh 561.	398	Powell, M'Leamore v., 12 Wheat. 554.	454
Miller, Robinson v., 1 Roll's Abr. 837, pl. 12.	409	Powell v. M. & B. Manufacturing Company,	506
Miller v. Adams, 16 Mass. Rep. 456.	478	3 Mason 347.	506
Mingo & c., Paup's adm'r & c. v., reported 163.	163	Preston v. Harvey, 3 Call 427, 495, 2 Hen. & Munf.	55
mitted.	250, 264, 297	55.	380, 81, 4, 5
Minnis, Stratton v., 2 Munf. 329.	274	Prestwidge, Doe v., 4 Mau. & Selw. 178.	138
Minor's case, 11 Ves. 559.	376	Purcell v. M'Namara, 9 East 157.	399
Missing, Cotten v., 1 Madd. Ch. Rep. 176.	334	Purchase, Cotterell v., Ca. Temp. Talbot 61.	269
Mitchell, Cunningham v., 4 Rand. 192.	4	Purefoy v. Rogers, 2 Wms. Saund. 388, note 9.	123
Mitchell v. Cue, 2 Burr. 660.	149	Pye, Atherton v., 4 T. R. 710.	108
Mitchell, Harris v., 2 Vern. 485.	367	Quantock & c. v. England, Burr. 2068.	245
Monk, Peacock v., 1 Ves. sen. 131.	9	The Queen v. Wigg, 2 Ld. Raym. 1168.	577
Moore v. Gilliam, 5 Munf. 346.	30	Queensberry (duke of), Cullen v., 15 Ves. 14, note.	9
Moore, Jones v., 5 Binney 576.	531, 4	Radcliffe v. Buckley, 10 Ves. 201.	124
Moore v. The Auditor, 3 Hen. & Munf. 232.	500, 564, 5	Rainbow, Taylor v., 2 Hen. & Munf. 423.	609
Moore v. Bank of Columbia, 6 Peters 92.	607	Raine, Harrison v., 5 Munf. 456.	597, 600
Moore v. Dawney, 3 Hen. & Munf. 127.	609	Raines v. Phillips's ex'or, 1 Leigh 483.	4
Morey, James v., 2 Cowen 246.	269	Raleigh, Smith v., 3 Camp. 513.	487
Morgan, Doe v., 3 T. R. 743.	123	Ralston & Pleasants, Brown & Rives v., 4 Rand.	504
Morgan, Rees v., 3 T. R. 349.	480	504.	56
Morice v. Bank of England, Ca. Temp. Talbot 318.	318	Ramchander v. Hammond, 2 Johns. Rep. 200.	242
3 Bro. P. C. 465.	215	Randolph v. Randolph, 3 Rand. 490.	345, 6
Morrice v. Hankey, 3 P. Wms. 146.	149	Randolph v. Randolph, 6 Rand. 194.	348
Morrill v. Terrell, 2 Rand. 6.	220	Randolph, Eppes v., 2 Call 108, 557, 8, 560, 1, 3, 564, 5, 615	615
Morris, Clason v., 10 Johns. Rep. 534.	580	Rankin, Donaghe v., 4 Munf. 261.	610
Morrison, Bell v., 1 Peters 351.	525, 606	Rawlinson, Kidd v., 2 Bos. & Pul. 59.	540, 542
Morrow, Thompson v., 5 Serg. & Rawle 289.	506	Ray v. Law, 3 Cranch 179.	216
Moseley v. Jones, 5 Munf. 23.	610	Raynal, Perham v., 2 Bing. 306.	610
Mountsorrel, The King v., 3 Mau. & Selw. 497.	496	Rayworth, Potter v., 13 East 417.	455
Mowry v. Miller, 3 Leigh 561.	398	Rees v. Morgan, 3 T. R. 349.	123
Mundy v. Mundy, 4 Bro. C. C. 294, 2 Ves. jun. 122.	122	Reeve v. Long, 4 Mod. 259.	420
507, 518	507, 518	Reeve, Dalston v., 1 Ld. Raym. 77.	488
Munroe, Clark v., 14 Mass. Rep. 351.	31	Reeves v. Brymer, 4 Ves. 692, 8.	127
Murchie, Mayo v., 3 Munf. 358.	9, 11	Regina v. Wigg, 2 Ld. Raym. 1168.	577
Murdock v. Herndon's ex'ors, 4 Hen. & Munf. 200.	528	Rex v. Arnesby, 3 Barn. & Ald. 568.	494, 496
Murray, Carter v., 5 Johns. Co. Rep. 522.	249	Rex v. Bake & al., 3 Burr. 1731.	677
Mutual Assurance Society v. Stone and others,	74	Rex v. Chillesford, 4 Barn. & Cress. 94.	496
3 Leigh 219.	74	Rex v. Cromford, 8 East 25.	494, 6
Nadenbush v. Lane, 4 Rand. 413.	422	Rex v. Great Wigston, 3 Barn. & Cress. 484.	496
Nanny, Lambert v., 2 Munf. 196.	9	Rex v. Mountsorrel, 3 Mau. & Selw. 497.	496
Nelson v. Carrington, 4 Munf. 332.	154, 5, 7	Rex v. Ripon, 9 East 295.	494
Nelson v. Sheridan, 8 T. R. 395.	199	Rex v. Storr, 3 Burr. 1668.	677
Newburg, Gardner v., 2 Johns. Ch. Rep. 164.	578	Reynolds v. Lady Tenham, 9 Mod. 40, 2 Eq. Ca.	586
Newland v. Champton, 1 Ves. sen. 105.	9	Abr. 486, ca. 16, 4 Bro. P. C. 302.	586
Newman v. Chapman, 2 Rand. 93.	562	Richardson, Oliver v., 9 Ves. 222.	507, 518
New River Company, Adair v., 11 Ves. 429.	9	Rickett's ex'ors & c., Brown v., 3 Johns. Ch. Rep.	555
Newton v. Wilson, 3 Hen. & Munf. 470.	578	555.	12, 13
Nichol, Attorney general v., 16 Ves. 341.	78	Riddick v. Cohoon, 4 Rand. 547.	406
Nicholson v. Gouthit, 2 H. Blac. 609.	48, 9, 54, 6	Right v. Beard, 13 East 210.	18
Noble, Colt v., 5 Mass. Rep. 167.	43	Ringer v. Joyne, 1 Marsh. 404.	398
Noble v. Smith, 2 Johns. Rep. 53.	384, 6	Ripon, The King v., 9 East 205.	494
Norris v. Crummev, 2 Rand. 223.	454	Ritchie v. Mauro, 2 Peters 243.	587
Norvell, Ross v., 1 Wash. 14.	268	Robertson, Lundie v., 7 East 231.	455
Nourse v. Finch, 1 Ves. jun. 344, 2 id. 78.	178	Robinson v. Bland, 2 Burr. 1065.	197
O'Kines, Staples v., 1 Esp. 332.	48, 9	Robinson v. M'Donnell, 2 Barn. & Ald. 134.	268, 270, 540, 2
Oliver v. Richardson, 9 Ves. 222.	507, 518	Robinson v. Robinson, 1 Burr. 38, 3 Bro. P. C. 180.	409
Orford (earl of) v. Churchill, 3 Ves. & Beames 59.	127	Robinson v. Miller, 1 Roll's Abr. 837, pl. 12.	199
60.	127	Roe v. Apsley, 1 Sid. 442.	199
Pagani v. Gandolfi, 2 Carr. & Payne 370.	39	Roe v. Archbishop of York, 6 East 86.	593
Panton v. Hall, Carth. 107.	205	Roe v. Baker, reported in note, p. 416, cited.	416, 423

Roe v. Jeffrey, 2 Wils. 322.	109	Stuart v. Goodall, 2 Hen. & Munf. 105.	105
Roe v. Jeffrey, 7 T. R. 589.	97, 8.	Sutton, Sherwood v., 5 Mason 143.	596, 597, 8, 600, 601
Rogers, Purefoy v., 2 Wms. Saund. 388, note 9.	123	Swaine v. Perline, 5 Johns. Ch. Rep. 492.	478
Roosevelt v. Marks, 6 Johns. Ch. Rep. 366.	584, 607	Swartwood, Butts v., 2 Cowen 481.	517
Ross v. Norvell, 1 Wash. 14.	208	Swartwood, Butts v., 2 Cowen 481.	208
Ross, Brodwin v., 6 Munf. 391.	456	Sym v. Griffin, 4 Hen. & Munf. 277.	609
Rootes v. Holliday, 6 Munf. 258.	559, 561	Tabb v. Baird, 1 Call 475.	47
Rootes and others, Fox's adm'r v., reported in note, p. 429, cited.	428, 9, 432, 433.	Tabb's adm'r, Beaty v., 2 Munf. 254.	528
Row v. Young, 2 Brod. & Bingh. 165.	116	Tanner v. Smrt, 6 Barn. & Cress. 603.	526, 534
Rowles, Ryal v., 1 Atk. 165.	336	Tatton, Leaper v., 16 East 420.	529, 531
Royalls v. Johnson, 1 Rand. 427, 421.	213, 219	Taw v. Bury, Dyer, 167, 1 Anders. 4.	567
Royle v. Hamilton, 4 Ves. 437.	127	Taylor v. Horde, 1 Burr. 60, 111.	157
Rudge, Pincombe v., Hob. 3.	28, 135, 142	Taylor v. Chowning, 3 Leigh 654.	457
Ruggles v. Ruggles, 18 Johns. Rep. 285.	563	Taylor v. Jones, 1 Salk. 389.	564
Russell, Hamilton v., 1 Cranch 300.	287	Taylor v. Rainbow, 2 Hen. & Munf. 423.	609
Ryal v. Rowles, 1 Atk. 165.	336	Temple, Chamberlayne v., 2 Rand. 384.	196
Ryder, Attorney general v., 2 Ch. C. 178.	9	Tenham (lady), Reynolds v., 9 Mod. 40, 2 Eq. Ca. Abr. 486, ca. 16, 4 Bro. P. C. 302.	586
Sadler, Archer v., 2 Hen. & Munf. 370.	280, 81, 4, 5	Terrell, Morris v., 2 Rand. 6.	230
Sands v. Gelston, 15 Johns. Rep. 511.	534, 607	Terry, Van Vechten v., 2 Johns. Ch. Rep. 197.	5
Sarell v. Wine, 3 East 409.	524, 532	Teynham (lady) v. Lennard, 4 Bro. P. C. 303.	566
Sargent, Higgins v., 2 Barn. & Cress. 348.	200	Thom. Hansbrough's ex'ors v., 3 Leigh 147.	293
Saunders, Cooper v., 1 Hen. & Munf. 412.	587	Thomas v. Soper, 5 Munf. 28.	540
Sayer, Doe v., 3 Camp. 8.	18	Thompson v. Cumming, 2 Leigh 321.	9
Scales v. Jacob, 3 Bing. 638.	523, 531, 3, 611	Thompson, Cockburn v., 16 Ves. 321.	9
Scarlet's case, 3 Inst. 33, 12 Rep. 98.	668	Thompson v. Morrow, 5 Serg. & Rawle 239.	506
Scott, Turner v., 5 Rand. 322.	150	Thompson, Dixon v., 2 Show. 12d.	593
Scott v. Lorraine, 6 Munf. 117.	285	Thompson, Wren v., 4 Munf. 380.	323
Scott v. Gibbon, 5 Munf. 86.	568	Threlkelds v. Fitzhugh, 2 Leigh 451.	133, 143, 509, 511
Seers v. Fowler, 3 Johns. Rep. 272.	25	Tibbut, Dowthwaite v., 5 Mau. & Selw. 75.	533, 531
Segar, Smith v., 3 Hen. & Munf. 394.	609	Tiernans, Harrison v., 4 Rand. 177.	177
Selby, Jones v., Prec. in Ch. 300.	334, 5, 8	Tift, Stow v., 15 Johns. Rep. 458.	31
Selden, Commonwealth v., 5 Munf. 160.	566, 7	Tinkler, Crowder v., 19 Ves. 617.	578
Sexton v. Holmes, 3 Munf. 566.	609, 610	Todd, Jackson v., 2 Caines 185.	20
Shaller, Pilkington v., 2 Vern. 374.	77	Tomlinson v. Day, 3 Brod. & Bing. 680.	492
Sharp, Jackson v., 9 Johns. Rep. 183.	18, 20	Tovey v. Pitcher, 1 Salk. 80.	77
Shaw, Phillips v., 4 Barn. & Ald. 435.	399	Towgood, Anson v., 1 Jac. & Walk. 619.	376, 7
Shaw, Hellings v., 5 Taunt. 608.	523	Tredgold, Atkins's ex'ors v., 2 Barn. & Cress. 23, 533, 610.	479
Shawcross, Wright v., 2 Barn. & Ald. 501, note a.	43	Troup v. Smith, 2 Johns. Rep. 38.	479
Shemeld v. Dutches of Buckinghamshire, 1 Atk. 628.	148	Turner v. Leech, 4 Barn. & Ald. 451.	47
Shelton's ex'ors v. Shelton, 1 Wash. 64, 174, 7, 181.	3, 8	Turner, Hill v., 1 Atk. 515.	148
Shepherd, Entwistle v., 2 T. R. 79.	197	Turner v. Scott, 5 Rand. 322.	150
Sheridan, Nelson v., 8 T. R. 395.	197	Turner, Ward v., 2 Ves. sen. 431.	334, 5, 7
Sherwood, Lawson v., 1 Stark. Rep. 314.	55	Turner, Bullythorpe v., Willes 435.	422
Sherwood v. Sutton, 5 Mason 143.	478	Turner, Mayo v., 1 Munf. 405.	574
Shields v. Anderson, 3 Leigh 729.	270, 549	Twigg v. Field, 18 Ves. 517.	376, 7
Short v. McCarthy, 3 Barn. & Ald. 626.	67, 477, 452	Twort v. Twort, 16 Ves. 128.	578
Shurt, Beall v., 2 Rand. 401.	199	Union Bank, Mandeville v., 9 Cranch 11.	116, 17
Simmons, Meagoe v., 1 Mood. & Malk. 121.	584	United States Bank v. Smith, 11 Wheat. 171.	116
Sims, Cooke v., 2 Call 89.	609	Upton v. Else, 12 Moore 303.	530, 531
Skipwith, Young v., 2 Wash. 300.	213	Urquhart v. King, 7 Ves. 235.	178
Skoulding, Catling v., 6 T. R. 189.	250	Utica Bank v. Childs, 6 Cowen 238.	478
Skyring v. Greenwood, 4 Barn. & Cress. 272.	185	Vanneck, Deschamps v., 2 Ves. Jun. 716.	106
Slate River Company, Crenshaw v., 6 Rand. 245.	578	Van Vechten v. Terry, 2 Johns. Ch. Rep. 197.	8
Smallpiece, Irons v., 2 Barn. & Ald. 552.	334	Vaughan, Williams v., Cro. Jac. 97, Moor 775.	470
Smart, Eggleton v., 1 W. Black. 375.	417	Vawdry, Cartwright v., 5 Ves. 530.	130
Smart, Tanner v., 6 Barn. & Cress. 603.	526, 534	Waddy, Callis v., 2 Munf. 511.	479
Smith, Bass v., 12 Vin. Abr. 229.	523	Waldo v. Caley, 16 Ves. 206.	214
Smith v. Burtis, 6 Johns. Rep. 198.	19	Walker's case, 3 Co. 23.	77
Smith v. Chapman, 1 Hen. & Munf. 298.	126	Walker v. Frohisher, 6 Ves. 70.	367, 8
Smith, Childers v., Gilm. 200.	31	Walker, Smith v., 1 Wash. 135.	481
Smith v. Coryton, cited in 2 Vern. 251.	367	Walker, Hickman's ex'ors v., Willes 27.	532
Smith v. Crooker, 6 Mass. Rep. 538.	279	Waller v. Long, 6 Munf. 61.	313, 14
Smith, Doe v., 7 T. R. 581.	107, 8	Waller, M'Kenny v., 1 Leigh 434.	454, 625
Smith, Drury v., 1 P. Wms. 404.	334	Wangford v. Wangford, 1 Salk. 308.	156
Smith, Hall v., 3 Munf. 550.	609	Ward, Hopkins v., 6 Munf. 38.	17
Smith, Noble v., 2 Johns. Rep. 52.	334, 6	Ward v. Johnson, 1 Munf. 45.	323
Smith v. Raleigh, 3 Camp. 513.	487	Ward v. Turner, 2 Ves. sen. 431, 442.	334, 5, 7
Smith v. Segar, 3 Hen. & Munf. 394.	609	Ward v. Hunter, 6 Taunt. 210.	624, 5, 533
Smith, Troup v., 2 Johns. Rep. 33.	479	Ware v. Cary, 2 Call 263.	229, 503, 514
Smith, St. Saviour's Churchwardens v., 3 Burr. 1271.	77	Warrington (earl of), Booth v., 4 Bro. P. C. 163.	453
Smith, United States Bank v., 11 Wheat. 171.	116	Watson, Southcot v., 3 Atk. 231.	180
Smith v. Walker, 1 Wash. 135.	481	Watson, Busby v., 3 W. Blac. 1050.	400
Snell, Commonwealth v., 3 Mass. Rep. 82.	698	Weldon, Lewis v., 3 Rand. 71.	35, 29
Snellgrove v. Bailly, 3 Atk. 214.	334	Weldon, Commonwealth v., reported 653, cited.	693
Snibson, Hodgkinson v., 3 Bos. & Pul. 603.	417	Wernick's adm'r v. M'Murdo, 5 Rand. 78, 51.	174, 7, 182, 3, 461, 2
Soper, Thomas v., 5 Munf. 28.	540	West v. Belches, 5 Munf. 187.	316, 220
Southall v. Garner, 2 Leigh 372.	415, 421	West, Isaac v., 6 Rand. 652.	290
Southcot v. Watson, 3 Atk. 231.	180	West, Humphreys v., 3 Rand. 518.	489
Sowerby, Esdalle v., 11 East 114.	48, 9, 54	Westerdell v. Dale, 7 T. R. 310.	497
Spain v. Arnott, 2 Stark. Rep. 266.	29	Wetzell v. Bussard, 11 Wheat. 314.	606, 9
Staples v. O'Kines, 1 Esp. 332.	48, 9	Whitcomb v. Whiting, 2 Doug. 662.	610
Steel v. Brown, 1 Taunt. 380.	540	White, Clay v., 1 Munf. 162.	17
Stephens v. Lynch, 12 East. 38.	455, 7	Whiting, Whitcomb v., 2 Doug. 662.	610
Stevenson's adm'r, Wilson v., 2 Call 217.	613	Wigg, The Queen v., 2 Ld. Raym. 1163.	577
Steward v. Lombe, 1 Brod. & Bing. 506.	267	Wilcox v. Plummer's ex'ors, 4 Peters 172.	67, 478
St. Leger, Adams v., 1 Ball & Beat. 181.	11	Wild's case, 6 Co. 17.	122, 130
Stocker, Earle v., 2 Vern. 251.	367	Wilkinson, Cutchin v., 1 Call 1.	156, 8
Stokes v. Cooper, 3 Camp. 514, note.	487, 8	Willan v. Willan, 16 Ves. 216.	214
Stone and others, Mutual Assurance Society v., 3 Leigh 219.	74	Williams v. Bosanquet, 1 Brod. & Bing. 238.	77, 9, 66
Storr, The King v., 3 Burr. 1698.	677	Williams v. Vaughan, Cro. Jac. 97, Moor 775.	470
Stout v. Jackson, 2 Rand. 132, 133, 4, 6, 7, 143, 4, 509.	511	Williams, Bartlett v., 1 Pick. 268.	542
Stoveld, Butler v., 1 Bing. 368, 8 Moore 412.	200	Williams, Clementson v., 8 Cranch 72.	606, 8
Stow v. Tift, 15 Johns. Rep. 329.	31	Williamson v. Codrington, 1 Ves. sen. 516, 134, 7, 142.	543, 7
Stratton v. Minis, 2 Munf. 428.	87	Willis, M'Williams v., 1 Wash. 199.	529
St. Saviour's Churchwardens v. Smith, 3 Burr. 1271.	77	Wilson, Mandeville v., 5 Cranch 15.	949
Stuart v. Lee, 2 Leigh 77.	457	Wilson, Newton v., 3 Hen. & Munf. 470.	538
		Wilson, Boot v., 8 East 311.	538
		Wilson v. Crowhill, 2 Munf. 302.	609
		Wilson v. Stevenson's adm'r, 2 Call 317.	613

Winchester (bishop of) v. Beaver, 3 Ves. 314.....	9	Fox's adm'r v. Rootes and others, reported in note, p. 429, distinguished from Rogers & brothers v. Marshall et al.....	482, 3, 4
Wine, Sarell v., 3 East 409.....	524, 532	Graham's adm'r v. Pence, 6 Rand. 529, distinguished from May v. Yancey.....	308
Winstons, Commonwealth v., 5 Rand. 546..318. 17, 19, 20	78	Hale v. James, 6 Johns. Ch. Rep. 258, doubted in Todd v. Baylor.....	517
Wise, Cooke v., 3 Hen. & Munf. 463.....	78	Henderson v. Foote's ex'ors, 3 Call 248, disapproved in Rice v. White.....	481, 2
Wood, Michie v., 5 Rand. 571.....	301	Leaper v. Tatton, 16 East 420, disapproved in Butcher v. Hixton.....	581
Woodley v. Abby, 5 Call 336.....	323	Maxwell v. Light, 1 Call 117, distinguished from Bargamin v. Poltiaux ex'or &c.....	419
Wren v. Thomson, 4 Munf. 380.....	24	Mundy v. Mundy, 2 Ves. jun. 122, distinguished from Todd v. Baylor.....	517, 18
Wright, Bristow v., 2 Doug. 666.....	43	Oliver v. Richardson, 9 Ves. 222, distinguished from Tod v. Baylor.....	517, 18
Wright v. Shawcross, 2 Barn. & Ald. 501, note a.....	613	Randolph v. Randolph, 3 Rand. 490, explained in Fleming's ex'or v. Dunlop &c.....	346
Wyld, Ambler v., 2 Wash. 36.....	531	Roe v. Apsley, 1 Sid. 442, disapproved in Mercer's adm'r v. Beale et al.....	419
Yea v. Fouraker, 2 Burr. 1099.....	563	Roe v. Baker, reported in note, p. 416, disapproved in Bargamin v. Poltiaux ex'or &c.....	429
York (archbishop of), Roe v., 6 East 86.....	609	Smith v. Raleigh, 3 Camp. 513, explained in Briggs v. Hall.....	487, 8
Young, Howell v., 5 Barn. & Cress. 259... 67, 478, 482	116	Smith v. Walker, 1 Wash. 135, disapproved in Rice v. White.....	481, 2
Young v. Gregorie, 3 Call 446.....	213	Stokes v. Cooper, 3 Camp. 514, note, explained in Briggs v. Hall.....	487, 8
Young, Row v., 2 Brod. & Bing. 165.....		Swaine v. Perine, 5 Johns. Ch. Rep. 492, doubted in Tod v. Baylor.....	517
Young v. Skipwith, 2 Wash. 300.....		Walker v. Frobisher, 6 Ves. 70, distinguished from May v. Yancey.....	308

CASES,

AMONG THOSE CITED,

WHICH WERE DISAPPROVED, DOUBTED OR EXPLAINED.

Brett v. Levitt, 13 East 214, doubted in Brown & Sons v. Ferguson.....	54	Smith v. Walker, 1 Wash. 135, disapproved in Rice v. White.....	481, 2
Bryan v. Horseman, 4 East 599, disapproved in Butcher v. Hixton.....	581	Stokes v. Cooper, 3 Camp. 514, note, explained in Briggs v. Hall.....	487, 8
Butcher v. Hixton, reported p. 519, explained in Farmers Bank v. Clarke.....	609, 10	Swaine v. Perine, 5 Johns. Ch. Rep. 492, doubted in Tod v. Baylor.....	517
Curtis v. Curtis, 2 Bro. C. C. 620, distinguished from Todd v. Baylor.....	517, 18	Walker v. Frobisher, 6 Ves. 70, distinguished from May v. Yancey.....	308
Cutter v. Powell, 6 T. R. 320, explained in Bream v. Marsh.....	29	Williamson v. Farley, Glim. 15, distinguished from Sydnor v. Gee &c.....	543, 7
Dowthwaite v. Tibbut, 5 Mau. & Selw. 75, disapproved in Butcher v. Hixton.....	581	Wren v. Thompson, 4 Munf. 380, distinguished from Garland v. Marx.....	323
Eaton v. Jaques, 2 Doug. 455, disapproved in Farmers Bank v. Mutual Assurance Society et al.....	86	Yea v. Fouraker, 2 Burr. 1099, disapproved in Butcher v. Hixton.....	581

CASES

ARGUED AND DETERMINED IN THE

Supreme Court of Appeals of Virginia.

Bowyer v. Chesnut.

November, 1832.

[90 Va. 268.]

(Absent CABELL, J.)

Appellate Practice—Bills of Exceptions Indefinite—Effect.—Whenever a bill of exceptions to an instruction of the court to a jury, on the trial of an issue, is so vague and imperfect, that the appellate court cannot ascertain the exact state of the case, nor consequently the import and effect of the instruction, it is the settled practice, to reverse the judgment, set aside the verdict, and remand the cause for a new trial.

Debt on a bond for 200 dollars, brought by Chesnut against Bowyer in the county court of Bath. Bowyer cravedoyer of the bond, and pleaded non est factum. It appeared from the bond (set out onoyer) that one Sophia Burk was the subscribing witness to the execution thereof. At the trial, the defendant Bowyer filed a bill of exceptions to an opinion of the court, stating, "That on the trial of the issue, the plaintiff to support the same on his part, introduced testimony to prove various acknowledgments of the defendant, of sums of money he had borrowed from or owed to the plaintiff, said to be in corroboration of the testimony of Mrs. Burk—but none

of which testimony went to prove the execution of the note in question; to the introduction of which the defendant by his counsel objected, but was overruled by the court, and the evidence was admitted: to which opinion the defendant excepted &c." There were two depositions of Sophia Burk, the subscribing witness to the bond, in which she deposed that Bowyer executed it in her presence, and the clerk certified, that these depositions were read in evidence for the plaintiff at the trial, but they were not regularly made part of the record. Verdict and judgment for the plaintiff. The defendant Bowyer applied to the circuit court of Bath for a supersedeas, which was awarded; but the circuit court affirmed the judgment of the county court; and then he appealed to this court.

Johnson, for the appellant.

Bacchus, for the appellee.

CARR, J. The question is not as to the sufficiency or weight of the evidence, but as to its admissibility; and if under any circumstances which could exist in the cause, this evidence was admissible on the issue joined, the judgment of the courts below must be supported. Suppose, for instance, the plaintiff had introduced the subscribing witness to prove the execution of the bond, and her character was assailed, or facts and circumstances adduced tending to discredit her evidence; would not the plaintiff have a right to resort to circumstantial evidence to corroborate and support her? This cannot be denied. But the question is, what latitude might he take? The writers on the subject say, "that all facts and circumstances, upon which any reasonable presumption or inference can be founded, as to the truth or falsity of the issue, or disputed fact, are admissible in evidence." Stark. Law Ev. part 1, § 7, vol. 1, p. 17.* The disputed fact here, was, whether the defendant had executed the bond for the 200 dollars? And the subscribing witness having been examined as to that fact, it was sought to corroborate her evidence, by proving various acknowledgments of the defendant that he had borrowed, or owed sums of money to the plaintiff: and the question is, would these acknowledgments furnish any reasonable ground of inference or presumption as to the truth of the disputed fact? To my mind, they might go to found very strong presumptions of the truth of the fact in issue. The objection to their introduction is, that "they do not go to prove the execution of the bond;" but this would exclude all presumptive and circumstantial evidence, which we know is

***Appellate Practice—Bills of Exceptions Indefinite—Effect.**—It has been held repeatedly that when a bill of exception is so indefinite as not to shew whether an instruction or evidence was proper or not, the judgment should be reversed. Strader v. Goff, 6 W. Va. 264, citing the principal case: Barrett v. Tazewell, 1 Call 215 (see also, foot-note to this case): Beatle v. Tabb, 2 Munf. 254; Brooke v. Young, 3 Rand. 106; Thompson v. Cummings, 2 Leigh 321. To the same effect, the principal case was cited in McDowell v. Crawford, 11 Gratt. 398. But see monographic note on "Bills of Exception" appended to Stoneman v. Com., 26 Gratt. 887, where it is shown that the later decisions sustained the rule that a bill of exception must clearly and distinctly point out the error complained of, otherwise the exception will be unavailing.

***Appellate Practice—Record—Certificate of Clerk.**—The evidence produced upon a trial can only be known and reviewed in the appellate court by its being spread upon the record by a bill of exceptions, or by the certificate of the judge himself. It is not the province of the clerk to add anything to the record; and his certificate, that certain papers copied by him in the transcript were read and filed, cannot be received as evidence of that fact, such a certificate does not make the papers a part of the record; nor does the certificate of counsel afford any evidence of opinions expressed, or evidence given, at the trial. To this point, the principal case is cited with approval in White v. Toncray, 9 Leigh 347, 352, and foot-note; Roanoke, etc. Co. v. Karn, 80 Va. 592, 593; Johnson v. The Norton, etc., Co., 90 Va. 268, 269, 18 S. E. Rep. 36; Sweeney v. Baker, 13 W. Va. 302.

In discussing the question as to whether exceptions taken to the rulings of the trial court are available in the appellate court where there has been no motion for a new trial in the lower court. Danks v. Rodeheaver, 26 W. Va. 378, cites the principal case.

On the subject of new trials, see monographic note on "New Trials" appended to Boswell v. Jones, 1 Wash. 332.

always resorted to when necessary to strengthen and support the direct and positive proof. I think, then, that the opinion of the county court was correct, and that the judgment ought to be affirmed.

TUCKER, P. I am of opinion, that the bill of exceptions in this case, is too imperfect to enable the court to decide, whether the evidence admitted by the county court was legal or otherwise. The issue made up in the cause was on the plea of non est factum, and no evidence was proper or admissible, which did not go to sustain that issue. The proof objected to was the testimony of witnesses "to prove various acknowledgments, on the part of the defendant, of sums of money which he had borrowed from or owed to the plaintiff." Now, the obligation being made part of the record by oyer, the court perceives there was a subscribing witness. The proof of the execution of the bond can only be by the subscribing witness, where there is one, unless the failure to produce him is sufficiently accounted for. The secondary evidence even of handwriting, is not admissible till this is done; much less the more vague and uncertain evidence of acknowledgments of debt. These principles are too familiar to require authority for their support. Unless, therefore, something is shewn to justify the introduction of this testimony, it was improperly admitted. If the sub-

scribing witness had been examined, and this evidence was introduced to sustain her credit, it would have been proper evidence. But this does not certainly appear. The testimony was introduced to sustain the testimony of Mrs. Burk, but whether this was Sophia Burk the subscribing witness or not, does not appear; nor does it certainly appear, Mrs. Burk, even if she was the subscribing witness, had testified to the execution of the bond. In this, indeed, there is something equivocal in the bill of exceptions. It is there said, that the plaintiff "introduced testimony to prove various acknowledgments by the defendant, that he had borrowed money, or owed money to the plaintiff, said to be in corroboration of the testimony of Mrs. Burk—but none of which testimony went to prove the execution of the note." I understand these words not as applying to Mrs. Burk's testimony, but to the corroborating testimony. I think the counsel for the appellant understood it otherwise. According to my understanding, then, it is not denied that Mrs. Burk's testimony went to the execution of the note. If it did, and if she was the subscribing witness, then the corroborating testimony was proper; otherwise, it was not. In this state of uncertainty, the court cannot pronounce any definitive opinion, but must send the cause back for a new trial, when, it is hoped, if the question is again insisted on, a more perfect bill of exceptions will be filed. *Raines v. Philips's ex'or*, 1 Leigh, 483; *Thompson v. Cumming*, 2 Leigh, 321. The case might have been differed if the depositions of Sophia Burk were before us. But they are no part of the record. The clerk's certificate that they were read and filed, cannot be received as evidence of that fact; for the appellate court never can

know what took place at the trial from the clerk's certificate. That is not within his province. *Cunningham v. Mitchell*, 4 Rand. 192. The evidence produced upon the trial can only be known by its being spread upon the record, by bill of exceptions, or by the certificate of the judge himself. The very object of the institution of bills of exceptions, was to enable a party to spread upon the record the matters that occurred at the trial; the improper evidence introduced, the instructions asked, the opinions given, and other matters of which the party could not otherwise avail himself in an appellate court. 1 Bac. Abr. 527, 2 Inst. 426. Unless this is done, the court sees nothing but the process, the pleadings, the verdict and the judgment. The certificate of counsel affords no evidence of opinions expressed, or evidence given, nor the certificate of the clerk, of the papers produced before the jury, or the depositions read in the cause.

BROOKE, J., concurring with the president, both judgments were reversed, the verdict set aside, new trial directed, and the cause remanded to the county court.

Buck v. Pennybacker's Ex'ors.

November, 1832

(Absent CABELL, J.)

Partnership*—Assignment for Benefit of Creditors—Suit against Trustee for Account of Surplus—Parties.—D. & A. partners, assign effects to B. upon trust to pay all debts due from a former partnership of D. & C. and all debts of D. & A. for which B. the trustee, was responsible as their surety, and to pay the surplus to the order of D. & A. Afterwards D. & A. draw an order on B. the trustee, in favour of P. for a sum of money they owed him, to be paid out of the surplus of the trust fund; and B. accepts the order, payable out of the surplus: Upon a bill in chancery by P. against B. the trustee alone, praying that he might render an account of the fund, that the surplus might be ascertained, and applied to discharge of the order. *Held*, that neither D. & A. nor D. & C. nor any other of the cestuis que trust, are necessary parties, since the trustee represents the interests of all the cestuis que trust.

By deed executed by J. Dickerson, T. Amis and H. Conn of the first part, T. Buck of the second part, and J. & R. Withers of the third part—reciting, that Dickerson & Amis, merchants and partners, were bound to indemnify H. 6 *Conn from all demands against him as a partner of a former house of Dickerson & Conn, and as security for the due performance of that undertaking, Amis had mortgaged certain real estate to Conn; that Amis had mortgaged the same estate to Buck, to indemnify him for indorsing notes at bank for Amis's accommodation, and had then mortgaged it to J. & R. Withers, to secure a debt due them; and that J. & R. Withers were apprehensive, that this mortgage was not a sufficient security for the debt due them—therefore, all the accounts, notes, bonds and judgments, for debts due to the house of Dickerson & Conn, and for debts due to the house of Dickerson & Amis,

*Partnership.—See generally, monographic note on "Partnership" appended to *Scott v. Trent*, 1 Wash.

77. *Assignment for Benefit of Creditors.—See generally, monographic note on "Assignments for the Benefit of Creditors" appended to *French v. Townes*, 10 Gratt. 515.

were assigned to Buck, upon trust, that he should apply the moneys, as they should be collected, to the payment of all the debts due from the house of Dickerson & Conn, and such debts of Dickerson & Amis as Buck had in any way become bound for, and to pay the surplus to Dickerson & Amis or their order; and it was agreed, that whenever 2000 dollars should be collected from this trust subject, Conn should release his lien on the real estate mortgaged by Amis for his indemnity; and Buck covenanted to appropriate all the moneys coming to his hands from the trust subject, to the purposes above mentioned; but he should not be bound to settle the accounts or collect the debts assigned, himself, or be accountable beyond the moneys paid over to him by the person employed to do the business; which agent Buck was authorized to employ.

Afterwards, Dickerson & Amis, being indebted to B. Pennybacker, by bond, in the sum of 1533 dollars, drew an order on Buck, requiring him to pay the same to Pennybacker, out of any moneys that might be in his hands, after paying the debts of Dickerson & Conn, and all moneys for which he was bound for Dickerson & Amis; and Buck accepted this order upon the conditions therein stated.

Pennybacker's executors exhibited their bill, in the superior court of chancery of Winchester, against Buck alone, setting forth the deed of assignment above mentioned, the *order of Dickerson & Amis on Buck, in favour of their testator, and Buck's acceptance thereof; alleging, that a surplus of moneys of the trust fund, had come to Buck's hands, which was properly applicable to, and sufficient for the payment of, the debt due Pennybacker; and praying an account of the trust subject, and a decree against Buck for the balance which should be found in his hands, after satisfying the debts of Dickerson & Conn, and the debts of Dickerson & Amis for which Buck was bound. Buck having put in his answer, in which he said, that the trust fund had been nearly exhausted in payment of the debts having precedence to that due Pennybacker, and that he was ready to render an account of the trust subject; an order was made, by consent of parties, referring the accounts to a commissioner. Dickerson was present at the taking of the accounts in the commissioner's office, and was a witness. The commissioner's report showed, that, after satisfying all the preferred debts out of the trust subject, there was a surplus in Buck's hands, applicable to the debt due to Pennybacker, of 1060 dollars, with interest &c. Whereupon the court decreed, that Buck should pay that sum to the plaintiffs. And Buck appealed from the decree to this court.

The cause was argued here by Briggs for the appellant, and Johnson for the appellees. There were some questions of fact and mere details, not necessary to be stated; the only point of law was, whether all necessary and proper parties had been brought before the court? and, particularly, whether Dickerson & Conn ought not to have been made parties?

CARR, J. The only question worthy of consideration in this case, is, whether the proper parties are before the court? The general rule is, that all persons interested in the

subject of the suit, shall be made parties, in order that complete justice may be done, and future litigation prevented. These being

the ends in view, and the rule adopted only as the *means of accomplishing them, we should be careful not to sacrifice the end to the means; and, on this ground, courts often modify and bend the rule, making it subservient to convenience and justice. We are to decide, whether justice requires, that we should undo all that has been done in this cause, and leave the plaintiffs to start afresh in this long race, because they did not make Dickerson & Conn parties to their bill. I cannot think that this would be right. The bill claimed nothing adverse to the rights of Dickerson & Conn. They were represented by the trustee, whose own interest was the same with theirs. They were probably standing by, looking on upon the whole transaction, and well satisfied with it. We see that one of them (Dickerson) was the collector of Buck as to this very trust fund, and a witness before the commissioner. It would seem to me, that the same principle, which requires that Dickerson & Conn should be made parties, would, if carried out, equally require that all their creditors should be brought before the court; for they are the persons to whom Buck was to pay the money, not Dickerson & Conn: and there can be no doubt, that, though they are not parties to the deed, they have a much deeper interest in the fund provided for the satisfaction of their claims than Dickerson & Conn have, and might have filed their bill against the trustee, called him to account, and made him liable to them for any mismanagement or misapplication of the fund. In the eye of equity, it was their fund, and Buck their trustee. Yet it is not pretended, that the plaintiffs, in order to come upon Buck for their claim, must have convened all these creditors before the court. In *Van Vechten v. Terry*, 2 Johns. Ch. Rep. 197, where real estate has been purchased by a joint fund raised by a number of subscribers, and the property conveyed to trustees, on a bill to foreclose and sell under a mortgage made by the trustees, it was held not necessary that the subscribers should be made parties; the trustees sufficiently representing all the interests concerned, for that purpose. In *Branch's adm'x v. Booker's adm'or*, 3 Munf. *43, where the will directed that each child's portion should be laid off to it, when it separated from the family, this court held, that it was not necessary that all the children should be made parties to every suit which each child might bring for his share: yet all were interested in the common fund. There are several other cases which shew the same course of decision; *Lambert v. Nanny*, 2 Munf. 196; *Mayo v. Murchie*, 3 Munf. 358; *M'Clintic v. Manns*, 4 Munf. 328. In *Haycock v. Haycock*, 2 Ch. Ca. 124, there were separate legacies to A. B. & C. and B. sued the executor, who pleaded in abatement, the omission to make the others parties; but the plea was overruled, and the executor ordered to answer. So in *Attorney General v. Ryder*, Id. 178, the same point met the same decision. The general rule as to parties is flexible, and subject to be modified according to the sound discretion of the

court; *Newland v. Champion*, 1 Ves. sen. 105; *Peacock v. Monk*, Id. 131; *Lawson v. Barker*, 1 Bro. C. C. 303; *Bishop of Winchester v. Beavor*, 3 Ves. 314; *Adair v. New River Co.*, 11 Ves. 429; *Cullen v. Duke of Queensberry*, 15 Ves. 14, in notes; *Cockburn v. Thompson*, 16 Ves. 321. I think the decree should be affirmed.

BROOKE, J. The only question in this case, is, whether Buck, as a trustee of the funds of the two houses *Dickerson & Conn* and *Dickerson & Amis*, on an order drawn by *Dickerson*, a partner in both firms, in behalf of *Pennybacker*, and accepted by Buck, the trustee, could be sued by *Pennybacker's* executors, without making all the partners of the two houses, and also all the cestuis que trust of the funds assigned, parties? The principle, that all persons having an interest in the controversy, ought to be made parties to it, is well settled; but this principle does not apply to a case where such persons are fully represented by a party designated by themselves, as in the case before us. By the terms of the deed of assignment to Buck, he was constituted a trustee to administer the funds of both *Dickerson &*

10 *Conn* *and *Dickerson & Amis*, according to the provisions of the deed. The order in behalf of *Pennybacker*, which he accepted, was drawn on the funds in Buck's hands by *Dickerson*, a partner in both houses, and accepted by Buck; conditionally, indeed, to be paid after other claims were provided for; but Buck had been constituted the trustee by the partners for this purpose; and it was not the duty of a stranger to question his authority to accept the draft drawn on him, or to take care of the interests of those who had confided that duty to him. It is true, the money drawn for was due to *Pennybacker* by the house of *Dickerson & Amis*, who were only entitled to the residuum of the funds after the payment of the debts of *Dickerson & Conn*: but there is no strict analogy between a trustee and an executor; the former represents all the cestuis que trust; the latter does not represent the legatees, in the same sense, and therefore, cannot be sued by one residuary legatee, without making the others parties. The house of *Dickerson & Conn*, certainly, had an interest in seeing that the debts of that house were paid, before the debts of *Dickerson & Amis*; but, as regarded the creditors of either house, they had confided that interest to Buck, their trustee, and they could not require of a creditor of *Dickerson & Amis*, to sue all the parties to the deed of assignment which constituted Buck their trustee, and also all persons interested in the funds assigned to him, instead of *Dickerson & Amis*, the debtors of the appellees. If they could, they might, by the assignment of their funds, have required that all interested in them should be before the court, before a single creditor could get his money. This ought not to be tolerated in a court of equity; otherwise, a principle settled for purposes of justice, would be made to defeat it. I concur in the opinion, that the decree should be affirmed.

TUCKER, P. In this case, there is but a single difficulty; and that is the want of proper parties. But I think the want of par-

ties a fatal objection; not the omission
11 of *Dickerson* * & *Amis* as parties (as Mr. Briggs contended) but the omission of *Dickerson & Conn*, the peculiar objects of the trust. The rule is general and well established, that all persons concerned in interest shall be made parties, for two purposes—1. to settle the controversy all round; and 2. because no decree should be made affecting the interest of any man, unless he has had an opportunity to contest it; for, if all parties are not before the court, contradictory decrees may result, between which the rights of a party may be overlooked or crushed. See judge Coalter's remarks in *Mayo v. Murchie*, 3 Munf. 376, citing 1 Atk. 290, 2 Atk. 111, 2 Eq. Ca. Abr. 165, pl. 5. Thus, in the present case: the court has decreed that there is a residuum which Buck must pay; yet if *Dickerson & Conn* hereafter sue Buck, as they may, for a settlement of the trust, they may shew, that there are yet other debts of their firm, for which the fund is primarily liable, and that there is no residuum; and they will have a decree accordingly. This decree, in this case, will be no barrier to it. Thus between the two inconsistent decrees, Buck must inevitably suffer.

The necessity of parties in interest being parties to the cause, is peculiarly strong in cases of trust. As a general rule, in all cases of suits by or against a trustee, or for the settlement of a trust subject, the cestuis que trust are essential parties. *Malin v. Malin & al.*, 2 Johns. Ch Rep. 238; *Kirk v. Clark*, Prec. in Ch. 275; *Adams v. St. Leger*, 1 Ball & Beat. 181; *Clark v. Long*, 4 Rand. 451. The only known exception is, where the parties are so numerous as to render it extremely inconvenient to join them all, and the court has permitted a few to sue on behalf of themselves and others; as in the case of various companies not incorporated. 2 Madd. Ch. Prac. 173. But here *Dickerson & Conn* are the only parties wanting; they fairly represent their own creditors, if these last be even considered cestuis que trust.

This case, however, presents the singular fact of a debtor who has conveyed his property in trust for his creditors, being
12 *aided in drawing these funds out of the hands of the trustee, by the decree of the court of chancery, without giving the creditors an opportunity of contesting it, and of saying whether the fund will be adequate to their demands or not; and this too when the trust expressly provides, that the trustee shall not be bound to see into the accounts. It must be observed that the appellees' testator was not one of the creditors secured by the deed. The funds were to be applied to the payment of the debts due by *Dickerson & Conn*, and such debts of *Dickerson & Amis* as Buck was bound for. Now, *Pennybacker* was not a creditor of *Dickerson & Conn*, but of *Dickerson & Amis*; therefore, he did not come under the first description of persons. Nor was Buck bound for *Dickerson & Amis's* debt due to him; therefore, he did not come under the second. He was not then a cestui que trust, and the only way in which his debt could have been made payable out of the fund was by a draft of *Dickerson & Amis*, who were to have the residuum. This draft he obtained. It was a draft, then, on the residuum; and the payment of the draft to

the order of Dickerson & Amis, would have been a payment to themselves, of a part of that residuum, which they were to have after the debts of Dickerson & Conn were paid, and not till then. Yet this has been decreed by the chancellor to be paid, without giving the cestuis que trust, Dickerson & Conn, an opportunity of contesting it, and of shewing that the fund will be insufficient to pay even them. If this should prove to be fact, Buck must pay this money over again to them; or, if he prove to be insolvent, then the cestuis que trust will have lost their debts, in consequence of the trustee, under the order of the court, having violated the trust, and dissipated and misapplied the trust subject.

The analogy to the case of a suit against an executor, which was suggested by Mr. Johnson, at first view, appeared to me to be apt. But it is said, that the case of suits by creditors and legatees against an executor, form an exception to the general rule as to parties. Brown v. Rickett's ex'ors

13 * &c., 3 Johns. Ch. Rep. 555. Yet even where a residuary legatee or a distributee sues, he must make all persons parties, who are to share with him that residuum. And so I conceive, even in the case of legatees, if a testator direct a particular part of his estate to be divided between three persons, all must be parties in a suit against the executor; or if he directs one half of his personal estate to be given to A. and the residue to B.—B. cannot sue the executor for his residuum, without making A. a party. Much more, if the devise had been to sell a particular estate, and out of the proceeds to pay first the debts of the testator's son A. and then to pay the residuum to his son B. would it be necessary in a suit for the residuum, to make A. a party. For where a fund is to be distributed among several, it is common justice, that all who are to partake of it, should be present at the division, that they may see they get their proper portion. Had Pennybacker been a creditor named in the deed of trust, it could not have been questioned that it was necessary that the other claimants should be parties. Is the case not yet stronger, when his claim is for the residuum? The suit here, is in effect for the residuum, and the whole residuum; for even the whole is insufficient to pay the demand. It is a demand of that residuum, too, in right of the debtor to whose order it is to be paid. Now, is it not a judicial solecism to decree the residuum of a fund for payment of debts, to the debtor, without convening the creditors before the court, and giving them an opportunity to shew, that after the payment of their demands, there will be no residuum. I think it is; and, therefore, am of opinion to reverse the decree.

Decree affirmed.

14 *Williams v. Snidow.

November, 1832.

(Absent CABELL, J.)

Adversary Possession—What Constitutes*—Case at Bar.—C. being seized of land in fee, agrees to sell

***Adversary Possession—What Constitutes.**—It is not every possession of land for the period prescribed by the statute that constitutes adversary possession under the law, and will sustain the plea. The possession to be adverse must be actual, exclusive, open and notorious, and be accompanied with a *bona fide* claim of title against the claim of all

and convey the same to J. and receives the purchase money, and puts him in possession, but does not make a conveyance to him; J. agrees to sell and convey the same land to W. and puts him in possession, but W. not paying the purchase money, this contract is rescinded, and W. agrees to give up to J. all his claim to the land; W. nevertheless, remains in possession, without paying any rent, and without pretence of title; and while W. is thus in possession, C. conveys the title to J. by deed of bargain and sale: *Held*, W.'s possession was not an adversary one, and, therefore, C.'s deed to J. passed the legal title to him, so that C. cannot maintain a writ of right against W. for the land.

Writ of right brought by Christian Snidow against Abraham Williams, in the circuit court of Giles, for 196 acres of land. The pleadings were in the form prescribed by the statute, 1 Rev. Code, ch. 118, p. 463, 4, and the mise joined on the mere right. The jury found a special verdict, stating the following case:

The land in question was granted by the commonwealth to Christian Snidow, the demandant, by grant regularly issued from the land office, dated September 12, 1787, under which the grantee entered, and was seized in fee; and being so seized, in the year 1796, he covenanted, by articles in writing, to sell and convey the land to John Byars; who, thereupon, received and held the possession, and paid the whole purchase money, but no conveyance was ever executed to him. Byars having thus acquired possession of the land, and a right to demand a conveyance thereof from Christian Snidow, by articles in writing executed in October 1799, covenanted to sell

other persons, and be continued for the period prescribed by the statutory bar. *Drumright v. Hite*, 2 Va. Dec. 467, citing the principal case, *Creekmur v. Creekmur*, 75 Va. 480, and *Chapman v. Chapman*, 91 Va. 397, 21 S. E. Rep. 813. "Adverse possession is not the mere holding over against the will of the party from whom you obtain the possession. It is the holding by claim of title, adverse to another's title, that constitutes an adverse possession." *Chapman v. Chapman*, 91 Va. 400, 21 S. E. Rep. 813, quoting with approval from the opinion of *PRESIDENT TUCKER* in the principal case.

So it is well settled that the possession of the purchaser of land, under an executory contract is not adverse to his vendor, although he has paid all the purchase money and used and occupied the land for his own exclusive benefit. The contract, being executory and made in contemplation of a conveyance by a deed, recognizes the legal title as outstanding, and his possession will be treated as in subordination thereto and not as adverse. *Core v. Faupel*, 24 W. Va. 244; *Hudson v. Putney*, 14 W. Va. 575, both citing the principal case. To the same effect, see the principal case cited in *Clarke v. McClure*, 10 Gratt. 310, 311, 314.

For a possession not adversary in its commencement will be presumed not to be adversary in its continuance, unless and until the presumption be repelled by proof that the party in possession claimed to hold adversely to the other and with his knowledge. To this effect, the principal case was cited in *Layne v. Norris*, 16 Gratt. 242, 248 (distinguishing the principal case); *Cross v. Cross*, 9 Leigh 252.

See generally, monographic note on "Adversary Possession" appended to *Nowlin v. Reynolds*, 25 Gratt. 137.

Conveyance—Necessity of Actual Possession by Grantor.—Actual possession by the grantor is not indispensable to give effect to his deed, for if the possession held by another be of a fiduciary character or if its origin and continuance was such as not to amount to a disavowal except at the election of the owner for the purposes of the remedy, it will not impede the operation of the deed. *Early v. Garland*, 18 Gratt. 8, citing the principal case; *Duval v. Bibb*, 8 Call 362; *Tabb v. Balrd*, 8 Call 475.

Statute of Pretense Titles—Effect.—To the point that the statute against conveyance of pretense titles merely creates a penalty and does not affect the right, the principal case was cited in *Middleton v. Arnolds*, 18 Gratt. 491. See also, *foot-note* to *Tabb v. Balrd*, 8 Call 475, *foot-note* to *Middleton v. Arnolds*, 18 Gratt. 489.

the land to Jacob Snidow, and put him in possession; and Jacob Snidow paid Byars the whole purchase money, but no conveyance was executed to him, at the time, by either Byars his immediate vendor, or Christian Snidow in whom the legal title yet remained.

Jacob Snidow, in 1803, by a verbal contract with Abraham *Williams, the tenant, agreed to sell him the land, and he put him in possession of it, and Williams paid him some part of the purchase money; but in the year 1807 or 1808, this contract between Jacob Snidow and Williams, was rescinded by them, and the latter gave up to the former all the claim he had to the property; nevertheless, Williams continued in uninterrupted possession to the present time, exercising in-tire control over the subject, without paying any rent to Jacob Snidow, Christian Snidow, or any other person, though he never pretended any other claim or right than that which he derived from the contract between him and Jacob Snidow made in 1803, and rescinded in 1807-8. Christian Snidow, by deed of bargain and sale, dated in November 1824, conveyed the land to Jacob Snidow, Williams being still the tenant in actual possession, as above mentioned; and, not long afterwards, Jacob Snidow demanded the possession of Williams, who refused to give it to him. Whereupon, the writ of right in this case, was sued out in the name of Christian Snidow. And the question referred to the court, was, whether the legal title of the land was in Christian Snidow, the demandant? in other words, whether or no his conveyance to Jacob Snidow of November 1824, executed while Williams still held the possession as above mentioned, operated to pass the legal title to Jacob?

The circuit court gave judgment on the special verdict for the demandant; and Williams, the tenant, appealed to this court.

The case was argued by Johnson for the appellant, and Daniel for the appellee. The only question was as to the nature of the possession held by Williams at the time of Christian Snidow's conveyance to Jacob in November in 1824—whether that possession was an adversary one, and so prevented the conveyance from operating to pass the legal title? If it was, the legal title remained in Christian Snidow notwithstanding the conveyance, and the suit was properly brought in Christian's name; but if Williams's possession

16 *was not adversary, then the conveyance passed the legal title to Jacob Snidow, Christian had no right, and the suit should have been brought in Jacob's name.

CARR, J. The only question arising upon this special verdict seems to be, has the jury found an adversary possession in Williams? I think not. His possession certainly commenced legally: it was delivered by Jacob Snidow to him, under his contract of purchase: and the jury find, that, after holding under this purchase for some three or four years, Williams gave up to Jacob Snidow, all claim which he had to the land under the contract, and the contract was then rescinded. Williams's continuance in possession after this, without claim or pretension, I consider as no possession adversary to the right of Jacob

Snidow, but a possession under him; just as if Williams had leased the land from him for years, and at the end of the term, had held over without any agreement. He was, in truth, the tenant of Jacob Snidow, and his possession was Jacob Snidow's; which so far from being adverse to Christian Snidow, was held under the purchase from his vendee Byars. I think, then, that the deed made by Christian to Jacob Snidow thus in possession under him, was valid and operative; and that, upon the facts found, the fee was in Jacob. It follows that the judgment of the circuit court must be reversed.

BROOKE, J. I am of the same opinion.

TUCKER, P. The question in this case, is, whether the deed from Christian Snidow to Jacob Snidow operated to pass the legal title to the land in controversy, from Christian to Jacob? If it did, then at the time of the commencement of the writ of right, Christian Snidow had no title, and judgment should have been rendered for the tenant.

The judgment of the court below has obviously been given upon the supposition, that the possession of Williams 17 *was such an adverse possession as prevented the operation of the deed of bargain and sale from Christian to Jacob, upon the principle of the cases of *Duval v. Bibb*, 3 Call, 362; *Tabb v. Baird*, Id. 475; *Hall v. Hall*, Id. 488; *Clay v. White*, 1 Munf. 162; *Bream v. Cooper's heirs*, 5 Munf. 7; *Hopkins v. Ward*, 6 Munf. 38. I do not think so. The incapacity of a person out of possession, to pass an estate in the land of which another has possession, does not arise out of the statute against pretended titles, as we are told by judge Roane in *Tabb v. Baird*: that statute does not declare the deed void, but leaves its effect to be decided by the principles of the law relative to the subject. According to these principles a man cannot give that which he has not; nor can the statute of uses transfer to the bargainee, a possession which is not in the bargainor; for it only provides that the possession of the bargainor shall be transferred to the bargainee; if he has none, none can be transferred.

It is, however, very justly observed, that this possession may be a statutory possession, and an actual possession is not essential. Thus if A. in actual possession bargains and sells to B., the vendee, before actual entry, has a statutory possession, and may bargain and sell to C. Moreover, it is a familiar principle that the possession of my tenant is my possession. If, therefore, I lease for years, I may nevertheless convey by bargain and sale, and my deed will pass the title. So, if there be a fiduciary possession, it will not impede the operation of the deed; *Bibb v. Duval* and *Tabb v. Baird*. So too, I think it clear, that if I put a party in possession, or if a man holds possession under me, such possession will not impede the operation of my deed. For, to give it that effect, there must be an actual adverse possession. Was there such a possession here?

It is found by the verdict, that Williams came into possession by the consent of

Jacob Snidow, and indeed under a purchase from him, he having in like manner possession derivatively from Christian Snidow, the patentee, who yet held the legal title.

18 That his possession from the time of *his purchase until the rescission of the contract between himself and Jacob Snidow, was an adverse possession, cannot be pretended. He claimed under Christian Snidow derivatively, and not adversely to him; he claimed under his title and not adversely to that title. Until the moment of his refusal to deliver the possession, this state of things continued: he continued in the possession by the permission or sufferance of Jacob Snidow, a privy in title, who held his possession under and not adversely to Christian. Jackson v. Sharp, 9 Johns. Rep. 163. He was strictly a tenant at sufferance; for "an estate at sufferance is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all;" 2 Blacks. Comm. 150. It is not confined to holding over after the determination of a lease for years: even a mortgagor left in possession, is a tenant at sufferance; Patridge v. Bere, 5 Barn. & Ald. 604, 7 Com. Law Rep. 204, S. C. And if a purchaser be let into possession before conveyance of the legal interest, he is a mere tenant at sufferance; Doe v. Sayer, 3 Camp. 8; Right v. Beard, 13 East 210. Here then Williams was, at least after the rescission of the contract, a mere tenant at sufferance. That such a tenant has no adverse possession, it cannot be necessary to establish by reference to authority. It remains, then, to consider, whether his refusal to surrender the possession, changed his character from that of a tenant by sufferance into that of a disseizor? from a rightful possessor into a tortfeasor, against the will of his lord?

That this cannot be, is obvious from various considerations. As the landlord can, at any moment, evict his tenant by sufferance, by entry after demanding possession, his omitting to do so, leaves the tenant still a possession by sufferance. The character of his tenure is not changed until entry. Moreover, even the owner "cannot maintain trespass against a tenant by sufferance, as he might against a stranger; and the reason is, that being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful, unless the

19 *owner of the land, by some public and avowed act, such as an entry is, will declare his continuance to be tortious, or in common language wrongful." 2 Blacks. Comm. 150. I think, indeed, we shall not err in laying it down as a general proposition, that if a person comes into possession lawfully, his or his heirs subsequent unlawful continuance in possession, will not of itself operate as a disseizin, unless at the election of the party injured. Thus it is that though a tenant at sufferance, who has but a bare possession, cannot by continuance of his possession become a disseizor, yet if the owner thinks it more expedient to suppose or to admit himself to be disseized, and his tenant to have gained a tortious freehold, he may do so, and is then remediable by action.

3 Blacks. Comm. 175, 1 Johns. Ca. 88. Such is the case here as to Williams. When the deed was made, he still held as tenant by sufferance; but when the owner found it necessary to seek his remedy by suit, he was obliged to elect to consider himself disseized, and to consider Williams as in of the freehold, in order to maintain the writ of right, which is only sustainable against the tenant of the freehold. Nor will the refusal to surrender the possession to the rightful owner, operate a disseizin against his will. The rightful owner must have been tortiously ousted, either by violence or by some act that the law regards as equivalent in its effect, to constitute a disseizin; for it is an estate gained by wrong and injury. Smith v. Burtis, 6 Johns. Rep. 198. Thus, even a lease for a thousand years made by a tenant at will, is no disseizin except at the election of the owner, Blundel v. Baugh, Cro. Car. 302. And even a bargain and sale by a mere tenant, unaccompanied by livery of seizin, would not operate to divest the seizin of the reversioner; for a particular tenant can only effect this by feoffment, which is therefore called a tortious conveyance, since it can work a disseizin. The rightful conveyances of bargain and sale and lease and release, can never effect this. They only pass what the party lawfully may pass. See on these topics, Co. Litt. 239a, n. 1; Taylor v. Horde, 1 Burr. 60, 111, 5 Cruise's Dig. 371.

20 *From these authorities it is clear, that Williams's refusal worked no disseizin, except at Snidow's election. But if by his refusal, his possession became adverse, it must have operated a disseizin. For, although he who dispossesses a mere tenant for years, may perhaps by disclaiming title to the freehold, avoid the divesting of it, yet it is a universal principle, that he who divests the possession of the tenant of the fee, is a disseizor. Hob. 323, Harg. Co. Litt. 180b, n. 7, 296b, n. 1.

If then there was no disseizin, and by consequence no adverse possession in Williams, the seizin remained in Christian Snidow, until the execution of his deed to Jacob, when it passed to him by the operation of the statute of uses.

It appears to me, that the error in this case has arisen, from a misconception of what an adverse possession means. It is not the mere holding over against the will of the party from whom you obtain the possession. It is the holding by claim of title, adverse to another's title, that constitutes an adverse possession. Though a mere intruder or squatter, without pretence of title, holds possession of my land, and keeps me out of it, such possession does not amount to an adversary possession within the meaning of the law. Having no pretence of title, he cannot hold by title adverse to my title; and this it is which the law meant to protect. It pays no respect to the wrongful intrusion of a party without a scintilla of title. It requires too, that this adverse possession should be made out not by inference but by clear proof, and makes every presumption in favour of the possession being subordinate

to the true owner. *Jackson v. Shark*, 9 Johns. Rep. 162.

These opinions are sustained by the decisions of some of our most respectable tribunals. Authorities upon such a subject, are naturally more abundant in a newly settled country, where adventurers set down, very often, upon the land which suits them best, without pretence of title. Judge Spencer, in the case of *Jackson v. Todd*, 2 Caines 185, remarks, that "it has

been adjudged, that mere possession 21 by "a person claiming no title, is no disseizin of the rightful owner, and consequently he may convey or devise, notwithstanding the statute against champerty and maintenance. That to constitute that possession adverse to the true owner, which is equivalent to a disseizin in spite of him, there need, indeed, be no legitimate right, but it must be accompanied by a claim to the land." And judge Livingston said, "coming in as an intruder, or as a mere occupant, without any claim of title, will not prevent an alienation by the real owner, or be regarded as a holding adverse to his title." In the case before us, Williams had no pretence of title.

The judgment must be reversed, and judgment entered for the tenant.

Bream v. Marsh.

November, 1832.

(Absent CABELL, J.)

Dependent Covenants.—When Construed as Independent.*—Where reciprocal covenants have been contracted, and one party has partially performed the covenants on his part, and has no other remedy for compensation therefor but by action on the covenant, there, whatever be the form of the contract, and even though the covenants are expressly dependent covenants in form, and though they are pleaded as dependent covenants, yet they shall be held independent covenants and the plaintiff shall recover compensation for his part performance.

This was an action of covenant, brought by Marsh against Bream, in the circuit court of Kanawha.

The declaration alleged, that, by sealed articles of agreement between the defendant Bream and the plaintiff Marsh, Bream covenanted with Marsh, in consideration of the covenants therein contained to be performed by Marsh, that, Bream being the owner of a salt well and two furnaces in Kanawha, at which furnaces Marsh was to manufacture salt, Marsh should receive 22 one or both the furnaces, at his election, "in the then state of the same, with the machinery, pumps and appendages, and possession thereof should be given to him on the monday next after the date of the articles; and Marsh covenanted, that he would go on, immediately afterwards, to manufacture the quantity of 14,000 bushels of salt; for which Bream covenanted to pay Marsh after the rate of

ten cents per bushel loose, for the whole quantity manufactured, in consideration of Marsh furnishing the whole of the fuel to be used at the furnaces, which he covenanted to furnish; and Bream also covenanted to let Marsh have one half of all the salt manufactured at the furnaces, in addition to ten cents per bushel on the whole quantity, which last was to be in lieu of all the expenses which Marsh undertook to defray; and it was further covenanted, that, in case the water in the well should fail in quantity or quality, so as to be unfit for the manufacture of salt in the usual way, Bream would, at his own expense, bore deeper in the well, until water of the ordinary quality of the salt waters on the river Kanawha, should be obtained; and that Bream would furnish the usual quantity of metal for the furnaces, which, with the metal, should be restored to him by Marsh so soon as the quantity of 14,000 bushels of salt should be manufactured, but in all events by the 1st day of January next after the date of the articles. And Marsh averred, that he performed all the covenants in the articles contained on his part to be performed, until the water in the well intirely failed both in quantity and quality so as to be unfit for the manufacture of salt; and that Bream had failed to perform the covenants on his part, and had broken the same, in this, that, after Marsh had manufactured 8000 bushels of salt, the water in the well became insufficient, both in quantity and quality, and unfit for the manufacture of salt, and Bream failed and refused, though requested by Marsh, to bore the well deeper at his own expense,—and Bream also refused, and still refused, to pay Marsh ten cents per bushel for the quantity of 8000 bushels,

23 actually manufactured before the failure of the water in the "well,—and Bream also failed and refused to allow Marsh the half of the 8000 bushels of salt so manufactured &c.

Bream pleaded performance of the covenants in the declaration mentioned; and on this plea an issue was made up.

At the trial, Bream filed a bill of exceptions to an opinion of the court, in which it was stated, that he moved the court to instruct the jury, that, under the pleadings in the case, unless the jury should be satisfied from the evidence, that, after the making of the salt proved to have been actually made (namely, 7697 bushels), the water in the well failed in quantity or quality, according to the true meaning of the covenant in that particular, and that thereupon Bream failed and refused to bore the well deeper according to the covenant, Marsh was not entitled to recover any thing for the salt which was actually made. But the court refused to give such instruction, and instructed the jury, on the contrary, that the covenant in relation to the quantity of salt to be made, and the covenant in relation to the price per bushel to be paid by Bream for making the same, were independent covenants; and that Marsh, in order to recover the price of ten cents per bushel for the quantity really made, was not bound to prove, either that he had made the whole quantity of 14,000 bushels in the

*Covenants—How Construed.—Covenants and agreements are construed according to the intention of the parties, and the good sense of the case. Though in form they may be dependent, yet, to prevent injustice, they will be construed as independent, and *vice versa*. *Todd v. Summers*, 2 Gratt. 109; *Osborne v. Cabell*, 77 Va. 406; each case citing *Bream v. Marsh*, 4 Leigh 21, as its authority. The principal case was also cited with approval in *Tait v. Tait*, 6 Leigh 165. See generally, monographic note on "Covenants" appended to *Todd v. Summers*, 2 Gratt. 109.

covenant mentioned, or that the water had failed and that Bream had failed and refused to bore &c. as alleged in the declaration: to which opinion Bream excepted. (The covenant itself, on which the action was founded, was nowise set out in the record).

There was a verdict for Marsh, for 685 dollars 27 cents, with interest &c. But Marsh entered a release of 97 dollars 83 cents (it did not appear, why) and the court gave him judgment for only 587 dollars 44 cents, with interest &c. Bream appealed to this court.

Briggs and Nicholas, for the appellant, premised, that the terms and the intent of the covenants, on both sides, could only be ascertained from the declaration; and they insisted, that however these covenants

might have been in fact, dependent
24 *or independent, the declaration
pleaded them as dependent covenants. It alleged, that Bream covenanted to do what he undertook to do, in consideration of the covenants to be performed on the part of Marsh; and it averred, that Marsh performed all the covenants on his part, until the water in the well failed both in quantity and quality, and that Bream failed and refused to bore the well deeper; which is only an excuse for his own failure of full performance of the precedent covenant on his part; and thus Marsh shewed and pleaded, that the covenants, according to his own understanding, meaning and intention, were dependent covenants. It could not, with any propriety, be held that the intent of the covenants was that they should be independent, when the declaration pleaded them as dependent; yet the circuit court told the jury, in direct opposition to the case as stated in the declaration, that they were independent covenants. Marsh was bound to prove his case as laid in the declaration; Bristow v. Wright, 2 Doug. 665. He was bound to prove, that he had proceeded to perform the covenant on his part, until the water in the well had failed in quantity or in quality, that being the only excuse he alleged for his default of full performance of the covenants on his part. The circuit court held that he was entitled to recover, without proving his case as he had pleaded it.

Johnson, for the appellee, said, that covenants were to be construed to be dependent or independent covenants, according to the intention of the parties, and the good sense of the case; and technical words should give way to such intention; that a covenant going only to part of the consideration on both sides, a breach of which might be compensated in damages, was an independent covenant; and that, even in the case of dependent covenants, when a party has performed a part, for which he can have no other remedy but by action on the covenant, unless the plea goes to the whole consideration, there, from the necessity of the case, and because the defendant has his remedy for the failure of the plaintiff in part, an action may
25 be maintained in the same *manner
as if the covenants were independent. 1 Wms. Saund. 320, note 4, and the authorities there collected. Lewis v. Wel-

don, 3 Rand. 71, 81; Seers v. Fowler, 3 Johns. Rep. 272. As to the argument deduced from the circumstance of the covenants being stated in the declaration as dependent covenants, he referred to Havens v. Bush, 3 Johns. Rep. 387. Marsh must be entitled to recover his ten cents per bushel for the salt he actually manufactured, though it fell some thousands of bushels short of the quantity he stipulated to manufacture, and though it were owing to his own fault that he did not complete the stipulated quantity; otherwise, if he had manufactured 13,999 bushels, he would have been entitled to no compensation whatever, because he had not manufactured the whole quantity of 14,000 bushels. This consideration, he said, was decisive of the case; Lewis v. Weldon, before cited; and Boone v. Eyre, 1 H. Blacks. 273, in notes.

CARR, J. The question is, whether the instruction given by the circuit court to the jury, upon the trial, was correct? It is laid down, that covenants are to be considered dependent or independent, according to the intention of the parties, and the good sense of the case, and technical words should give way to such intention. The authorities on this subject are collected, and the principles deducible from them clearly stated, by sergeant Williams, 1 Saund. 320, note 4. Looking to the good sense of the case, and the meaning of the parties, what feature is there in the contract that would lead to the conclusion, that the plaintiff should receive nothing for his labour and expense, unless he made the whole 14,000 bushels, or shewed a failure of the water, and a failure of the defendant to bore deeper? Justice and good sense would seem to require, that the redress given for a breach of the covenant, should be measured by the injury resulting from that breach: but if these were held dependent covenants, this principle would be reversed; and the

nearer the plaintiff had approached
26 to a full performance, *the smaller the
injury he committed, the greater
would be the redress to the defendant. Thus, if the plaintiff had made 13,000 bushels, the loss resulting to the defendant by the plaintiff's breach would have been trifling, and the defendant would gain the whole quantity made, without paying a cent. To be sure, if parties make such contracts, they must abide by them; but this on the ground of positive contract, not of justice. But here, there is nothing in the covenant (testing it by the rules deduced from the cases) that would, either upon the ground of the intention of the parties, or the good sense of the case, make these dependent covenants. The plaintiff was to have "after the rate of ten cents per bushel, for the whole quantity manufactured:" surely, this does not mean that unless he manufactures 14,000 bushels, he shall have nothing; that would not be after the rate of ten cents per bushel, for the quantity made. He made 7697 bushels; give him his ten cents upon that; and if he has broken his covenant in not making 14,000 bushels, let the defendant sue him, and recover the exact damage he has sustained by the breach. This seems to me

the good sense of the case, and the meaning of the parties. I think the judgment should be affirmed.

BROOKE, J., concurred.

TUCKER, P. This case turns upon the question, whether the covenants of the parties respectively, in the deed declared on, are independent or dependent covenants? The circuit court was of opinion, upon the trial, that they were of the former character.

It was justly said at the bar, in the language of the books, that covenants are construed to be dependent or independent, according to the intention of the parties and the good sense of the case; and technical words should give way to such intention. If the justice of the case requires it, though the words of a covenant are dependent in form, it shall yet be construed to be independent. This was the precise case

27 *of *Boone v. Eyre*. There A. sold a tract of land and a number of negroes to B. and covenanted that he had good title and was possessed of the negroes. B. covenanted, that, A. well and truly performing all things on his part, he, B., would pay a certain annuity. In an action for the annuity, B. pleaded that A. was not legally possessed of the negroes. But though no language could be stronger for the creation of a dependent covenant, yet the plea was held ill; "for, if such plea were allowed, the fact that any one negro was not the property of A. would, on the same principle, bar the action for the price of the land, or, the rest of the slaves, though B. was enjoying the profit of all but one." To avoid this gross injustice, the covenant was construed to be independent, against the express form of the words. Hence, in these cases, the first and most appropriate inquiry seems to be, what does the justice of the case require between the parties?

In the case before us, Bream was the proprietor of certain salt works; Marsh was a manufacturer of salt. Bream let his works to Marsh, put him in possession of them, and bound himself, if the water failed, to bore deeper for more. Marsh agreed to go on to manufacture 14,000 bushels of salt; to pay all expenses and furnish all the fuel; and to return the salt works as soon as the salt was manufactured, but at all events by the succeeding new year's day. And Bream agreed to pay Marsh ten cents per bushel, for the whole quantity manufactured, and to let him have one half of all the salt manufactured, besides. These were the simple terms of this agreement. Suppose it had been fully complied with, and the 14,000 bushels of salt made. What would Marsh the manufacturer have got? 7000 bushels of salt, and ten cents on each bushel manufactured besides, equal to 1400 dollars. What would Bream, the proprietor, have been entitled to? To 7000 bushels of salt, minus ten cents per bushel on the whole quantity manufactured, that is 1400 dollars. And what has he got, as appears by this record under the course

28 *He has got 7697 bushels of salt, minus 587 dollars 44 cents, the amount of the judgment of the court. I am hard of belief, that there can be any error to his

prejudice, in a case which has redounded so eminently to his advantage.

Let us next see what, in fairness, the parties ought respectively to have had under the real state of things. Only 7697 bushels of salt have been manufactured, and we are bound to take it upon this record, that the wells did not fail. Does it follow, because the manufacturer has not made the full amount of 14,000 bushels which he might have made, that he is to have nothing? Is the contract so entire that it can admit of no apportionment, and that the plaintiff must prove he manufactured every bushel before he can shew himself entitled to recover even the ten cents per bushel which were allowed to cover expenses? The affirmative is the answer given to these inquiries in the argument of the counsel for the appellant. If so, the consequence (as Mr. Johnson justly said) is inevitable, that if he had manufactured 13,999 bushels, he would nevertheless not have been entitled to one cent for the labours of a year, and the heavy expenses of such an establishment. Lord Mansfield did not think thus, when overruling the demurrer in *Boone v. Eyre*; he said, "if this were allowed, any one negro not being the property of the plaintiff, would bar the action." And so I say here, if this pretension be allowed, the failure by a single bushel of salt, would bar the plaintiff's action for the whole compensation. This is not reason; neither is it law.

It is said by a learned author, that the spirit of the common law is opposed to apportionment of contracts. See 2 Evans's Pothier, 40. This certainly was anciently strictly true; and it is still true, I imagine, as to all entire contracts, which do not admit of apportionment, and indeed as to many others. In contracts for service between master and servant, the principle seems often very rigorously to prevail; as in the case of a clerk who quitted his employer within

29 *the year for which he engaged to serve—he was held entitled to nothing. *Pagani v. Gandolfi*, and *Huttman v. Bulnois*, 2 Carr & Payne, 370, 510; 12 Com. Law Rep. 177, 239. So too, as to ordinary servants; *Spain v. Arnott*, 2 Stark. Rep. 256; 3 Com. Law Rep. 339. See also *Cutter v. Powell*, 6 T. R. 320, though that case can only be sustained, I think, on the ground, principally relied on, of extra wages. But, notwithstanding these and other cases, which rigorously deny compensation unless there is intire performance, there can be no doubt, that where the subject is divisible, where the failure as to part can be fairly and accurately compensated by an apportionment of the consideration, the law permits, as justice certainly requires, that it should be done. In such cases the parties have their cross actions; as here,—if Bream had not really received full as much as under any circumstances he would have been entitled to, he might have his action against Marsh for the damages. With these views of the case, I do not think it necessary to go into a comparison of it with the strongly analogous case of *Lewis v. Weldon*. It is proper, however, to remark, that the circuit court was not

only right in instructing the jury, that these covenants were to be considered independent, but it was extremely guarded in saying, that the plaintiff was not bound to prove the making of 14,000 bushels of salt, in order to entitle him to recover the ten cents per bushel. There is no intimation, that he was entitled to recover any part of the salt itself; and accordingly he seems to have been allowed none. I certainly think he was entitled to all above 7000 bushels. Nor do I see why the verdict, which I presume was for the 10 cents per bushel, was reduced. Some reason appeared, I suppose, on the trial. Be this as it may, these things were in favor of the appellant, and he cannot complain of them.

Judgment affirmed.

30 *Seekright on Demise of Gilliam v. Moore.*

[24 Am. Dec. 704.]

November, 1832.

Dower—Transitory Seizin of Husband—Deed of Trust for Purchase Money.—G. by deed of bargain and sale, sells and conveys a parcel of land to M. and M. by deed of the same date, conveys the same land to trustees, upon trust to secure the purchase money thereof to G. HELD, the two conveyances shall be intended parts of the same transaction, and the seizin of M. was instantaneous and transitory, so that M.'s widow is not entitled to dower of the land.

Ejectment, in the circuit court of Goochland, by W. B. Gilliam against Anna Moore, for a parcel of land described in the declaration as being "so much of a larger parcel of land lying part in Hanover and part in Goochland counties, containing by estimation 560 acres, more or less, and adjoining the lands of E. L., S. M., W. W. and others, as lies in the county of Goochland." Upon the trial, the jury found a special verdict, stating, in substance, the following case:

W. B. Gilliam being seized in fee of the 560 acres of land, whereof the land in question was parcel, sold the whole 560 acres to J. S. Moore, for £1000. and conveyed the same to him by deed of bargain and sale, dated the 10th October 1804; and Moore, on the same day, by deed of bargain and sale (purporting to be the deed of

Moore and Anna his wife, but she never executed it) conveyed the land to trustees, upon trust to secure payment of the purchase money to Gilliam. Several years afterwards, the whole 560 acres of land was duly sold by the trustees, in pursuance of the deed of trust, to pay the purchase money due to Gilliam; and at that sale, Gilliam himself became the purchaser, and the trustees conveyed the land to him; but before he got possession of it, Moore died. Moore's mansion house was on that part of the land which lay in Goochland; and his widow Anna Moore claimed to hold possession of this part on which the mansion house was situated, until dower of the whole tract should be assigned to

31 *her, under the provisions of the statute, 1 Rev. Code, ch. 107, § 2, p. 403. And the question of law upon the verdict, was, whether Mrs. Moore was entitled to dower of the 560 acres of land or not?

The circuit court gave judgment for her; to which, upon the petition of Gilliam, this court awarded a supersedeas.

Daniel and Lyons, for the plaintiff in error, said, there could be no doubt, that the conveyance of the land by Gilliam to Moore, and the reconveyance thereof by Moore to the trustees to secure the purchase money to Gilliam, were contemporary, and, in fact and in law, parts of one and the same transaction; and that Gilliam's seizin was merely transitory as well as instantaneous, and, therefore, his widow was not entitled to dower. They cited Co. Litt. 31b; 1 Rep. on Prop. 370; 2 Bac. Abr. Dower, c. 2, p. 370; Holbrook v. Finney, 4 Mass. Rep. 566; Clark v. Munroe, 14 Id. 351; Stow v. Tift, 15 Johns. Rep. 458; Childers v. Smith, Gilm. 200.

Forbes and Nicholas, for the defendant in error, insisted, that the verdict did not find, with certainty, that the conveyance by Gilliam to Moore, and the reconveyance by Moore to the trustees, were contemporary, much less that they were in fact, or were intended to be, parts of the same transaction; and the court could not supply the defects of the verdict by intendment or inference from the facts found. For aught that appeared, Gilliam might have made his conveyance to Moore, and Moore being unable to secure the purchase money otherwise, might have agreed to secure it by the deed of trust, after Gilliam's conveyance to him was executed and delivered, and might have executed the deed of trust in pursuance of such subsequent agreement. In such case, Moore's seizin, however short its duration, and though it might have been momentary or instantaneous, would not have been merely transitory, and his widow would have been

entitled to dower. Therefore, Gilliam was not *entitled to judgment on this verdict. They also objected, that the description of the parcel of land claimed in the declaration was so vague and uncertain, that it could not be known whether the circuit court of Goochland had jurisdiction over the subject.

Lyons in reply, shewed, by a critical examination of the declaration, that there was no ground for the last objection.

CARR, J. The first and principal ques-

*This seems to be part of the same controversy which was before this court in 1817, Moore v. Gilliam, 5 Munf. 346.

Dower—Transitory Seizin of Husband—Deed of Trust for Purchase Money.—Where land is conveyed to a husband, and he, by deed of the same date, executes a deed of trust or other incumbrance to secure the purchase money, in which the wife does not join, she will take her dower in the estate subject to the incumbrance. For, in such case, the two instruments are regarded not as separate or distinct transactions, but as parts of the same contract, taking effect at the same time, and investing the husband with a seizin for a transitory instant only; and not such seizin as will entitle his wife to dower. This principle of law seems settled both in Virginia and West Virginia, several cases citing the principal case in support of it. See Wilson v. Davison, 2 Rob. 398; Wheatley v. Calhoun, 12 Leigh 374, and *foot-note*; to Robinson v. Shacklett, 29 Gratt. 99; Summers v. Darne, 31 Gratt. 801; Coffman v. Coffman, 79 Va. 508; Hurst v. Dulaney, 87 Va. 445, 12 S. E. Rep. 800; George v. Cooper, 15 W. Va. 674; Holden v. Boggess, 20 W. Va. 73; Roush v. Miller, 30 W. Va. 641, 20 S. E. Rep. 664; Schmertz v. Hammond, 47 W. Va. 524, 35 S. E. Rep. 952; Randall v. Jaques, 20 Fed. Cas. 233.

See further, monographic note on "Dower" appended to Davis v. Davis, 26 Gratt. 587.

tion arising on this special verdict is, whether under the deed from Gilliam to Moore, a title to the land vested in Moore, whereof his wife was dowerable? I am clearly of opinion, that she was not dowerable. It was objected, that the verdict has not found, that the deeds were executed at the same time, and as parts of the same transaction, and that, this being a special verdict, we cannot draw this inference; but to my mind the finding is abundant to justify, and indeed to compel, the conclusion, that the two instruments were parts of one and the same transaction, and that the seizin of Moore was that instantaneous seizin, spoken of in the books, where the land was merely in transitu, and never vested in the husband. The deeds bear the same date; they are between the same parties; relative to the same subject matter. The vendor conveys the land, for so much money; the vendee reconveys it to secure that money. It is impossible to doubt for a moment, the meaning, connection and (I may say) unity, of the transaction. We have no reported case in our own books directly in point; and this, no doubt, has resulted from the general impression of the bar, that no such right existed in the widow; for the case must have happened a thousand times. The english books, however, all lay down the position that a transitory seizin in the husband for an instant, does not entitle the wife to dower, and the point has been decided in the same way, in Massachusetts and New York. A different decision at this day, would be exceedingly mischievous, and open an inexhaustible source of litigation. With respect to

33 *of uncertainty, it seems to have been founded in misapprehension of the meaning of the declaration. I think the judgment ought to be reversed, and judgment entered for the plaintiff on the special verdict.

CABELL, J. I am of the same opinion. The jury having found that the deed by which Moore acquired title to the land, and also that by which he conveyed it in trust to secure the payment of the purchase money, were both executed on the same day, I am of opinion, that both deeds must, in the absence of proof to the contrary, be regarded as having been executed at the same time, and to have constituted parts of one and the same transaction; and consequently, that Mrs. Moore is not entitled to dower.

TUCKER, P. I have no doubt that the description of the land demanded by the declaration is sufficiently certain, and that no part of what is demanded, lies beyond the county line of Goochland, and so out of the jurisdiction of the circuit court.

Nor have I any doubt as to the operation of the deed from the trustee to Gilliam. That deed was executed shortly before Moore's death. It is found, that Moore was in possession at his death, and that the widow was in possession at the time of the verdict; but no adverse possession is found. This will never be presumed against the true owner, but the law will rather presume, unless the contrary is proved, that the party who has possession holds it for

the owner. And this is done not only to uphold his right, but because the law will always presume that the acts of the party are rightful rather than wrongful. If in this case (as we think) the widow has no title to dower, and if her possession is adverse, then she is a trespasser or disseizor. This the court cannot presume. The jury must find it, and hence the rule that adverse possession must always be expressly found, or such facts as amount to it incontestably.

34 *The real question, in this case, is as to the right of dower. The authorities cited by the counsel for the plaintiff in error, leave no doubt that where the vendor passes the title to the vendee, and at the same times takes a mortgage or deed of trust for the security of the purchase money, in which the wife of the vendee does not join, she will nevertheless take her dower in the estate subject to the trust or mortgage. In such case, the husband is seized but for an instant, and not beneficially for his own use; the deed of conveyance, and the mortgage or deed of trust, are to be considered, like the levy of a fine, as parts of the same transaction and of the same contract; as taking effect at the same instant, and as constituting but one act. If both contracts were contained in the same instrument, there could be no doubt; and it is the same thing though they are contained in different instruments, provided they are parts of the same contract, and make together but one transaction. That they are parts of the same transaction, must be presumed where they are executed at the same time; and, moreover, as they cannot be absolutely isochronous, as there must be some interval, however small, the court ought always to take the same day to mean the same time, unless the contrary be found,—unless it be found, that the acts were separate, distinct and independent.

Judgment reversed, and judgment entered for the plaintiff.

35 *R. & I. Moon v. Pasteur's Adm'r.

November, 1832.

Debts of Decedent*—Priorities.—A debt due by recognition of special bail, is of higher dignity than a debt due by specialty, and shall have preference accordingly, in the administration of the assets of a decedent.

In an action of debt brought by R. & I. Moon against Ware, in the circuit court of Fluvanna, Pasteur entered into recognition of special bail for the defendant Ware; and judgment having been recovered against Ware, a scire facias was sued out against Pasteur, the bail, upon the recognition. The scire facias was executed on Pasteur, but he died soon afterwards, and the proceeding was revived by scire facias against Shores his administrator. Shores the administrator pleaded in bar, that he had duly administered all the assets of his intestate Pasteur's estate, except an amount of assets sufficient to pay a specialty debt due from his intestate to himself, which amount, therefore, he retained to satisfy

*See monographic note on "Debts of Decedents" appended to Shores v. Ware, 1 Rob. 1.

his own debt. To this plea there was a general demurrer. The circuit court held that the plea was a good bar to the scire facias, and gave judgment for the defendant. The plaintiffs, R. & I. Moon, appealed to this court.

Johnson, for the appellant.

Forbes, for the appellee.

TUCKER, P. In the payment of the debts of a decedent, recognizances are always regarded as of higher dignity than specialties. 3 Bac. Abr. Ex'ors & Adm'ors, L. 2, p. 81; Off. of Ex'or, 138; 2 Wms. on Ex'ors, 562. In this case, the recognizance of bail being the solemn acknowledgment of obligation in a court of record, and the bail having been irrevocably fixed for the debt by the return of the scire facias executed before his death, and his failure to surrender his principal, the obligation upon him was complete *and final. Against a debt of this dignity, it was not competent to the administrator of the bail, to retain a debt due by specialty to himself.

Judgment reversed—the demurrer sustained—and judgment entered for the appellants against the appellee de bonis testatoris.

37 *Brown & Sons v. Ferguson.

[24 Am. Dec. 707.]

November, 1832.

(Absent BROOKE, J.)

Bill of Exchange—What Deemed Foreign Bill—Judicial Notice—Law of Sister State.—In an action by indorsee against drawer of a bill of exchange, it is found by special verdict, that the bill was drawn in Maryland on a person in Virginia, and no law of Maryland found, declaring such a bill an inland bill: HELD, the court cannot take judicial notice of any law of Maryland to that effect, unless it be expressly found; and such bill being a foreign bill of exchange, according to the general law merchant, it must be so regarded.

Same—Notice—Time Allowed for Giving.—Every party upon a bill of exchange, even (it seems) a party who is a mere agent for collection, indorsing the bill, though only for the purpose of collection, is entitled to one full day, to give notice to the party next before him, in succession:

Same—Same—Each Party Must Exercise Due Diligence—Onus Probandi.—But the over diligence of one party to a bill, shall not supply the under diligence of others; and though the drawer or indorser sought to be charged, in fact receive notice as early as he would have been regularly entitled to it, yet the holder, in order to charge him, is bound to shew due diligence in each and every party through whose hands the bill has passed; the onus probandi, in such case, lying on the plaintiff, to prove due diligence, not on the defendant, to prove negligence.

Same—Same—Valuer by Drawer—Case at Bar.—A bill of exchange is drawn by a creditor on his debtor, payable sixty days after date; the drawee being advised thereof, before acceptance, writes to the drawer, that he will be unable to pay the bill at its maturity; whereupon the drawer, by letter to the drawee, authorizes him, when the bill approaches maturity, to redraw on himself. In order to raise funds to honor the bill; the drawee redraws accordingly, and then the drawer refuses to accept his bill; but no credit is given, by the holder or any other person, to the drawee, on the faith of the drawer's authority to him so to redraw: HELD, the drawer has not, by this authority to the drawee to redraw, waived notice of dishonor

of his own bill, nor do the facts constitute any excuse for neglect to give such notice; nor is there any assumption to the holder, but only a promise to the drawee, which being without consideration is not binding.

Special Verdict—Uncertain—Effect.—If a special verdict be uncertain, so that the court cannot say for which party judgment ought to be given, there ought to be a venire de novo; but if the verdict be not uncertain, but the plaintiff's case thereby shewn to be a defective case, or a defective title, there should be no venire de novo, and judgment must be given for the defendant.

This was an action of assumpsit, in the circuit court of Norfolk, brought by Brown & Sons, indorsees of a bill of exchange, against Ferguson, the drawer. § There was a *great deal of special pleading, on both sides, but the case having been tried at last on the general issue, the jury found a special verdict; and the question was, Whether, upon the case found in the verdict, and upon the merits, the plaintiffs were entitled, on any ground, to recover?

1. It was found, in the special verdict, that the bill of exchange, on which the action was brought, was drawn on the 30th January 1817, at Baltimore, Maryland, by Ferguson a merchant of that city, on Foster & Moore merchants of Norfolk, Virginia, in favor of M'Donald & Son of Baltimore, for 3775 dollars, payable sixty days after date; and was, on the same day, indorsed in blank by M'Donald & Son for Ferguson's accommodation, and put into the hands of a broker of Baltimore, to be sold on Ferguson's account. The broker sold it, the next day, to Brown & Sons, who filled up the blank indorsement of M'Donald & Son, and made it an indorsement in full to W. & J. Cummings of Petersburg, Virginia, to whom they sent the bill for collection; so that the name of Brown & Sons, the real holders of the bill, did not appear upon it. W. & J. Cummings indorsed it in blank to Wilder, cashier of the bank of Virginia at Petersburg, who indorsed it in full to Williamson, cashier of the same bank at Norfolk, and forwarded it to him, to be presented to the drawees for acceptance, and payment at its maturity, according to the usages of the bank in such cases. The bill was presented to Foster & Moore, at Norfolk, for acceptance,

§ **Special Verdict—Uncertain—Effect.**—The proposition laid down in the last headnote—that if a special verdict is imperfect by reason of any ambiguity or uncertainty, so that the court cannot say for which party judgment ought to be given, there ought to be a venire de novo, but that, if the verdict be not ambiguous or uncertain, in itself, but the case made by the plaintiff is a defective case, or a defective title, then the judgment should be for the defendant and a venire de novo should not be granted—has met with approval in several subsequent cases. See, citing the principal case, Taylor v. Hill, 10 Leigh 466; Anderson v. Com., 18 Gratt. 301; McCrowell v. Burson, 79 Va. 295; Oney v. Clendenin, 28 W. Va. 48; Williams v. Ewart, 20 W. Va. 668, 2 S. E. Rep. 886.

Same—Inferences by the Court.—Although it is an inflexible rule that the court upon a special verdict cannot infer other facts from those found, yet it is the province of the court to make all legal inferences from the facts found in the verdict. Layne v. Norris, 16 Gratt. 242, citing the principal case; Robertson v. Ewell, 8 Munf. 1; Betty v. Horton, 5 Leigh 618; Charlton v. Gardner, 11 Leigh 281, and Purcell v. Wilson, 4 Gratt. 16.

§ It did not appear, that any suit had been brought on the bill in Maryland, though defendant resided at Baltimore: this action was brought many years after the transaction, against Ferguson, then at Norfolk.—Note in Original Edition.

***Bill of Exchange.**—See generally, monographic note on "Bills, Notes and Checks" appended to Archer v. Ward, 9 Gratt. 622.

†**Same—Notice—Time Allowed for Giving.**—In discussing this subject, HAYMOND, P., in Cox v. Boone, 8 W. Va. 500, cites the principal case.

To the point that knowledge of dishonor does not constitute notice, the principal case was cited in Bank of Old Dominion v. McVeigh, 29 Gratt. 559.

and accepted, on the 24th March; and, when it came to maturity, namely, on thursday the 3rd April, it was again presented to them for payment; and payment being refused, it was, on the same day, duly protested by a notary for non-payment. The notary returned the bill, with the protest, to Williamson, on friday morning the 4th April, which was the time at which he ought so to have returned it. Williamson sent notice of the dishonor of the bill, to Wilder the cashier at Petersburg from whom he received it, by the next mail, which left Norfolk in the 39 afternoon *of saturday the 5th (but without then returning the bill itself and protest to him) and the notice was received by Wilder at Petersburg, on monday morning, the 7th.

2. It was not found, when Wilder gave notice to W. & J. Cummings, or when the latter put their letter in the post office at Petersburg, giving notice to Brown & Sons, or whether such notices were given at all: but it was found, that Brown & Sons addressed a letter to Ferguson, dated Baltimore, 12th April 1817, giving him notice of the dishonor of the bill, in these words—"Your draft on Foster & Moore, in favor of M'Donald & Son, dated the 30th January last, at sixty days, for 3775 dollars, is this day returned under protest for non-payment; and we have to request that you will have the same immediately settled."

3. It was found, that the course of the mails, at the time, was as follows: the mail was closed at Norfolk, at one o'clock P. M. and left Norfolk at two o'clock, every tuesday, thursday and saturday; and, if it proceeded without interruption, would reach Baltimore in three days; that is, a letter mailed at Norfolk for Baltimore, on saturday the 5th April 1817, would have arrived at Baltimore, in regular course, on tuesday the 8th. And a letter mailed at Norfolk for Petersburg on saturday the 5th, would have arrived at Petersburg, in regular course, on sunday the 6th at night, and been delivered the next morning. From Petersburg to Baltimore there was a daily mail, which was closed at nine o'clock P. M. every day, left Petersburg the next morning, and arrived at Baltimore in about forty-five hours; so that a letter mailed at Petersburg for Baltimore, on wednesday the 9th, would have arrived at Baltimore, in regular course, on friday the 11th. But it was found, that, at that season of the year, the state of the roads between Petersburg and Richmond, and between Fredericksburg and Alexandria, on the mail route to Baltimore, was generally such that delays in the mail might frequently occur, though there was no proof of any such delay having occurred *at the particular period in question, namely, from the 5th to the 12th April 1817.*

*Allowing each party one day to give notice of the dishonor of the bill to the party next before him.—Williamson, to whom the bill was returned protested by the notary on friday morning the 4th April, sent notice to Wilder in due time by the mail from Norfolk of saturday the 5th. Wilder received it on monday the 7th, and ought to have given notice to W. & J. Cummings, on tuesday the 8th. They ought to have forwarded notice to Brown & Sons, the real holders, or to M'Donald & Son, the first

4. It was found, that it was not the usage of the bank at Norfolk, or of the notaries there, in case of bills protested for non-acceptance or non-payment, to send notice of dishonor to the drawer, but only to the person or the bank, from which the bill was immediately received for collection.

5. It was found, that it did not appear, that Ferguson, the drawer, in this case, had sustained any actual damage in consequence of not receiving earlier notice of the dishonor of the bill, other than what the law might presume from the other facts found.

6. It was found, that at the time the bill in question was drawn by Ferguson, and when it was accepted by Foster & Moore, and when it was protested for non-payment, the drawees were indebted to the drawer in a sum exceeding the amount of the bill—but, that Ferguson having advised Foster & Moore that he had drawn the bill on them, they *wrote him a letter on the subject (of which they kept no copy) to which Ferguson returned an answer, dated Baltimore, March 15th 1817, wherein he said—"Your's of the 11th inst. at hand, and note its contents—I am sorry you will be unable to retire the draft, but am well aware of the hard times, and have every disposition to accommodate my friends—When the draft is nearly due, you can draw on me at sixty days, to enable you to take it up; I should like, if possible, you would lessen it—The draft, I think, is due the 1st—4th April." That according to the permission given them in this letter, Foster & Moore, on the 20th March, drew a bill on Ferguson, for 3650 dollars, at sixty days, in favor of J. & W. Southgate of Norfolk, who agreed to give them the cash for it, as soon as they should be advised of Ferguson's acceptance of it: this bill was forwarded to Baltimore, and presented to Ferguson some days before the 3rd April when his own bill on Foster & Moore came to maturity; but Ferguson, notwithstanding his letter of the 15th March, refused to accept it; of which advice was received at Norfolk on the 5th or 6th April.

7. It was found, that when Ferguson's bill on Foster & Moore, was presented by the notary for payment on the 3rd April, they informed him of their draft on Ferguson, and of their arrangement with J. & W. Southgate in relation thereto, to enable them to meet their own acceptance, and requested him to hold up the bill, and to forbear to protest the same, saying, they were sure Ferguson would furnish them funds to

indorsers, by the mail which closed at Petersburg on wednesday the 9th; and then the notice would have reached Baltimore. In regular course of mail, on friday the 11th; and the notice should have been given to Ferguson, the drawer, on the 12th. But as Brown & Sons, in their letter to Ferguson, dated the 12th, stated that the bill was that day returned under protest.—therefore, they did not receive any notice of its dishonor on the 11th; and either Wilder did not give the notice to W. & J. Cummings on the 8th; or, if he did, they did not send the notice to Brown & Sons, by the mail which closed at Petersburg on the 9th; or there was some irregularity in the mails. Yet, by the over diligence of Brown & Sons, who gave notice to Ferguson, the drawer, on the same day they themselves received the bill and protest, he had notice on the 12th, which was as early as he would have been entitled to it, if the most perfect regularity had been observed.—Note in Original Edition.

take it up, for his own credit-sake; but the notary refused to comply with this request. And then, on the same 3rd day of April, Foster & Moore made application to the officers of the bank; and, informing them of the arrangement they had made with Ferguson, and with J. & W. Southgate, to enable them to pay the bill, they requested that it should be held up for a day or two; in consequence of which representation, the bill itself, and the protest, were retained by the bank, till tuesday the 8th, when
42 they were *forwarded by mail to Wilder at Petersburg;* but, the bill and protest were so retained, merely in the expectation (founded on the statement of Foster & Moore) that they might be able to take it up, without any agreement to give them time; and, meanwhile, notice of the dishonor of the bill was forwarded to Wilder by the mail of the 5th April, as above mentioned.

The question referred to the court, was, Whether upon the whole case, as stated in the special verdict, the plaintiffs Brown & Sons were entitled to recover the contents of the bill from Ferguson, the drawer?

The circuit court held that they were not, and gave judgment for the defendant. Brown & Sons appealed to this court.

Stanard and Leigh, for the appellants, said, 1st, that it was very material to ascertain the character of the bill on which the action was founded; that is, whether it was an inland or foreign bill of exchange; and this depended on the law of Maryland, where the bill was drawn and negotiated. By the law of Virginia, a bill drawn here on any other state in the union, was an inland bill, 1 Rev. Code, ch. 125, § 1, p. 483, and so, by a statute of Maryland (as they were informed) a bill drawn there on any other state in the union, was an inland bill. In Maryland also, they said, the statute of 9 & 10 Will. 3, ch. 17, was in force; whereby it is provided, that inland bills of exchange may be protested for non-payment at maturity, and that such protest shall be notified within fourteen days after to the
43 party *from whom the bills were received, who, upon producing such protest, is to repay the bills, with interest and charges from the protesting. This case must be governed by the law of Maryland, the *lex loci contractus*. If this court would take judicial notice of the law of Maryland, it could be easily shewn to the court; and the plaintiffs would be entitled to judgment, since the bill was duly protested, and the protest produced to the drawer within the fourteen days. But, if the court could not take judicial notice of the law of another state, then the special

verdict was defective in not finding the law of Maryland, by which alone the character and effect of the contract, and the manner in which it behoved the holders of the bill to proceed in order to entitle them to recover of the drawer, could be ascertained; and there ought to be a venire de novo.

But, 2ndly, taking this to be a foreign bill of exchange, and that the holders were bound to proceed upon it as such, according to the general law merchant, in order to entitle them to recover against the drawer; then, they said, every party upon the bill, or indorsee, was entitled to one day, to give notice of its dishonor to the party next before him, in succession; and this, whether such parties were bankers or any other, or were themselves the owners, or in fact only agents of the holders; for an agent of the holder by indorsing a bill, no matter with what motive, made himself party to it. 4 Petersd. Abr. 468; Wright v. Shawcross, 2 Barn. & Ald. 501, note a.; Haynes v. Birks, 3 Bos. & Pull. 599; Colt v. Noble, 5 Mass. Rep. 167. Now here, Williamson, the cashier at Norfolk, gave notice of the dishonor of the bill (but without sending at the same time the bill and protest) to Wilder, the cashier at Petersburg and his immediate indorser, in due time, by the mail of the 5th April, which notice Wilder received on the 7th; he had till the 8th to communicate the notice to his immediate indorsers, W. & J. Cummings; they were to send it to Baltimore by the mail which closed at Petersburg on the 9th; and then (supposing perfect regularity of the mails) it would have reached
44 *Brown & Sons on the 11th, and they

were bound to give notice to the drawer on the 12th. They in fact gave the drawer notice on the 12th. It was not found, that Wilder communicated the simple notice of the dishonor of the bill, which he first received from Williamson, to W. & J. Cummings, or that they communicated it to Brown & Sons; but, on the other hand, it was not found, that they did not give the notices, regularly, from one to the other, in succession. It only appeared, that the bill itself and the protest, which were certainly sent from Norfolk by the mail of the 8th, and reached Petersburg on the 10th, were received by Brown & Sons at Baltimore on the 12th. It is perfectly consistent with the facts found, to suppose that Brown & Sons received the simple notice of dishonor on the 11th, and waiting till the next day to give the same notice to the drawer (as they had a right to do), and receiving the bill itself with the protest by the mail of the next day, they then gave notice to the drawer, of the fact of the bill being that day returned protested. Therefore, they said, for aught that appeared, the parties proceeded regularly with the bill. And, they argued, that as notice was in fact given to the drawer on the 12th, which was as early as he was entitled to it, as want of diligence was not found, and as the facts were entirely consistent with due diligence in all parties, it should be intended that due diligence was used by them all. If as early notice was given to the drawer as he was entitled to, it was not necessary to shew that it was transmitted through the

*The bill and protest thus sent from Norfolk by the mail of the 8th, would have arrived at Petersburg, in regular course of mail, on the 9th at night, and been delivered to Wilder in the morning of the 10th; and if they were sent to Brown & Sons by the next mail from Petersburg, which left that place in the morning of the 11th, they would have arrived at Baltimore on the 12th. In the letter of Brown & Sons to Ferguson, dated the 12th, they said that the bill had been that day returned under protest; whence, it seemed, that the return of the bill itself with the protest was the first notice of its dishonor received by them, and that this was on the 12th; and so the court understood the transaction.—Note in Original Edition.

mail. And they endeavoured to maintain, as a just and reasonable general rule, that whenever it appears, that a party to be charged upon a protested bill, has had notice of dishonor as early as he was regularly entitled to it, and yet insists that there has been want of due diligence in any of the parties through whose hands it had passed, so that the timely notice given him was owing to over diligence in other parties, such party ought to be held bound to shew the under diligence in any of the parties, on which he relies to discharge him from liability.

45 *However, supposing the court should not think the appellants entitled to judgment on this special verdict, they said, it did not follow that the appellee was. For if due diligence in each and every party through whose hands the bill passed, was not found, neither was negligence in any of them found; such negligence could only be imputed by way of inference. In this respect also, the verdict was imperfect, and a venire de novo should be awarded.

3rdly. They contended, that Ferguson had, by his conduct in respect to the bill in question, made himself liable to Brown & Sons, whether notice of its dishonor was regularly transmitted to him or not. It was found, that, at the time he drew the bill on Foster & Moore, and they accepted it, they were indebted to him in a greater amount; but it was also found, that, on their representation, he had authorized them to draw on him at sixty days, to raise funds to take up the bill when it should come to maturity. This was, in effect, to give them sixty days further credit for the debt they owed him; and the case was the same as if he had drawn for the money they had contracted to pay him, sixty days before it was due; that is, in other words, before he had funds in their hands. The case, in principle, was like that of *Claridge v. Dalton*, 4 Man. & Selw. 226. Ferguson undertook to furnish funds to pay the bill; and the obvious effect of his promise to accept their bill on him, was to induce them to neglect any exertion to raise money by other means, to meet their acceptance of his bill; and thus his own conduct was calculated to lead to the dishonor of his bill, which, but for his promise and the breach of it, the drawees might have otherwise raised funds to take up. The authority, too, which Ferguson gave Foster & Moore to draw on him, was a letter missive, which they had a right to shew to any party interested in the transaction; and they did, in fact, state to the notary and to the officers of the bank at Norfolk, that they had such authority from Ferguson, that they had drawn on him in pursuance of it, and that they expected funds from that source to take up his bill on them;

46 *all which was calculated to throw the holders of the bill, and all through whose hands it passed, off their guard, as to giving Ferguson notice of dishonor. A drawer thus actively and wilfully accessory to the dishonor of his own bill, and to the failure of the holders to give him regular notice of its dishonor, ought not to be allowed to allege want of such notice to avoid

his liability. A case so singular in its circumstances, ought to form an exception to all general rules, and to be determined on reasons peculiar to itself.

Johnson, for the appellee, as to the 1st point, said, that the general law merchant must govern this case, as it does every case of the kind, unless some local law or usage affecting it, and variant from the general law, was shewn. If it were at all material (which he did not admit) to ascertain, whether the bill in question was a foreign or an inland bill of exchange, it was enough to say, that, according to the general law merchant, a bill drawn in Maryland, on persons in Virginia, and negotiated in Maryland, was a foreign bill, and the holders must deal with it as a foreign bill, in order to entitle them to recourse against the drawer; and that, if the holders relied on the local law of Maryland, as varying the nature of the contract, or constituting, in any way, part of their title to recover, it was incumbent on them to have exhibited the law, and had it found in the verdict. There was no uncertainty or imperfection in the verdict, in this respect; but the plaintiffs' case, as they shewed and proved it to the jury, and as it was accordingly stated in the verdict, was defective. It was the simple case of a foreign bill of exchange protested for non-payment by the acceptor, and not so dealt with by the holders as to entitle them to recourse against the drawer.

As to the 2nd point, he insisted, that, in this case, in order to charge the drawer, notice of the dishonor of the bill ought to have been sent by the bank at Norfolk, directly to the drawer at Baltimore: if that had been done, the notice would have reached Ferguson as early as the 8th. The

rule which allows every party to a bill one full day to give notice of dishonor, in succession, should be confined to parties in interest; certainly not extended to mere agents of the holders, such as W. & J. Cummings were. English authority had been cited, indeed, to shew that bankers through whose hands bills had passed, whether interested in them or not, should be allowed a day to give notice of dishonor, probably out of respect to an established course of business: but no case had gone so far as to allow, for every mere private agent for collection, having no interest in the bill, a full day to communicate notice of dishonor; and it would be most mischievous to extend the rule so far; for, if a bill passed through the hands of many agents, and each were allowed a day to give notice of dishonor to the next agent, and so on in succession, notice to the person to be charged might be postponed till it could be of no use to him. But admitting the rule, in its full extent, as the appellants' counsel stated it, he said, there was manifestly want of due diligence in this case. If the bill itself and the protest was all that was transmitted to Brown & Sons (and their letter to Ferguson of the 12th April, shewed that this was really the case); then it was expressly found, that these were transmitted from Norfolk to Petersburg, by the mail of the 8th, whereas they ought to have been transmitted by that of the 5th.

If the simple notice of dishonor, which was sent from Norfolk to Wilder by the mail of the 5th, were relied on, then it did not appear, that Wilder, who received it on the 7th, communicated it to W. & J. Cummings, or that they communicated it to Brown & Sons, at all: and if they had regularly communicated it from one to another, it ought to have reached Baltimore on the 11th. Yet it appeared, that the earliest notice received by Brown & Sons, was received on the 12th. And though they gave immediate notice to the drawer on the 12th, their over diligence could not make good the under diligence of the other parties through whose hands the bill had passed. *Marsh v. Maxwell*, 2 Camp. 210; *Turner v. Leech*, 4 Barn. & Ald. 451, 6 Eng. C. L. R. 484. In any view of the case, therefore, there was want of due diligence to charge the drawer.

48 *Here too, the imperfection of the appellants' case, was not in the verdict, but in the case itself. They were bound to shew, that notice of the dishonor of the bill was regularly given to the drawer; it was an essential part of their title to recover of him. If they had pretended, that Wilder gave timely notice to W. & J. Cummings, and they gave timely notice to Brown & Sons, it had been easy to prove the facts by those parties; and if proved, they must have been found in the verdict. As to W. & J. Cummings, it was only necessary to prove that they deposited the notice for Brown & Sons in the post office, in time to go by the mail which closed at Petersburg on the 9th April; the irregularity of the mails was not material; and if it was, it was incumbent on the appellants to shew it.

3rdly. The letter from Ferguson to Foster & Moore, authorizing them to draw on him at sixty days, to raise funds to pay his bill on them, could not, in any way help their case. That letter contained no promise to them, nor did they act upon the faith of it. It was most a promise to Foster & Moore, and a promise without consideration, and not binding. The appellants could not possibly avail themselves of it, as an assumpsit to pay them the contents of the bill. And it was well settled, that it did not dispense with regular notice of dishonor; it only proved that Ferguson had reason to apprehend that the bill would be dishonored; but even positive knowledge of dishonor was not equivalent to notice. *Nicholson v. Gouthit*, 2 H. Black. 609; *Staples v. O'Kines*, 1 Esp. 332; *Clegg v. Cotton*, 3 Bos. & Pull. 239; *Esdaile v. Sowerby*, 11 East 114, and the other cases collected in Chitty on Bills, 264, & seq.

CARR, J. This case was admitted, in the argument, to depend entirely on the special verdict; I have therefore confined my examination to it. Two points were considered as arising out of it: 1. Whether a regular notice of non-payment of the bill, was necessary, under the circumstances, to charge the drawer? 2. Whether such notice was given?

49 *Upon the reason and justice of the case, I at first felt doubts, whether the drawer was entitled to strict commercial notice. There is no doubt, that he was authorized to draw the bill, for the jury find,

that the drawees owed him the sum for which it was drawn. This, under the general rule, would entitle the drawer to notice. But it is also found, that before the bill was presented for acceptance, Foster & Moore, the drawees, having been advised of it, wrote a letter to Ferguson, the drawer, on the subject; in answer to which letter Ferguson writes—"I am sorry you will be unable to retire the draft"—"When the draft is nearly due, you can draw on me at sixty days, to enable you to take it up." It is found also, that when the time for paying the bill drew near, the drawee did draw on Ferguson for the purpose of meeting it; that this bill was sold, on condition that Ferguson should accept it; and was sent on and presented to him, and dishonored by him. These facts seemed to me to shew, clearly, that Ferguson had, if not a perfect knowledge, the strongest grounds to conclude, that Foster & Moore would not pay the bill he had drawn on them; and, therefore, was not entitled to strict notice. An examination of the subject, however, has satisfied me, that my first impressions are in opposition to the fixed and settled law of the subject. *Nicholson v. Gouthit*, 2 H. Blac. 609, is the leading case on the point, which has been since uniformly followed. In *Esdaile v. Sowerby*, 11 East 117, the indorser of a bill had full knowledge of the bankruptcy of the drawer, and the insolvency of the acceptor, before and at the time when the bill became due; yet the court held, that this did not dispense with the necessity of giving such indorser regular notice of the dishonor of the bill. The case of *Staples v. O'Kines*, 1 Esp. Rep. 332, seems directly in point to the present case: in an action against the drawer of a bill, the defence was want of notice; the plaintiff called the acceptor, who proved, that when the bill was drawn, he was indebted to the defendant in more than the amount, but 50 that he then represented to *the defendant, that it would not be in his power to provide for the bill, when it should become due, and that it was, therefore, then understood between them, that the drawer should provide for it: and it was contended that this superseded the necessity of giving the drawer notice: but lord Kenyon held that it did not, and non-suited the plaintiff. There are many more cases to the same point. The authority of these adjudications, and the reason on which they are founded, satisfy me, that the drawer, in the case before us, was entitled to regular notice of the non-payment of the bill by Foster & Moore.

Has he received such notice? The general rule is, that each party must give notice of dishonor of a bill, as soon as he reasonably can; and this reasonable time is a question of law, depending upon the circumstances of each case. Where persons live in the same town, notice must be given the next day; where they live at different places, notice should be sent by the next post; each party having a full day to give notice, but not so that the over diligence of one shall be made to supply the under diligence of another. To this standard, let us bring the facts found by the special ver-

dict. They are substantially these: the bill was protested on the 3rd April and returned to the bank at Norfolk, on the 4th. By the next mail, which left Norfolk on the 5th, a notice of the dishonor of the bill (not the bill and protest) was forwarded to Wilder, which reached him on the 7th; thus far, all was regular. The jury has not found when Wilder gave notice to W. & J. Cummings, nor when they gave notice to Brown & Sons; but it is found that there was a daily mail from Petersburg to Baltimore, reaching the latter place in about forty-five hours, and that Brown & Sons gave Ferguson notice of the non-payment and protest on the 12th April, at Baltimore; saying "Your draft &c. is this day returned under protest for non-payment." It is further found, that the bill and protest were forwarded from Norfolk to Wilder on the 8th April, being the second mail after the protest. From these

51 facts, the conclusion seems *irresistible, that there must have been a delay of twenty-four hours more than there ought to have been, in the arrival of the notice at Baltimore: for Wilder receiving notice on the 7th, was bound to give it to W. & J. Cummings on the 8th; and they ought to have given it to Brown & Sons by the mail of the 9th; which if they had done, it would have reached Baltimore on the 11th; whereas no notice was in fact received by Brown & Sons, at Baltimore, till the 12th. And though Brown & Sons gave immediate notice to Ferguson on the same day, yet this over diligence on their part could not cure the want of due diligence in any of the parties standing before them.

No doubt there might have been causes excusing the delay; but if such had existed, they ought to have been found; for in special verdicts, the maxim *de non apparentibus et non existentibus eadem est ratio*, applies with peculiar force. Standing as they do, I cannot but say, that the facts found shew such negligence as under the settled rule discharges the drawer.

I have come to this conclusion, not without a feeling of reluctance; for, like some other questions *stricti juris*, this requisition of exact notice does not, in the case before us, seem to lead to the justice of the case. But we must recollect, that the rule which prefers a private hardship to a public inconvenience, applies to no subject of the law, with more force than to that in which the mercantile world is concerned.

I do not think the law of Maryland can have any influence on the case. The judgment should be affirmed.

CABELL, J. I am of the same opinion.

TUCKER, P. The bill of exchange in this case, having been drawn in Maryland by a merchant of Baltimore on a house in Virginia, was by the law merchant a foreign bill; for as to such bills the several states of the union are held to be foreign to each other; *Longdale v. Brown*, 3

52 Wash. *C. C. R. 404. This decision is in conformity with the legislative understanding of the matter: the legislature of Virginia has thought it necessary to provide, that bills drawn in Virginia on other states, shall not be taken to be foreign bills; a provision certainly unneces-

sary, if these commercial securities had been deprived of that character by the mere act of the adoption of the federal constitution. As to bills drawn in other states on Virginia, the statute is however silent. It may well indeed be doubted, whether it could have declared bills drawn and negotiated elsewhere, though drawn in Virginia, to be inland bills; since this would have been to declare the law of the contract of another jurisdiction. Be this as it may, it has not thought proper to do so; and, therefore, the principle of the law merchant remains unchanged, in its application to this bill, unless the law of Maryland has expressly enacted otherwise: this is not found by the verdict, and cannot be presumed. Considering the bill in this light, the question is, Whether there has been due diligence on the part of the holders?

The transaction relative to the engagement of Ferguson to accept the bill of Foster & Moore, for the purpose of enabling them to take up his bill on them, has been introduced with a view to strengthen the plaintiffs' case. I do not think it varies it. It neither amounted to an *assumpsit*, of which the holders of the bill could avail themselves, nor can it have the effect of a waiver of notice. 1st, It cannot amount to an *assumpsit* to Brown & Sons; it was only an engagement with Foster & Moore to accept; and this without consideration, for they were Ferguson's debtors. It was, therefore, revocable at any time, until either Brown & Sons, or some third person, on the faith of that engagement, had advanced their money or given credit to Foster & Moore. Had J. & W. Southgate, for instance, purchased absolutely, Ferguson might have been bound. But their purchase was qualified by a condition, that the bill should be accepted before they advanced their money; thus leaving Ferguson still

53 at liberty to accept or to refuse payment of the bill. So, "if Brown & Sons had accepted a bill of Foster & Moore on Ferguson, in payment of the first bill, or had even given credit on the faith of Ferguson's engagement to accept, Ferguson might have been bound. But the verdict expressly finds, that they gave no credit; they stood upon their rights, as holders of the protested bill, which is the foundation of the present controversy. 2ndly, The agreement to accept and the knowledge of the drawer in anticipation, that the bill would not be paid, did not amount to a waiver of notice. It has been long since settled, that notice or rather knowledge by anticipation, will not dispense with the necessity of notice of non-payment. Even the known insolvency of the drawee will not have that effect; for, as many means of securing payment may exist through the assistance of friends or otherwise, it is reasonable that the drawer or indorsers shall have notice that the holder designs to look to them, in order that they may have the opportunity of availing themselves of such means. Knowledge of the fact of insolvency, or that a bill will be dishonored, is one thing, and notice of protest for non-payment is another. For, until the drawer or indorser receives such notice, he has no reason to conclude that

resort will be had to him. He is lulled into security, instead of being awakened to the necessity of providing for his own indemnity. If he receives no notice of dishonor, he may reasonably conclude, either that contrary to expectation, the bill has been paid, or that the acceptor has been able to provide for it by redrawing or otherwise, or that the holder, notwithstanding the failure to pay at maturity, may hold up the bill from his confidence in the house, and may prefer to look to the acceptor as a matter of convenience. Thus, if a bill were drawn in Richmond on London, in favor of a London merchant, and was not paid at maturity, the payee might nevertheless find it more convenient to arrange with the acceptor in London, than to send back the bill to Virginia for collection. When, therefore, notice is not given, the drawer is diverted from the necessity of providing for his own safety, by the supposition that the holder has given credit to the

54 acceptor. A distinction, however, has been attempted, in this case, because it appears the holders here were informed, that the drawer had notice by anticipation. I do not think this makes any difference. The drawer still had a right to due notice, in order that, knowing of the intention to look to him, and being distinctly informed that what had been anticipated had really occurred, and that no provision was made for taking up the bill, he might provide for his own safety. Even, if the case of *Brett v. Levitt*, 13 East 214, be deemed altogether reconcilable with the current of decisions from *Nicholson v. Gouthit* to *Esdaile v. Sowerby*, yet that case would not sustain this: for there, it appeared, that the holder received notice of the fact of the anticipated dishonor from the drawer himself, and this too upon his own express application to the drawer to know if the bill would be paid; but here, the drawer was not at all aware, that the holder had been informed that he (the drawer) had had notice that the bill would not be paid. He could not, therefore, attribute the failure of the holder to give notice, to any such cause, but was left to the conclusion that the holder did not design to look to him, and had either given time, received payment contrary to expectation, or had otherwise arranged with the acceptor. Nor could Ferguson's offer to accept a new bill have lulled the holders into security; since they must have been aware, that it was a revocable promise until some bill had been negotiated upon the faith of it; and, in fact, they were not lulled into security; for, though they held up their protested bill for a few days, they stood upon their rights as holders, and proceeded to give notice of the protest for non-payment.

Was notice duly given? The bill was returned by the notary to the bank on the 4th April; notice was sent to Wilder on the 5th, and he received it on the 7th; this was in due season. If he gave notice to W. & J. Cummings on the 8th, and they transmitted a notice to the parties in Baltimore, on the 9th, it would have reached there on the 11th; and then a notice to the drawer on the 12th, would have been good. Now,

the drawer did receive notice on 55 *the 12th, which was as soon as he had a right to receive it, provided the intermediate parties had proceeded regularly. But it is not enough, unless it is also shewn that each indorsee gave notice within a day after receiving it: if there be a defect in any link of the chain of notices, it is fatal to the holder's demand. We can not eke out the under diligence of one party, by the over diligence of another. This is settled by authority, and upon sound reason: for, as the recourse of any immediate indorser against those who lie behind him, arises from his own liability to pay the bill to him to whom he passed it, the laches which takes away his liability, takes away theirs also. The instant such laches occurs in any, all who might otherwise have been liable are discharged at once. It would be unreasonable to permit the over diligence of a prior indorser, to give new life to a responsibility which had once been annihilated by the negligence of another party to the bill. It is, therefore, not sufficient, that, in the aggregate, the drawer had notice as soon as he had a right to expect it. The plaintiff must shew that each indorsee has given regular notice. The onus as to this matter is upon him. He recovers upon the ground, that he has used diligence and given due notice; and, therefore, he must shew due diligence and due notice. And it is not more incumbent upon him to prove that the drawer in fact received notice of the non-payment and protest, than it is to shew that the notices have all been regular in the several gradations. This is a part of his title; and seems, moreover, to be a matter which cannot be permitted to rest upon mere inferences, but must be expressly proved; *Lawson v. Sherwood*, 1 Stark. Rep. 314; 2 Eng. C. L. R. 405. In this case, such proof must have been in the power of the appellants, if the fact was as their case requires. W. & J. Cummings and Wilder must have been able to establish when they respectively gave notice, if they gave it at all. If we look to the special verdict, it is a blank as to these notices. It does not appear, that any other notice was forwarded from Petersburg to Baltimore, except the bill and protest; and these could not have been 56 sent on until the *10th, as they left Norfolk on the 8th, and must have reached Petersburg on the 10th, according to the usual course of mail. This was too late, and accordingly they were not received until the 12th, as the letter of notice of Brown & Sons explicitly proves.

Thus, then, it appears the special verdict does not set forth a good right of action on the part of the plaintiffs. They have failed to establish the various facts upon which alone the defendant could be made liable. Feeling well satisfied of the hardship of the case, and that the rigorous rules as to these commercial securities, which a just policy requires to be inflexible, probably work injustice in this case, I have earnestly revolved this matter in my thoughts, with a view to discover whether a *venire de novo* could with propriety be awarded. I am satisfied, upon the maturest reflection, that it cannot. If a verdict is

indeed imperfect by reason of any ambiguity or uncertainty, so that the court cannot say for which party judgment ought to be given, a venire de novo ought to be awarded. *Brown & Rives v. Ralston & Pleasants*, 4 Rand. 504. But if the verdict be not ambiguous or uncertain in itself, but the case made by the plaintiff is a defective case, or a defective title, then the judgment should be for the defendant and a venire de novo should not be granted. *Bellows v. The Hallowell and Augusta Bank*, 2 Mason 31. Now, in this case, there is nothing ambiguous or uncertain; but there is a total failure to trace down the notices from Wilder to Ferguson, through W. & J. Cummings; which was essential to the plaintiffs' right of action. With every disposition therefore to have sustained the plaintiffs' action, if it could have been done consistently with settled rules, I am compelled to give my judgment against them; saying with the lord chief justice in *Nicholson v. Gouthit*, in reference to these commercial securities, that "it is, perhaps, better to adhere to a rule, however strict, than to relax it," although the justice of the case be, without doubt, on the side of the party against whom it operates.

Judgment affirmed.

57 *Newcomb v. Drummond.

November, 1832.

Appeals—Destruction of Record Pending—Right to Bring Debt on the Judgment.*—D. recovered judgment against N. from which N. complaining of error, regularly took an appeal: but before this appeal was or could be prosecuted, the office of the clerk of the court, and with it the record of the judgment, were destroyed by fire, and therefore the appeal was never prosecuted: then D. brought debt on the judgment whereof the record was so destroyed: HELD, he was entitled to recover, notwithstanding the appeal taken from the judgment, and the circumstances which prevented the prosecution thereof.

Debt by Drummond against Newcomb, in the county court of Gloucester, upon a judgment of the same court for 100 dollars, previously recovered by the former against the latter, in an action of trespass, assault and battery. The declaration excused the production of the record of the action and judgment, by stating that since the judgment was rendered, the clerk's office had been consumed by fire, and this record among other papers wholly destroyed. Newcomb put in a special plea in bar, alleging that the proceedings and judgment in the action of assault and battery against him were erroneous, and shewing particularly wherein they were supposed to be so, and that he had filed a bill of exceptions to the proceedings, taken an appeal from the judgment, and given an appeal bond, but that before his appeal was or could be prosecuted, or any steps taken to prosecute it, the clerk's office, and this record therein contained, had been wholly consumed by fire; concluding with a verification. And upon this plea an issue was made up.

At the trial in the county court, Newcomb filed a bill of exceptions to an opinion

of the court, stating, that Drummond having proved, by parol testimony, the rendition of the judgment in the action of assault and battery against Newcomb, and Newcomb's appeal from the same, and due execution of the appeal bond, and the subsequent destruction of the clerk's office by fire, and of the whole record of the action of assault and battery,—Newcomb, thereupon, moved the court to instruct the jury, that this action of Drummond
58 *could not be maintained; but the court refused to give such instruction, and instructed the jury, on the contrary, that though the effect of Drummond's judgment was suspended by the appeal taken by Newcomb, yet the judgment was an evidence of Drummond's demand; to which opinion Newcomb excepted.

There was a verdict and judgment for Drummond. The circuit court of Gloucester, upon a supersedeas awarded at the instance of Newcomb, affirmed the judgment of the county court. And then he applied to this court for a supersedeas to the judgment of the circuit court; which was awarded.

Johnson for the plaintiff in error; no counsel for the defendant.

TUCKER, P. There is no error in the judgment. In considering the case, it shall be taken for granted, that the plea sets forth, distinctly, the fact that an appeal had been taken and consummated by giving bond, but that by the burning of the record the party could not take steps to prosecute his appeal. The appeal of a party can have no greater effect upon the judgment appealed from, than a writ of error awarded by a superior tribunal: if there be a difference, that difference would preponderate in favor of the considerate act of a court, rather than the arbitrary appeal of the party. Now, it is no bar to an action of debt upon a judgment, that a writ of error has been awarded. The writ of error is, indeed, so far a supersedeas to the judgment, that an execution cannot regularly be issued upon it, and if issued will be quashed. But an action of debt may, nevertheless, be brought upon it; and unless for some cause, deemed adequate by the court, the proceedings be suspended, the plaintiff will be entitled to his judgment. 2 Wms. Saund. 101, h; 1 Tidd 574, 5, 6. On the judgment so obtained, an execution will not, generally, be permitted, until the writ of error is determined;
59 but the rule is *not uniform, but depends upon circumstances. Thus, where the plaintiff obtained judgment in the second action, before the writ of error sued out to the first, he was permitted to take his execution. *Bishop v. Best*, 3 Barn. & Ald. 275; 5 Eng. C. L. R. 281. And in *Fisher v. Emerton*, 1 Stra. 526, where the plaintiff got the second judgment against the bail, on a scire facias, pending the writ of error, the execution levied on their bodies was not set aside; the court saying that as the party did not apply to stay the proceedings, the court would not set them aside. In the present case, then, Drummond was entitled to the second action on the judgment. Now was it a vexatious one; for the destruction of the record ren-

*Appeals.—The principal case is cited in *Hudgins v. Marchant*, 28 Gratt. 183. See monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 263.

dered it the most proper, as it certainly was the fairest, course. Therefore, the instruction of the court was not erroneous to the prejudice of Newcomb; for if he could have produced the fullest evidence of an appeal or writ of error, it could not have barred the action. The plea was, in fact, an immaterial plea; and had the verdict been for Newcomb, Drummond would have had judgment non obstante veredicto. The verdict having been for Drummond, the judgment upon it cannot be questioned.

It must be observed, too, that the plea distinctly admits, that by burning of the papers, the party could take no steps to prosecute his appeal. His appeal then was not prosecuted. Putting technicalities out of view, it may be asked, whether a plaintiff who has obtained a verdict of twelve jurors and the judgment of a court in his favor, shall be debarred of his judgment by an appeal which his adversary has never prosecuted, and which he certainly cannot now prosecute. The destruction of the record may have operated a prejudice to him perhaps; but if this unprosecuted appeal, which cannot now be prosecuted, is to have the effect of a reversal of the judgment out and out, the plaintiff will sustain greater injury. In a question whether the consequences of this accident should fall on the plaintiff who had the verdict of a jury and the judgment of a court in his favor, or on the defendant who complains that that court erred in its decisions, we should not hesitate.

60 *There was a mode, perhaps, in which the appeal might have been prosecuted. The facts might have been ascertained as to the bill of exceptions and the consummation of the appeal by the execution of the appeal bond, under the provisions of the statute, 1 Rev. Code, ch. 130, and then, it is possible, the transcript of the evidence obtained might have been acted on by the court of appeals. It struck the court, at first, that Drummond could only have been permitted to prove his case by evidence taken under that statute; but, as there was no objection to the testimony introduced, as there was no proof that a board of commissioners had ever been appointed and had acted, and as independently of the statute, a record which has been burnt or destroyed, may be set up by parol evidence, according to the common law, there is no good ground of objection on that score. Stark. Law Ev. part 2, § 39, p. 159.

Judgment affirmed.

61 *M'Alexander v. Montgomery.

December, 1832.

Breach of Contract—Assumpsit—Allegations—Proof.

—In assumpsit, plaintiff declares, that defendant contracted to locate a treasury warrant for plaintiff on waste and unappropriated lands, and to cause the same to be surveyed and patented, and alleges a breach, that defendant did not cause lands by him located on the warrant, to be surveyed and patented; but at the trial, plaintiff proves a contract whereby defendant did not undertake to cause the lands to be patented as well as located and surveyed: on demurrer to evidence, HELD, the evidence does not prove the con-

tract laid in the declaration, and plaintiff is not entitled to recover.

Same—Limitation—Case at Bar.—Contract to locate a treasury warrant on lands in Kentucky, is made in August 1783; and it appeared, the breach, if any, must have occurred before the erection of Kentucky into a separate state: HELD, the act of limitations of Virginia began to run from the time of the breach, and was, therefore, a bar to an action on the contract brought in 1816.

Assumpsit by M'Alexander against Montgomery, in the circuit court of Nelson. The action was brought in 1816, but (for some cause not explained in the record) remained pending and undecided there, for some ten or twelve years.

The declaration alleged, in substance, that, on the — day of — in the year —, M'Alexander delivered to Montgomery a treasury land warrant of Virginia, dated the 1st April 1782, for 4612 acres of land, and agreed with Montgomery, that if he would locate the warrant on waste and unappropriated lands, and cause the same to be surveyed and patented, he M'Alexander would give Montgomery one half of the lands so located, surveyed and patented, under the warrant, and pay him all the costs of surveying the same; in consideration whereof, Montgomery assumed upon himself, and promised and agreed to and with M'Alexander, that he would well and truly locate the warrant on waste and unappropriated lands on the western waters in Virginia, so soon as such location could conveniently be made, and would cause the lands so located, to be surveyed and patented for M'Alexander, within reasonable and legal time after such locations—and that at the time of the contract, there were waste and unappropriated lands on the western

62 waters in Virginia, of great value, subject to *be located, surveyed and patented, under the warrant, and which might have been located within a reasonable time, in pursuance of Montgomery's promise and agreement, if he had used reasonable and due diligence in making such locations—Yet Montgomery had evaded, failed and refused to perform his promise and agreement, in this, 1. that he had altogether neglected and failed to locate part of the warrant; 2. that he had negligently located other part thereof on lands not then waste and unappropriated, so that the title thereof was wholly lost to M'Alexander; 3. that, having located other part of the warrant on waste and unappropriated lands of great value, he had neglected, failed and refused to have the lands so located, surveyed and patented, so that the title of the same was wholly lost to M'Alexander; 4. that having located other part of the said warrant on other waste and unappropriated lands, he neglected, failed and refused, to have a part of these lands so by him located, surveyed and patented for M'Alexander, so that the title to this part of the lands so located was wholly lost to him; and 5. that Montgomery, having located other part of the warrant on waste and unappropriated lands, instead of having these lands surveyed and patented for M'Alexander, had them surveyed and patented for himself, and appropriated them

*Assumpsit.—See monographic note on "Assumpsit" appended to Kennaird v. Jones, 9 Gratt. 183.

†Limitation of Actions.—See monographic note on "Limitation of Actions" appended to Herrington v. Harkins, 1 Rob. 591.

to his own use. By reason whereof &c.

Montgomery pleaded, 1. the general issue, and 2. the statute of limitations. To the second plea, M'Alexander replied, that, at the time his cause of action accrued, Montgomery was out of Virginia, and in Kentucky, and so continued out of Virginia from the time when the action accrued, till the year 1815, within five years before the commencement of the action. Montgomery put in a rejoinder to this replication,—that he was, at the time the cause of action accrued, and long before had been, a resident of Kentucky, which was then a part of Virginia, and had always thenceforth continued to reside in Kentucky, where the contract in the declaration set forth, was, by agreement

63 *between the parties, to have been executed, until the year 1815, when he came to Virginia on a visit; and that there were, at the time the action accrued, and thenceforth until the year 1792, courts of justice in Kentucky established by authority of Virginia, and courts of justice there since 1792, established by authority of Kentucky and of the U. States, of competent jurisdiction, at all times, to hear and determine the claim alleged in the declaration. Then, there was a sur-rejoinder,—that, at the time when the action accrued, that part of the territory of Virginia in which Montgomery then resided, namely, the district of Kentucky, had been erected into a separate state, and was nowise subject to the jurisdiction of Virginia, and so Montgomery was, at the time the action accrued, out of the state of Virginia, namely, in the state of Kentucky, and thenceforth continually kept himself in Kentucky, out of the limits and jurisdiction of Virginia, so that the action could not be brought against him, until the year 1815 within five years next before the action was commenced. And a general rebutter being put into the sur-rejoinder, an issue was thereupon made up.

Upon the first trial of the issues, the jury found a verdict for M'Alexander for 1584 dollars damages. But the court, on the motion of Montgomery's counsel, set aside the verdict, on the ground that it was contrary to evidence, and directed a new trial; and M'Alexander filed a bill of exceptions to this opinion of the court, detailing at large all the evidence which had been given at the trial. The evidence set forth in this bill of exceptions, was the same with that set forth in the demurrer to the evidence, which Montgomery filed upon the second trial, and in which the court compelled M'Alexander to join.

Without detailing the evidence set forth in the demurrer to evidence filed upon the second trial, of which there was a good deal, and that very vague and very confused, it is sufficient to state, that it appeared—1st. That the treasury land warrant

64 by *M'Alexander to Montgomery, and the contract between them in relation thereto was made, in August 1782.

2ndly. That the evidence of the contract, and of its terms, consisted, 1. Of a bond executed by M'Alexander to Montgomery, dated the 3rd August 1782, in the penalty

of £2000. with a condition in these words —“The condition of this obligation is such, that whereas the above bound A. M'Alexander hath given W. Montgomery, treasury land warrants amounting to five thousand seven hundred and some odd acres, to be located on the western waters; now, if the said M'Alexander, his heirs &c. make or cause to be made unto W. Montgomery a good and sufficient right in fee simple to the one half of all the lands he locates for him, and pay all costs for surveying, then this obligation to be void &c.” 2. A receipt for a land warrant given by Montgomery to M'Alexander, in these words—“August 4th 1782, Received of A. M'Alexander one land warrant containing 4612 acres of land, likewise two silver dollars; by me, W. Montgomery.” 3. The evidence of a witness, proving that Montgomery informed the witness, that he had been employed by M'Alexander to locate some land for him in Kentucky, and had located part thereof, but that owing to his want of knowledge of a sufficient quantity of vacant lands, he had been induced to employ the witness's father to locate a part of the lands, agreeing that he should make the locations on the same terms, on which he, Montgomery, was to have made them; and he stated the terms of the location to be one half of the land, M'Alexander defraying all expenses incident to surveying and patenting.”—And 4. proof that Montgomery, acting under the contract did locate, and cause to be surveyed and patented for M'Alexander, about 1300 acres of land, which was afterwards equally divided between them; and Montgomery charged M'Alexander with the expenses of locating, surveying and patenting, this land, and of making the division thereof between them, and M'Alexander paid him the amount of those expenses.

65 *3rdly. There was evidence, that there were waste and unappropriated lands in Kentucky, in 1782, subject to location under the land warrant, on which the quantity mentioned in the warrant might have been located; and that, besides the 1300 acres which Montgomery located, and had surveyed and patented, as above mentioned, he made an entry for 3312 acres on Green river, of which however only 1728 acres could be surveyed, because there was no more vacant land there, subject to be surveyed under the entry; and of the 1728 acres, which were surveyed, the greater part was included in prior and conflicting entries and surveys.

4thly. There was evidence, that though M'Alexander paid Montgomery the expenses of locating, surveying and patenting, the 1300 acres above mentioned, after the same had been patented, yet he refused to advance money for defraying the expenses of surveys; saying, that though he was bound to defray such expenses after the surveys and patents were completed, yet he was not bound to advance money for the purpose before he got the title for the lands.

5thly. There was evidence, that after January 1783, there were not to be found in Kentucky, any large quantities of good lands lying in one body, subject to location under the warrant; and that though a

Kentucky surveyor located 10,000 acres of land after November 1783, yet it was of such inferior quality, that he sold parcels thereof for two dollars per hundred acres.

And 6thly. There was evidence, that Montgomery resided in Kentucky at the date of the contract, in August 1782, and there continued until the year 1815, when he came to Virginia on a visit to his friends; and during his stay here, this action was brought.

The jury, upon the second trial, found a verdict for the plaintiff M'Alexander, for 1584 dollars damages, subject to the opinion of the court upon the demurrer to evidence. But the court held, that the law upon the demurrer, was for the defendant Montgomery, and gave judgment for him; from which M'Alexander appealed to this court.

66 *Johnson for the appellant; no counsel for the appellee.

TUCKER, P. The declaration sets out a contract on the part of Montgomery, to locate a land warrant on waste and unappropriated lands, and have the same surveyed and patented; and one of the breaches assigned is, that after locating, he failed to have the lands conveyed and patented. The jury has found a verdict for 1584 dollars upon this declaration, and, for aught we know, for the breach of failing to patent what may have been located and surveyed; which renders the patenting a most essential ingredient in the case, even if we could disregard the general principle, that in an action upon a special contract, the contract must be proved as laid.

To the declaration, the general issue and the statute of limitations were pleaded; and upon the last plea, the parties came to issue, at last, upon this question,—Whether at the time the action accrued, the district of Kentucky had been erected in an independent and separate state, no wise subject to the jurisdiction of any court of Virginia? Upon these issues, I am clearly of opinion, that the verdict in the first trial, and the judgment on the demurrer to evidence in the last, should have been given for the defendant, Montgomery. The contract proved did not bind him to have the land patented, as well as located and surveyed; nor is there evidence from which any such term in the contract could fairly have been inferred. The statement which he made to one of the witnesses, of the terms of the contract,—that he was to have one half of the land, and M'Alexander to defray all the expenses incident to surveying and patenting, refers to the terms of his compensation, which was to be one half, without any charges to him for surveying or patenting. For, in speaking of what he had been employed to do, he says nothing of patenting, but only that he was to locate. I think, therefore, on this point, the judgment was right.

67 *On the second issue, I think there can be no question, that the judgment should have been given for Montgomery. He received the warrant in 1782. The whole current of testimony goes to shew that if there was any negligence,—any breach of the contract, it must have occurred long before the year 1789, when the

first act was passed for the erection of Kentucky into a state; and it was not until after November 1791, that the jurisdiction of the courts of Virginia was determined. It was not necessary, that the breach should have been five years anterior to the separation: one day before would have sufficed, for then the statute would have commenced running. Now, if the defendant be chargeable on the ground of negligence, I think it cannot be denied, that he was as guilty at the expiration of nine years from the date of the contract, as at this moment. That would have brought the breach down to August 1791; and from that date the statute would have been a bar. Indeed, if there was a cause of action, it probably accrued as early as 1784. One witness deposed, that good lands, in large quantities, in one place, could not have been procured after January 1783. Another, who was a Kentucky surveyor, after November 1783, made an entry for 10,000 acres, but of such inferior quality, that he sold part of it for only two dollars per hundred acres. Afterwards, it seems probable, more could not be obtained. Now, the statute runs from the time the negligence occurred; as, in the case of an attorney, it is not the loss of the debt which gives the action, but the unskilfulness or negligence whereby it was ultimately lost, and the statute runs from the date of that negligence; Wilcox v. Plummer's ex'ors, 4 Peters 172; Short v. M'Carthy, 3 Barn. & Ald. 626; 5 Eng. C. L. R. 403; Howell v. Young, 5 Barn. & Cres. 259; 11 Eng. C. L. R. 219. The application of the statute, in the present instance, can be no subject of regret. The transaction is very stale; and the evidence in support of the action, very vague and inconclusive. The question how far a party is to be required, relictis omnibus negotiis, to proceed to the

68 fulfilment of one *of these contracts, is not very easily answered; and the presumption that the locator, who had an equal interest, and no expenses to incur, would not grossly neglect the concern, is very strong. Add to this, that Montgomery did not abscond from our jurisdiction, but was cut off from it by an act of sovereignty, and that M'Alexander might, at any time within the last forty years, have asserted his claim in Kentucky, where the question of due diligence would have been settled by a Kentucky jury, surrounded by a cloud of Kentucky witnesses, who best knew what in those times did, and what did not, amount to due diligence in such cases. We have little reason to fear, that the rigorous principles of law will work injustice between the parties in this controversy.

The judgment is to be affirmed.

69 *The Farmers Bank v. The Mutual Assurance Society &c. and Others.

December. 1832.

Mutual Assurance Societies.—Mortgage of Insured Building—Effect.*—If buildings insured in the Mut.

*Mutual Assurance Societies.—The principal case is cited in foot-note to *Ingrams v. Mutual Assurance Soc.*, 1 Rob. 661. See monographic note on "Insur-

Ass. Society against fire &c. be mortgaged, the policy of assurance is ipso facto assigned to the mortgagee.

Mortgage to Secure Debt—Renewal of Note—Effect.—Mortgage of leasehold property, to secure to Bank of Virginia the contents of a note discounted for mortgagor's accommodation, with stipulation that the note shall be renewed only till a certain time; and then same subject is mortgaged to Farmers Bank, to secure a debt to it; the Bank of Virginia renews the note for three years after time stipulated: *H.M.B.*, such prolonged renewals of the note were only an extension of credit for the same debt, which no wise impaired the lien of the first mortgage, and the Bank of Virginia has priority over the Farmers Bank.

Mortgage of Term of Years—Liability of Mortgagee to Perform Covenants.—A mortgagee of a term of years, though he never in fact enters into possession, is, like any other purchaser, bound to perform the covenants in the lease, after the date of the mortgage.

Term of Years—Assignee—Liability for Breach of Covenants.—In general, the assignee of a term of years is not liable for breaches of the covenants in the lease before the assignment—but, if the assignee by express covenant with his assignor, bind himself to pay the rents, and perform all the covenants in the lease contained, and required to be done and performed on the part of the lessee,—such a covenant not only binds the assignee to fulfil the covenants during his own time, but makes him liable for breaches before his time.

The corporation of the Borough of Norfolk, being the proprietor of a parcel of land on Town Point in that borough, had the same laid off in lots in 1792; and by indenture, made in May in that year, leased two adjoining parcels thereof to Nicholas Booze, for a term of ninety-nine years, renewable forever, at a certain stipulated ground rent for each parcel respectively, payable yearly. And Booze covenanted for himself, his executors, administrators and assigns,—that he and they would pay the ground rents to the borough yearly, and would also pay the public and all other taxes—and that he and they would, within three years from the date of the lease, improve the premises in such manner that the yearly ground rents should be thereby sufficiently secured; and, on failure so to improve the premises within the three years, would give bond with sufficient surety to the borough for the

further payment of the yearly ground rents *and taxes, until improvements should be made sufficient to secure the same; and, in case such security should not be given within three months from the expiration of the three years, the borough might lease out the premises again, at auction, for the best price to be had, and Booze, his executors, administrators and assigns, would make good any deficiency in the rents obtained, and any difference between the first and last prices; the borough, on its part, accounting for and paying to him, his executors, administrators and assigns, any overplus that should be

obtained on the re-letting of the premises—and further, if the ground rent and taxes should be in arrear and unpaid for three years, at any time during the term, in such case also, the borough might in like manner lease out the premises again, with all the improvements thereon, for the residue of the term, on the best terms to be had; and Booze, his executors, administrators and assigns, would make good to the borough any deficiency between the first and last prices, together with the arrears of rents and taxes—And the borough covenanted on its part, that in case the improvements should be made as stipulated by the lessee, and the ground rents and taxes punctually paid, so as not to leave three years rents and taxes in arrear at any one time during the term, then, after the expiration of the term, it would renew the lease for a further term of ninety-nine years, and so on forever.

Booze proceeded to put improvements on the premises, according to his covenant in the lease. He sold the term in 1796; and, after passing through several hands, it was purchased by Henry M'Dowell in September 1815, who, not long afterwards, effected insurance of the buildings on the premises, with The Mutual Assurance Society against fire &c.

At the time the term was assigned to M'Dowell, the ground rents for above five years, that is, from the 10th May 1810 were in arrear, and neither those arrears, nor any of the rents accruing in M'Dowell's time, after the assignment of the term to him, were ever paid, or (it seemed)

71 *demanded, though there was always, while the buildings remained, sufficient distress on the premises for the rents.

By deed of trust, dated the 20th March 1817, and duly recorded,—reciting that M'Dowell was indebted to the Bank of Virginia at Norfolk, in the sum of 4648 dollars by note dated the 18th of the same month, payable sixty days after date, indorsed by T. Powell for his accommodation, which note it was contemplated should be renewed from time to time till the 1st March 1818, and that it was the intent of the deed to secure the payment of the debt at that time, or whatever sum should then be due to the bank,—M'Dowell conveyed the residue of the term of ninety-nine years held under the lease from the borough of Norfolk, to trustees,—“they, the trustees, or their assigns, paying the ground rents, and performing all the stipulations and covenants in the original deed [of lease] of the said land contained, and required to be done and performed on the part of the lessee:” upon trust, that if M'Dowell should fail to pay the bank the contents of the note then existing, or of such other note as might afterwards, from time to time until the period before mentioned, be given in lieu or renewal thereof, then the trustees, whenever requested by the bank, might enter on the premises, sell them at auction, and pay the debt out of the proceeds; and the trustees covenanted with M'Dowell, that they would execute and discharge the several trusts stipulated to be performed on their part.

M'Dowell remained in possession of the

ance. Fire and Marine” appended to Mutual, etc., Soc. v. Holt, 29 Gratt. 612.

***Mortgages.**—See monographic note on “Mortgages” appended to Forkner v. Stuart, 6 Gratt. 197.
***Renewal of Notes—Effect.**—The principal case is cited in Tardy v. Boyd, 28 Gratt. 638, and *foot-note*; Moses v. Trice, 21 Gratt. 568, and *foot-note*; *foot-note* to Blair v. Wilson, 28 Gratt. 165; Miller v. Miller, 8 W. Va. 550, 551; Feamster v. Withrow, 12 W. Va. 652; Bank v. Good, 21 W. Va. 465; Hopkins v. Detweiler, 25 W. Va. 748; Wolfe v. McGugin, 37 W. Va. 563, 16 S. E. Rep. 800; First National Bank v. Handley, 48 W. Va. 600, 37 S. E. Rep. 540.

See monographic note on “Bills, Notes and Checks” appended to Archer v. Ward, 9 Gratt. 622.

***Covenants.**—See monographic note on “Covenants” appended to Todd v. Summers, 2 Gratt. 167.

premises. And the bank not only renewed the loan to him, and he the note for the same to the bank, from time to time until the 1st March 1818, but continued to do so, upon the credit of the same indorser Powell, until July 1819, when Powell failed, and the note was protested for non-payment; but in October following, it was again renewed, with the same indorser, until May 1822, when, M'Dowell having died, it was again protested for non-payment. The debt then due on the note to the bank was 4548 dollars.

72 *Meantime, by another deed of trust, dated the 7th October 1818, and duly recorded, M'Dowell conveyed his equity of redemption in the premises to trustees, in trust to secure a similar debt, to a large amount, contracted by him and due to the Farmers Bank at Norfolk.

The buildings on the premises were consumed by fire, on the 30th April 1822; and the amount of loss, for which the Mutual Assurance Society admitted itself to be liable on the policy of assurance, was 6262 dollars, with interest from the 6th January 1823, when the claim for the loss became demandable at the office of the society.

M'Dowell died about the time the fire happened; and the hustings court of Norfolk committed administration of his estate to the sergeant of the borough. The estate proved utterly insolvent.

In August 1822, the trustees for the Bank of Virginia offered the residue of the term of ninety-nine years in the premises, for sale at auction, under the deed of trust of the 20th March 1817, but no bid was made for it. It appeared, indeed, that, owing to the abandonment of that part of the town, the property, now destitute of improvements, was almost if not quite valueless, and certainly unsaleable.

The Farmers Bank exhibited a bill in the superior court of chancery of Richmond, against the Mutual Assurance Society, the sergeant of Norfolk administrator of M'Dowell, the Bank of Virginia and its trustees, and the Borough of Norfolk,—setting forth the facts above stated; and that conflicting claims to the money due on the policy of assurance, were set up by the Farmers Bank and the several defendants respectively, and the society refused to pay the money till those conflicting claims were adjusted; claiming satisfaction, out of this fund, of the debt due the Farmers Bank, in preference both to the Bank of Virginia and the Borough of Norfolk; and praying, accordingly, that the society should be directed to pay the Farmers Bank the amount of its claim, and that the premises should be sold,

73 *and the proceeds applied as justice required, under the circumstances of the case; and general relief.

The Mutual Assurance Society admitted the amount of the loss for which it was liable on the policy of assurance, and expressed its readiness to pay the money to the party or parties to whom the court should decree it. The society was a mere stake-holder.

The administrator of M'Dowell claimed this money, as assets of his intestate, appli-

cable to his debts in due course of administration.

The Bank of Virginia, in its answer, insisted, that it had a specific lien on the fund, and was entitled to satisfaction of it in preference to the Farmers Bank; but as to the question of preference between it and the Borough of Norfolk, the answer was silent.

The Borough of Norfolk answered, and insisted, that the fund should be applied to the ground rents which had accrued and were in arrear since the 10th May 1810 (amounting to 1575 dollars in arrear in August 1821), in preference to the claims of both the banks. And it also insisted, that by the failure of the lessee or his assigns to perform the covenant for payment of the ground rents, so as to let them be in arrear for three years, the term was ipso facto forfeited, and the premises reverted in the lessor.

The chancellor declared, that the Borough of Norfolk was entitled to priority over both the banks, and that the Bank of Virginia was entitled to priority over the Farmers Bank; and, therefore, decreed, that the Mutual Assurance Society should pay the borough, the sum of 2080 dollars (being the aggregate of the principal of the rents claimed, and interest thereon from August 1821 when the last of those rents accrued, to the date of the decree) with interest on 1575 dollars, part thereof being principal, from the date of the decree, and the costs of the borough in this suit; and then pay the residue of the money due on the policy of assurance, to the Bank of Virginia, in part satisfaction

74 *of its claim, it being not enough to discharge the whole.

From this decree the Farmers Bank appealed to this court.

The cause was argued here, by Nicholas for the Farmers Bank, Leigh for the Bank of Virginia, and Johnson for the Borough of Norfolk: there was no counsel for M'Dowell's administrator.

I. As to the claim to the fund in question, set up by M'Dowell's administrator in the court of chancery, it was clearly shewn,—by reference to the 8th section of the original act of incorporation of the Mutual Assurance Society (an abstract of which may be seen in the report of the M. A. Society v. Stone & others, 3 Leigh 219.) and by the rules and regulations of the society, to which all the assured are parties,—that when property there assured, is mortgaged, the policy of assurance is ipso facto assigned to the mortgagee.

II. Nicholas argued for the Farmers Bank, that it had a right to have satisfaction out of the money due on the policy of assurance, in preference to the Bank of Virginia; because M'Dowell's notes, by the express provisions of the deed of trust of the 20th March 1817, under which the latter claimed, were only to be renewed until the 1st March 1818, and the security provided by the deed was only a security for the contents of the note existing at the date of the deed, or of such other note as might, afterwards, from time to time until the period before mentioned (namely, the 1st March 1818), be given in lieu or renewal.

thereof. But the Bank of Virginia continued the accommodation to M'Dowell upon notes renewed from time to time (with an interval of three months in 1819) until May 1822. Therefore, the note protested at the last date, was not a note whereof the contents were secured by the deed of trust under which the Bank of Virginia claimed; it was a wholly different note, the contents of which were not secured or intended to be secured by the deed, but on the contrary distinctly excluded from the security thereby provided.

75 *Leigh, for the Bank of Virginia, answered, that the original note given for the debt due that bank, was not the debt, but only the evidence of the debt and personal security for it, and the notes renewed from time to time, were only renewed evidences of the debt and of the personal security; the debt itself, of which it was the purpose of the deed of trust to provide collateral security, remaining throughout one and the same. The original debt remained unpaid, acknowledgedly, till the 1st March 1818. The effect of the renewal of the notes for it from time to time afterwards, was to give a further credit for it, beyond what was at first intended; but, notwithstanding the extension of credit, the same original debt, which was due the 1st March 1818, remained still unpaid. The giving such further credit nowise changed the debt, or impaired the collateral security for it: the rights of the Bank of Virginia were exactly the same, in this regard, as if it had allowed the further credit, without a renewal of the notes. The Farmers Bank was the assignee of M'Dowell's equity of redemption, and so entitled to redeem upon the terms on which he would have been; and, surely, M'Dowell could not have been heard to object to the lien of the Bank of Virginia, that it had renewed his notes for a longer time than it had stipulated to renew them.

III. Leigh said, the chancellor erred in adjusting the question of preference between the Borough of Norfolk and the Bank of Virginia, upon the bill and the pleadings in this cause; for they presented no such question between those parties. The bill, indeed, claimed a priority for the Farmers Bank over both; but the only question it presented, was, whether that bank was entitled to such priority? It nowise concerned the Farmers Bank, which of the defendants was entitled to priority over the other; on this point, therefore, the bill presented no issue. Accordingly, the Bank of Virginia, in its answer, only controverted the priority insisted on by the Farmers Bank over its own claim, and properly avoided to put in issue the question of priority between itself and the borough.

76 *Johnson, for the borough, answered, that the obvious purpose of the bill was to have the rights of all parties, as to priority of satisfaction out of the insurance money, adjusted. The claim of the borough to priority equally affected the interests of both the banks: that claim, therefore, the Farmers Bank contested; it claimed priority over the borough as well as over the Bank of Virginia; and the adjudication of the claim asserted in the

bill, necessarily involved the examination, comparison and adjustment of the rights of co-defendants.

IV. Nicholas and Leigh then contended, 1st. That the decree was erroneous in giving preference to the borough over the banks, for satisfaction out of the money due on the policy of assurance. The policy was a personal subject assigned to the banks as collateral security for debt: the borough had no specific lien on the policy, or on the money due upon it: with respect to this fund, the banks were specific incumbrances; the borough a general creditor. There could be no question in equity, between the borough as lessor of the premises and creditor for the rents in arrear, and the banks as assignees of the policy of assurance: the only questions between the borough and the banks grew out of the relation of the borough as lessor, and the banks as assignees, of the term originally leased to Booze, and from him through M'Dowell derived to the banks; and these were questions which could properly be controverted only in an action at law brought by the borough, upon the covenants in the lease. 2ndly. Supposing the first objection unfounded, yet, they said, the decree was erroneous in allowing the claim of the borough, and giving priority of satisfaction, for rents in arrear for which the banks as assignees of the terms were not bound, and which, therefore, were not properly chargeable on this fund. The only breaches of the covenants in the lease, consisted in the non-payment of the ground rents reserved. The amount of about eleven years rents in arrear was claimed by the borough, and allowed by the decree; comprising

77 the rents of about five years, *which accrued before the term was assigned to M'Dowell in September 1815; the rents of about two years following, which accrued before M'Dowell mortgaged the term to the Bank of Virginia; and the rents of about four years, which accrued after that mortgage was executed, but while M'Dowell, not the bank, held the possession. Now, M'Dowell was not bound to pay the rents in arrear, or liable for any breach of covenants, before the assignment of the term to him; nor were the banks bound to pay any rents which accrued before the term was mortgaged to them. For the assignee of a lease could not be held liable for any breaches of covenants before the assignment; he was only liable in respect of his possession, and for breaches during his own time. Walker's case, 3 Co. 23; Grescot v. Green, 1 Salk. 199; Tovey v. Pitcher, Id. 80; Cook v. Harris, 1 Ld. Raym. 368; St. Saviour's church wardens v. Smith, 3 Burr. 1271. Whether the banks were bound for the rents accrued during the four last years, which elapsed after the execution of the first mortgage of the term, but while M'Dowell the mortgagor remained in possession, was a doubtful point. In Pilkington v. Shaller, 2 Vern. 374, it was held, that the mortgagee of a term, though never in possession, was bound for breaches of the covenants in the lease after the execution of the mortgage; but the contrary was adjudged by lord Mansfield and the whole court of King's

Bench, in *Eaton v. Jaques*, 2 Doug. 455. And then, in *Williams v. Bosanquet*, 1 Brod. & Bing. 238, 5 Eng. C. L. R. 72, it was decided, that by the mortgage of a lease, the whole interest passed to the mortgagee, and he became liable on the covenant for rent, though he never entered into the possession; and it was said to have been the opinion of a great majority of all the judges, that *Eaton v. Jaques* was not to be considered as having been rightly decided. This court would decide, between these conflicting authorities, which was the better opinion. But 3rdly, they insisted, that, whatever rents in arrear the borough was entitled to, the decree was erroneous 78 in allowing interest on *those rents, even from the time the last of the rents in arrear accrued; for it appeared that, during the time when those rents were accruing,—until, indeed, the buildings on the premises were destroyed by fire in April 1822,—there was always sufficient distress on the premises. *Cooke v. Wise*, 3 Hen. & Munf. 463; *Newton v. Wilson*, Id. 470; *Dow v. Adams*, 5 Munf. 21; *Michie v. Wood*, 5 Rand. 571.

Johnson answered, 1st. That as the lease from the borough to Boozé was a building lease, and the lessee covenanted, for himself and his assigns, to improve the premises within three years, in such manner that the yearly ground rents should be thereby sufficiently secured, and that in case the rents should be in arrear at any time during the term for three years, the borough might lease out the premises again, with all the improvements thereon, for the residue of the term,—it was, therefore, plain, that the lessor had a specific lien on the buildings erected on the premises in pursuance of the covenants, for the ground rents; and, in equity, after the destruction of the buildings by fire, the money due on the policy of assurance thereof, must be regarded as standing in the place of the buildings, and subject to the same specific lien for the security of the rents to the lessor. The assignees of the lease, too, were expressly bound for the performance of all the covenants, and took subject to all the rights of the lessor, and subject especially to the specific lien on the buildings to secure the rents. 2ndly. He went into an examination of the general doctrine, that an assignee of a lease is not liable for breaches of covenants before the assignment, in order to shew that it was inapplicable to this case. Here, there was an express covenant, that in case the rents should be in arrear at any time for three years, not only the lessor might lease the premises again for the residue of the term, and that the lessee and his assigns should make good any deficiency, but that he and they should make good the arrears of rents. Therefore, the assignees of the term were expressly bound to pay all arrears of rent, whether they accrued before or after 79 the assignment. *And he considered it now settled, by the case of *Williams v. Bosanquet*, that there is no difference, in respect of liability to the lessor for breaches of covenants in a lease, between a mortgagee and any other purchaser of the whole term; and that the mortgagee

is bound, like any other purchaser, though he never enters into the possession. But here again, he said, there was an express contract which obviated all doubt: it was expressly covenanted in the deed of trust executed by M'Dowell to secure the debt to the Bank of Virginia, that the trustees and their assigns should pay the ground rents, and perform all the covenants in the original lease contained, to be performed on the part of the lessee. 3rdly. As to interest on the rents, he said, the decisions of this court on the point, amounted in effect to this,—that interest on rents should be allowed or not according to circumstances. And under the circumstances of this case, he said, the decree was right as to the allowance of interest: or, at least, interest should be allowed from the time the buildings were destroyed, since, thenceforth, a distress would have been unavailing, and M'Dowell being dead insolvent, the borough had no means of recovering the rents: or, at any rate, interest should be allowed from the 6th January 1823, when the insurance money fell due; for that money ought to have been then immediately applied to the payment of the rents; and as it had not been so applied, and had been yielding interest all the time, that interest justly belonged to those to whom the principal ought to have been paid. Lastly, he himself objected to the decree, that it had not given to the borough what it had a right to insist upon: that the chancellor ought, undoubtedly, to have made provision out of the fund at his disposal, for the payment of all rents to accrue in future during the residue of the term; and more, he ought to have made provision to secure the future rents, in the manner in which it was intended and covenanted in the original lease that they should be secured; that is, by putting such new buildings on the premises as would suffice to secure them. He insisted, 80 that the intent *and effect of the covenant for improving, was, not only that buildings should be erected on the premises, but that they should be erected and kept up during the whole term. Therefore, he contended, the whole insurance money should have been appropriated to the erection of new buildings in lieu of those which had been destroyed by fire.

Leigh replied, that the covenant for improving, bound the lessee and his assigns to make improvements once only; for the improvements which the lessee covenanted to make, were to be made within three years from the date of the lease, and there was no stipulation that they should be kept up. The claim to have the insurance money appropriated to the erection of new buildings was wholly untenable. And unless that proposition could be established, he thought it would be impossible to give the borough a specific lien on the insurance money for any purpose. It could not be inferred from the covenant, that if the rents should remain in arrear for three years, the borough might sell the premises with the improvements, and the lessee and his assigns should make good the deficiency, together with the arrears of rents: the borough had not sold, or attempted to sell, the premises, and so the *casus foederis*

had not occurred. As to that covenant, he also insisted, that, in just legal construction, its obligation on the assignees of the lease, was, that they should make good the arrears of rent accruing in their own time. So, too, as to the covenant in the mortgage to the Bank of Virginia, it ought to be taken prospectively, that the bank should perform the covenants in the lease after the assignment of the term to it, as M'Dowell was bound to perform them before the assignment. In fine, he said, the borough, if it had any specific lien on the insurance money for any purpose, was only entitled, at the utmost, to have provision made out of it for the payment of the ground rents which should accrue during the residue of the term yet to come; and (having regard to the present state of the premises, which were now unsaleable and abandoned) he suggested, that this might best be accomplished, by considering

81 the "annual ground rents, as an annuity to the same amount, for as many years as yet remained unexpired of the term; and decreeing to the borough, out of the insurance money, a sum equal to the present value of such an annuity.

TUCKER, P. I do not concur in the opinion intimated at the bar, that the present state of the pleadings in this case, neither calls for, nor permits, a decision upon the rights of the parties before us in all their different relations. The Farmers Bank being the junior incumbrancer in point of time, and therefore *prima facie* inferior to the prior claimants, having filed its bill praying for the satisfaction of its demand out of the insurance fund, we cannot possibly decide upon its claim, without comparing the conflicting claims in the first place; and if, as I apprehend, that bank must yield in point of right to the Bank of Virginia, it then becomes all important to ascertain the validity and precise extent of the rights of the Borough of Norfolk, upon which will depend the amount that can be decreed to the Farmers Bank out of the fund in question. If the borough has rights in this matter; if those rights have priority; if they entitle it not only to back rents but to interest, and to a demand of the investment of a principal sum so as to secure an interest adequate to the payment of the rent during the residue of the term; then it would seem, indeed, very probable that the struggle of the Farmers Bank has been for nothing; for nothing will remain to be paid to it. Hence it becomes absolutely necessary to look at the demands and rights of the borough in every aspect, before we scatter the funds out of which the counsel have supposed that it has a title to be secured in the payment of the rents reserved on its lease. I shall therefore proceed first to examine the title of the borough to the funds in court.

The borough being the proprietor of land at the Town Point, proceeded in 1792 to have it divided into lots, and to lease the lots for ninety-nine years, renewable forever, reserving a ground rent payable

82 annually by the lessee and "his assigns. The object on the part both of lessors and lessees, was to build upon the property, since otherwise it would be

useless to the latter, and to the former the payment of the rents would be precarious. Among other lessees was one Booze, under whom M'Dowell, the debtor of the banks, claimed to hold. By the lease to Booze, the borough reserved a certain rent on each of the lots leased to him: and Booze, for himself, his executors, administrators and assigns covenanted, 1. to pay the rent annually: 2. to pay the taxes: 3. to improve the land in the space of three years, in such manner as that the yearly rent should be thereby sufficiently secured; and 4. on failure thereof, at the expiration of three years, that he, his executors, administrators and assigns, would tender bond with sufficient security for the further [future, probably] payment of the yearly ground rents and taxes, until improvements should be made sufficient to secure the same; or 5. if such security should not be given within three months from the expiration of the three years, the borough might lease out the premises again, for the best price to be had, and the lessee, his executors, administrators and assigns would make good the deficiency, or be entitled to the surplus if the new lease brought a higher rent: and 6. if the rent should be in arrear at any one time for more than three years, there was a like privilege to re-let, and a like obligation on the lessee, his executors, administrators and assigns, to make good the deficiency, together with the arrears of rent. Such were the terms of this lease, which Booze parted with, it seems, in 1796, and which M'Dowell did not acquire until September 1815; from which time he became liable for the accruing rents. Previously, it seems, the covenant as to the erection of buildings had been complied with; but, if the account filed by the mayor of Norfolk be correct, there were, at that time, more than five years rent in arrear and unpaid; and, of course, two years before his purchase, it had been lawful for the borough to have leased out the premises again to some other tenant.

83 *This provision, however, had not the effect of avoiding the lease, *ipso facto*, without some act on the part of the lessor. The answer of the borough, in this regard, misinterprets the lease. A lease for years, indeed, may be avoided without entry, if it be so provided, though a lease for life cannot. But a prudent landlord will so provide, as to give him an option to avoid the lease or not; for if it be an advantageous lease, it may be better for him to waive the right to enter and be reinvested with his old estate. So, in this case; the draftsman has secured the power to re-let; but it was a power which might be waived or not at the lessor's pleasure. That pleasure has never been exerted to defeat this lease, although it may at any moment be exerted. But it is obviously not their interest; for it seems the time has gone by when this property could be leased for a cent, with provisions like those of this lease.

M'Dowell having purchased the property, proceeded to insure it. He then, in 1817, executed a deed of trust of it to secure the Bank of Virginia, and another in October

1818, to secure another debt to the Farmers Bank. In 1822, the houses were burned down; and about the same time he died. The insurance company are ready to pay the insurance money; and four claimants are competitors for it,—M'Dowell's administrator (whose claim however is not urged), the Borough of Norfolk, the Bank of Virginia, and the Farmers Bank.

In the examination of the rights of the Borough of Norfolk, I shall take it for granted, for the present, that the Bank of Virginia, though a mere mortgagee, is to be looked upon as an assignee of the term; for, however the general doctrine may be on the subject, if the bank takes the benefit of the lease, it must assume its burdens, to the same extent as if it was assignee of the term out and out. But as such, it is very manifest, that, unless there is something in the lease which varies its case from that of ordinary assignees, the bank is not chargeable with any breach which occurred anterior to its title. For an

84 assignee is only liable *in respect of his possession; he bears the burden while he enjoys the benefit, and no longer. In particular, the assignee cannot be liable for rent in arrear before his title accrued. Rents due and in arrear are considered as debts severed from the realty sub modo. Moreover, it is inconsistent with any principle of the law, that one man should bind any other than his heir or his executor; and they are only bound in respect to the assets passing to them. He cannot bind his assignee; but the assignee, by the acceptance of the estate, binds himself to fulfil the obligations of the contract devolving upon him during his occupation. By law he is bound for nothing more. In the present case, however, a doubt hangs over this question from the peculiarity of the covenants. The difficulty is to say, whether the breach has occurred, or may be made to occur, in the time of the bank or not. The breach in non-payment of the rents, certainly occurred even before M'Dowell's time; for when he purchased in September 1815, there were five years rent in arrear. Now, I have much doubt, whether M'Dowell, or those who come after him, could have been bound for the rents in arrear, or to give security for deficiency in price, for rents to become due after their possession and estate might have been passed away. Boozee certainly and his estate are bound, that his assigns shall do what is provided; for he is bound for the performance of all his express covenants, during the continuance of the whole lease, notwithstanding the assignments; and this, although the lessor accepted the assignee as tenant: But after assignment and acceptance, he is not liable on covenants merely implied by law. 2 Bac. Abr. Covenant, E. 4, p. 72, and the cases there cited.

The next question under these covenants, is, Whether the covenant to improve is satisfied by the erection of the first buildings, or is a continuing covenant, binding the parties to renew the buildings from time to time, in case they should be destroyed by flood or fire? The language of the covenant affords no ground for this latter construction. If an action for breach of the

85 covenant were brought, the plea *of covenants performed would be sustained, by proving that the party has once improved or built according to his engagement. A different construction cannot be given to the lease in a court of equity. It is the misfortune of the landlord, indeed, that by the burning of the houses, the lot is reduced to its originally naked condition, and still more that the change of times has reduced its value to nothing. But the conflagration fell more heavily upon the tenant than upon the landlord, and if the holders are bound for prospective rents forever, upon these valueless lots, the change of times, which has desolated that part of the town, will prove ruinous to them. These are losses which the parties must be content to bear in proportion to their respective interests. The tenant must put up with the loss of his house, and the landlord with the loss of his rents. Neither can throw his share of the loss upon the shoulders of the other. It is said, that the houses were insured, and that the insurance money stands in the place of the buildings. And what is the sequitur? Is it that the rents are to be paid out of it, or that a court of equity may compel the rebuilding out of this fund, because of its supposed relation to or substitution for the buildings which have been destroyed? I think not. Whatever the supposed relation may be between the houses and the insurance money, the landlord has no sort of equity in this case to demand its application to the payment of arrears, or to rebuilding the premises. The tenant was neither bound to rebuild, nor to insure. Had he been so bound, the case would have been otherwise. As it is, the insurance money is the price paid by the insurance society for the consideration of the premiums and quotas advanced by M'Dowell out of his own pocket. Upon what pretext could the borough claim the benefit of this covenant purchased by M'Dowell's funds for his own benefit, if he was not bound to purchase it for their benefit? If they had bound him to insure, or had borne the charges of insurance in proportion to their interest, the case would have been widely different. As

86 they did not, it would be iniquity instead *of equity, to take from him what has been acquired by his own advances.

If the case, then, stood solely upon the original lease, and there was nothing in the deed of trust to the bank, which could enure to the benefit of the borough, I should be clearly of opinion that the borough had no rights whatever in relation to this fund. But that deed, I conceive, changes the whole aspect of the case, and would have rendered unnecessary an investigation of the questions I have been considering, but that the earnest discussion of them at the bar, forbade that they should be passed over in silence.

What, then, were the rights and obligations of the Bank of Virginia? By the operation of the deed of trust, the bank became assignee of M'Dowell of the lease; for it seems to be now settled, that when a party takes an assignment of lease by way of mortgage, the whole interest passes

to him, and he becomes liable on the covenant for payment of rent, though he had never occupied or become possessed in fact: *Eaton v. Jaques*, which had determined otherwise, is now considered as not rightly decided; *Williams v. Bosanquet*, 1 Brod. & Bing. 238. This case is certainly in strict analogy to the doctrines of courts of law, which look upon a mortgage as the conveyance of the title, and not as a mere security for money. And as they also consider the mortgagor as tenant at will only of the mortgagee, the mortgagee must be the tenant for years, unless the estate for years is gone by the assignment, which cannot be. In this case, moreover, the Bank of Virginia is before the court, claiming the benefit of this lease, and demanding to be paid its debt out of funds to which it could have no title except as assignee of the lease; and if they take the benefit, they must be content to bear the burden. But this is not all. When M'Dowell encumbered this property to the Bank of Virginia, it was a valuable tenement. Its insurance amounted to 7000 dollars. M'Dowell was aware, that by the terms of the lease under which he held, the Borough of Norfolk had a right, if the rent was three 87 years in arrear, to re-let *the tenement upon such terms as they could, and to hold him responsible, moreover, for the back rents accruing in his own time a lease. He, therefore, expressly provides in the deed of trust for the rights of the borough. He assigns the premises to the trustees,—they or their assigns paying the ground rents and performing all the stipulations and covenants in the original deed of lease for the said land contained, and required to be done and performed on the part of the lessee. Is this a covenant? Then the trustees of the bank covenant, that they will perform all that the original lessee was bound to do and perform. Is it a condition? Then they took the estate upon the condition that they should do and perform all that he was bound to do and perform. Is it a trust? Then this deed enures to the Borough of Norfolk, as a security for the payment of the ground rents, and the performance of all the stipulations and covenants in the original lease, required to be done and performed on the part of the lessee. One of these is, that if the rent be behind for three years, the landlord may re-let; and upon re-letting, the lessee bound himself to pay up and make good the deficiency, together with the arrears of rents and taxes. This obligation, then, rests upon the assignees here. The rent is now three years and more in arrear; and in the language of the books, having been due then, and there having been no tender, it has been due and payable every day since; 6 Bac. Abr. 29. The borough may therefore now, at its pleasure enter and re-let. If it do so, it is obvious the property will bring nothing, and the assignees of the term, who have assumed to do and perform what the lessee had bound himself to do, will be bound to pay up and make good the deficiency, together with the arrears of rent. The arrears of rent, and the future payment of the rents stipulated, are thus secured by

this deed of trust. The consciences of the trustees for the bank, are as much affected by this part of the undertaking, as by any other. Indeed, from the language of the deed, this is anterior to all others; for provision must be made for the payment 88 of past and future rents, before the bank can take any thing. This may be effected by decreeing the amount of the rents due, and that the Bank of Virginia be permitted to retain a capital sum equivalent to the production of an interest equal to the annual rents, or in some other way,—leaving this matter, however, to be arranged by the court of chancery, upon the principles I have laid down.

With respect to interest on the rents in arrear, the court is of opinion, that no interest whatever should have been allowed.

A few words are now necessary as to the rights of the Bank of Virginia. As assignee of the term, it would have been clearly entitled to the benefit of the policy of insurance, which is a covenant real, running with, and entered into for the purpose of upholding, the estate, even if there had been no provision on this subject in the insurance regulations. These however expressly provide for the case, and that the mortgagee shall be paid out of the insurance money. As against M'Dowell's estate, therefore, there can be no difficulty.

But it is contended for the Farmers Bank, that the lien of the deed of trust of the Bank of Virginia, did not extend to any note renewed after the 1st March 1818. To this it might be a sufficient answer, that it indisputably extended to the note that was due and unpaid on the 1st of March 1818; and, to say the least, it is questionable, whether the new credit ought in equity to be considered as a discharge of the debt. Equity looks to the substance, not to the forms, of things. Equity sees that when a dealer at bank pays off a note by renewal, the debt is the same; the debt remains unpaid, and the credit only is extended. The Farmers Bank, conversant with such transactions, must also have known this. It had full notice of the deed of trust of the Bank of Virginia, and therefore stands, as to this question, precisely in the shoes of M'Dowell. It knew the contents of the deed, and was bound to know the legal operation of it. If it did not know 89 that the note was renewed, *then as the debt was not paid, it knew there was a lien for its amount. Had it inquired, it would have learned, indeed, that there were subsequent renewals; but it would have found also that the debt was not paid; and it was bound to know the legal inference from that fact. It was bound to know, that until it was paid, M'Dowell could not be received to say that the additional indulgence granted by the bank, discharged the lien. Upon what equity could he have demanded a reconveyance of the legal title, before the payment of the debt, which it was conveyed to secure? Upon none. The property would have been bound in his hands, and it is equally bound in the hands of the subsequent incumbrancer, with full notice of the prior lien.

In this opinion of the president, the other judges concurred. And the decree of the court was as follows:

"The court is of opinion, that by the deed of trust executed by H. M'Dowell deceased to the trustees of the Bank of Virginia, that bank became entitled to the benefit of the insurance fund, subject nevertheless to the obligation of discharging the arrears of rent on the leasehold premises, and to the further obligation of paying and discharging all future rents which may accrue during the continuance of the lease; that the rents in arrear should, therefore, not only have been decreed to be paid by the said bank, but provision should have been made for securing the payment of future rents; that this should have been effected, either by decreeing, that the said banks should retain, or should invest, so much of the said fund as would be equivalent to the production of an interest equal to the annual rents, or in such other way as might be deemed most convenient and advisable; and that the decree is, therefore, erroneous in having made no such provision: that, under the circumstances of this case, no interest whatever ought to have been allowed upon the rents in arrear; and that the decree is accordingly erroneous in allowing such interest: that the insurance fund ought to be applied, 1. to the satisfaction of *the rents in arrear and 90 unpaid on the leasehold premises; 2. to making a provision for future rents; 3. to the satisfaction of the debt secured by the deed of trust to the Bank of Virginia; 4. to the satisfaction of the debt secured by the deed of trust to the Farmers Bank; and the residue, if any, ought to be paid over to the administrator of M'Dowell. Therefore, it is decreed &c. that the said decree be reversed and annulled, and that the appellants pay to the appellees, as the parties substantially prevailing, their costs &c. and that the cause be remanded &c."

Seekright on Demise of Bramble v. Billups.

January, 1838.

Wills—Estates Tail—Contingent Remainder—Statutes*

—Case at Bar.—Testator devises the residue of his real estate to his daughter L. B. and her husband J. B. during the life of the longest liver of them, and then to their offspring if any by his daughter L. B. as they shall think best to give it; and, in default of such offspring, to M. B.'s and N. A.'s offspring, if they have any, and as they think best to dispose to their offspring; and if they have none, then to the poor of E. R. parish—At the date of the will, the testator's daughter L. B. had offspring by her husband J. B.—the daughter died before the testator: her offspring survived him, and died in infancy, leaving their father J. B.—HELD, J. B. the husband, took by the will an estate tail, which the statute for abolishing entails, converted into a fee simple, and barred the contingent remainder limited on the estate tail; dissentiente TUCKER, P.

Same—Same—Same—Same—Statute Abolishing Words of Inheritance.—Quære, how far, in determining what is an estate tail on which the statute for abolishing entails shall operate, the statute which dispenses with the necessity of words of

inheritance, in deeds or wills, to give an estate of inheritance, may affect the construction of the grant or devise?

Ejectment, brought by George, William and Ann Bramble in the circuit court of Norfolk, for a parcel of land in that county. The question of title was referred to the decision of the court upon a case agreed; which was thus:

Matthias Christian died in the year 1794, seized in fee of the premises; and, by his will duly made and published in August 1788, after a devise and bequest 91 to his step daughter *Molly Baynes and her husband John Baynes, he devised as follows: "I give to my step daughter Nancy Ashley my house and that part of my plantation on the north side of the road leading to Norfolk borough, to herself and her offspring, if she have any, if not to her half sister Lydia Bramble and her offspring if any, if not to her sister Molly Baynes's offspring, as she pleases to give it: my will is, that, so long as my step daughter Nancy lives a single life, the rent of the house and land on the north side of the road be equally divided between her and my daughter Lydia"—"I give and bequeath to my loving daughter Lydia Bramble and her husband John Bramble, the rest of my real and personal estate, to them during the life of the longest liver of them, and then to their offspring if any by my daughter Lydia, as they shall think best to give it; and in default of such offspring, to Molly Baynes (the wife of John Baynes) and Nancy Ashley's offspring, if they have any, and as they think best to dispose to their offspring; and if they have none, then to the poor of Elizabeth-River parish." In this last devise of the residue of the testator's real estate, to his daughter Lydia and her husband John Bramble, the land in controversy was included.

The testator's daughter Lydia died before her father, namely, in March 1789, leaving two children by her husband John Bramble. The elder of these children was born before, and was living at, the date of the execution of the testator's will, and this was known to him at the time: and both of them survived him, but died in 1795, infants and without issue.

John Bramble survived the testator, and, immediately after his death, entered upon the land in question, under the devise thereof in the testator's will contained, and held the same till his own death in 1814. He never attempted to execute the power of appointment vested in him by the will. He died intestate, leaving three children by a second marriage, his heirs at law, namely, George, William and Nancy Bramble, the lessors of the plaintiff in this ejectment, who claimed the land by descent from their father.

92 *The testator's step daughter Nancy Ashley died in 1798, without issue, and never having had any.

His step daughter Molly Baynes died in 1804, having first duly made and published her will, whereby she devised as follows: "I give all the rest and residue of the lands formerly Matthias Christian's, to be equally divided among all my children." This devise included the lands then held by

*Wills—Estates Tail—Statute.—On this question the principal case is cited in Jiggetts v. Davis, 1 Leigh 368: See v. Craigh, 8 Leigh 450, 452: foot-note to Callis v. Kemp, 11 Gratt. 78: Tinsley v. Jones, 13 Gratt. 297, 299, and foot-note: Hood v. Haden, 82 Va. 597; 4 Va. Law Reg. 655. See Graham v. Graham, 4 W. Va. 322. See monographic note on "Wills."

John Bramble under the devise to his first wife Lydia and him, in the testator Matthias Christian's will, if the testatrix Mrs. Baynes had power so to dispose of or appoint the same. She left four children, all of whom had been born before the date of the execution of the testator Christian's will, and he was apprised of their existence at the time. Three of them died intestate and without issue, before the year 1810. The other, Patsey Baynes, was the wife of the defendant Billups. She died before this action was brought, leaving issue one daughter by Billups. And Billups claimed, that the remainder of the land in question after John Bramble's death passed to his deceased wife, by force of the executory limitation thereof in the testator Christian's will contained, and of the appointment in Mrs. Baynes's will to her four children, and by descent from the three deceased children of Mrs. Baynes, as to their shares, to their sister Mrs. Billups.

Upon this case agreed, the circuit court held, that the law was for the defendant, and gave him judgment; from which the lessors of the plaintiff appealed to this court.

The cause was argued here, by Johnson for the appellants, and Leigh for the appellee; but it was discussed by the judges yet more fully than at the bar, and all the arguments of the counsel on both sides are stated in their opinions.

CARR, J. The question is, what estate was given by the will of Matthias Christian to his daughter Lydia and her husband John Bramble? Was it an estate for life, with a contingent remainder to such
93 of the offspring as shall be *living at the death of the survivor? or an estate tail, by implication, in the first takers?

It was admitted, and must be admitted, that the word offspring is as much nomen collectivum as issue, embracing the whole line of descendants, of which the most remote is just as much the offspring of the original stock, as the most immediate. Suppose the devise had been to husband and wife for life, and to the longest liver, and then to their issue, and in default of such issue, over; it would hardly have been denied, that, according to the rule in Shelly's case, the word issue must be taken as a word of limitation, and the estate of the parents an estate tail. But it is said, that admitting the general words for default of issue, or offspring, would be taken to mean an indefinite failure of issue, yet there are words superadded in this devise, which tie up the contingency to the death of the tenant for life, shewing the word offspring to be used as a word of purchase; such offspring as should be living at the death of the surviving partner: and the superadded words supposed to have this effect, are the limitation to the offspring, if any by the daughter Lydia, and as they (the parents) should think best to give it. Let us examine, first, the effect of the words, if any by the daughter, and then that of the power of appointment.

"I give to my loving daughter L. B. and her husband J. B. the rest of my real and personal estate, during the life of the

longest liver of them, and then to their offspring if any by my daughter L." Do these words shew, that the testator meant, if there be any offspring living at the death of the surviving parent? No adjudged case, no dictum even, has been adduced to prove that such a construction has ever been given to them; neither is that, to my mind the import of the language. The testator was making provision for his daughter and her descendants: in looking forward, it was natural for him to reflect, that his daughter might have no offspring at the time of his death, and none born after, and he

would of course direct to whom, in
94 that event, he wished *the property to go; he did not wish it to go to the issue of the husband by any other woman; therefore, he said to their offspring if any by my daughter—these last words being mere expletives, thrown in from abundant caution, and shewing that the matter pressed upon his mind. I call them expletives, because we know that a devise to husband and wife for life, and then to their offspring, means their joint offspring, and that if they have no offspring there will be nothing on which the devise can operate: but the testator did not wish to leave this to inference or construction, and therefore said, "to their offspring if any by my daughter." If any, when? why, if any at all. This is further shewn by the limitation over:—it is not in default of such offspring living at the death of the surviving parent, but, generally, in default of such offspring; shewing that his mind was not fixed to any limited time, but that the estate was not to go over till after a general, indefinite failure of the offspring of the first takers. It was said, such offspring meant offspring living at the death: how can that be? Nothing had been said before of offspring living at the death. The testator had given the estate to his daughter and son in law for life, and then to their offspring; and the words in default of such offspring meant, simply, and clearly, offspring of the son in law and daughter. This exposition of the words if any by my daughter, is much strengthened by the other clauses of the will, where we find the phrases if any and if she have any, used by the testator indiscriminately, as being exactly synonymous; thus, "I give to my step daughter Nancy Ashley my house &c. to herself and her offspring if she have any, if not, to her half sister Lydia Bramble and her offspring if any; if not, to her sister Molly Baynes's offspring." Again, in the latter part of the clause under consideration, and by the very devise under which the lessors of the plaintiff claim, the testator after giving the estate to Lydia and her husband for life, and then to their offspring, adds—"and in default of such offspring to Molly Baynes's and Nancy Ashley's offspring, if they have any &c. and if they have none, to the

95 *poor of the parish &c." Surely, no one will contend, that a devise to A. for life, then to his issue, if he have any, and in default of such issue, over,—will make A. tenant for life only, with a contingent remainder to such of his issue as may be living at his death. It is too well

settled at this day, and for ages past, that in such case, A. is tenant in tail, the word issue being taken as a word of limitation. Our case seems to me exactly the same, using offspring for issue.

Let us now consider, whether the power of appointment changes the case, and makes the word offspring a word of purchase? "To their offspring, if any by my daughter L. as they shall think best to give it:" to their offspring; not a part; not to such as their parents shall appoint; but to the whole offspring, as they shall think best to give it. To shew that this power makes no difference in the construction of the will, I think it sufficient to refer to the case of *Ball v. Payne*, 6 Rand. 73, and the cases there cited; particularly the case of *Doe v. Goldsmith*, 7 Taunt. 209, 6 Eng. C. L. R. 73, where the devise was to F. G. for life, and immediately after his decease, to the heirs of his body lawfully begotten, in such parts and shares as F. G. should by deed or will appoint, and in default of such heirs of the body of F. G. then immediately after his decease, over to J. G.; and the question was, whether F. G. took an estate tail? Chief Justice Gibbs, in delivering the opinion of the court, thus states the argument of the counsel who contended that F. G. took an estate for life only—"that the words heirs of the body, mean children of F. G., for when he devises to the heirs of the body of F. G. in such shares as the tenant for life shall appoint, that is a gift to persons who must be in esse when F. G. was to appoint to them; that the default of such issue, must therefore be a default of such persons, who can only be children; and that the testator by this expression, therefore, manifestly means to refer to the same persons who were to take as tenants in common under the appointment, not to the heirs of the body of

96 the *first taker, in the ordinary legal sense. This is the precise argument used in the case before us, as to the effect of the power of appointment. But in *Doe v. Goldsmith*, the court said—"It is an established rule, that where a general intent appears, any particular intent which appears, however clearly expressed, shall never take effect, where it is inconsistent with the general intent; and it was clearly the testator's general intent, that the estate should never go over to J. G. till all the heirs of the body of F. G. were extinct;" and, therefore, that it was an estate tail in F. G. So said this court, in *Ball v. Payne*, where there was the same power of appointment. And so say I here, where the general intent of the testator, expressed by the words in default of such offspring, is clear, that the estate should not go over to the offspring of Molly Baynes, till all the issue of his daughter Lydia was extinct.

I see nothing, then, in this case to take it out of the settled course of decision, in support of which I shall not cite authorities, but merely refer generally to those with which we are all so familiar, and with which our books teem.

With respect to the operation of our law dispensing with words of inheritance, upon this subject, I refer to the case of *Ball v. Payne*, where the point was expressly de-

cided, and though by a court of only three judges, I feel authorized to say, from conversations with my absent brethren, that they approved the decision.

Upon the whole, I conclude, that John Bramble and Lydia his wife took an estate tail, under the will of Matthias Christian, which was enlarged by our statute into a fee, which on the death of the wife, became the sole estate of the husband, and descended at his death, to the lessors of the plaintiff; and, therefore, that the judgment must be reversed, and judgment entered for the appellants.

CABELL, J. The real question in this case, is, Whether the words in the will of Matthias Christian, purporting to limit the estate to the offspring of John 97 Bramble and Lydia *his wife, after the determination of the previous life estate given by the will to them and the longest liver of them,—were words of purchase to the offspring, or words of limitation operating to enlarge the life estate of Bramble and wife into a fee tail? I can see nothing in the case, to distinguish it from *Ball v. Payne*, 6 Rand. 73. If that case was rightly decided, it must rule this: I did not sit in it, but I have considered it with great attention; the opinion delivered by judge Carr, for the court, has my entire approbation; I could add nothing to its strength or clearness. I am, therefore, of opinion that the will before us gave to John and Lydia Bramble an estate tail; and, consequently, that the judgment should be reversed, and entered for the appellants.

It may not be improper, however, to observe farther, that if the words offspring of John and Lydia Bramble, be (as I think they are) words of limitation, then our statute of 1785, dispensing with words of perpetuity and of inheritance, can have no application to the case; for that statute was not intended to convert words of limitation into words of purchase, but to give a new effect to words that are already words of purchase. But I am still of the opinion expressed in *Jiggetts v. Davis*, 1 Leigh 368, that there may be cases of wills made since the statute of 1785, on which that statute will have an overruling influence, in deciding the question whether the estates devised be or be not fees tail: as, for example, where the extent of the first limitation in a will, depends upon the extent of the second, and the extent of the second depends on the operation of the statute. I allude to such cases as *Roe v. Jeffery*, 7 T. R. 589. There, the devise was "to T. F. and his heirs forever, and in case he should leave no issue, then to E. M. and S. or the survivor or survivors of them, share and share alike;" and the court of King's Bench decided that the limitation over to E. M. and S. was good as an executory devise limited on the fee devised to T. F. solely on the ground that E. M. and S.

took only life estates; for, as the 98 limitation to them *was to take effect, if at all, in the course of a life in being, it is obvious, that the failure of issue, on which the estate was to go to them, was not an indefinite failure, but a failure of issue living at the death of T. F.

and, therefore, there was no ground for implying an estate tail. And such would, I presume, be the decision of this court, on the same case arising on a will made before the statute of 1785 dispensing with words of perpetuity and of inheritance. But I apprehend the result would be widely different, on a will made since that statute; for I suppose no one could doubt, that the limitation over to E. M. and S. would, by virtue of the statute, give them an estate in fee simple, in the same manner as if it had been given, expressly, to them and their heirs for ever. This would, of itself, remove the sole ground of the decision in *Roe v. Jeffery*. There would, then, be nothing to restrain the generality of expression, and confine it to a failure of issue living at the death; for the limitation over to E. M. and S. and their heirs, would take effect at any period, however remote, when the issue might fail: this would manifest an intention in the testator, to provide for the whole line of the issue of the first taker: and whenever that is the case, the limitation in favor of the first taker will be held to be a fee tail, in whatever words it may be couched, since, otherwise, the general intent of the testator would be defeated. I have thought it necessary to say thus much, as to the statute of 1785, to prevent misconception as to the extent of the opinion I expressed in *Jiggetts v. Davis*.

BROOKE, J. This is one of those cases, in which there has been so great a diversity of opinion among judges and lawyers, since the decision of the case of *Pells v. Brown*, Cro. Jac. 590, which is said by lord Kenyon (in *Porter v. Bradley*, 3 T. R. 146), to be the foundation, and as it were the magna charta of executory devises: a diversity that has, I think, proceeded from not enough regarding a rule of construction, settled and admitted ever since Shelley's

case—that the general intent of the testator to provide for all the issue of the first devisee, must overrule any particular intent, no matter how plainly expressed, unless it amount to evidence that the testator did not intend to provide for issue generally. In the case before us, I think it impossible not to see, that the testator did not intend the estate devised to his daughter Lydia and her husband for life, and then to their offspring, to go over to the offspring of Molly Baynes and Nancy Ashley, so long as there was any offspring (which is as comprehensive as issue) of his daughter Lydia and her husband; and that to carry that intent of the testator into effect, Lydia and John Bramble must take an estate tail according to the settled rule of construction, “as the law aforetime was.” Nor can any inference against this intent of the testator to provide for all the offspring of Lydia and John Bramble, be drawn from the circumstance, that, in the devise over to the offspring of Molly Baynes and Nancy Ashley, no estate is given to Molly Baynes or Nancy Ashley; on the contrary, I think, this last devise to the offspring of Molly Baynes and Nancy Ashley, strengthens the evidence of the testator's intent to provide for all the offspring of Lydia and John Bramble before the estate was to go over to the offspring of the

other two. Lydia Bramble was his daughter, and her offspring must have been more dear to him, than the offspring of his step daughters; and accordingly, the testator evidently preferred all the offspring of his daughter Lydia to any of the offspring of the step daughters. The power to Lydia and John Bramble to dispose of the estate to their offspring, as they shall think best, is not in conflict with his intent to provide for all their offspring (or issue) so long as there should be any. The case of *Doe v. Goldsmith*, cited by this court in *Ball v. Payne*, was a stronger case than this; and yet no inference was drawn from the power of appointment, to change the intent to provide for all the issue, however remote. Nor can I think, that, consistently with the decisions of this court, any stress can be laid on the existence at the date of the will, of the provision of the statute of 1785, re-enacted *from that of 1776, abolishing entails, or of the other provision of the same statute, which dispenses with words of inheritance or perpetuity to pass an estate of inheritance. 12 Hen. Stat. at large 155, 7. If the intention of the testator is to be inferred from a supposition that those statutory provisions were in his contemplation when he made his will, we must take it that, as he knew that his will would be construed “as the law aforetime was,” and that the latter provision would not be so applied as to defeat the intent and effect of the former, he would have taken care, in wording his will, to conform to the construction thereof, “as the law aforetime was;” and if he had intended, that the estate devised to the offspring of his daughter and her husband, should go over before a total failure of their offspring, he would have used terms which, under the construction “as the law aforetime was,” would have created an executory devise over to the offspring of Molly Baynes and Nancy Ashley. He would not have relied on the application of the statute, to give an estate of inheritance to the offspring of his daughter and her husband. To give consistency to the two provisions of the statute, it will be impossible to apply the provision which dispenses with words of inheritance to pass an estate of inheritance, to any case, in which, without it, an estate tail, of an executory devise, would be created, under the rules of construction “as the law aforetime was.” It would be to reject altogether the language of the provision for abolishing entails; and, as the object of the other provision dispensing with words of inheritance, was to enlarge an estate to an inheritance, which under the common law (intended to be repealed) was only a life estate, it would be to defeat its object. If this provision should be applied in such a case as that of *Roe v. Jeffery* in 7 T. R. by giving to the survivor an estate of inheritance instead only, which made the limitation there a good executory devise, his life estate (under the old rule) would be entirely defeated, instead of being enlarged to an inheritance, as was intended by the statute. *It cannot be said, that this construction of the statute of 1785, would render any of its provisions ineffec-

tual: on the contrary, it may be applied to every case, in which an estate is given either without words restricting it to a life estate, or words of inheritance, and in which, by its application, the rules of construction, "as the law aforesaid was," in respect to estates tail and executory devises, applied to the words in the deed or will, will not be affected; so as that the application of this provision of the statute shall serve only to enlarge an estate for life into an estate of inheritance, without defeating the life estate, or changing an estate tail into an executory devise, or vice versa.

I concur in the opinion, that the judgment should be reversed.

TUCKER, P. The testator devised the residue of his real and personal estate, to his daughter Lydia and her husband John Bramble, during the life of the longest liver of them, and then to their offspring, if any by his daughter Lydia, as they should think best to give it; and, in default of such offspring, to Molly Baynes's and Nancy Ashley's offspring, as they think best to dispose to their offspring, if they have any; and if they have none, then to the poor of Elizabeth-River parish. This devise clearly evinces the testator's intention, that his daughter and his son in law should have but an estate for life, and that the estate should go over after their deaths to his grandchildren; for, had an estate either in tail or in fee been given to the parents, the children might have been cut off by their alienation. But, while this was obviously his object, yet this particular intent, it is admitted, must be disregarded, if the enlargement of the life estate into a fee tail, is essential to effectuate his principal design. This was, that the estate should not go out of the family of his daughter, over to the family of Molly Baynes and Nancy Ashley, as long as there should be any descendants of his daughter, however remote in the line of succession.

This subordination of the particular
102 to *the general intent, is readily admitted, and from it have sprung the numerous cases, in which estates for life, followed by a limitation over upon an indefinite failure of issue, have been enlarged into estates tail. To produce this effect, however, there must be a limitation upon an indefinite failure of issue. Such I conceive not to be the case here. The devise over to the offspring of John Bramble and wife, if any by his daughter Lydia, as they shall think best to give it, is, according to my conceptions, a designation of the persons who are to take, and not the addition of an inheritable quality to the life estate of the first takers: other words, they are words of purchase, not words of limitation. They are equivalent to the offspring of Bramble and wife living at their deaths; and if so, no estate tail is created.

That the words above referred to, are intended to designate those descendants of the testator's daughter, who might be living at the death of the survivor of herself and her husband, appears from the language and character of the bequest. For,

1st. The estate is to go to "their offspring by his daughter Lydia, as they shall

think best to give it." Here then was a power of appointing in what manner and portions the offspring were to take. The language of the will conveys, with a force not to be resisted, a power to the parents to divide the estate among their children, at their discretion. In doing this, one might have more, another less; and if so, they cannot take as heirs, but must take as purchasers; for, as heirs, they would take according to the law of descents, by which equality is the rule, where the descendants are all in equal degree. The testator, therefore, could not have designed to use these words as words of limitation or inheritance; as pointing out the indefinite line of succession. He could not have contemplated their taking as heirs, when he was providing a power of appointment by which they might take unequally. And it is, in this view, unimportant whether the power was or was not executed: the conferring the power, is the important

103 matter, as pointing out distinctly *the character in which the testator looked upon the offspring to whom the devise over was made; that he viewed them as purchasers, and never contemplated that they should take as heirs. If, as seems to be supposed, any illustration of the testator's leaning in this clause, is to be drawn from the other clauses of the will, the most ample evidence is afforded, that the word offspring here, is used as a word of purchase. In a preceding clause, he limits another part of his estate over to Molly Baynes's offspring, as she chooses to give it, without devising any interest to Molly Baynes herself; and in the subsequent limitation over of this very estate devised to Bramble and wife, it is devised to the offspring of Molly Baynes and Nancy Ashley, if they have any, as they shall choose to dispose to their offspring, without giving to the mothers themselves any estate whatever. Now, nothing is more clear, than that as no estate was given to Molly Baynes and Nancy Ashley, they had no estate to enlarge, and their offspring, if they took at all, could only take as purchasers, and the word of course is a word of purchase and not a word of limitation.

2ndly. That the offspring are to take as purchasers, is not only pointed out by the circumstance, that the estate was to be divided among them according to parental discretion, but the same thing seems to me distinctly conveyed by the very power of appointment itself. What offspring are to take and how? The offspring of Bramble and wife; and they are to take according to appointment; and, as this appointment was contemplated to be made by persons in being, the testator could only have contemplated its being made to persons in being: and this altogether excludes the idea of his having designed by these words to embrace the whole line of succession.

In the construction I place upon the language of the testator in this clause, I draw no distinction between the words offspring and issue. I freely admit they mean the same thing; and are to be construed a like in this case. In that view, however, it

104 may be well to present two cases, to illustrate *and sustain the two posi-

tions I have taken. The first is the well known case of *Doe v. Laming*, 2 Burr. 1100. That was a devise of gavelkind lands to A. and the heirs of her body lawfully to be begotten, as well females as males, and to their heirs &c. to be divided equally, share and share alike as tenants in common. These words shewing clearly that the devisees were to take as purchasers, since they could not take in the mode prescribed if they took as heirs, the first taker was held to take an estate for life only, although the superadded words of inheritance would not of themselves have sufficed to take the case out of the operation of the rule in *Shelley's* case. So in this case (to apply the language of Mr. Fearn) the word offspring does not stand independent and unqualified, but is corrected and explained by the words which are coupled with it. Those words are incompatible with and expressly break the descent, because the parties may take unequally by appointment, and not equally as heirs. *Butler's Fearn*, 154, 197. The other case I shall cite, is that of *Hockley v. Mawbey*, 3 Bro. C. C. 82, the similarity of which to the present is altogether remarkable. It was a devise "to the wife for life, remainder to the testator's son R. R. and his issue lawfully begotten, to be divided as he shall think fit, and if he should die without issue, remainder over: held, an estate for life with a power, and the remainder good. Lord Thurlow said—"I think the testator intended, and has expressed his intention, to give a contingency with a double aspect; in one event, a gift to the children of the son if he should have any, and if he should not have any child, then to be sold for the purposes of the will. He did not mean the estate to go as an estate tail, but that the children should take distributively, in which case they must take as purchasers, and the consequence is, the son took only an estate for life. He had a power to divide; but if he did not, there was an interest in the children that would entitle them to an equal division. It is observed, that if he had no children, it would go to grand-

105 children; it would so,—but *only as descriptive of his power: in order to take, they must be alive at the son's death: it is not sufficient to say they are immediate descendants of Richard (the son) to make them take under the estate tail. It is sufficient the division must take place at the death of Richard, which is within the rules. Therefore two events were provided for: 1. There being children of Richard; in which case they would take: 2. There being no children; in which case the estates vested in the persons described,"—that is, in the remaindermen.

3rdly. I proceed next to consider some other expressions of this will, which ought not to be dissevered from the rest, but regarded in connexion with them. The estate is given to Bramble and wife, and the longest liver of them, and then to their offspring if any by the daughter Lydia, as they shall think best to give it. In connexion with this clause, it is important to advert to the fact, that the testator had full knowledge when he made his will (which

is to be understood as speaking from its date) that his daughter Lydia had offspring at that time. He could, therefore, only have used these words if any, which irresistibly imply uncertainty, in reference to some future state of things; the persons contemplated by him to take, were not such as merey had the quality of being then in existence, but such as should be in existence at some future period; and this period was either indefinite, or fixed to the determination of his own life, or of the life of the survivor of John Bramble and wife. I think it was the latter he had in view. For, although the word then is sometimes indefinite, and does not designate a point of time, but merely a succession of events, yet, in this connexion, I think it is otherwise. The devise is to them and the longest liver of them, and then to their offspring if any. If any, when? The answer seems to be echoed by the clause, if any then; at that time. To what could he be considered as so naturally referring, as to that time of which he had just spoken, namely, the termination of the particular estate? Can he be supposed to have 106 referred rather *to the time of his own death, to which there had been no manner of allusion? Had such been his design, he would have said, if any at the time of my death, as that event had not been before mentioned. Can he be supposed to have intended no definite period,—to have meant, if any in the long succession of generations? I think not. His daughter had issue at that time; and had his mind been directed to the failure of the line of succession, he would have used language in reference to the continuance of offspring, rather than these terms which so strongly imply a reference to some definite period. Instead of the words to their offspring if any, he would have said, in reference to the known existence of children at that time, to their offspring as long as there shall be any. But this was not his design; and, as he had just provided that Bramble and wife should have the estate during the life of the longest liver of them, he added, and then to their offspring if any; not deeming it necessary to repeat at the death of the longest liver of them. This construction of the words in question is strengthened, instead of being impugned, by a reference to the subsequent part of the clause, in which the testator in default of offspring of his daughter, devises the estate to Molly Baynes's and Nancy Ashley's offspring, if they have any. Now, in this devise, unquestionably, the words if they have any, mean if they have any at the time of the death of the survivor of Bramble and wife. For, as Molly Baynes and Nancy Ashley took nothing themselves, their offspring could only take as purchasers. The word offspring did not designate the line of succession, but pointed to some particular offspring. And as they too had children at the time, the testator could only have used the terms to shew, that he did not mean those who happened then to be in existence, but those who might happen to be in existence at a particular time; that is, at the death of the surviving tenant for life. If then, the words if there be any,

have this meaning in this part of the clause, the words if any, in the former part of the same sentence, may be fairly interpreted in the same manner.

107 *Having thus established, that the true interpretation of the limitation is, to J. B. and wife during the life of the longest liver of them, and then to such of their offspring as there might be at the death of the survivor, thus making the word offspring a word of purchase and not of limitation; it is sufficiently obvious, that the subsequent words in default of such offspring, can mean nothing more. If the former do not amount to an indefinite limitation to the issue, neither can the latter: for, the words such offspring, mean such as were just mentioned; that is, offspring living at the death &c.

This construction of the testator's will is, however, resisted on the ground of principle and authority. It is said, that the testator did not design the estate to go over to the offspring of Molly Baynes and Nancy Ashley, as long as there were any descendants of his daughter Lydia by John Bramble: this cannot be denied. It is then said, that if the words are not construed to give an estate tail, the descendants of Lydia, after the first generation, would be cut off, since the offspring, if they took as purchasers, would only take estates for life, there being no inheritable words in the bequest to them. This position cannot be admitted. To sustain it, a variety of cases are cited, some of which I shall examine. In *Doe v. Applin*, 4 T. R. 82, the devise was to A. for life, and after his decease to and amongst his issue, and in default of issue, then over: A. took a fee tail; and for this obvious reason, that as the issue could not take more than an estate for life for want of words of inheritance, the estate would go over from the grandchildren, notwithstanding the clear intent to postpone the remainder so long as there should be issue or descendants of A. In *Doe v. Smith*, 7 T. R. 531, the devise was to A. and the heirs of her body forever, as tenants in common and not as jointenants, and in case she died before twenty-one or [and] without leaving issue of her body, then to B.—Held, A. took an estate tail, avowedly upon the necessity to effectuate the general intent. And lord Kenyon said, “here are no words of limitation added to the estate given to the children (sup-

108 posing *they took as purchasers) and yet the remainder over is not to take effect, until there was a general failure of her issue, so that there must be an estate to comprehend all her children forever.” So, in *Doe v. Goldsmith*, 7 Taunt. 209, the devise was to F. G. for life, and immediately after his decease to the heirs of his body lawfully to be begotten, in such parts or shares as he should by deed or will appoint, and in default of such heirs of his body, then immediately after his decease over to J. G. And it was held, that F. G. took an estate tail; chief justice Gibbs resting it upon the ground, that this was necessary to effectuate the general intent in behalf of the issue; the testator having clearly shewn his design “that the estate should never go to J. G. as long as there

was issue of F. G.” which could not be the case there, without implying a fee tail, since the issue, if they took as purchasers, took only an estate for life. So too, in *Doe v. Cooper*, 1 East 229, the devise being to R. C. for life, and after his decease, to his issue as tenants in common, but if he die without leaving issue, then to E. H.—the first taker took an estate tail. This case was determined expressly on the authority of the former cases, and therefore rests upon the same foundation. In all these cases, then, the want of superadded words of inheritance upon the devise to the issue, so as to give them heritable estates instead of estates for life, was the obvious, and, in some of them, the avowed principle of decision. For, if we attend to the course of argument, in all of them, both of the bar and bench, it is very manifest that the power of appointment, the direction to divide the estate amongst them, and the provision that they should hold as tenants in common, would, in these cases, as in *Doe v. Laming*, have prevented the implication of an estate tail, if there had been superadded words of inheritance. Thus, in *Doe v. Cooper*, lord Kenyon, speaking of *Atherton v. Pye*, 4 T. R. 710, said, “in that case there were words of limitation added to the devise to the daughters, and this forms a principal ground of distinction;” and in *Doe v. Smith*, in speaking of *Doe v. Laming*, which had been cited, he said, “that case is distinguishable from this, for there were words of limitation superadded.” Indeed, even with this foundation for the cases cited, they are by no means without opposition. The case of *Doe v. Applin* is considered in *Burnsall v. Davy*, 1 Bos. & Pull. 221, as going further than any case, in giving an estate tail to the first taker, by the rejection of the word amongst; that is, by considering the word issue as a word of limitation, notwithstanding the authoritative provision, that they should take in a manner incompatible with the notion of an inheritance. Accordingly, in the case of *Hockley v. Mawbey*, (before cited) the implication of an estate tail did not arise, though there were no words which would give an inheritance to the issue. But, where there are such words, I imagine the decisions are uniform. Thus in *Doe v. Ellvey*, 4 East 313, the devise being to A. and to the issue of his body, his, her or their heirs, equally to be divided if more than one, and if A. have no issue, then over; A. took but an estate for life. In *Doe v. Barnsall*, 6 T. R. 30, where the devise was to A. and the issue of her body as tenants in common, but in default of such issue, or being such, if they should all die under twenty-one and without leaving issue, then over; A. took only a life estate. Lord Kenyon, who had decided several of the former cases, said—“I agree that the limitation to M. O. was for life only, and the limitation to her children [issue] was to them as purchasers; and it certainly is sufficient to carry to them some quantity of estate. If the plaintiff's counsel had succeeded in proving, that there was nothing [any thing] to be collected from the will, to shew that the children were only to take for life, then

according to the case of *Roe v. Grew*. [2 Wils. 322,] the court would have endeavoured to convert the estate to M. O. into an estate tail, in order to effectuate the intent of the devisor."

If, then, the existence of an inheritable estate in the issue or offspring, is the point upon which those cases turn in which there is a limitation to the issue to take in 110 a manner *different from the law of descents, then I say, that that is furnished, in the case before us, by the statute of 1785, which declares, that a fee shall be construed to be conveyed where there is no restriction either by express words or by construction of law. If this statute has any operation upon the case, then the offspring of *Bramble* and wife, living at the death of the survivor of them, would have taken a fee simple estate in remainder; and thus, the whole generation of the testator's daughter, would in succession have come to the estate, unless it should have been aliened by those in whom it might vest. And thus, there could be no ground for implying an estate tail, by forcibly converting a designation of the persons to take, into words of limitation.

The will in this case, having been made subsequent to the statute of 1785, must be under its influence upon general principles, unless some reason can be shewn for the contrary. I confess I see none. Enacted at the same session and contained in the same statute, and immediately succeeding the section respecting estates tail, I should think it not unreasonable to suppose that it might have been intended directly to modify it. But whether this was designed or not, so it is, that here is a solemn act of the legislature, prescribing a rule for the construction of instruments. What authority have we to disregard it, even in the construction of wills according to the direction of the preceding clause? It is because that clause declares, that the construction shall be "as the law aforesaid was?" Does this lock up the case from the operation of all legislation, except the clause respecting limitations in tail? Do the terms as the law aforesaid was, require us not only to look back to the law of entails as it existed before the act of 1776, but to govern ourselves by the state of the law of that day in all other respects? Was it intended, as was very pertinently asked by judge Green, in *Bells v. Gillespie*, 5 Rand. 291, to refer to all the decisions in England and Virginia prior to 1776, as the rules for decision in all future time, without regard

to the effect which future laws might 111 have upon the reasons *upon which these decisions were founded? I certainly should have answered these questions in the negative, with the utmost confidence, but that it is manifest there is a difference of opinion on this most important point between the members of this court. Such, at least, appears to me to be the case. In the case of *Goodrich v. Harding*, 3 Rand. 280, the subject seems to have presented itself to the consideration of the court, but the question was waived by all the judges. In the case of *Bells v. Gillespie*, the testator after devises to several sons, bequeathed "to his son *Pleasants* a

certain tract of land to him and his heirs, after the decease of his wife; and further provided, that if either of his sons should die without lawful issue, the part allotted to him should be divided among his surviving brothers:" and judge Green, in his opinion, distinctly avows that the statute of 1785 was decisive to give the surviving brothers a fee, if they took any estate, and that *Pleasants*, therefore, took an estate tail, "unless," says he, "we are not at liberty to take into consideration the effect of that statute in determining whether he took an estate tail or not." This question he pronounces to be of great importance, and proper to be at once decided. He proceeds to discuss the subject at large, enforces the opinion that the statute of 1785 must be referred to, and concludes that *Pleasants* either had an estate tail and not a fee, by force of the will, or if he had an estate in fee, the limitation over to his brothers was void; they having a fee by operation of the statute, and the limitation over being therefore not tied down to a life in being, which would have been the case had they taken only estates for life. In *Jiggetts v. Davis*, 1 Leigh 405, judge Green again recurs to this subject, refers to his opinion in *Bells v. Gillespie*, and again invokes the aid of the statute of 1785. In the same case, judge Cabell in giving his opinion (Id. 427,) speaking of the statute of 1785 respecting entails, and of the rules of construction recognized by it, said,—"It was, surely, competent to the legislature of 1785, to make any exceptions to or 112 *thought proper, and it did make an exception as to deeds and wills to be made after the passing of that act, by declaring, in the sentence almost immediately succeeding, that every estate thereafter granted &c. should be deemed to be a fee, if a less estate be not expressly limited, or appear to have been granted &c. by construction or operation of law. It must be admitted, that this provision makes a most important change in one of the former rules of construction, and it is imperative on the courts. As to estates created since the act of 1785, the expression as the law aforesaid was, must, therefore, be understood, as controlled by the clause just referred to. But with this exception, there is no difference between the construction of deeds, and wills, made before the statute of 1785 and those made since."

Next comes the case of *Ball v. Payne*, 6 Rand. 73. Upon the point in question, I am not disposed to controvert the opinion there expressed, if indeed it were admissible to do so. There, the court having looked upon the words heirs of the body, as words of limitation, notwithstanding the provision for a division among them, it was surely not competent to apply the statute of 1785, to vest a fee in those heirs who took no estate. But where the words are clearly used as a designation personæ, as I consider them in this case, the statute may be applied to enlarge the estate, and thereby effectuate the whole of the testator's intentions. And this course is more reasonable, than to reject, in effect,

the strong expressions, which shew that the offspring were designed to take as purchasers. It is more reasonable than to convert those expressions into a limitation creating an estate tail, and defeat the object of the testator.

In this opinion, I would be distinctly understood as nowise contending for the application of the statute, where the word issue is used as a word of limitation. Thus, if an estate be given to A. for life, remainder to the heirs of his body, and if he die without issue, over; the words heirs of the body, being words of limitation, cannot be converted by the statute into words of purchase, and considered as giving a

113 fee *to the issue. Such a construction would be subversive of every principle. But, where the limitation is to offspring or issue, so designated and pointed out, as to make those words, words of purchase instead of limitation,—the intention of the testator is best subserved, the statute of 1785 dispensing with words of inheritance is respected, and the clause respecting estates tail is not infringed, when we consider the statute as giving a fee to those, who, but for it, would have only an estate for life.

* Upon the whole, I am of opinion, that John Bramble took only an estate for life; and the course of my remarks has shewn that the children of Lydia by him could not have taken any vested interest. Therefore, I think the judgment ought to be affirmed.

Judgment reversed, and judgment entered for the appellants.

114 *Barrett v. Wills.

January, 1833.

[26 Am. Dec. 315.]

Promissory Notes—Negotiable at Bank—Presentment—Averment of.—In debt on promissory note, by indorsee against maker, the declaration states the note as one made negotiable at the bank of V. and avers, that the note, at maturity was duly presented at the bank, and protested for non-payment; the note offered in evidence, was made negotiable at bank; and there was no proof that it was presented at bank for payment: HELD, a note made negotiable at bank, is not therefore payable there also, and so the averment of presentation at bank was wholly immaterial, and need not be proved.

Same—Payable at Particular Bank—Averment of Presentment.—Quære, whether, in the case of a note made payable at a particular bank, it is necessary, in an action on it against the maker, to aver and prove due presentation of the note for payment, at the bank?

Appellate Practice—Failure to Object to Point in Lower Court—Waiver.—In a case brought before an appellate court, on complaint of error in a particular point stated in a bill of exceptions, the appellate court will regard only that point, and will not look into objections that might have been, but were not, made in the court below.

Verdicts—Certainty.—Verdict and judgment for

***Notes—Negotiable at Bank—Where Payable.**—In Taylor v. Bank of Alexandria, 5 Leigh 475. It is said, if the object of the demurrer was to assert the necessity of presentment and demand at the bank of Alexandria, that objection is conclusively met by the fact, that the promissory note was not payable there, though it was negotiable there. Citing *Barrett v. Wills*, 4 Leigh 114. See monographic note on "Bills, Notes and Checks" appended to Archer v. Ward, 9 Gratt. 622.

†**Appellate Practice—Failure to Make Objection in Lower Court—Waiver.**—The principal case is cited in *foot-note* to Newsum v. Newsum, 1 Leigh 86; Rose v. Burgess, 10 Leigh 198.

‡**Verdicts—Certainty.**—The principal case is cited in *oot-note* to Richards v. Tabb, 4 Call 522.

debt claimed in the declaration, with interest &c. subject to a credit for a specified sum, paid at a specified date: this is certain enough.

Debt, in the circuit court of Amelia, by Wills the indorsee, against Barrett the maker, of a promissory note for 300 dollars, made negotiable at the bank of Virginia, and therefore, placed on the same footing as foreign bills of exchange, by the amended charter of the bank, 2 Rev. Code, ch. 194, § 10, p. 78.

The declaration stated the note, as a promissory note in writing, commonly called a negotiable note, dated the 8th June 1826, made and delivered by the defendant Barrett to one Southall, for 300 dollars, payable to Southall or order ninety days after date without set-off, negotiable at the office of the bank of Virginia at Petersburg; and, after alleging the indorsement thereof by Southall to the plaintiff Wills, averred, that, afterwards, when the note came to maturity, the same was presented for payment at the said office of the bank, and payment thereof demanded there, but the same was then and there not paid, and yet remained wholly due and unpaid. Plea, the general issue.

At the trial, the defendant filed exceptions to an opinion of the court, stating, that the plaintiff, to support the issue 115 *on his part, offered in evidence the note in the declaration mentioned, which was set out in *hæc verba*, and was a note made negotiable (but not payable also) at the office of the bank of Virginia at Petersburg; and that, there being no other proof, the defendant's counsel thereupon moved the court to instruct the jury, that the plaintiff could not maintain his action, without proving the averment in his declaration, that the note was presented for payment at the time and place mentioned in the note and declaration; which instruction the court refused to give the jury; and the defendant excepted to the opinion.

The jury found a verdict for the plaintiff "for the debt in the declaration mentioned, with interest from the 10th September 1826, subject to a credit for 53 dollars paid on the 26th September 1826;" and the court gave judgment for the plaintiff, pursuant to the verdict, for the debt and interest thereon, subject to the credit of 53 dollars. Barrett applied to this court for a superseas to the judgment which was awarded.

Allison, for the plaintiff in error, took three objections to the judgment—1. That, as the declaration averred the presentation of the note for payment at bank, Wills was bound to prove the fact of such presentation there, in order to maintain this action. And advertng to the circumstance, that the note was only made negotiable at the bank, without being expressly made payable there also, and was so described in the declaration; he insisted, that a note made negotiable at bank, is, by force of that term of the contract, payable there. 2. That it was distinctly stated in the bill of exceptions, that there was no other proof in the cause but the note; that is, no proof of the hand writing of the maker, or of the indorser; without which, certainly, the indorsee was not entitled to a verdict. 3.

That the judgment was irregular and uncertain: that the verdict, or if not the verdict, the judgment, at least, should have ascertained the exact sum due, instead of
 116 being for the debt claimed with *interest, subject to a credit for the sum paid at the specified date; *Grays v. Hines*, 4 Munf. 437.

There was no counsel for the defendant in error.

CARR, J. As to the first objection,—it is a general rule in pleading, that the declaration must contain an averment of all such facts as are necessary to maintain the plaintiff's action; but if, in addition to the necessary averments, it contain one idle and impertinent, so that it may be struck out without affecting the action, such averment is mere surplusage, and the plaintiff will not be held to proof of it. Is the averment here of this character, or is it one necessary to be stated in the declaration, and proved on the trial, to maintain the plaintiff's action? Since the case of *Row v. Young*, 2 Brod. & Bing. 165, 6 Eng. C. L. R. 58, it may be considered as settled in England, that where a promissory note is made payable, or bill of exchange is accepted payable, at a particular place, it is necessary, in an action against the maker or acceptor, to aver and prove a presentment at the place. But the point has been decided differently in the courts of New York, 4 Johns. Rep. 183, 17 Id. 248. And in the case of *U. S. Bank v. Smith*, 11 Wheat. 171, it is strongly doubted by the supreme court whether such averment and proof be necessary, in a suit against the maker of a note, though it is decided that they are, as against the indorser. This question, however, does not arise in the case before us; for the note is not made payable at any particular place; it is only made negotiable at the office of the bank of Virginia at Petersburg. The counsel, indeed, contended that this, of course, made it payable there; but he cited no authority for this, and I can find no decision to that effect. It would seem strange to me, if it had been so decided. There is no necessary connexion between the bank where a note is made negotiable, and the place where it is made payable; they are very different operations. In *Mandeville v. Union Bank*, 9 Cranch 11, chief justice Marshall said—

“By making a note negotiable at a
 117 particular *bank, the maker authorizes the bank to advance, on his credit, to the owner of the note, the sum expressed on its face.” But the payment of that note by the maker is quite another matter; it may be payable at large (and is always so where no place is named for payment), or payable at the bank where it is negotiable, or at a different place. This is all matter of express stipulation. In the case just cited, of *Mandeville v. Union Bank*, there are two instances of notes negotiable at one bank, and payable at a different bank. The note, then, in the case before us, was payable at large, and the averment in the declaration wholly immaterial and idle, of which no proof was necessary. The circuit court, therefore, was right in refusing the instruction.

The next objection is to the form of the

verdict and judgment: They are objected to for uncertainty, but I can perceive none. The counsel, in support of his objection, cited the case of *Grays v. Hines*. In that case, a judgment on a bond was entered for the penalty, to be discharged by the sum in the condition, “subject to a deduction for the said credits indorsed on the said bond:” here was much uncertainty; the sums to be credited were not specified; the judgment, instead of being complete in itself, referred to another document, which was liable to be changed by the clerk or others. The two cases are wholly different; and I think there is nothing in the objection.

Another objection was relied on in the argument; that the hand writing of the maker, and of the indorser, were not proved. But the record presents no such point. There is a general verdict for the plaintiff on the note; without any objection at the trial for want of such proof; without any motion to the court for instructions on the point; without any demurrer to the evidence. This is an attempt to supply the defect, by making the bill of exceptions operate as a demurrer to evidence; but that point has been too often decided here, to be now stirred.

The other judges concurred, and the judgment was affirmed.

118 *Doe on Demise of Thomason v. Andersons.

January, 1833.

Wills—Estates Tail—Effect of Statute—Contingent Remainder.—Testator devises real and personal estate to his natural daughter P. A. to her and her heirs forever; and if she should die leaving no child, the estate before given should return into his estate, and be divided among his legitimate children; but should she leave a living child or children, then the estate should be held by him, her or them, as the case might be: *Held*, P. A. took by the will, an estate tail in the lands devised to her, which the statute for abolishing entails converted into a fee simple, and barred the contingent remainder limited on the estate tail.

Same—Devise to Daughter—Remainder to Her Children—Right of Illegitimate Children—Quære.—The devisee P. A. having left illegitimate children living at her death, capable of inheriting and of transmitting inheritance on the part of their mother, in like manner as if they had been her lawful children, by the provision of the statute of descents, 1 Rev. Code, ch. 96, § 18. Whether effect of the devise, in this case, was not the same as if she had left legitimate children?

Ejectment by George Thomason against Ambrose, John and Tabitha Anderson, in the circuit court of Louisa, for 100 acres of land in that county. Upon the trial a special verdict was found, stating the following case:

That John Anderson died seized of the premises, in 1800, having duly made and published his will, whereby he devised and bequeathed, inter alia, as follows: “As to my estate both real and personal, I dispose of it in manner and form following”—“I

***Wills—Estates Tail—Effect of Statute.**—The principal case is cited in *foot-note* to *Jiggetts v. Davis*, 1 Leigh 368; *foot-note* to *Hill v. Burrow*, 3 Call 243; See *v. Craigen*, 8 Leigh 452; *foot-note* to *Callis v. Kemp*, 11 Gratt. 78; *Tinsley v. Jones*, 13 Gratt. 309.

Same—Constructions—Children.—On this question the principal case is cited in *foot-note* to *Tebbe v. Duval*, 17 Gratt. 349; *Vaughan v. Vaughan*, 97 Va. 328, 33 S. E. Rep. 603. See *foot-note* to *Morris v. Owen*, 2 Call 520; also, monographic note on “Wills.”

give to Patsey Anderson, my natural daughter, 100 acres of land in Louisa" (describing it) "also the two following negroes" (naming them) "one feather bed and furniture, one choice horse and side saddle" (and some other chattels) "to her and her heirs forever—I also lend her, during her being in a single state, the two rooms being in the west of my dwelling house, called the hall and study"—with sundry other property real and personal particularly mentioned; and then the testator added, in the same clause—"My further will and desire is, that if she should die leaving no child, the estate before given should return into my estate, and be divided as hereafter mentioned, viz. amongst all my children, but should she leave a living child or children, then the estate shall be heired by him, her or them, as

119 "the case may be." The testator then gave some real and personal estate to two of his legitimate children, and concluded his dispositions of his property, with the following residuary clause: "As to the rest of my estate, including the lands in Louisa not yet disposed of, negroes and property of every kind, I will and dispose of it to the following of my children, viz. Sally Pulliam, Betty Richardson, Francisca Johnson, and Augusta Johnson, to them and their heirs forever, except Betty Richardson's proportion, and that proportion of my estate, my will and desire is, shall remain with her and for her use, at the discretion of my executors, and after her decease to be equally divided among all her children."

That the hundred acres of land devised to the testator's natural daughter, Patsey Anderson, was the land in controversy.

That the devisee Patsey Anderson, in her lifetime, by deed of bargain and sale, dated the 18th October 1815, conveyed the land to John Thomason, who by deed of bargain and sale dated the 20th November 1821, conveyed it to George Thomason, the lessor of the plaintiff.

And that Patsey Anderson died shortly after her sale and conveyance of the land to John Thomason, leaving three illegitimate children, Ambrose, John and Tabitha Anderson, the defendants in this cause.

And then the verdict referred the question of title to the court—without finding, that Patsey Anderson entered on the land under the testator's will, and was seized and possessed thereof at the time of her conveyance to John Thomason; or that he entered under that conveyance, and was in possession at the time of his conveyance to the lessor of the plaintiff; or that the defendants were in possession at the time the ejectment was brought—that is, the formal finding of lease, entry and ouster, was omitted.

The circuit court (apparently, without adverting to the imperfections of the verdict) held, that the law was for the defendants, and gave judgment for them; from which the lessor of the plaintiff appealed to this court.

120 "Leigh for the appellant, premised, that the devise of the 100 acres of land to the testator's natural daughter, was an express devise of a fee simple, in the

first instance. And then he contended, 1st, that, even supposing the limitation over in the event of her death leaving no child, was an executory devise, and good in its creation, yet, as she in fact left children, though they were illegitimate, the event had not happened upon which her fee was to determine; for though the word children generally meant legitimate children; yet here, he said, it meant any children capable to inherit from their mother; and by the statute of Virginia, bastards were heirs of their mother in like manner as lawfully begotten children, 1 Rev. Code, ch. 96, § 218, p. 357. It was, indeed, upon the strength of this proposition, that the appellees themselves were claiming title; they were illegitimate children, and yet they claimed under the limitation to the children of their mother. But, 2ndly, he insisted, that the devisee Patsey Anderson, took by the will an estate tail, which the statute for abolishing entails converted into an absolute fee simple. The devise was to her in fee, in the first instance; and if she should die leaving no child, then over to the testator's children; but if she should die leaving a living child or children, then the estate should be heired by him or them; that is, inherited from the mother. An estate of inheritance, so limited to a mother that her children shall take it from her by inheritance, could be nothing else but an estate tail in the mother.

Johnson argued, for the appellees, 1st, that the word children used in deeds or wills as a description of persons, always meant lawful children only, unless illegitimate children were particularly pointed out by the donor, and manifestly and incontrovertibly intended. Cartwright v. Vawdry, 5 Ves. 530; Godfrey v. Davis, 6 Ves. 43. It would be of immoral and pernicious tendency to permit bastards to take under a donation to children, generally; and it was most unreasonable to suppose, that the testator, in making provision for his daughter and her offspring, though she herself was illegitimate, looked to the case of her

121 offspring being "bastards"; especially, seeing that he anticipated her marriage, and made some special provision for her while she should remain single. As to the ground on which the appellees claim title, it was immaterial here, whether they had title or no; the only question was, whether the appellant had title. 2ndly. He endeavoured to maintain, that, upon the just construction of this will, the testator's natural daughter Patsey took only an estate for life, with contingent remainders over upon alternative events,—a contingency with a double aspect; if she should die leaving no child (meaning, as afterwards appeared, child living at her death) then the estate was to go to the testator's lawful children, who could, of course, take only as purchasers; if she should die leaving a living child or children (that is, living at her death) then the estate was to go to him or them, in like manner, as purchasers. The word children, he said, generally, in its legal signification, was a word of purchase; and though the will said, that the estate should be heired by the children of the daughter, the meaning was that they should

take it, not that they should inherit it from their mother; for the phrase was applied not only to real but to personal estate, of which, properly, there could be no heirs.

Johnson pointed out the imperfections of the special verdict, and remarked, that, on that account, no judgment could be given, for the appellant, and that the court must order a venire de novo; and this Leigh admitted; but both counsel requested the court to decide the question of title now, so as to put an end to the controversy.

CARR, J. The decision of the circuit court is right, if the devisee Patsey Anderson took under the will of her father, a life estate only, and her children the remainder as purchasers; but it is wrong, if she took an estate tail; or even if she took a fee, with an executory devise over to the other children of the testator, provided it shall be considered, that the leaving natural children at her death, was an event, which, under the will, defeated the executory

122 devise. Upon *that point, however, I give no opinion. It is not necessary in the view I take of the case: for, in my opinion, under the well settled doctrines both in England and Virginia, this was an estate tail, enlarged by our statute into a fee.

The general questions involved have been so often and so thoroughly discussed both by the bar and the bench, that I shall not go into them at large. Did the testator mean to provide for his daughter and her issue indefinitely? If so, this is an estate tail, no matter how he may have expressed himself, or with what conditions or limitations he may have attempted to clog it. "I give to my daughter 100 acres of land—to her and her heirs forever—my further will is, that if she should die leaving no child, the estate shall be divided among all my children—but should she leave any living child, or children, the estate shall be heir by him, her or them as the case may be." Can any one look upon this clause, and not perceive, that the intention was to provide for the daughter and her whole line of descendants? When this intent is clear, the words child or children are taken to mean issue. The children are to heir the estate; how? surely, through the mother; they cannot heir it, as purchasers. Again—it is apparent from the will itself, that the children were not in esse, when the will was made. In Wild's case, 6 Co. 17, there was a devise over in remainder, to Rowland Wild and his wife, and after their decease, to their children, Rowland and his wife then having issue a son and a daughter: it was resolved, by all the judges of England, that Rowland and wife had but an estate for life, with remainder to their children for life, and no estate tail: but this difference was resolved for good law, that if A. devises his lands to B. and his children or issues, and he hath not any issue at the time of the devise, that the same is an estate tail; for the intent of the deviser is manifest and certain, that his children or issues should take, and as immediate devisees they cannot take, because they are not in rerum natura, and by way of remainder they cannot take, for that was not his intent, for the gift is im-

123 mediate; therefore, there, *such words shall be taken as words of limitation, to wit, as much as children, or issues of his body. Now, though the case put here is not exactly like ours. I consider the principle applicable; for it being equally clear in both cases, that the children were intended to take, and that they could not in either take as purchasers, it follows alike in both, that the word children is used as a word of limitation, in the sense of issue.

If I considered it doubtful, upon the face of the will, whether this were a fee tail, or a fee with an executory devise over, I should feel inclined, on several grounds, to lean against the executory devise. In *Reeve v. Long*, 4 Mod. 259, it is said, "that the only ground on which executory devises were originally admitted, was an indulgence to a man's last will and testament, when otherwise the words of the will would be void." In *Purefoy v. Rogers*, 2 Wms. Saund. 388, note 9, lord Hale laid it down as a rule, "that where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise;" upon which sergeant Williams remarks, that "this rule so laid down by lord Hale, has been uniformly adhered to ever since." And in *Doe v. Morgan*, 3 T. R. 763, lord Kenyon said, "if ever there existed a rule respecting executory devises, which had uniformly prevailed without any exception to the contrary, it was that laid down by lord Hale in *Purefoy v. Rogers*." Again—an executory devise establishes a perpetuity to its extent—putting fetters upon the estate which may often last for a century: a restriction directly opposed to the policy of our statute docking entails, to the whole spirit of our subsequent legislation, and to the genius of our government. Judge Lyons in *Hill v. Burrow*, 3 Call 297, speaking with reference to the attempt then making, to break down the established course of decision, and turn what had been considered estates tail into executory devises, very sensibly remarks, "An infringement of the rule, then, instead of supporting 124 *the legislative intention, would go directly to defeat it, and would tend, under the notion of executory devises, to introduce that very clog to alienation, which the statute meant to abolish." I refer also to the excellent remarks of my brother Green on this point, in *Jiggetts v. Davis*, 1 Leigh 403, 4.

Upon these grounds, then, I should feel disinclined to consider this an executory devise, if the question were doubtful; but I do not think it at all so. The testator was making provision for his daughter and her issue; would he make such a disposition of the property as, in certain events not at all improbable, would carry it over to others, though there were descendants of his daughter in being, or just coming into life? Yet such might be the case, if this were taken as an executory devise; which, we know, is a limitation of a future interest, not to take effect at the testator's death, but limited to arise and vest upon some future contingency. The contingency

here would be, the death of the daughter without a child living. The moment this happened the executory devise would take effect, and the estate vest in the legitimate children of the testator, and no subsequent event could divest it. Suppose the daughter had had six children, who had all died in her lifetime, each leaving five children, and then the daughter died; she would die, without leaving any child living, and the estate would be taken from her family, though she left thirty grandchildren. It may be said, the word children sometimes comprehends grandchildren, and under that meaning these would be taken in. I admit, that grandchildren, are sometimes comprehended by the word children, but not, I think, in such a case as this, if you take it to be an executory devise; for, then, the whole fee is in the daughter, and her dying without leaving a child living, is not mentioned for the benefit of such child, but merely to mark the contingencies upon which the estate passes over. Sir W. Grant, in *Radcliffe v. Buckley*, 10 Ves. 201, states the only cases in which children may mean grandchildren; and this is surely not one of them. But if grandchildren

125 were comprehended, no one would contend, that great grandchildren were; and it might well happen that the daughter might die leaving only such. But suppose another case: suppose she had one son who married and died leaving his wife enseat, and then, before the birth, his mother died; she would die leaving no child or other descendant living; and yet from the after born child of her son there might be numerous descendants, who, assuredly, were never meant to be disinherited by this testator.

Upon the whole I am of opinion, that Patsey Anderson took an estate tail, enlarged by our statute into a fee; and, consequently, that the circuit court erred.

CABELL and BROOKE, J., concurred. TUCKER, P. Upon the first reading of the clauses of this will, which have been so earnestly discussed, it struck me that it was the case of an executory devise, in which the only question was, whether it was with a single or a double aspect. The more I have reflected upon the case, the more has my first impression been confirmed.

The first part of the clause in question, contains a distinct devise to the testator's natural daughter, of an estate to her and her heirs forever. Standing alone, it cannot be questioned that this would have passed to her a fee simple. The words have that legal effect, and a subsequent part of the will clearly proves that the testator was aware of their legal operation. But, as the devisee was a natural daughter, upon whose death without children, the estate would either pass from his family to her collateral kindred, on the part of her mother, or escheat to the commonwealth for want of heirs, the testator desired to provide for such a state of things. Therefore, he proceeded to declare, that if she died without leaving a child, the estate before given her should return into his estate, and be divided amongst his children. Had the clause ended here, it would be a clear case of the

devise of the fee to Patsey, with an
126 executory devise over to his children, upon her dying without children living at her death. And his children, had the estate ever vested in them, would have taken a fee, as I think, by the operation of the statute of 1785 dispensing with words of inheritance in the creation of estates in fee simple; *Smith v. Chapman*, 1 Hen. & Munf. 298.

But it is contended, that the will, by the next clause, gives a double aspect to this executory limitation. It proceeds thus, "but should she leave any living child or children the estate shall be heir by him, her or them, as the case may be." And it is said, that any child she might leave at her death, would take as purchaser, and that thus also the fee simple limitation to her would be defeated, or converted into a mere life estate. I shall not contest the proposition, that the limitation over is within the time prescribed in the case of executory devises: I shall concede that this is no case if an indefinite failure of issue, 1. because if the strong expression shall leave a living child, and 2. because the term used is child, not issue; a term which, in its natural sense, implies a descendant in the first degree, and not an indefinite succession of posterity. I shall admit, what I think is a concession to the appellees, that children, in this will, would comprehend grandchildren of Patsey, living at her death, provided she had no child then living to take the estate. That this is a concession, important to the removal of a great difficulty in the case, is sufficiently apparent: for, if grandchildren cannot be comprehended under the term children, then, in case of Patsey's death leaving grandchildren, but no children, the grandchildren could not take, unless she herself should be held to take an estate of inheritance. The counsel felt this difficulty, and endeavoured to repel it, by contending, that the testator naturally would prefer his own children to the grandchildren of his natural daughter. But as to this portion of his estate, set apart for that branch of his family, this cannot be admitted: the very bequest shews that in reference to it, he preferred her children to his own legitimate children; and it is natural, that
127 *he should have designed what he bequeathed to his daughter to go to her posterity, instead of coming back to the posterity of his other children, who had their shares of his bounty provided by other parts of the will. This is clear from the bequest to her and her heirs; terms which abundantly shew, that he designed that portion of his property for that portion of his generation. I am, indeed, decidedly of opinion, that if Patsey had died leaving no child, but leaving grandchildren, they would have been embraced by "the terms child or children in this will. For, although where there are children, as well as grandchildren, the latter are not usually considered as comprehended under the term children, yet where there are only grandchildren it is held otherwise; *Crook v. Brookeing*, 2 Vern. 106; *Gale v. Bennett*, Amb. 681. And although the natural sense of the word children will be adopted

unless there is something to control it, yet where by the context it appears, that the testator has used the word in a more extended sense, it will be construed to embrace in its description more remote descendants. *Royle v. Hamilton*, 4 Ves. 437; *Reeves v. Brymer*, Id. 692, 8; *Earl of Orford v. Churchill*, 3 Ves. & Beam. 59, 69. Thus, in *Royle v. Hamilton*, where the devise was to the children of W. H., that is to say, to J. H. and his issue, to his sisters and their issue &c. and J. H. died before the testator, leaving a child who was thus a grandchild of W. H. this grandchild took, and took as purchaser; for the word issue shewed an intention to embrace the descendants of J. H. So here; the devise to Patsey and her heirs, clearly shews a design to embrace all her descendants in the limitation, and not to confine it to descendants in the first degree only.

The particular clause in question may, therefore, be considered as reading thus: should she leave any descendant living at the time of her death, the estate shall be heir by him, her or them. Understanding it even thus, it is, in effect, but a reiteration of that which in the first part of

the clause had been already declared,
128 and cannot be considered as a new, substantive, independent limitation.

For, should it be so considered, and thus converted into a contingent limitation, then it would be an executory devise with a double aspect, not merely defeating the fee upon the happening of the event in one way only, but defeating it let the event happen which way it might. Such a construction is never made without an absolute necessity; *Ives v. Legge*, 3 T. R. 488, in notes. Thus, if she die without descendants, her fee simple is to be defeated, and the estate is to go over to her father's children; and if she die leaving descendants, her estate in fee is to be defeated, and is to go over to her own descendants: so that let the event happen in which way it may, the fee simple so explicitly given is to be overthrown. Why then was it given? Why did not the testator at once give her an estate for life, if under every state of things she was to have no more? It was not ignorance; for, in a subsequent provision of the will, he displays some little knowledge of the matter. Designing to give a fee simple to his other children in the lands bequeathed to them, with the exception of his daughter Betty Richardson, for whom he intended a life estate with remainder over to her children, he expressly excepts her proportion from the operation of the words of inheritance, and gives her only a life estate, with remainder to her children.

I am therefore of opinion, that the clause in question is not a limitation to the children of Patsey, as purchasers; since if so, the inheritable words in the devise to her must be rejected intirely; whereas it is a rule of construction, that every word, if possible, should be retained, and receive its due weight and consideration. Nor do we, in this view of the case, reject the last clause. It is but a repetition of what had before been declared and provided by the inheritable clause; that if there were chil-

dren they should heir the estate. If this be understood literally, he designed them to inherit, and not to take by purchase; and though I shall not insist upon this, yet we should strain not less, in attributing to him the design to revoke an explicit
129 devise of an estate of inheritance to his daughter, for the purpose of vesting it in unborn children or grandchildren, as purchasers.

There are, indeed, a variety of cases in the books of limitations upon a contingency with a double aspect. But I have been unable to find a single case, in which a fee simple given in the most explicit terms by the first clause of a will, has been held to be defeated, whichever way the contingent event might happen. Where, indeed, the first estate is for life, then there may well be a contingency with a double aspect; as in *Plunket v. Holmes*, 1 Lev. 11, and *Luddington v. Kime*, 1 Ld. Raym. 203. Thus, in this last case, the devise was to A. for life, and if he have issue male, then to such issue male in fee; but if he have none, then to B. and his heirs. This was a contingency with a double aspect; but it did not defeat, or trench upon, a previously limited estate, for that estate was expressly but for life: it provided for the disposition of the remainder whether the contingency should happen one way or the other; which was absolutely necessary to prevent intestacy, for if it had not done so, but had provided only for the contingency in one way, then, if it had happened in the other, there would have been no disposition of the fee, as A. had but an estate for life.

Nothing, indeed, is more common, than a previous estate in fee being defeated upon the happening of a certain event; for this is the very essence of a whole class of executory devises and shifting limitations. But I know of no case, in which an express estate in fee is given, and yet is to be considered as defeated, whether a certain event does or does not happen. According to such a construction, although the testator expressly gives a fee, yet in no event can the devisee take a fee. The case of *Heath v. Heath*, 1 Bro. C. C. 147, is more like the case at bar, than any I have met with; and the construction corresponded with my construction of this will. That was a devise to E. H. forever, that is, if

he have a son or sons, who shall at-
130 tain twenty-one; but "if he should chance to die without son or sons to inherit, my will is, that the son of W. H. shall inherit: this was adjudged a fee simple to E. H. with an executory devise to the son of W. H. In that case, as in the case at bar, the first words imported a fee: there, if E. H. died without son, the estate was to go over, as here, if Patsey should die without child: there, it is implied, that if E. H. left a son, that son should inherit, and here it is provided, if Patsey left a child, that child should heir: in that case, E. H. was adjudged to take a fee, and in this, we must, I think, accordingly adjudge that Patsey took a fee. The case of *Heath v. Heath* settles also the question as to the supposed estate tail. I do not think we can by any fair construction make an estate tail here. The word child or children is

indeed construed to mean issue or heirs of the body, when such a construction is absolutely necessary, but not otherwise: as, in Wild's case, it is said, an estate to a man and his children, he having at that time no children, creates an estate tail: but the reason is, that the present gift to children not in esse, being incapable of vesting in them as purchasers in presenti, they would take nothing by purchase or inheritance, if the father were to take only an estate for life; and, therefore, to effectuate the obvious intention, the word children was converted from its natural sense, in order to give an inheritable quality to the estate. But I know of no case in which the words child or children living at the death &c. have been construed to mean issue or heirs of the body, where the parent himself has an express estate in fee limited to him by a prior clause of the will. It is obvious, however, that if the natural daughter took an estate tail, it would have been converted into a fee; and thus her conveyance would have been good and effectual. In either view, therefore, the appellant's title would prevail.

But the special verdict is too defective to enable the court to pronounce a judgment between the parties. This is understood to have been admitted, so that it is unnecessary to enter into a detail of its imperfections.

131 *The judgment of the court was entered in the following words:

"The court is of opinion, that the said judgment is erroneous in this, that the court ought not to have proceeded to render judgment upon the verdict of the jury upon the issue joined between the parties, the same being imperfect in omitting to find as to the entry and seizin of the parties under the successive deeds in the special verdict set forth, and being otherwise uncertain and void; therefore, it is considered that the said judgment be reversed and annulled, and that the appellant recover against the appellee his costs &c. And it is ordered, that the verdict of the jury be set aside, and a venire de novo awarded, and that the cause be remanded to the circuit superior court of Louisa, to be proceeded in accordingly. And it is further certified, at the request of the parties by their counsel here, that this court is of opinion, that by the operation of the will of the testator John Anderson, the devisee Patsey Anderson took an estate tail in the lands in controversy, which was converted into a fee simple by virtue of the statute in such case made and provided, and so had good right and title to sell and convey the said lands to her vendee John Thomason.

132 *Tabb's Adm'r v. Binford.

January, 1833.

[26 Am. Dec. 317.]

Deed of Bargain and Sale—Covenant—Personal—Case at Bar.—In a deed of bargain and sale of lands, the bargainor covenants as follows—"And the said T.

*Conveyances—Covenant of Warranty—Effect.—In *Burners v. Keran*, 24 Gratt. 68, it is said: "Warranty is now considered a personal covenant, sounding merely in damages. Under our statutes and decisions it is treated as a covenant to warrant and defend, while it has also all the effect of a covenant for quiet enjoyment. *Tabb's Adm'r v. Bin-*

ford hereby covenant, for himself and his heirs, to and with the said B. that he the said T. will warrant and forever defend to the said B. his heirs and assigns, the title to the said parcels of land against all persons whatever"—Held, this covenant was not a mere warranty real, but was a personal covenant, upon which an action of covenant lay for the bargainee, on being evicted, against the administrator of the bargainor.

In an action of covenant, brought by Binford against Bolling administrator of Tabb, in the circuit court of Dinwiddie, the plaintiff declared, That Tabb, in his lifetime, by indenture dated the 1st March 1815, in consideration of 2285 dollars, granted, bargained and sold, to Binford and his heirs, two parcels of land in the county of Dinwiddie; and that "the said Tabb then and thereby did covenant, for himself and his heirs, to and with the said Binford, that he the said Tabb would warrant and forever defend to the said Binford, his heirs and assigns, the title to the said parcels of land against all persons whatever"—And the breach alleged was, that Tabb, in his lifetime, and the defendant, his administrator, since his death, had not defended the title of the two parcels of land against all persons whatever; but that, on the contrary, a certain A. B., who, at the time of making the said indenture, and continually until the eviction after mentioned, had and still had lawful title to the said lands,—on &c. at &c. entered into the same, and by process of law ejected and removed the plaintiff against his will from his possession and occupancy, and still held him out of possession thereof, contrary to the form and effect of Tabb's covenant aforesaid—By reason of which premises, the plaintiff had not only lost the lands, and divers sums of money, amounting to 1000 dollars, by him expended in improving them, but also the costs sustained by the lessee of the said A. B. in prosecuting his action of ejectment against the plaintiff in the circuit court of Dinwiddie, for the recovery of the lands, and the plaintiff's own costs in defending the action of ejectment against him. The defendant pleaded covenants performed; upon which an issue

ford, 4 Leigh 133; 2 Rob. Prac. 86. It creates personal rights, wholly independent of the estate, and which may survive long after it is extinguished, for the benefit of the covenantee."

Also in *Rex v. Creel*, 22 W. Va. 376, it is said: "But a more serious objection to the declaration and each count is, that the action will not lie against him for breach of ancestor's covenant of general warranty. That such a covenant as is sued on here: 'that said Creel by said indenture of bargain and sale did then and there covenant to and with the said plaintiff, his heirs and assigns, that he would warrant generally and defend all the land thereby sold, etc.'," which by our Code is declared to 'have the same effect, as if the grantor had covenanted, that he, his heirs, and personal representatives will forever warrant and defend the said property unto the grantee, his heirs, personal representatives and assigns against the claims and demands of all persons whomsoever.' (Code, W. Va. chapter 72, section 13, page 466.) is a personal covenant, there is no doubt. *Tabb's Adm'r v. Binford*, 4 Leigh 132; Chapman v. Holmes, 10 N. J. Law 24; Townsend v. Van Courtlandt's Ex'ors, 6 Cow. 123."

A covenant of warranty of title is a personal covenant, upon which an action of covenant lies on eviction against the personal representative. *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. Rep. 901, citing *Tabb v. Binford*, 4 Leigh 132. The principal case is reported in 26 Am. Dec. 317, with note.

See monographic note on "Covenants" appended to Todd v. Summers, 2 Gratt. 167; monographic note on "Landlord and Tenant" appended to Mason v. Moyers, 2 Rob. 606.

was made up. Verdict and judgment for the plaintiff for 3206 dollars, with interest thereon &c. to which judgment, this court, on the application of Tabb's administrator, awarded a supersedeas.

And now Johnson argued, for the plaintiff in error, that the covenant set out in the declaration, was a mere general warranty of the land, which bound the warrantor and his heirs, to render to the grantee, in case of eviction, an equivalent in land; which, therefore, entitled the warrantee to recover an equivalent in land only, and that by voucher or warrantia chartæ, against the warrantor and his heirs, but not to any personal action of covenant against the warrantor, or to any remedy whatever against his personal representative. He cited Harg. Co. Litt. 365 a, note 1, 2 Tho. Co. Litt. 245, note A.; Shep. Touchs. 181, note 1, and the opinions of the judges of this court, in *Stout v. Jackson*, 2 Rand. 132, and *Threlkelds v. Fitzhugh*, 2 Leigh 451.

Leigh, for the defendant in error, contended, 1st, That this was not a mere warranty, that is, the real covenant of warranty and nothing more; that it contained terms which made it a personal covenant. He referred to the form of a mere warranty real, and compared it with the covenant in this case. The form of a warranty, properly so called, was thus: "And I the said W. and my heirs and assigns, all the said parcel of land with all its appurtenances, to the said J. and his heirs and assigns, against all mankind will warrant forever." 2 Black. Comm. Append. No. 1. But here, the bargainor and his heirs did not warrant, but covenanted for himself and his heirs, that he would warrant; he did not covenant to warrant only, but to warrant and defend; and he covenanted to warrant and defend the title of the land, not the land itself: in all which particulars, it was obvious, the covenantor departed from the

134 terms of a mere warranty *real: therefore, he contracted for more than such a warranty would have bound him to perform. For, he said, a covenant to warrant was no more a warranty, than a covenant to sell and convey was a sale and conveyance; and the very use of the word covenant imported an intent to incur a personal obligation. The warranty proper, the mere real covenant of warranty, was created by the word warrantizare alone, without more; a covenant to defend, as well as to warrant, was a stipulation different from, and additional to, the warranty, as was clearly pointed out in *Co. Litt.* § 773, 383b, 384a. "Where a man is bound upon condition to warrant and defend land to W. S. the warranty is where he is impleaded, but the defending is to save the party so that no stranger enters upon him;" 22 Vin. Abr. Voucher, B. pl. 6, p. 27. And lord Hardwicke, in *Williamson v. Codrington*, 1 Ves. sen. 516, adverted to the effect of a covenant for assurance of title not being penned as real warranty, and to the difference between a covenant or agreement to warrant, and a warranty; and plainly intimated the opinion, that a covenant to warrant and defend is larger than a covenant to warrant only. Upon these authori-

ties, it was justly remarked by Green, J., in *Stout v. Jackson*, 2 Rand. 148, that, if a covenant of warranty stipulates not only to warrant but also to defend—"the word warrant would be construed technically, so as to bind the warrantor to compensate in lands of equal value, upon voucher or warrantia chartæ; the word defend would be considered as making a personal covenant equivalent to a covenant for quiet enjoyment." Further, the court would find, that the real covenant of warranty always stipulated to warrant the land conveyed itself; but this was a covenant to warrant the title conveyed by the deed, that is, the fee simple in the land; and so was tantamount to a covenant that the grantor had good title in fee. Therefore, he concluded, that either this was a personal covenant, or it contained both a real and a personal covenant. And, without doubt, in every

135 case of an express personal covenant, the *covenantor was bound to make compensation in damages for a breach, and his personal representatives were bound, without being named, unless the covenant be such as determined by his death. 2 Bac. Abr. Covenant, E. 1, p. 69, Shep. Touchs. 178. 2ndly, He admitted, that (as is said in 2 Bac. Abr. Covenant, C. p. 67,) it seemed by the better opinion, that upon the eviction of a freehold, no action would lie upon a warranty either in deed or in law; for the party might have had his warrantia chartæ or voucher. But it had been adjudged, in an action of covenant upon a warranty real of a freehold estate, of which the breach was that the warrantee had been impleaded and evicted for a term of years, that "the action of covenant would lie; because, though the warranty was annexed to the freehold, yet the breach and impeaching was not of a freehold but of a chattel, for which there could neither be voucher, rebutter, nor warrantia chartæ, so that though there had been a judgment in warrantia chartæ in such case, yet either upon entry or upon recovery in ejectione firmæ upon the lease, there could be neither voucher nor rebutter, nor value upon warrantia chartæ; and therefore, a real warranty is a covenant real when the freehold is brought in question, but when a lease is in question, or any other loss that doth not draw away the freehold, it may be used as a personal covenant whereupon damages may be recovered; so it is both a real and a personal covenant to several ends and respects;" *Pincombe v. Rudge*, Hob. 3, 28. Now, in the case before the court, the warrantee was impleaded in an ejectment, which being, in form, an action to recover only a term of years, though in effect it involved the whole question of title, the warrantee could have had neither voucher nor warrantia chartæ against the warrantor; and being evicted, of course, but for a term of years, which did not draw away the freehold, he had a right to use this as a personal covenant; to bring his action of covenant for the breach, and to recover compensation in damages; for, otherwise, he would have had no remedy. 3rdly, He referred to 136 the doubt expressed by *Coalter, J., arguendo, in *Stout v. Jackson*, 2

Rand. 156, whether upon a pure warranty, *warrantia chartæ* would lie in Virginia, at this day, when voucher was done away by our statute, 1 Rev. Code, ch. 128, § 34, p. 496, and to the opinion intimated by that judge, that,—since the statute,—considering the obsolescence of the ancient remedy, its incompatibility with the situation of this country, and the probable intent of parties in all contracts of warranty,—“the general sense of the country and sound principles of justice, therefore, require, that all covenants of this kind, however worded, should be considered, as to the remedy in case of eviction as personal covenants of the vendor, that is, that a personal action of covenant will lie on such a warranty.” And the counsel argued that these opinions were just though extrajudicial, and ought at once to be declared the law of the land. To shew the effect of the statute taking away the voucher, upon the remedy by *warrantia chartæ*, how intimately the two remedies were connected, and how essential the voucher was, in many cases, to the efficiency of the *warrantia chartæ*, he cited *F. N. B. 134, K. 4thly*. He said, all difficulties were obviated by the statute of jeofails, 1 Rev. Code, ch. 128, § 103, p. 512, providing, that no judgment after verdict shall be stayed or reversed—“for any mistake or misconception of the form of action, or for any other defect whatsoever in the declaration or pleadings, whether of form or substance, of which might have been taken advantage of, by demurrer, and which shall not have been so taken advantage of.”

Johnson replied, 1st, That though the covenant in question varied from the ancient technical form of a warranty real, in some particulars, yet the variances were wholly immaterial; they were variances in words, not in sense: and it could hardly be maintained, that the real covenant of warranty could only be expressed in one set form of words, and no other could be devised to convey the same meaning and intent. The first variance from the ancient form, was, that the bargainor did not say that he and his heirs would
137 *warrant; he only covenanted for himself and his heirs that he would warrant. Now, the definition of a warranty real, was, “a covenant real annexed to lands and tenements, whereby a man and his heirs are bound to warrant the same;” *Co. Litt. 365a*: so that here, the warrantor, without exactly copying the usual form of warranty real, had expressed his contract in the terms of the definition of such a warranty. In truth, a warranty real, expressed in the strict ancient form, was nothing but a covenant to warrant; a real covenant, of peculiar character and effect, but still only a covenant: for every agreement or consent by two or more, by deed, whereby either promises to the other, that something is done already, or shall be done afterwards, is a covenant; *Shep. Touchs. 160, 1*. As to the next variance from the ancient form of the warranty real, which had been mentioned, namely, that the warrantor here, stipulated not only to warrant, but to warrant and defend; he said, that was a variance from the form of the warranty real

given by Blackstone; but the form given in *Sheppard's Touchstone*, 181, was thus—“I and my heirs will warrant and forever defend to W. S. and his heirs, the said tenements against all men forever.” And he insisted, that when those two phrases are used in one covenant annexed to a conveyance of land only, they made only one covenant, and that a real covenant of warranty, not two distinct covenants, one real and one personal. The opinion of *Green, J.*, in *Stout v. Jackson*, 2 Rand. 148, was, he thought, extrajudicial in this respect, and, certainly, was not supported by *lord Hardwicke's* reasoning in *Williamson v. Codrington*, 1 Ves. sen. 516, for that was the case of a covenant in a conveyance of both real and personal estate, whereby the warrantor obliged himself, his heirs, executors and administrators, to warrant and forever defend both the real and personal estate conveyed; and the decision was, that this was, in respect to the personal estate, a personal covenant, not (as had been contended) a covenant of warranty real applicable only to the real estate conveyed. In the passage from *Bracton*, quoted *in *Co. Litt. 383b*, it was said—“by this phrase we warrant, the warrantor took upon himself an obligation to defend his tenant and his assigns, and their heirs, in possession of the thing granted;” and 2 *Tho. Co. Litt. 245*, note A. was to the same effect: so that, here again, the warrantor, in the present case, had only expressed his contract to warrant, according to the legal effect of the warranty real, which bound him to defend the land granted to the warrantee. Then, as to the peculiarity in this covenant, last relied on, to shew that it was not a mere warranty real,—that it was a covenant to defend the title, not the land itself; he said, it was enough to remark, that the warrantor could nowise defend the land but by defending the title; and had the warrantor been vouched on this warranty, he would only have been called to defend the title. The true test, by which to determine whether the covenant in question was a warranty real or no, was, to ascertain whether voucher or *warrantia chartæ* would have lain upon it, at common law? for if either of those remedies might have been resorted to, this was a mere warranty real. And he contended that voucher or *warrantia chartæ* might have been maintained; to which point he cited *Doe v. Prestwidge*, 4 *Mau. & Selw. 178, 182*. 2ndly, Taking this to be a mere warranty real, which bound the warrantor and his heirs to render an equivalent in land only; he said, it resulted from the very nature of the contract, and the authorities were quite clear, that no personal action lay against the warrantor himself, much less against his personal representatives. And to the argument of the counsel of the appellee, that though this might have been true in case the warrantee had been evicted of the whole fee simple warranted, yet it was not true in the actual case, in which he had been impleaded in ejectment, and evicted of only a term of years, and that this was a breach for which a personal action of covenant lay, even though this were a warranty real; he answered, 1. that it had been admitted, that

the judgment in ejectment was, in effect, though not in form, an eviction of the whole estate; *and 2. that the breach laid in the declaration was, that the warrantor had not defended the title—namely, the title conveyed,—the fee simple; and it was necessary to prove that he was evicted of that, in order to establish the breach. 3rdly, He argued, that our statute taking away the remedy by voucher, nowise affected the other remedy that lay at common law on a warranty real,—the remedy by warrantia chartæ; for this lay wherever the warrantee was impleaded in an action in which he could not vouch. F. N. B. 134, D. 4thly, As to the provision in the statute of jeofails, he said, that, if he was right on the main points in debate; if the appellee had, by his own shewing in his declaration, stated a case in which the defendant was clearly exempted from all liability; surely, the statute could not be strained so far as to entitle him, notwithstanding, to a judgment.

CARR, J. It was contended for the plaintiff in error, that the covenant declared upon, is a pure warranty which descended upon the heirs of the covenantor, and upon which this action of covenant did not lie against the administrator. In discussing this point, the counsel on both sides went into the ancient and obsolete doctrines of the pure common law warranty, embracing the warrantia chartæ, voucher, and other points of learning connected with the subject. The view which I have taken of the covenant in this case, will render it unnecessary to explore this unfrequented path. Whether the writ of warrantia chartæ be an existing remedy with us at this day, I shall not undertake to decide: but this I may say,—so entirely have the personal covenants in conveyances superseded the old common law warranty, that there is not one man in ten thousand, who, when he stipulates for a deed with warranty, means to take that common law assurance, which binds the lands only of his vendor, and gives him no remedy but the warrantia chartæ. In truth, this is never the intention of the contracting parties; and therefore, in the construction of their covenants, I would hold those only to constitute a pure technical warranty, 140 *which come strictly up to the definition of it by the ancient writers.

Ego et heredes mei warrantizabimus in perpetuum: these are the technical words; the alienor for himself and his heir warrants the lands forever. It is no covenant or agreement to warrant; it is an actual warranty: it is no covenant to warrant the title to the land; it is a warranty of the land itself. In these particulars the covenant before us differs from the warranty real; and the counsel for the defendant in error shewed, that these are by no means mere verbal differences; but if they were, I would, in this case, hold them important. There is another difference, held by lord Hardwicke to be important; which is that here, the word defend is added to the word warrant. Upon the whole, I am of opinion, that this is a personal covenant; that the action well lay against the administra-

tor; and therefore that the judgment of the circuit court must be affirmed.

CABELL, J. I am clearly of opinion, that the judgment should be affirmed.

BROOKE, J. I think the terms of the covenant in this case, make it a personal covenant, and not a pure warranty real at common law. In the first place, this is an executory contract, not a contract executed, as I understand the technical warranty real at common law to have been; it is a covenant to warrant; and it also differs from the terms of the pure warranty real, in being a covenant to warrant the title, not the land conveyed. A covenant to warrant and defend the title, is a different agreement from a pure warranty, and admits of a different plea; for though it was argued, that a pure warranty is only a covenant, though it be a real one, and that on voucher by the warrantee, the warrantor must insist on his title, and that a covenant to warrant and defend the title, imports no more,—yet I think there is a wide difference between the two things. In warrantia chartæ

brought on the pure warranty real, 141 upon the supposition *that the warrantee had been impleaded though in fact he had not yet been impleaded (a proceeding that might be had on the pure warranty); if the defendant by plea denied that the plaintiff was impleaded, he would thereby admit the warranty, and that it was broken, and judgment would be given for the warrantee; N. B. 134, K. Now this shews the difference between the covenant in the case before us, and the pure warranty: for I take it for granted, such a defence, on such a covenant as this, would not be an admission on the part of the defendant, that he had broken his covenant: on the contrary, such a defence would be held good; it would be equivalent to a denial, on the part of the defendant, that the title which he covenanted to warrant, had been disturbed or legally questioned; a denial, that any claim or demand against which he covenanted to warrant and defend, had been made by any person by suit. Or, suppose the plaintiff had been impleaded in a proper action, and he had vouched the defendant, the vouchee, in order to defend the premises warranted, must have shewn, that he was seized in fee at the time he made the warranty: he could not have shewn, that, though he had no title at that time, he then had the title,—as he might in this action of covenant, if I understand the import of the covenant to warrant,—because by shewing that the title was then in him, his covenant to warrant would not be broken. This illustration may be said to beg the question,—to take for granted, that the covenant in question does not amount to a pure common law warranty. But its object is, to shew that the covenant here was not intended by the parties for a pure common law warranty and nothing more, since the obsolete remedy by a writ of warrantia chartæ, could not have been in the contemplation of the parties. As the law makes a part of every contract, and the parties are presumed to know the law; a departure from the terms which constitute a pure warranty real, is conclusive that the pure warranty real was not in their con-

temptation; especially, as it hardly can be imagined, that the grantee meant to
 142 rely on the ancient *common law remedies upon a breach of the warranty real, one of which (the voucher) is taken away by statute, and the other obsolete, if not also abolished. In the case of *Williamson v. Codrington*, where the covenantor "oblige himself, his heirs, executors and administrators to warrant and defend the plantation, negroes, cattle &c." lord Hardwicke after remarking on the subject of the covenant, said, "this clause is not penned as a real warranty; which is, I do for myself and my heirs warrant such land: here, the words are, I do oblige &c. which amount to the same as I covenant &c., for many words in a deed will amount to a covenant besides the word covenant, as I oblige, agree. This then is barely a covenant, for himself, his heirs, executors and administrators, to warrant; which word must be construed in a larger sense than warranty in a strict legal sense; as large as defend." Such, essentially, is the covenant before us. The grantor covenanted to warrant and defend the title in fee simple, as it was the fee simple in the land which he sold and conveyed. In substance, it was a covenant of seizin in himself; that is, that he was clothed with the title in fee conveyed to the grantee. A covenant and agreement to warrant the title, is, I think, no more a warranty than a covenant to sell is a sale. Had the previous words in the covenant been the appropriate words to constitute a real warranty, with the words and defend superadded, I should doubt whether these last words would change the character of the contract, and make it a personal covenant (though lord Hardwicke has laid some stress on them, in the case just mentioned): for, in the case of *Pincombe v. Rudge*, Hob. 3, 28, the words and defend were added to the word warrant, and yet the judges treated it as a real warranty, though it was decided, that, as the warranty was broken by a claim to a term of years only, covenant well lay.

I think the fair conclusion from the authorities, is, that whenever there is a departure from the form of the real warranty we find in the books, from which to
 143 infer a change *of the contract, it must be considered a personal covenant, whether executors are named or not, and though the heirs are named, as in the case before us.

Although I do not think it belonged to this case, to investigate the remedies on the real warranty at the common law; yet, as much was said by the bar on that subject, I have again consulted the books, and find that I was entirely correct in what I said concerning it, in *Stout v. Jackson* and *Threlkelds v. Fitzhugh*.

The judgment should be affirmed.

TUCKER, P. Waiving the inference that this is a personal covenant, drawn from the expression I covenant to warrant, instead of the simpler form I do for myself and my heirs warrant, which lord Hardwicke thought a proper inference,—it is sufficient to rest this case upon the use of the word defend. This is a covenant not only to warrant but to defend. Now,

the same great judge distinctly intimates, that the sense of the word defend, is larger than that of warrant. Therefore, where a party covenants to warrant and defend, the obligation to defend, cannot be identical with the obligation to warrant, because it means something more. Not being identical, it is therefore distinct; so that if, as I concede, the covenant to warrant, has here the operation of the common law warranty, yet the covenant to defend, has a separate and distinct operation. It is a distinct covenant, though contained in the same clause. And it is clearly not the technical warranty; for *defendemus* does not make a warranty, nor indeed any other word than *warrantizabimus*. Co. Litt. 384, a. If then it be not the technical warranty, it is a personal covenant, as much as a covenant of seizin or for good title. It is, in effect, much the same as a covenant for quiet enjoyment: for "where a man is bound to warrant and defend, the warranty is" [that is, applies] "when he is impleaded: but the defending, is to save the party that no stranger enters upon him." 22 Vin. Abr. Voucher, B. pl. 6,

citing Br. 60, who cites 2 E., 4, 15.
 144 And judge Green, *accordingly, in *Stout v. Jackson*, remarks, that if a covenant of warranty binds the party not only to warrant, but to defend, the word defend, would be considered as making a personal covenant, equivalent to a covenant for quiet enjoyment. Indeed, it seemed to be admitted by the counsel in the argument, that if by one clause I covenant to defend, and by another clause I covenant to warrant, the first would make a personal, and the last a real covenant. I cannot perceive, that the union of them in the same clause, will neutralize the operation of the covenant to defend. If in the same clause, I covenant to deliver a horse, and to pay a sum of money, or to pay money, and make a title to land, or that I have good title and right to convey; yet, in each of these cases, the covenants are distinct though the clause is the same. In like manner, a covenant of seizin, and for quiet enjoyment, would be distinct covenants, though united in the same clause; and so, a covenant to warrant and defend; since it is established by concurrent authorities, that they are not convertible terms.

Upon these reasons, and sustained by the opinion of lord Hardwicke, and the uncontradicted authority of a decision more than 400 years old, as to the effect of a covenant to defend, I am of opinion, that the covenant to defend in this case constituted a personal covenant; and so bound the personal representatives of the covenantor, whether named or not named. I am also of opinion that that covenant was broken by the entry of a stranger (having better title) under a judgment in ejectment.

Judgment affirmed.

145 *Epes's Adm'rs v. Dudley.

January, 1838.

Injunctions*—Against Judgments—Dissolution—Affirmance by Appellate Court—Execution.—If proceed—

*Injunctions—Equity Acts in Personam.—The principal case is cited in *foot-note* to *Asbby v. Kiger*. Gilb. 153; *Gholson v. Kendall*, 4 Leigh 618.

†Same—Appeal—Effect.—In *Jeter v. Langhorne*, 5

ings on a judgment at law be enjoined by a court of chancery, and the injunction be afterwards dissolved; and on appeal taken to the court of appeals, the order of dissolution is affirmed in omnibus; an execution may be sued out on the judgment at law, before the decree of affirmance is entered up in the court of chancery.

Dudley recovered a judgment against Epes's administrators, in the circuit court of Prince George. The superior court of chancery of Richmond, upon a bill exhibited by Epes's administrators, enjoined him from further proceedings at law upon it; and, afterwards perpetuated the injunction as to part of the sum recovered, and dissolved it as to the residue. From that decree Epes's administrators appealed to the court of appeals; which affirmed the decree, and ordered its decree of affirmance to be certified to the court of chancery; but, before the decree of affirmance was entered in the court of chancery, Dudley sued out from the circuit court of Prince George, an execution upon his judgment, for the residue of the sum thereby recovered as to which the injunction had been dissolved. Thereupon, Epes's administrators moved the circuit court to quash the execution; insisting, that Dudley had no right to sue out execution on his judgment at law for the sum as to which the injunction had been dissolved, before the decree of the court of appeals affirming that of the court of chancery, had been entered up in the latter court; in other words, that until the decree of the court of appeals should be entered in the court of chancery, the injunction originally awarded as to the whole judgment, remained in force as to the whole. The circuit court held, that Dudley's execution was regularly sued out, and overruled the motion; to which judgment, on the application of Epes's administrators, a superseas was awarded by a judge, of this court.

146 *Allison, for the plaintiffs in error; Spooner, for the defendant. The argument turned chiefly upon the construction and effect of the statute, 1 Rev. Code, ch. 64, § 21, p. 195.*

CARR, J. This motion is not rested on any rule of english practice, which seems admitted to be against it: nor is it rested on that general power which courts have to

Gratt. 199. It is said an appeal would be utterly idle, if it did not have the effect of suspending the order of dissolution, and thereby continuing or reviving the injunction. As a necessary consequence, and for no other reason, the plaintiff at law cannot sue out execution pending the appeal: and so it was held by this court, and upon that ground only, in *Turner v. Scott*, etc., 5 Rand. 332. The principle of this decision was afterwards recognized by the court in *Epes's Adm'rs v. Dudley*, 4 Leigh 145, in which it was held that upon the affirmance in the court of appeals of a dissolution order, there was no longer any injunction, and the plaintiff at law was then at liberty to sue out his execution, without waiting till the decree of affirmance should be entered up in the chancery court.

The reasoning of the judges very properly treats the dissolution of the injunction as derived from the order of dissolution in the court below, but as rendered effectual by the decree of affirmance in the appellate court. The principal case is also cited at page 208.

See monographic notes on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518, and "Appeal and Error" appended to *Hill v. Salem*, etc., Turnpike Co., 1 Rob. 263.

*The statute, speaking of causes brought before the court of appeals, by appeal &c. provides, that this court "may hear and determine the matter, and give such decree or judgment, if it be not affirmed

watch over their process, and prevent it from being used as an engine of fraud or oppression; for the execution issued for the sum really remaining due. The justice of the case, therefore, does not require the quashing of the execution. The general purpose of an injunction is to inhibit a party possessing some legal advantage, from using it in an unconscientious manner. In reason, it would seem that so soon as this inhibition is removed, the party is reinstated, and may go on. Here, Dudley recovered a judgment at law. The defendants obtained an injunction to the whole, which the chancellor, afterwards, perpetuated for part, and dissolved for the balance. If there had been no appeal from that decree, the plaintiff at law could at once have sued out execution for that balance. The appeal suspended that right: the affirmance removed the suspension. It would seem, then, that, on general principles, as well as the justice of the case, the clerk of the court of law might well issue the execution, when a copy of the decree of affirmance was before him.

But the counsel for the appellant rests his case upon strict, positive law. He insists, that, under the provisions of the statute, 1 Rev. Code, ch. 64, p. 195, the clerk of the court of law, could not issue an execution, until the decree of the court of appeals affirming that of the court of chancery, was entered up in the court of chancery, as its decree. In the first place, I question whether this provision applies at all to bills of injunction to stay judgments at law. It directs that the court below shall enter the judgment or decree of the court of appeals as its own, and award execution thereupon. Now, we know, when a court of equity perpetuates an injunction in part, and dissolves for the balance, no execution for such balance can issue from the court of chancery. The decree of that court merely lets loose the judgment at law. But, 2ndly, what kind of judgments of this court, are, under this provision, to be certified to the court below, and there registered as their own? Not those where the judgment or decree is wholly affirmed or reversed; for, says the statute, the court may give such judgment or decree, if it be not affirmed or reversed in the whole, as the inferior court ought to have given, to be certified to such court, and entered as their own. What is to be certified? that judgment which the court below ought to have given, in cases where the judgment or decree is not wholly affirmed or reversed; for where the judgment or decree is wholly affirmed, it is still the judgment or decree of the court below, unaltered and untouched; and where it is wholly reversed, the bill is dismissed in this court. In the case before us the decree was wholly affirmed, and therefore not within the provision of the statute. I think the judgment of the circuit court should be affirmed.

CABELL, J. The courts of law are cer-

or reversed in whole, as the court whose error is sought to be corrected ought to have given—with an allowance of the costs of appeal: to be certified to the court from which the matter was removed, which shall enter it as their own, and award execution thereupon accordingly."—Note in Original Edition.

tainly bound to respect orders and decrees of the courts of chancery, enjoining the parties, in suits at law, from proceeding farther in those suits, or from executing judgments which may have been recovered therein. But, in this case, there was no injunction existing at the time when the execution issued, or when the application was made to quash it. The injunction

having been dissolved by the chancellor, and that dissolution affirmed by this court, the parties were, so far as related to the injunction, restored to the situation which they occupied before the injunction was awarded. The party who had recovered the judgment, might therefore proceed with his execution, unless restrained by some statute. The provision of the statute, relied upon by the appellant's counsel, as preventing the issuing of the execution till the decree of this court had been certified to the court of chancery, and there entered up, applies only to cases where an execution is to issue on the decree or judgment which has been certified by the court of appeals to the inferior court, and which has been entered as the judgment or decree of the inferior court. Now the judgment on which the party in this case took out the execution, was not the judgment of the court of appeals, nor of the court from which the appeal had been taken: it was the judgment of the circuit court of Prince George, from which no appeal had been taken. The judgment had been only enjoined; and so soon as the injunction was dissolved, the party was left free to execute it. The judgment of the circuit court should be affirmed.

BROOKE, J. I concur in affirming the judgment.

TUCKER, P. It seems, that, at different times, very different opinions have prevailed, as to the notice which a court of law should take of an injunction from a court of chancery. That the injunction operates upon the party only, and not upon the court, would seem to be a truism requiring no argument to support it. Accordingly, we find the doctrine distinctly stated in some cases, *Ashey v. Kiger*, Gilm. 158, *Hill v. Turner*, 1 Atk. 515, and acted upon in others, *Sheffield v. Duchess of Buckinghamshire*, Id. 628; *Barnesley v. Powell*, 1 Ves. sen. 119, 284. It is, indeed, I conceive, one of the axioms of the court. In the earlier cases, it was also held, that the court was not only not bound by the chancery order, but that it would take no

notice of it. 3 Bac. Abr. Injunction B. p. 656, *Tidd's Prac.* 1156. In our own courts too, it was generally held that if the party enjoined chose to incur the hazard of a contempt, he might proceed at law to the trial of his case, or to take judgment on a forthcoming bond, and the like. It would seem, however, upon due reflection, to be a strange state of things, that courts forming parts of the same judicial system, should not take notice of what is legally done by each other, respectively; as, in this instance, that although the chancellor has, in the rightful exercise of his authority, enjoined a judgment, yet the court of law would permit the plaintiff in that judgment, to go on to issue his execu-

tion at his pleasure. Accordingly, it would seem to be admitted in more recent decisions, that a court of law will take notice of the injunction of a court of equity, and mould its proceedings and decisions accordingly. Thus in a case where judgment was enjoined, and execution stayed for more than a year, no scire facias to revive the judgment was held necessary, *Mitchell v. Cue*, 2 Burr. 660, *Tidd* 1156, though formerly it was held otherwise; and, I think it clear from *Tidd's Book of Practice*, that in Westminster hall, the proceedings in suits at law are now always stayed during the pendency of an injunction, upon certain principles established by the court. It is right that they should be so. But still it would seem to be a matter in the sound discretion of the court, since it is very clear, that a party could not plead his injunction as a matter of abatement, and still less in bar. Thus we find, that, notwithstanding an injunction, the party may, in many cases, proceed to trial and judgment, being only restrained from taking out execution; *Tidd* 4700. And even courts of equity themselves admit, that the plaintiff at law may proceed so far, as that he may be at liberty, eo instante that the injunction is dissolved, to take out execution. 3 Bac. Abr. *Ubi supra*; *Morrice v. Hankey*, 3 P. Wms. 146.

In the present case, the injunction had been dissolved by the court of chancery.

The evidence of dissolution was before the circuit court of Prince George. And though the appeal from the dissolution revived the injunction (*Turner v. Scott*, 5 Rand. 322,) and rendered it improper that the plaintiff should take out execution pending the appeal, yet the chancellor's decree having been affirmed, and the decree of affirmance produced, it was manifest there could no longer be any injunction; and therefore nothing illegal or irregular in the issue of the execution. So far from it, the plaintiff would certainly not have been liable to be proceeded against for a contempt of the injunction order in the court of appeals, and I should think, not in the court of chancery. The cause was clearly out of the court of appeals; and I incline to think, it must be considered that the injunction at least had no longer continuance in the court of chancery. That court had dissolved it; and a decree of affirmance had ratified that dissolution, and abrogated the revival by the appeal. If the appeal revived the injunction, yet the instant the appeal was at an end, its effect to revive was at an end also and the injunction of course was dissolved. In reference to this view of the subject, however, some considerations must be weighed. A doubt has been expressed, whether the party may not have procured the certificate of the affirmance prematurely. This, I think, cannot be presumed. He produced the certificate to the court of law. It must be presumed to have issued regularly. It was, moreover, strenuously argued, that the statute, 1 Rev. Code, ch. 64, § 21, requires, in all cases, the decree of the court of appeals to be returned to the court of chancery, and there entered as its own, before it can be considered as consummate to any purpose. I doubt, whether this is a

true construction of the statute. If the decree be not affirmed or reversed in whole, this court makes such decree as ought to have been given; and that decree must be entered as the decree of the court of chancery. But where there is a total affirmance, although the party cannot sue execution for his costs in chancery, or in the court of appeals, I do not perceive any reason
151 for considering *an injunction which was dissolved, and only revived by the appeal, as continuing in force until the court of chancery meets, although the appeal has been determined and the order of dissolution affirmed. If it be so, it would lead to great inconveniences and mischiefs. The plaintiff at law would not only be delayed in his recovery after the ultimate tribunal had finally passed upon the case, and pronounced a dissolution of the injunction, which it is no longer even in their power to set aside, but the defendant being protected by the operation of this principle from execution, and finding no farther chance of escape, may avail himself of the interval, to eloin his effects to the certain prejudice either of the creditor, or of innocent sureties.

Judgment affirmed.

152 *Thornton v. Winston.

January, 1833.

(Absent BROOKE, J.)

Executors—Renunciation in Pals.—There may be a valid renunciation of the executorship of a will, by matter in pals.

Same—Renunciation—Effect.—An executrix declines to qualify as such, and agrees that administration with the will annexed shall be granted to her daughter, reserving her right to qualify after her daughter's death: **Held**, this renunciation of the executorship is absolute and perpetual, and cannot be retracted after the death of the administratrix, nor does the nomination of the executrix in the will give her any preferable right to the administration de bonis non with the will annexed.

Estate of Decedent—Who Entitled to Administer.*—The person entitled to the estate of a decedent, is entitled to the administration.

Willst—Provision of Personality for Wife—Right to Residuum—Statute.—A testator by his will gives personal property to his wife, and she takes the provision made for her by the will: **Held**, she is entitled to no part of an undisposed of residuum, as distributee of her husband, being excluded from distribution by the statute, 1 Rev. Code, ch. 104, § 26, and in a contest between the widow and a distributee, for administration with the will annexed, the distributee is entitled to it.

John Thornton, late of Culpeper, died in 1822, having first duly made and published his last will and testament, whereby, inter alia, he devised and bequeathed sundry real and personal estate to his wife Jane Thornton (it seemed a very large provision for her) and named her and his son George Thornton

executrix and executor. The will was proved in the county court of Culpeper, at April term 1822. George Thornton died in 1824, without having qualified as executor of the will; neither did Mrs. Thornton ever qualify as executrix. The testator's estate remained wholly unrepresented until the March term of the county court 1826, when the court granted administration with the will annexed to Frances Thornton, a daughter of the testator, with the express assent of the executrix Mrs. Thornton, who declared her agreement that the administration should be granted to her daughter, but said, at the same time, that she reserved her right to qualify after her daughter's death: but this assent and agreement of Mrs. Thornton, to the grant of administration with the
153 will annexed to her daughter, *and reservation of her own right to qualify after the daughter's death, were not entered of record, and, indeed, were mere parol declarations, upon which, however, the court proceeded to grant the administration. Frances Thornton, the administratrix, died in 1828.

The testator, John Thornton, had been an officer of the army during the war of the revolution, and, as such, had a claim against the U. States for half pay for life from the termination of his service, or commutation of five years full pay: this claim was nowise disposed of, or even mentioned, in his will, so that, as to it, he died intestate. The testator, besides his son George and daughter Frances, left several descendants living at his death; namely, several grandchildren, the children of a daughter then deceased, and a grandson, James Winston, the only child of another daughter then also deceased, who had been the wife of Isaac Winston: these grandchildren, of course, were distributees of the testator, and entitled to shares of the personal subject undisposed of by his will. The grandson James Winston died in 1831, leaving a will, by which he devised and bequeathed his whole estate real and personal, and especially his share of his grandfather's recently discovered claim against the U. States, to his father Isaac Winston, the appellee.

It being necessary that the testator's estate should be represented, in order to prosecute the claim against the U. States, Isaac Winston applied to the county court of Culpeper, at February term 1832, for administration de bonis non, with the will annexed; and his application was opposed by the appellant, Mrs. Thornton, the widow of the testator and executrix named in his will, who at the same time applied for a grant of the administration to her. The county court, at April term 1832, by one sentence, denied the administration to Winston, and by another, granted it to Mrs. Thornton. Winston appealed to the circuit court of Culpeper, which reversed both the sentences, of the county court, and granted the administration to Winston. And
154 *then, upon the application of Mrs.

Thornton, this court allowed her an appeal from the sentence of the circuit court. Harrison argued for the appellant, 1. That she had, in effect, never renounced the executorship of her husband's will: that it was necessary to constitute a valid renunciation

*Executors and Administrators—Right to Appointment—Persons Preferred.—On this question the principal case is cited in *foot-note* to Cutchin v. Wilkinson, 1 Call 1; Bridgeman v. Bridgeman, 30 W. Va. 218, 3 S. E. Rep. 584. See monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

*Wills—Provision for Wife—Failure to Renounce—Right to Residuum.—In Dupree v. Cary, 6 Leigh 37, it is held that, where a provision is made for the wife by the will of her husband, which she does not renounce, she has no right to any more of her husband's estate than that which was bequeathed to her by the will. The statute 1 Rev. Code, ch. 104, § 26, p. 381, is express: so are all the cases on this point, the last of which is *Thornton v. Winston*, 4 Leigh 152. See monographic note on "Wills."

of such a right, that the executrix should have been cited to appear before the court of probat, and should thereupon have renounced the executorship, and such renunciation entered and recorded; that a refusal by any act in pais, as by a mere verbal declaration to that effect, is not sufficient, but to give it validity it must be thus solemnly entered and recorded. Toller's Law of ex'ors, 41, 2, 93.* He said the cases of *Geddy v. Butler*, 3 Munf. 345, *Nelson v. Carrington*, 4 Id. 332, and *Burnley v. Duke*, 1 Rand. 108, in which it had been held that the renunciation of an executorship may be by act in pais, were distinguishable from the present case: in those cases, the right to the administration was not, as it was here, the point in contest. And here, as the executrix did not, by any act valid in law, renounce the executorship, so neither did she, in fact, renounce or intend to renounce it; for she expressly reserved her right to qualify after the death of her daughter, to whom she agreed, that administration with the will annexed should be granted. 2. He contended, that if the executrix had, in the most solemn and binding manner, renounced the executorship, and thereupon administration with the will annexed had been granted to another,—though she could not have retracted her refusal during the lifetime of the administrator, yet she had a right to do so after the grant of administration had ceased by the administrator's death, and then would have been entitled to the executorship or to the administration *de bonis non* with the will annexed; to which point he cited *Toll. Law of ex'ors*, 45, 92. But, 3. Supposing this a general question which of the 155 parties was entitled "to administration of the decedent's estate, the statute gave the preference to the widow over all other persons. 1 Rev. Code, ch. 104, § 20, 32, pp. 379, 382.

W. Green and Leigh, for the appellee, maintained, that a valid and binding renunciation of the right of executorship may be made by act in pais, and that the cases of *Geddy v. Butler*, *Nelson v. Carrington*, and *Burnley v. Duke*, were in point to that purpose. And they cited the case of *Broker v. Charter*, Cro. Eliz. 92, to shew, not only that an executor's renunciation of executorship may as well be by matter in fact as by judicial act, but that such a renunciation once made by an executor, however qualified, in favor of a particular person, is absolute, peremptory and perpetual. The reason was, that though an executor may renounce, he cannot assign, his right of executorship. The executrix, in this case, having duly renounced the executorship, and the other executor named in the will having previously died without ever qualifying, the testator was dead intestate (that is, in the technical sense, without having constituted any executor) as much as if he had made a testamentary disposition of his property without naming any executor, in which case the paper (technically speaking) would have been a codicil. 3 Bac. Abr. Ex'ors and Adm'rs, C. p. 27; *Shep. Touchs*. 406. It was, indeed, only because the decedent, in such case, was thus intestate in law, that an administration could be granted: and when,

by the refusal of a sole executor, if only one, or of all the executors, if more than one named in the will, or of the survivors after the death of the others, a decedent was become intestate in law, there could never afterwards be an executor, but only an administrator with the will annexed; and the refusing executor could neither qualify as executor, nor derive, from the nomination of him as executor in the will, any preferable claim to the administration: he stood, now, on the same ground as if he had not been named executor in the will. *Broker v. Charter*, ubi supra; *Hensloe's case*, 9 Co. 37, 38, 40; 156 *Shep. Touchs*. 461, 2, 6, 7; *Plowd.* *281, 2; *Wangford v. Wangford*, 1 Salk. 308; *House v. Lord Petre*, Id. 311. As to the passages cited by the appellant's counsel from *Toller's Law of ex'ors*, 42, 3, 92, that, after administration granted in consequence of an executor's renunciation of the executorship, the executor cannot retract his refusal during the lifetime of the administrator, but he may do so after the grant has ceased by the administrator's death; they said, it would be found, that the proposition was not sustained by any authority; on the contrary, the authorities were the other way. Then, if the appellant had no preferable claim to the administration by reason of the testator's nomination of her to the office of executrix, which she had renounced, she had certainly no preferable claim to administration as the widow of the testator, or rather, no claim to it at all on that ground, because she had no manner of interest in the estate undisposed of by the testator's will, and as to which he was intestate. The will made a provision for her (and apparently a most ample one) in real and personal property; she never renounced the provision made for her by the will; and, therefore, she could never claim any thing from the testator's personal estate besides that which his will gave her. The statute 1 Rev. Code, ch. 104, § 26, p. 381, provides, that a widow dissatisfied with the provision made for her by her husband's will, may renounce such provision within the year after his death,—but that every widow, not making such renunciation, "shall have no more of her husband's slaves and personal estate than is given her by his will." The appellant, then, had no interest in the estate to be administered; and the appellee was entitled to a distributive share of it. Therefore, she had no claim to the administration, and the appellee had a claim to it as a distributee. *Cutchin v. Wilkinson*, 1 Call 1; *Hendren v. Colgin*, 4 Munf. 237; *Bray v. Dudgeon*, 6 Munf. 132.

CARR, J. The first point made for the appellant, was, that her assent to her daughter's taking administration being *in pais, was not such a renunciation of the executorship, as bound her. But it has been expressly decided by this court, in *Geddy v. Butler*, *Nelson v. Carrington*, and *Burnley v. Duke*, that such renunciation may be effectually made by declarations in pais, or may be presumed from circumstances.

It was next insisted, that this renunciation, though it might for the time authorize the grant of administration to the daughter, was no peremptory renunciation, but that on the death of her daughter, the widow still

*Gordon's edl. Philadelphia 1824.

had a right to qualify as executrix. The passage cited from Toller's Law of ex'ors, 42, certainly supports the proposition; but that passage itself is not only wholly unsupported, but seems directly in opposition to the books there referred to. Toller says, "After refusal by the executor and administration granted, the party is incapable of assuming the executorship during the lifetime of such administrator, but after the death of the administrator, he may retract his renunciation:" and Wentw. Off. Ex'or, Swinburne, and 3 Bac. Abr. are cited in the margin. Now, in Wentw. Off. Ex'or, 38, I find this passage—"After refusal, and administration committed, the executor cannot go back, to prove the will, and assume the executorship"—almost the words used by Toller in the first part of the sentence, but unqualified by his assertion that the executor may retract after the death of the administrator. And (p. 41,) Wentworth gives the reason why there can be no such power of retraction: "It is clear, he says, that if there be but one executor, and he refuse, or being many, if they do all refuse, then is the party dead intestate, and administration is to be committed with the will annexed. Nor can any after meddle as executors." Certainly, the party could never be said to be dead intestate, if there were a person living who might, under any circumstances, still claim to qualify as executor. So, in Swinburne, part 6, § 12, it is said—"But after refusal, and administration committed to another, the executor cannot recede from it, and go back to prove the will, and assume the executorship." *And in 3 Bac. Abr. 42, it is said, still more strongly—"If an executor refuse before the ordinary, to take upon him the executorship, the ordinary may grant administration cum testamento annexo to another person, and he can never afterwards be permitted to prove the will." In Rolle's Abr. 907, it is said, "if all the executors refuse to administer, administration shall be granted, for then the testator is dead intestate;" and he cites several of the year books. In Graysbrook v. Fox, Plowd. 281, it is said, "where a man makes his executors, who refuse, the ordinary may commit administration to others, because, upon the matter he died intestate." And in Hensloe's case, 9 Co. 40, the court lay it down, that "the reason why the ordinary may, upon the refusal of all the executors, or their death intestate, grant administration, is, because now the testator dies intestate, and then the statute 31 Ed. 3, gives him power to grant it, which he cannot do, when one refuses, and the other proves." Upon all these authorities as well as the clear reason of the case, I am well satisfied, that the passage in Toller is erroneous, and that when an executor has once renounced, and administration has been committed, he can never retract his renunciation.

It was contended, in the last place, that the wife has the best right to administration under our statute; and this, though it be clear (as in the case before us it is) that she has no interest in the residuum; nothing to do with the personality beyond the provision made for her by the will. But this is a question concluded, as I conceive, by our own decisions, and these decisions founded on

the law and reason of the case. In Cutchin v. Wilkinson, Hendren v. Colgin, and Bray v. Dudgeon (cited at the bar), this court has decided, that the person entitled to the estate, is entitled to the administration, and, in the last case, this was so adjudged against a husband seeking administration on his wife's estate,—a case in point. I am of opinion, on the whole, that the sentence must be affirmed.

159 *CABELL, J. I am also of opinion, that the sentence should be affirmed.

TUCKER, P. The attempt to sustain the claim of the appellant, in this case, to the administration of the estate of her husband, rests upon three grounds—1. that she was the executrix named in the will, and has never refused the executorship; 2. that if her verbal declaration could be considered a refusal, she had a right to retract it after the death of the first administratrix; and 3. that if that be not so, she had as widow the preferable right to the administration.

As to the first proposition, it rests upon the assumption that a verbal declaration in pais does not amount to a refusal, but that a valid renunciation can only be by act done before the court of probat. Whatever may have been the former doctrines of the ecclesiastical courts, it seems to have been admitted in the case of Broker v. Charter, Cro. Eliz. 92, that a letter written by the executors declaring their inability to attend to the duties of executor, was held a valid renunciation; and upon that occasion, Dr. Ford declared before the justices, that by the civil law, a renouncing may be by a matter in fact as well as by judicial act, and that a refusal might even be by parol. This case seems to have been not only unquestioned, but it is also set forth by the various elementary writers as containing the law of the subject. In our courts too, it has been repeatedly adjudged, that the renunciation of an executorship may be by act in pais; and, in like manner, our statute makes the refusal or failure of all the executors to give security, equivalent to a refusal of the executorship. In the present case, it appears that when Frances Thornton, the first person who administered on the estate, was appointed, Mrs. Thornton declared her agreement that Frances should qualify, but at the same time reserved her right to qualify after her death. Now this agreement by an executor, that another shall qualify as administrator, amounts of course to a refusal of the executorship; because

the executor thereby consents, that his *testator shall be considered as having died technically intestate, that is without executor. It is a consent that the interest in the estate, which the testator had cast upon him, should be withdrawn from him and cast upon another, and of course inevitably implies a renunciation of that interest himself. Here, it is true, the widow reserved her right to qualify after Frances Thornton's death; and this leads to the

2nd Inquiry; whether she had a right to retract her renunciation after Frances Thornton's death? This rests upon a mere question of law: for the reservation of her subsequent right to qualify, can only have effect if it should appear she had such subsequent right. The passages which

have been cited from Toller's treatise, go fully to the point, that if an executor renounces, and an administrator is appointed, though the executor cannot retract in his lifetime, he may after his death, however formally the renunciation may have been made. Upon examination, however, this particular proposition seems wholly unfounded in authority. The editor of the new edition of the Office of Executors, seems to have considered it as sustained by Bacon's abridgement and by Swinburne, part 6, § 12, but in neither of those is there the slightest intimation of any such opinion. The case of *Broker v. Charter* moreover contains the declaration of Dr. Ford, very explicitly, that the renunciation of the executor cannot be partial, or only for a time, but is absolute and perpetual; and though the case itself is not in point here, since in that case the administrator was yet living when the act occurred retracting the renunciation, yet this declaration of a doctor of the civil law (who was, I presume, of the prerogative court) cannot be of less authority than the unsupported dictum of Toller. The proposition, indeed, seems at variance with fundamental principles. By the common law, he who made a will without naming an executor, was technically considered as dying intestate; and if an executor was appointed, and he refused, the testator was then considered intestate. By the common law, also, the

161 appointment of an executor gave him a right to the residuum *after the payment of debts and legacies, unless that right was expressly or impliedly excluded by the will. On the other hand, where the decedent died intestate, the ordinary, in early times, took the one-third of the estate in pios usus; and then, when administrators came to be appointed, they were at first deemed to be entitled to the residuum after payment of debts; and, afterwards, were compelled to make distribution. Hence it is obvious, that the residuum went, in right of property, to the executor, if he qualified; but if he did not, it went to the administrator in his own right, or as fiduciary. The effect, then, of a renunciation by the executor, was to part with this right of property; to consent that his testator should be deemed to have died intestate as to it, and to agree that it should pass into the hands of such person as the ordinary should make administrator, for the benefit of those by law entitled. This is of the nature of a transfer of a right or title in personal property; and hence it may be truly said, in the language of Dr. Ford, that, after the renunciation, the executor shall never retract, quia transit in contractum. The right of property has passed, and cannot be arbitrarily reclaimed: the testator has been admitted to be intestate, and the rights which thereby vested cannot be revoked and annulled by again considering him testate. The affairs of estates would be eternally unsettled, if such irregularities were permitted; and though it is true the executor is not now entitled to the residuum, and that the principles out of which the rule has grown, have been in part repudiated by our law, yet the practice to which they gave rise must still be adhered to. I am, therefore, of opinion, that after a

refusal by an executor, and the appointment of an administrator, there is no right on the part of an executor to retract his refusal upon the death of the administrator.

Then, 3rdly, upon the death of Frances Thornton, when it became necessary to appoint an administrator de bonis non, had Mrs. Thornton a preferable right to the appointment? Admitting, that, in the appointment of an administrator 162 *de bonis non, the same preferences are to be observed as in the original grant of administration, and admitting that Mrs. Thornton's permission to Frances Thornton to administer, was no waiver of her preferable right, still that right would or would not exist, according as she had or had not an interest in the testator's estate. For, notwithstanding the strong language of the statute, it cannot at this day be contested, that the right of administration mainly follows the title to the personal estate. This has been repeatedly decided in Virginia; and it is the settled law of England, Toll. 116. So far, indeed, is the doctrine carried, which gives the administration to the person entitled to the property, that although the statute directs the husband or wife to be preferred, yet their claims will yield when the estate is to go to other persons; as, where by settlement upon the death of the feme, her property is to pass to her representatives to the exclusion of her husband, her relations shall have the administration in preference to the husband or his representatives; Toll. 85, 116; *Bray v. Dudgeon*, 6 Munf. 132. Now, in this case, I take it the widow is entitled to no portion of the residuum. She has had an ample provision made for her by her husband's will; and if not, yet she has not renounced the will: and the law emphatically declares, as to the personality, that if she does not declare her refusal of the provision made for her by the will, within a limited time, she shall have no more of her husband's slaves and personal estate than is given her by his will. It is not correct to suppose, that such provision must be declared, or averred to be, in lieu of her distributable share: there is no such language in this statute. In the statute concerning dower, indeed, it is made necessary to bar dower, that the estate conveyed must be, expressly or by averment, in lieu of the dower of the wife; but that provision is confined to the real estate, and to that alone do all the cases refer, in which it has been held, that a wife may take the provision made for her by her husband's will, and her dower also.

Sentence affirmed.

163 *Paup's Adm'r and Others v. Mingo and Others.

January, 1833.

(Absent Brooks, J.)

Wills—Manumission of Slaves—Decree—Case at Bar.
—Testator by his will desires, that, when his affairs are settled and all his debts paid, his slaves be emancipated according to law, and those under age and over forty to be equally in the care of his wife, son and daughter, and that the above may be done by his executors: upon bill in chancery by slaves (suing in forma pauperis) against the executor, charging that ample fund has been raised out of their profits to pay debts, and praying an account of administration, and of their

profits, and decree for their manumission and for excess of profits above the debts, the chancellor, in 1809, finding that ample fund to pay the debts has been raised out of the profits, though debts not yet finally liquidated and paid, decrees, that the executor shall manumit them, reserving liberty to them to resort to the court, for a distribution of any surplus of profits which might remain after liquidation and payment of debts, or for other arrangement in respect to such surplus: the debts are not finally liquidated and paid till 1827, when there appears a surplus of profits: and now, the freedmen claim this surplus, the testator's next of kin claim it, and the executor claims it—HELD,

1. **Same—Same—Same—Final.**—The decree of 1809 is a final decree as to the manumission, but makes no disposition of the surplus of profits.
2. **Same—Same—Right to Profits Accruing during Bondage.**—The freedmen are not entitled to the surplus of profits accruing while they were actually held in bondage; negroes recovering freedom by suit in forma pauperis, cannot, in any case, recover profits or damages.
3. **Same—Right of Executor to Surplus of Profits.**—The executor is not entitled to the surplus of profits, but the same is part of his testator's estate undisposed of by his will, which belongs to his next of kin.
4. **Same—Same—Statute.**—It seems, that since the statute of distributions of 1785, the executor is not, in any case, entitled to the residuum of his testator's personal estate not actually bequeathed away by the will.

William Walker, late of Brunswick, who died in 1789, by his last will and testament, devised and bequeathed as follows: "After my debts are paid and all accounts together with merchants' accounts are settled and discharged by my executors hereafter named, I give my beloved wife Sarah the land I now live on during her life, and all the stock of each kind, and the household furniture, until my daughter Sarah and my son Leonard come of age or marry; then they shall have as much of either of these articles, together with stock of each kind, as she can spare—And the above land, after my wife's death, to my daughter Sarah and her
164 *heirs forever—And the land on James river to my son Leonard, to him and his heirs forever. I also desire, when my affairs are settled and all my debts paid, that my negroes be emancipated according to law, excepting one known by the name

of Lud, whose services of two years I reserve longer than the rest; then he also shall be liberated: and those under age or over forty, to be equally in the care of my beloved wife, daughter and son. I desire, that the above may be done by Benjamin Jones and my brother David Walker, whom I appointed executors &c." Jones alone qualified as executor; he died in 1801; and Peter Robinson was his executor, and so became executor of Walker also.

In 1805, the slaves of Walker's estate (suing in forma pauperis, by leave of chancellor Wythe, under the statute 1 Rev. Code, ch. 124,) exhibited their bill in the superior court of chancery of Richmond, against Robinson the executor of Jones and of Walker, and Leonard Walker, the son, and John Paup husband of Sarah the daughter, of the testator Walker; Wherein after setting forth Walker's will, they alleged, that a fund had already been raised out of the profits of their labor, more than sufficient to pay all the debts of that testator, and that therefore they were then entitled to demand deeds of emancipation, but that they were still held in bondage, some by Robinson the executor, and others by Leonard Walker and Paup; and they prayed accounts of Jones's and Robinson's administrations of the testator's estate, and of the profits of the slaves held by them, as well as of those held by the other two defendants, respectively; and a decree for the immediate manumission of the plaintiffs, and for the surplus of their profits over and above the testator's debts.

Robinson in his answer, shewed, that he was informed, after the death of his immediate testator Jones, of the existence of large claims against the estate of the first testator Walker, chiefly for debts contracted by him to british merchants before the revolution, for which suits were soon afterwards brought
165 against him, and these suits were still pending,*and the results very uncertain; that, therefore, he had hired out such of the slaves whereof Jones died in possession, from year to year, and should continue to do so, until he should raise a fund sufficient to pay the amount of the debts claimed, and no longer; intending, if the amount of debts which should be recovered of him, should fall short of the fund so raised, to pay the surplus to the plaintiffs when they should be manumitted; and that the other defendants, who were in possession of part of the slaves at Jones's death, and had since withheld them from him, were bound to account to him for the profits thereof, to be added to the profits he should himself receive, and thus the sooner to accomplish a sufficient fund for payment of the debts, and hasten the period of the plaintiffs' liberation.

The other defendants answered, that the first executor Jones, from the death of the testator Walker till 1795, left the old and young slaves in the care of the testator's widow on the plantation devised to her, with as many able bodied slaves as sufficed to maintain those who were chargeable, and hired out the other able bodied slaves: that, in 1795, the widow being dead, he divided the young and old slaves under twenty-one and over forty years of age, equally between Leonard the son, and Paup the husband

*Decrees—Cause Retained on Docket—Effect upon Finality of Decree.—In *Nelson v. Jennings*, 2 Pat. & H. 381, it is said, in *Harvey v. Branson*, 1 Leigh 108 (see also, *foot-note* to same case), a decree was rendered disposing of the whole subject, deciding all questions in controversy, ascertaining the rights of the parties and awarding costs, and a commissioner appointed to sell the property, to account for and pay the proceeds to the parties, with liberty to them to apply to the court to add other commissioners, and substitute new commissioners, or have a decree for a partition of the property directed to be sold. By the unanimous opinion of all the judges who sat in the cause it was held that the decree was final. The principle of this case was affirmed in the cases of *Paup v. Mingo*, 4 Leigh 163, and *Thorn-ton v. Fitzhugh*, 4 Leigh 206, in each of which cases the causes were retained on the docket, for further proceedings to be had therein showing clearly that the mere fact that the cause being retained in court and on the docket does not divest a decree of its finality.

See monographic note on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

*Slaves—Suit for Freedom—Profits.—On this question, the principal case is cited in *foot-note* to *Peter v. Hargrave*, 5 Gratt. 12; *foot-note* to *Pleasants v. Pleasants*, 2 Call 319; *Elder v. Elder*, 4 Leigh 259, 264; *Osborne v. Taylor*, 12 Gratt. 130.

*Same—Same—Assent of Personal Representative.—The principal case is cited in *foot-note* to *Ellis v. Jenny*, 2 Rob. 597; *Reid v. Blackstone*, 14 Gratt. 366; *Nicholas v. Burruss*, 4 Leigh 297.

*Wills—Residuum—To Whom It Passes.—The principal case is cited in *foot-note* to *Shelton v. Shelton*, 1 Wash. 53. See monographic note on "Wills"; monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

of Sarah the daughter, of the testator, retaining the slaves between twenty-one and forty, and hiring them out from year to year: that these defendants had ever since held the young and old slaves so put into their possession by Jones, and claimed to hold them; for, they insisted, that the testator, in providing that the slaves under age and over forty should be equally in the care of his wife, son and daughter, intended to give them the young as well as the old, in order that by the labor of such as were profitable they might maintain those who were chargeable.

It appeared that Jones, and after him Robinson, acted with perfect good faith towards the slaves whom their testator Walker intended to manumit, as well as to the creditors of his estate: That Jones's object was, to leave in the care of his
166 *testator's family, the young and old slaves, of whom the profits would not be more than equal to the charges, until he should complete his administration, and to raise a fund out of the profits of the middle aged and able bodied, to pay the debts he knew to be due, and such as he was apprised might be claimed; and for some two or three years before his death, it seemed, he suffered the slaves he had retained in his possession, to take and enjoy the profits they earned, and only withheld deeds of emancipation from them, because he had reason to apprehend, that there might be other debts, particularly british debts, for which the slaves, as well as their profits, might be liable as assets in his hands: And that as to Robinson, suits were brought against him, by british creditors of Walker, for large debts, very shortly after he took upon him the executorship; that he was wholly ignorant whether these claims were just, or to what extent they were so; that the suits were still pending and the results uncertain, and he was very diligently defending them; and that in retaining the slaves, as he did, and hiring them out from year to year, he was discharging his duty judiciously as well as faithfully, without the least design to reap any advantage to himself.

The accounts prayed for in the bill, were ordered. And the accounts taken and reported by the commissioner, brought the account of profits of the slaves down to the year 1809, inclusive; at the end of which year, it appeared, that Leonard Walker would have received profits of the slaves held by him, to the amount of 2335 dollars, and Paup, for profits of the slaves held by him, 2059 dollars; that the balance of the profits received by Jones in his lifetime, was 4256 dollars; and that the balance of the profits received by Robinson, at the end of the year 1809, would be 3628 dollars.

Upon this report coming in, chancellor Taylor, at June term 1809,—finding that a fund amply sufficient to meet all claims against the testator Walker's estate, had been raised out of the profits of his slaves, the plaintiffs in this suit,—decreed, that they should all (except Lud) be free to all
167 *intentions and purposes on the 1st January 1810, and that Lud should be free on the 1st January 1812; and that Robinson should execute proper deeds of emancipation to each and all of the plaintiffs, and should

execute bonds to the justices of the county courts of the counties wherein the plaintiffs resided, respectively, for the maintenance of the young and the aged and such as were unsound in mind or body, out of the estate of Walker in his hands—liberty being reserved to the plaintiffs, or any of them, to resort to the court for a distribution of any surplus of the fund raised from their profits, which might remain after the debts due from Walker's estate should be liquidated and fully discharged, or for any other arrangement in respect to such surplus.

In this decree all parties acquiesced. Robinson in pursuance of it, executed the deeds of emancipation, and gave bonds for the maintenance of such of the freedmen as might become chargeable; and shortly afterwards died. Meantime, the suits of the creditors of Walker's estate were still pending; they were all strenuously contested by Robinson's executors, and some of them with success. These suits were not finally determined till 1827. Such of the creditors as recovered judgments, were paid out of that part of the fund arising from the profits of the slaves, which had been reported to be in Robinson's hands, and the interest thereon accrued; and after paying all the debts, there was a surplus remaining.

Whereupon, Mingo and others, the freedmen manumitted by the decree of June 1809, presented their petition to the chancellor, shewing that there was a surplus in the hands of Robinson's executors; claiming this surplus; and praying, that accounts might be directed to ascertain the amount thereof, and the proportions in which it ought to be distributed among the petitioners. Robinson's executors made no objection; and the accounts were ordered accordingly.

In the accounts taken and reported in pursuance of this order, Robinson's executors were charged with 3628 dollars, the balance
168 of profits in his hands in 1809, and with *all interest thereon accrued, and credited for the debts adjudged against Walker's estate; and the uncontested balance in their hands, in December 1827, was 4815 dollars, principal and interest. And a scheme was reported for the distribution of this balance of profits among the freedmen who had earned them; those, namely, who had been retained by Jones in 1795, and coming after Jones's death to Robinson's possession, had been hired out by him.

But, before any other order had been taken upon the petition, the representatives of Leonard Walker the son, and of Paup the husband of Sarah the daughter, of the testator Walker (the original parties being now dead), exhibited a bill against Mingo and others, the freedmen, and Robinson's executors; wherein they claimed the whole balance in the hands of the executors; insisting, that the freedmen were not entitled to any part of their profits which accrued before their actual emancipation; and that whatever balance might be now in the hands of Robinson's executors on this account, and the balance likewise which had been ascertained to be due from the estate of Jones upon the account taken in 1809, appertained to the testator Walker's estate, and not having been disposed of by his will, devolved to his distributees.

The freedmen Mingo and others answered this bill, asserting their right to the money in question.

And then Robinson's executors (at the express instance of his distributees) insisted, that the money belonged neither to the freedmen nor to Walker's distributees, but to Robinson's own estate.

The chancellor declared that the freedmen were entitled to the surplus of profits accrued before their actual manumission; and, therefore, directed distribution among them, according to the scheme reported by the commissioner, of the balance of 4815 dollars in the hands of Robinson's executors; and dismissed the bill recently filed by the representatives of Paup and of L. Walker: but no

order was taken as to the balances of 169 profits reported in 1809 to be due *from the estate of Jones, from Paup, and from L. Walker, respectively. From this decree, Paup's and Walker's administrators, by petition to a judge of this court, prayed an appeal; which was allowed.

The cause was argued here, by Johnson for the appellants, Spooner for the appellees Mingo and others, the freedmen, and Leigh for Robinson's executors.*

I. Johnson argued, that the decree of June 1809, was erroneous in directing the manumission of the slaves of the testator Walker's estate. The direction contained in his will, that his slaves should be emancipated by his executors after his affairs were settled and all his debts paid, was not an effectual instrument of emancipation, within the meaning of the statute, 1 Rev. Code, ch. 111, § 53, p. 433. For, though prospective emancipations of slaves had been upheld, those were emancipations, so appointed to take effect at a certain time or on a certain event, as that when the right to freedom accrued, the slaves were emancipated by force of the will alone. Here, the period at which the manumission was designed, was altogether uncertain; and the actual manumission also depended on the discretion of the executors. It was only a delegation to them of the power to manumit. At any rate, the slaves were not entitled to emancipation until the affairs of the testator were settled and all his debts paid; which (without the least suspicion of fraudulent procrastination) was not accomplished till 1827. Till then, the testator designed they should be held as slaves by his executor; till then, they might justly, and ought to have been held as slaves by them: and so long as the executors held them as slaves, they could not maintain any suit whatever against their owners; for only such persons unjustly held in 170 *bondage, as are actually entitled to freedom, can be allowed to sue their masters in forma pauperis, under the statute, 1 Rev. Code, ch. 124, § 4, p. 481.

Spooner and Leigh said, they thought there could be no serious doubt, that the suit in forma pauperis brought by the slaves in 1805, with leave of the chancellor, was authorized by the statute concerning pauper suits; and

that the decree of June 1809, directing that these people should be manumitted, was entirely correct. But, supposing those proceedings were wrong, they maintained, that this court could not now examine and correct them. For the decree, so far, certainly, as it directed the manumission of the slaves, was final; and not the less so because it reserved liberty to them, to resort to the court for a distribution of any surplus of their profits; Harvey v. Branson, 1 Leigh 108. From this final decree, no appeal had ever been taken; the decree had been acquiesced in, and executed; and to any appeal from the decree now, the statute of limitation of appeals was a conclusive bar. Besides, in the bill exhibited by the appellants, they nowise contested that decree in respect to the manumission of the slaves; they only claimed the surplus of profits, which, as they contended, were not thereby disposed of.

II. Spooner argued, very strenuously, that the slaves were entitled to the surplus of their own profits. He said, that the effect of the testator Walker's will, was to give freedom to his slaves, subject only to the just claims of his creditors; in which respect, this emancipation was nowise different from every other emancipation of slaves; for, in every such case, the manumitted slaves were by law liable for debts. The first executor Jones, in fact, assented to the bequest of freedom to the slaves which after 1795 he retained in his own hands, some two or three years before his death, by permitting them to enjoy their own earnings; and he was right in doing so; for it was now certain, that the fund he had raised from the profits of the slaves retained by himself (independ-

171 *put into the possession of Paup and L. Walker), was much more than sufficient to pay all his testator's debts. The fund which Jones had raised was 4206 dollars; and a less sum, namely 3628 dollars, raised by Robinson afterwards, out of the profits of the same slaves to whom Jones before his death had given the rights of freemen, had proved not only sufficient to pay all the debts, but had left a large surplus; and it was only this surplus, which the chancellor had distributed among the freedmen who had earned it. The slave retained by Jones in 1795, should be considered as having been actually emancipated from the time that he permitted them to enjoy their own earnings: it was not necessary to complete the manumission of them, that he should have given them deeds of emancipation; the testator's will was the instrument of emancipation; the executor had nothing to do but to liberate them; Dunn v. Amey, 1 Leigh 465. When Robinson, after Jones's death, took possession of these people, he took possession of persons who were, and of right ought to have been, freemen. He, indeed, did not intend any injustice: he was informed of large claims against Walker's estate, which (if they were just), he knew these persons might have been sold to pay; and being ignorant whether those claims were just, or to what amount they were so, he resumed the rights of owner, only for the purpose of raising a fund out of the profits to pay the debts, with intent, as he

*They had put in no answer to the bill filed by the representatives of Paup and of L. Walker: but, by consent of counsel for all parties, it was agreed, that their claim to the subject should be now considered by this court, and determined, as if they had put in their answer to that bill, asserting such claim.—Note in Original Edition.

declared in his answer, to give them the benefit of the surplus; so that, in truth, he constituted himself their trustee, and acted throughout with a view to their benefit; in other words, he treated them as freedmen. In this point of view, he said, this case was altogether different from the common case of persons illegally held in bondage, recovering their freedom from the person holding them, and claiming to hold them, as slaves. In such case, it had been held, that profits accrued during the actual state of bondage, were not recoverable; which, to be sure, was hard enough. But Robinson took a very peculiar position; that of trustee both for the creditors of

Walker's estate and for Walker's
172 *freedmen; trustee for the creditors to raise a fund equal to the satisfaction of their claims; and trustee for the freedmen (who were liable to be taken and sold for the debts) to raise the fund for the debts, out of their earnings, and to preserve the surplus of their profits, if any, for their own use. It would be most unreasonable to interdict, or to exempt, Robinson's executors from doing what he intended, and what was in itself at once benevolent and just. But he insisted, that this point also was determined and concluded by the decree of June 1809, in which the court, in effect, declared that the surplus of the profits belonged to the freedmen, by reserving liberty to them to apply to the court for distribution of it. The decree was as final and irreversible in respect to this point, as in respect to the emancipation.

Johnson answered, that if the decree of June 1809 was final as to the emancipation (indeed, he could not help wishing that it might be so regarded), it certainly was not final as to the surplus of profits; for the decree made no disposition of it; it did not adjudge it to the freedmen; it only reserved liberty to them to ask it. Then, as to the right to the profits, he shewed, that, in fact, Jones never liberated the slaves of Walker's estate, nor intended to do so; that he intended, as his duty required him, to hold them as slaves till the debts of his testator should be ascertained, and the affairs of his estate settled; that, if he gave them their own earnings, or any other money, or any other indulgence, he yet retained all his right of property in them, and it had been folly in him to relinquish it: that Robinson succeeded to the rights of Jones, as well as his duties, and acted on the same principles, he too holding these people as slaves, and taking the profits of them as property, till the chancellor directed him to manumit them: in short, that the actual manumission of the slaves was accomplished by the decree of June 1809, and the execution of the deeds of emancipation in pursuance of it. Such being the state of facts, the claim of the freedmen to the surplus of profits could not be sustained. The

173 course of adjudication, long *before as well as since the case of *Pleasants v. Pleasants*, 2 Call 319, 342, 3, had been quite uniform on this point; and it must be regarded as the settled law, that persons illegally held in bondage recovering their freedom, are in no case entitled to recover profits: a rule which might, at the first

view, seem hard and unjust, but if it was necessary, it were easy to shew, the considerations of justice and policy, and even humanity, on which it was founded. Much less were the freedmen, in this case, entitled to profits; for they had been legally held in bondage, until the chancellor directed them to be liberated. Robinson's intention to give these people the surplus of profits, is immaterial: the surplus of profits was not his own to dispose of; or, if it was, his executors were not bound to fulfil such his mere intention to give away this money, conceived, probably, under a mistake of law on the subject.

III. Supposing the chancellor's decree wrong in giving the surplus of profits to the freedmen, a question arose, between the representatives of Paup and of L. Walker and Robinson's executors, whether the former were entitled to this money as distributees of the testator Walker, or the latter entitled to hold it as part of Robinson's own estate?

On this point, Leigh argued, for Robinson's executors, 1st, That as the subject in question was certainly nowise disposed of by Walker's will, it devolved to his executors. The common law, without doubt, would have given it to them: the question was, whether the statute of distributions of 1785,* had repealed the common law in this particular, and given the residuum of a testator's
174 estate, not otherwise disposed of *by his will, to his next of kin? In *Shelton's ex'ors v. Shelton*, 1 Wash. 64, president Pendleton suggested (for he did not intimate an opinion) that the statute of 1785 might have that effect; that the words in the statute, or any part thereof, referred to, and directed distribution of, every thing that was not actually bequeathed in a will. But *Green, J.*, in *Wernick v. M'Murdo*, 5 Rand. 78, controverted that suggestion, and shewed, that the right of an executor to the surplus stands on the same footing in Virginia as in England. But however this might be, he contended, 2ndly, That Walker's distributees were not entitled to the money in question: that Robinson, in holding Walker's freedmen as slaves, after having raised out of their profits a fund sufficient to pay the debts of that testator, must be regarded as a wrong-doer towards the freedmen, and towards them only—an unintentional wrong-doer, certainly, if there ever was one, for in the actual situation of the estate when he succeeded to the executorship, to have liberated them might have rendered him personally liable to the creditors, for a devastavit to the full amount of their value—but still he was a wrong-doer towards the freedmen only. He said, there was no principle on which Walker's distributees could found a

*The statute of distributions of 1785, ch. 61, § 25, 12 Hen. Stat. at large, p. 146, provided, that "when any person shall die intestate as to his goods and chattels, or any part thereof, after funeral debts and just expenses paid," the estate shall be distributed among the next of kin, as therein directed. The words or any part thereof, were first introduced into the statute of distributions by the act of 1785, as may be seen by comparing it with the former statute on the subject: 1706, ch. 23, § 2, 3, 8 Hen. Stat. at large, p. 371. The provision of the statute of 1785, has been ever since retained: 1 Rev. Code, ch. 104, § 29, p. 382.—Note in Original Edition.

claim for money received by Robinson, in consequence of a tort committed by him toward the freedmen. The freedmen, but for the peculiar rule of law applicable to such cases, would be entitled to the profits accruing from themselves while they were illegally held in bondage,—profits which accrued after they were entitled to freedom, but before it was adjudged to them: but the rule which exempted Robinson from accountability for the profits to them, did not give the profits to the distributees of Walker, the purpose of whose will was the emancipation of his slaves, subject only to the payment of his debts. The claim of Walker's distributees was, in effect, a claim to make the fruits of Robinson's injustice towards his freedmen, a part of Walker's estate.

175 *Johnson for the appellants, maintained, 1st, That president Pendleton's suggestion as to the effect of the statute of distributions of 1785, was founded on the just construction of the statute; that the legislature, in providing that when a person should die intestate as to his goods and chattels or any part thereof, the estate should be distributed, intended to provide for the cases of entire and of partial intestacy, in the common acceptation of the phrase; cases, namely, in which a decedent should leave no will, or should leave a will in which no disposition was made of part of his personalty; not for cases of intestacy, in the technical sense in which a decedent was said to be intestate, only because, though he left a will, he had omitted to appoint an executor. 2ndly, He adverted again to the will of the testator Walker, which directed that his slaves should be emancipated by his executors, "when his affairs were settled and all his debts were paid:" and, he said, the testator could not have intended, that the executors should raise out of the profits of the slaves, a fund barely sufficient to pay his debts, and then emancipate them; for he must have known, that the amount of his debts was uncertain, and that his executors could form no estimate of them. He intended, then, that his executors should hold his slaves as slaves, until his affairs were settled, since, until then, it could not be known what would be the amount of debts to be paid. If upon the final settlement of his affairs, it should appear, that the profits of the slaves exceeded the amount of debts, that was a consequence arising from the uncertainty as to the debts, which he might naturally have anticipated; and yet he did not direct his slaves to be emancipated, when a sufficient fund should be raised out of their profits to pay his debts,—but, when his affairs should be actually settled and all his debts actually paid. Robinson committed no wrong. It was his duty, undoubtedly, to retain the slaves, as he did; and it was as certainly his duty to contest claims against Walker's estate, which he believed to be unjust; but he acted in both respects, not in his own right, 176 but in his fiduciary character, *as executor of Walker. So long as he held the slaves, he held them as the property of his testator, and for his estate. Therefore, the surplus of profits eventually found

in his hands, belonged to his testator's distributees.

CARR, J. A question was made in the argument, whether the will of the testator Walker was an effectual instrument of emancipation of his slaves; but that question is not open for inquiry, unless the decree of June 1809, by which they were directed to be manumitted, can be examined by the court. It certainly cannot: it was a final decree, from which no appeal was ever taken, and none can now be taken: and if the decree were examinable as to the question of emancipation, the appellants have not raised it in their bill recently exhibited; they there ask only the surplus of the profits. On the other hand, it was contended, that the right of the freedmen to this surplus, as well as their right to freedom, was adjudicated by the decree of 1809; but neither is there any foundation for this position. The question comes before us, on the appeal from the last decree; and we are now to decide to whom the surplus of profits belongs—shall the freedmen have it? shall the executor retain it? or shall we decree it to the testator's next of kin?

It was strongly contended for the freedmen, that this fund having been raised from their labours, after they were entitled to their freedom, ought of right to go to them. There is much in this argument, which addresses itself to our sense of justice, and to our feelings; but unfortunately for them, the point has been irrevocably settled against them. Suits of this kind have been very frequent in Virginia, for more than a century past. There have been numerous cases of recovery of freedom by persons illegally held in bondage; and in many of them, the violation of freedom has been gross and palpable, and the public feeling strongly on their side; yet, in not one single case, have damages for the detention been given. In *Pleasants v. Pleasants*, the 177 chancellor *had allowed profits, contrary to the established rule; but this court reversed his decree in that particular; and the rule which denies profits in such cases, has been invariably followed ever since. Hard as the case may seem upon the freedmen, I for one, can never think, at this day, of breaking through this settled course and policy of the country.

Let us next inquire, whether the executor shall retain this surplus, as a residuum undisposed of. With respect to the influence of our statute of distributions on this question, my impression is, that the suggestion of president Pendleton, in *Shelton v. Shelton*, is correct. I believe too, it has from that time been taken as the law: I see that judge Roane, in delivering the opinion of the court in *Hendren v. Colgin*, 4 Munf. 235, takes it as a settled point. Yet, as it has been questioned by a brother judge in *Wernick v. M'Murdo*, as the point is very important, and there is now a bare court, and as the question before us may (as I think) without the aid of the statute, be easily settled by the long established doctrines of the law, I have thought it best to give no opinion on the construction of the statute.

By the common law, the whole personal es-

tate devolved on the executor; and if after payment of debts, legacies, and other charges, a surplus remained, it vested in him beneficially. But this rule was considered to operate hardly upon the next of kin; and, therefore, wherever it appeared, on the face of the will, either expressly or by sufficient implication, that the testator meant to confer on the executor, merely the office, and not the beneficial interest, equity interposed, and converted him into a trustee for the next of kin. President Pendleton, in *Shelton v. Shelton*, has shewn, with his usual ability, how, in the progress of this doctrine, variant and irreconcilable decisions took place, as different chancellors favored the legal, or the equitable, rule. Thus lord Thurlow laid it down, that the rule that the executor shall take the residue, must prevail, unless there

be an irresistible inference to the contrary; while lord Macclesfield *had held, that the next of kin have the apparent right, and there must be a devise of the surplus to the executors, either expressly, or by unavoidable implication, to exclude the next of kin: "An executor, he said, from his name, is but a trustee, he being to execute the testator's will, and therefore called an executor." I confess, I think the reason and justice of the case wholly with lord Macclesfield; and though he has been thought to carry the doctrine a little too far, I think he is in the main supported by the cases, especially the later ones. Thus, if there be a residuary clause, though the name of the legatee be left blank, and thus rendered ineffectual; or, if there be a residuary legatee, and he die in the life of the testator; or, if there be a particular legacy given to the executor; in all these cases, he is held to be a trustee for the residue. See the cases collected by Cox, in a note on *Farrington v. Knightly*, 1 P. Wms. 550, and *Nourse v. Finch*, 1 Ves. jun. 344; 2 Id. 78. It has also been decided, in numerous cases, that if one of several executors is made a trustee, for any particular purpose connected with his office, all shall be held trustees of the residue for the next of kin. In *Urquhart v. King*, 7 Ves. 225, a testatrix commenced her will by saying she intended to dispose of part of her personal estate: she then gave several legacies to relations of her deceased husband, residing in the U. States, and, after very particular directions as to those legacies &c. she concluded thus—"I constitute and appoint the honorable Rufus King, minister plenipotentiary from the U. States, or such other person who at the time of my death shall be minister plenipotentiary from the U. States, to this kingdom, and Francis Gregor &c. executors of this my will." She then by a codicil gave other legacies, specific and pecuniary, and made no disposition of the residue. The executors claimed it, beneficially, and the next of kin filed the bill against them: the only question was, whether the executors were trustees of the residue for the next of kin? Sir W. Grant said, "It is true, at law, the appointment of an executor is a gift of every thing not otherwise disposed
179 *of. But, in equity, it is always a question of intention, whether he is entitled beneficially, or as a trustee; and the question always arises upon the sufficiency of the evi-

dence, by which the intention is made out." He proceeds to state it as settled law, that the leaving a legacy to an executor, raises a presumption, which, unless he can rebut it by evidence, makes him a trustee; and adds—"In this case, the circumstances much more strongly indicate the real intention that the executors should not take beneficially, than a legacy would have done." He then points out those circumstances; among others, that the appointment of Mr. King was not in his individual capacity as a friend, but as minister—or such other person who at her death should be minister; and concludes, "It is evident, therefore, she meant to confer an office only; and the intention is much more clear than it would be from the single circumstance of a trifling legacy to each:" and he decreed for the next of kin.

Let us look now at the will before us, and see whether it is not most clear, that the testator intended to confer on his executors an office merely; to constitute them trustees for the purposes of his will, and more especially, for the emancipation of his slaves. His property consisted of two parcels of land, stocks, furniture and slaves; and, after giving his lands, stocks and furniture to his wife, son and daughter, follows the clause desiring that after his debts are paid, his slaves may be emancipated according to law: Adding, "I desire this may be done by Benjamin Jones and my brother David, whom I appoint executors" &c. Can any one fail to perceive, that this testator meant to dispose of, and in fact disposed of, every atom of property he had in the world; thereby evincing, as clearly as any residuary clause could do, that he meant to leave nothing to be taken by his executors? Is it not most apparent, that, with respect to the emancipation of his slaves, and every measure necessary to effectuate that end, he constituted them trustees, without dreaming that they were to draw one
180 cent of profit from *the execution of the trust? Could he have used any words of inhibition, however strong, that would have made this more clear? Suppose he had left these two executors 100 dollars apiece; would that have made it more manifest than it is now, that he did not intend to have his slaves hired out beyond the period when a sufficient sum was raised to pay his debts, for the purpose of creating a fund to go into the pockets of his executors? Assuredly, not. If it be said he had as little intention of creating a fund in this way for his next of kin, I agree to it fully; but the same consequence does not follow to them as to the executors. Here is the money; it is part of his estate undisposed of, raised by the error of the executors; to them we cannot give it: but it is different with the next of kin; for (as lord Hardwicke says in *Southcot v. Watson*, 3 Atk. 231,) they "take by a kind of succession ab intestato, without the assistance of this court; and it is the law throws it upon them."

CABELL, J. I am of opinion that the decree of June 1809, declaring the pauper plaintiffs free, was clearly final, and that, not having been appealed from, it is no longer examinable. If it were otherwise, and it were now regularly before us, I should think that it ought to be affirmed. But, I do not

think that the subject of the surplus profits of the freedmen, accrued before the date of the decree, was, in any manner, disposed of by it. It may, probably, be inferred, that the chancellor entertained an opinion that the freedmen were entitled to this surplus; but he did not give to that opinion the form or character of a judicial decision. The right to them, therefore, is now properly before us, on the present appeal.

I consider it the settled law of this country, that a person held in slavery, no matter how long and unjustly, cannot recover damages in the form of profits, or otherwise, for his illegal detention in slavery. This being the settled law, I deem it unnecessary to inquire into its policy or abstract justice. I am not disposed to disturb it. The decree is erroneous in this particular.

181 *Nor do I think, that the executors are entitled to this surplus of profits. They cannot claim to hold it merely on the ground of having received it, provided any other person can shew a better title to it. While they held the slaves of Walker's estate, they held them as fiduciaries. for the benefit of the estate; and their reception of the profits followed the character of their ownership of the slaves themselves, and, consequently, was fiduciary also.

But it was contended, that the executors will be entitled to the hires, as a part of the surplus of the estate, after the payment of debts and legacies. And this brings on the question, whether executors, in this country, are entitled to such surplus, in any case whatever, since the statute of distributions of 1785. Before the passing of that statute, the law as to the surplus of an estate, after the payment of debts and legacies, was certainly the same here, as in England. President Pendleton, in *Shelton v. Shelton*, speaking of the principles which should govern the decisions on this subject, said—"There are two, which seem the ground work, and are fixed: 1st, a legal one—That the naming of an executor, is a disposition to him of all the personal estate; and after payment of debts and legacies, the surplus belongs to him as a recompense for his labour and trouble. And if the spiritual court at this day, are about to compel the executors to distribute the surplus to the next of kin, the king's bench will grant a prohibition. 2ndly, A contending principle of equity, that where there is fraud in obtaining the executorship, or where it manifestly appears to have been the testator's intention, that the executor should not have the surplus, a court of equity will consider the executor as a trustee only as to the surplus for the next of kin." But, although these principles were fixed, much difficulty had been experienced in applying them to particular cases. What is to be regarded as proof of the testator's intention that the executor should not have the surplus? This question perplexed the judges in almost every case. At first, they confined themselves to a few circumstances only, as affording this proof. But, afterwards,

182 *they branched (as president Pendleton expressed it) into other considerations, which produced determinations, not to be reconciled, in principle, to each other,

and which must be resolved into the different inclinations of the chancellors to favor, some the legal, others the equitable rule; and to make the favored rule apply to the case before them." And, I believe, it may be confidently affirmed, that no subject in the whole law, has given rise to more contradictory decisions, and that, consequently, none has been more fruitful of litigation. It was in this state of things, that our legislature passed the statute of 1785. Did it mean only to provide thereby, for those very few and rarely occurring cases of partial intestacy, mentioned by judge Green, in *Wernick v. M'Murdo*? or, to put an end to the perpetual controversies between executors and the next of kin, as to the surplus after the payment of debts and legacies? It seems to me absolutely certain, that the legislature, in using the terms, "intestate as to his goods and chattels, or any part thereof," did not mean to apply them to a case of mere technical intestacy; to a case where a man, although he actually leave a will disposing of his whole estate, is, nevertheless, held to be intestate in law, because he has appointed no executor, or because the executor appointed, has refused to act. If the statute of 1785, were to apply to such a case, the consequence would be, that a man's estate would be distributed among his next of kin, in opposition to his declared and written will to the contrary, if he failed to appoint an executor, or the executor named died before him, or refused to qualify. Such a consequence was never contemplated, and would not be tolerated by the legislature. The statute can be applied only to cases, where a person has failed to declare by his will, expressly or by necessary implication, his intentions as to the disposition of his property; to cases, where he has failed to make an actual bequest. But, then, it extends to every such failure, whether that failure be partial or total; for the language of the statute is, when a person dies intestate as to his goods and chattels, or any part

183 *thereof. When we advert to the numerous and contradictory decisions of the courts, and the evils consequent on such an unsettled state of the law, prior to the statute of 1785, and to its peculiar phraseology, (the words, or any part thereof, having then, for the first time, been introduced into our statute of distributions) I am constrained to believe, that the legislature had in view, this very case of the surplus after payment of debts and legacies, and intended to put an end, forever, to all controversies concerning it, by giving it, in all cases, to the next of kin. This was the opinion of this court (extrajudicially expressed, it is admitted) in *Shelton v. Shelton*, and of judge Coalter, in *Wernick v. M'Murdo*; and, indeed, I have never heard a different opinion expressed, by any person whatever, except by judge Green, in the last mentioned case.

TUCKER, P. I consider the decree of June 1809 as concluding the right of the pauper plaintiffs to freedom. If that decree is erroneous (which I am not disposed to think it is) this court cannot, at this day, correct its errors, or even question its accuracy. It was the decision of a court of competent jurisdiction upon the matter in

lilation, from which there was no appeal taken, and which cannot now be reversed: the matter has passed completely in rem adjudicatam. It is not only binding, but we must take it to be a correct decision, in proceeding to adjust the ulterior pretensions of the parties growing out of it. I take it, therefore, as a postulate, that the freedmen, in this case, were justly entitled to their freedom in 1809, under the will of Walker; and that it was properly decreed to them by the court of chancery.

But though, by that decree, the right to freedom was placed beyond question, the right to the profits was not so definitively settled, as seems to have been supposed by counsel. That the opinion of the chancellor may have been at that time made up, is very possible. But that opinion can have no

influence, unless it has passed into the form of a *decree determining the rights of the parties. From such a mere opinion, there could have been no appeal for the purpose of correcting its errors; and it would be strange, that the party should be bound by it, without having power to have it corrected, if erroneous. In interlocutory decrees, indeed, where the principles of a case are settled by the court, and ulterior measures resting upon those principles are directed, an appeal will lie, because it may be necessary to arrest an expensive or dilatory course of proceeding, by striking at the principles of the decree out of which it is to grow. But here, the chancellor settled nothing as to this point. He merely reserved to the plaintiffs, liberty to resort to the court, for distribution of any surplus remaining after the debts should be paid, or for any other arrangement in relation to such surplus. Surely, this is any thing but a decree for the surplus. Whether the whole profits might not be absorbed by debts, did not appear; and therefore, whether Walker's freedmen would ever get any thing, or his distributees lose any thing, it was impossible to say. Had Robinson, the executor, appealed from that order, and the whole amount been absorbed by debts, so as to have left no subject of controversy, the absurdity of such an appeal would have been manifested. Therefore, I think, we must consider the reservation, not as settling the rights of the parties definitively, but as merely providing for the mode of bringing them before the court for final adjudication, when the affairs of the estate should have been completely wound up.

Considering the question of the profits as being open to inquiry, I think there is little difficulty in denying the correctness of the decree which has given them to the freedmen. No instance has ever occurred, I believe, in the history of our adjudications in these anomalous cases, in which profits or damages have been allowed to the claimants, as a compensation for detaining them in slavery. In *Pleasants v. Pleasants*, the demand was refused; and for thirty years, this decision seems to have been so far acquiesced in, that *no such pre-
185 tence is believed to have been since set up. It is too late, now, to make a precedent; and if it were not, there are many grave considerations which ought

to be weighed, before we should undertake to do so. It is, perhaps, difficult to say whence the opinion first arose, though it very probably originated in the nature of the suit or demand. Though its form was that of an action of assault and battery and false imprisonment, yet, in substance, it was always considered but as a fictitious action moulded by the courts for the purpose of trying the mere question of freedom. "Actions like the present" (said president Pendleton in *Coleman v. Dick*, 1 Wash. 233), "are merely fictitious, and are very properly in this respect (as to number of parties joining) likened to actions of ejectment." They are, in effect, to try the right, not to try the injury; as the writ of right, at common law, settled the mere right, but never gave damages. The issue made up between the parties is upon the right to freedom only, not upon the quantum damnificatus, and still less upon any idea of contract, express or implied. There is no room for such an implication where one party is held by another in slavery. There is little reason for it, when we consider that the slave, in his birth and his infancy, has been a burden, and that if the master could have foreseen his emancipation and his demand for profits, he might have been altogether averse from incurring such a charge. Moreover, having held and enjoyed the slave as his own, and acted entirely on that supposition; having spent the profits made by him during a long course of years, in the confidence they were his own; there is much reason for the application of the principles laid down by the court in *Skyring v. Greenwood*, 4 Barn. & Cres. 272, 10 Eng. C. L. R. 335. In that case, the paymaster of a corps had credited an officer with increased pay, which he was informed by the board of ordnance would not be allowed, but which information he did not communicate to the officer. The court refused to permit the paymaster to rectify the credit, by setting
186 it off against *the officer's demand: chief justice Abbott said,—"they suffered him to suppose, that he was entitled to the increased allowances. It is of great importance to any man, not to be led to suppose his income is greater than it really is. Every prudent man accommodates his mode of living to what he supposes to be his income; it therefore works a great prejudice to any man, if after having credit given to him in account for certain sums, he may be called upon to pay them back." The principle here avowed lies at the root of many of the doctrines of the law. Upon this ground, in part, no damages were given in *droiturel* actions; upon this ground, even now, rents and profits can only be recovered for five years anterior to the demand. Why? Not because they are presumed to have been paid, but because there ought to be some reasonable limit to a reclamation which might beggar a party, who, in good faith, had only spent and enjoyed what he believed to be his own. These principles apply a fortiori to the demand of a pauper who has recovered his freedom. Held by his master as his own property, brought up at his expense in infancy, sustained at his charges in sickness and in health; treated, perhaps, with an indulgence, which would not have been extended to one whom he knew to be a hireling; it would be

ruinous, indeed, to many a master if these unexpected demands for profits were permitted or countenanced by the courts. While, therefore, it cannot be denied to be a hardship on the person illegally held in bondage, it is not improbable that the difficulty of doing complete justice, together with the policy of protecting the master from a demand he could not have expected, lay at the foundation of the practice now firmly established. From that practice, I shall not deviate, nor admit a single exception. The legislature by the statute concerning pauper suits, 1 Rev. Code, ch. 124, § 4, has prescribed the course to be pursued in suits for freedom. The statute gives the courts authority to permit the petitioner to sue in forma pauperis for the recovery of his freedom; but it provides nothing as to damages or profits,

187 *though the courts had uniformly denied them. I argued from hence, a legislative assent to the principles established by the general practice of the country; and until a new law shall otherwise provide, I hold myself bound to adhere to that practice. I do not think it necessary, in addition to what I have said, to rely at all upon the proposition, that as no contract for profits can be implied, as they could only be recovered as damages for unlawful detention, there could be no such demand in equity. Yet this would of itself, perhaps, be a sufficient answer to such a demand in that court. Nor is it necessary to dilate on the particular character of the will, in this case, which does not direct the slaves to be hired out, and that when the debts should be paid out of their profits, they should be emancipated. It merely fixes upon the time when the affairs of the estate should be settled up and the debts paid, as the time for their emancipation. This has been settled by the former decree in the year 1809, at which time their title to freedom was consummate. The profits were, accordingly, received for the estate, and cannot be paid over to the freedmen, since they were not free, when the profits accrued. They derived their freedom, indeed, from the will; but it was not perfected until the execution of the power under the will by the executor.

The question as between the distributees and the executors of Walker next presents itself. Without again adverting to the language of the will, in this particular case, as decisive of the point that all the profits of these slaves until their actual emancipation, belonged to the estate, I will remark, that, as the executors came to the reception of these profits in their fiduciary character, they can have no title to retain them. The argument indeed, was most ingeniously and imposingly put—that the distributees had no pretence of right to the profits of these persons, who ought to have been in the enjoyment of their freedom; that, as profits are not recoverable by the plaintiffs in a pauper suit for freedom, the person who may chance to be the holder, will be entitled

188 *to the benefit, and that Robinson, the executor, being the holder, and a wrongdoer, he was entitled to retain the profits remaining in his hands, because there is no other person who has a right to demand them. The defect of this argument consists, I think, in the omission to consider Robinson

as holder, not for himself, but for the estate. Whatever incidental advantage might be derived from the possession of these people while held as slaves, belonged to the estate of his testator, since he had that possession only in a fiduciary character as representing that estate. An agent or overseer could not claim to retain the profits of a slave who recovered his freedom, though he may have actually received them, since his possession and his receipt of the profits, were not in his own right, but in right of another.

With respect to the question of the right of the executor to the residuum, I have always considered president Pendleton's suggestion in *Shelton v. Shelton*, as perfectly correct. For more than forty years, it has been deemed the law in Virginia; and thousands of wills have been probably drawn with a conviction, that it was no longer necessary to give the executor a legacy, or in any other manner to provide for his exclusion from a right to the residuum. A law of property has thus grown up, which I think it would be unwise to disturb, even if there were sound reasons for questioning the interpretation given to the statute by president Pendleton, and acquiesced in ever since by the legislature and the courts of justice.

Upon the whole, I am of opinion that Walker's distributees are entitled to the fund which had arisen from the profits of the slaves, so far as the same has been unexhausted by debts, and that the decree must be reversed.

Decree reversed.

189 **Mercer's Adm'r v. Beale and Others.*
January, 1833.

(Absent BROOKS, J.)

Covenant—Judgment—Payments—To What Applied.

—In covenant by M. against B. judgment is recovered by M. in 1792, for £2500. damages: s. fa. is sued out by M. and returned nulla bona; then both parties die; and afterwards, the executor of B. makes sundry payments, at sundry times, to M.'s administrator: HELD, all such payments shall be applied to the principal of the debt due on the judgment; and M. is only entitled to the balance of principal with interest from the date of the judgment, and shall not be allowed to compute interest on the whole debt from date of the judgment, and apply the partial payments, first to the satisfaction of interest so computed, and then to the principal.

Judgment against Decedent—Statute—Effect.

—Quære, whether the provisions of the statute of 1792, 1 Rev. Code, ch. 128, § 17, apply to any case of a judgment recovered before the date of the enactment thereof? or whether it does not apply to every case of a judgment recovered against a decedent, whether before or after the enactment, in which his executor or administrator has qualified after the enactment? And per TUCKER, P., it applies to every case in which the qualification of the representative of the deceased debtor has been subsequent to the enactment, though the judgment against the decedent may have been recovered before.

In an action of covenant, brought by James Mercer against Samuel Beale in the general court, Mercer recovered judgment

***Judgments—Interest.**—On this question the principal case is cited in *Laidley v. Merrifield*, 7 Leigh 357, 359, and note; *foot-note* to *Michaux v. Brown*, 10 Gratt. 612; *Tazewell v. Saunders*, 13 Gratt. 308; *Stuart v. Hurt*, 88 Va. 345, 13 S. E. Rep. 438. See monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425; monographic note on "Interest" appended to *Fred v. Dixon*, 37 Gratt. 541.

against Beale, at June term 1792, for £2500. damages assessed by the verdict of the jury, and costs of suit; the verdict and judgment according to the law and practice at that day, being simply for the amount of damages, without giving interest thereon.* And upon this judgment, Mercer sued out a writ of fieri facias, dated the 26th June 1792, returnable to the first day of November term following; upon which the sheriff made return,—“no property to be found

but what is under a deed of trust to
190 *Nathaniel Burwell, Robert Andrews, Basil Holmes and John Pierce, for the payment of debts therein expressed.”

The deed of trust referred to in the sheriff's return, had been executed by Beale to Burwell, Andrews, Pierce and Upton Beale [not B. Holmes] before Mercer recovered his judgment, namely, on the 10th March 1792.—And by this deed, Beale,—reciting that he was in an infirm state of health, and unable to attend to the adjustment of his private affairs, and therefore, had determined to relinquish to the friendly management of respectable men, all the debts, dues and demands, of every kind, that were or should become due to him from any person in Virginia,—assigned to Burwell, Andrews, Pierce and U. Beale, all the said debts &c. upon trust, 1. to collect the same, employing B. Holmes as an agent in making the collections; 2. to apply so much of the moneys when collected as should be necessary for the purpose, to the completion of a purchase he had made of one fourth part of an estate in New Kent, called Providence Forge, and then to sell the same, and apply the proceeds of sales to the general purposes of the trust; which were, 3. to apply the trust fund, first, to the payment of all debts due by him to certain specified creditors, and then of such other debts, due before the date of the deed to creditors not named therein, as he should acknowledge under his hand and seal in his lifetime, or as B. Holmes, after his death, should certify under his hand and seal, to be justly due, but (expressly) no other debts.

The debt due to Mercer was not one of those mentioned and provided for in this deed of trust.

About the time Mercer recovered his judgment, Beale removed from Virginia, and never returned: he died shortly afterwards, having by will devised and bequeathed one half of his estate to his son Norborne Beale, and the other half to his daughters Matilda and Harriet, and appointed his trustees, above named, his executors. Mercer also died not long after the recovery of his judgment against Beale;

and James M. Garnett and John T. Brooke were his administrators *with his will annexed. Brooke died pending this suit.

Robert Andrews alone first qualified as executor of Beale; and, acting as trustee

or as executor of Beale, or in both capacities, he made sundry payments to Mercer's administrators, in 1802 and 1803, in part satisfaction of the debt due by the judgment. These were general payments. Andrews died in 1803; and sometime after his death, Pierce qualified as executor of Beale; and he, likewise, as trustee or executor, or in both capacities, made sundry general payments, to Mercer's administrators, in 1804 and 1809, in part satisfaction of the judgment; after which Pierce died; and thenceforth, there was no representative of Beale's estate.

After the death of Andrews, his accounts as trustee and executor of Beale (for his accounts in the two characters were blended together) were settled by commissioners appointed by the county court of James City; and shewed a balance due from him, of £441. which Andrews's executor paid to Beale's son Norborne, and at the same time transferred to him bonds belonging to Beale's estate, to the amount of between £3000. and £4000. And then Norborne Beale, and his two sisters and co-legatees, Matilda and Harriet, removed to Kentucky, where they have ever since resided.

In January 1816, Mercer's administrators exhibited their bill in the superiour court of chancery of Richmond, against Norborne Beale, and his two sisters, as devisees, and legatees of their father,—the executor and the devisees and legatees of Andrews, trustee and first executor of Beale,—the executor and devisees and legatees of Pierce, trustee and second executor of Beale,—the heirs and distributees of Robert Munford deceased,—and George Divers,—setting forth the facts above stated: claiming the balance which would be due on Mercer's judgment, by computing interest on the judgment from its date: charging, that by the judicious management of the trustee and executor Andrews, there was a large real and

192 personal estate of Beale left, *after paying all his other debts, more than enough to pay the balance due on Mercer's judgment, of which estate, including a large portion of the trust subject comprised in the deed of trust of the 10th March 1792, the defendants Norborne Beale and his co-devisees and legatees had possessed themselves, and these defendants were residents of the state of Kentucky; that Andrews's executor had improperly paid and transferred the trust subject (which in equity was liable for all Beale's debts) and the residue of Beale's personal estate, to Norborne Beale; and that the estate of Munford (of which there was now no personal representative living) and the defendant Divers, were largely indebted to the estate of Beale: and therefore praying, that the debt due from the estate of Munford, and from the defendant Divers, to Beale's estate, might be attached in the hands of Divers, and in the hands of the heirs and distributees of Munford, respectively, as garnishees, to satisfy the balance due on Mercer's judgment; a decree for that balance; and general relief.

The representatives of Andrews and of Pierce, as well as Divers, and the represen-

*The statute, 1 Rev. Code, ch. 128, § 80, p. 508, provides, that “in all actions founded on contract, and tried before a jury, the jury shall ascertain the principal sum due, and fix the period at which interest shall commence. If interest be allowed by them: and judgment shall be rendered accordingly, carrying on the interest till the judgment shall be satisfied.” But this statute, which regulates the present practice, was not passed till January 1806. Sess. Acts 1804-5, ch. 8, § 2.—Note in Original Edition.

tatives of Munford, charged as garnishees, having answered the bill, a long controversy ensued, as to the liability of the estates of the two trustees and executors, and as to the debts alleged to be due from the garnishees to Beale's estate; and the cause had been pending many years, when the absent defendants appeared, and were allowed to put in their answers.

And Norborne Beale, in his answer, admitted, that he had ample funds of his father's estate to pay the balance due on Mercer's judgment, whatever it might be; but he insisted, 1. that the claim was barred by the provision in the statute of wills of 1792, (1 Old Rev. Code, ch. 92, § 57,) and 2. that at any rate, as Mercer's judgment did not give interest on the damages thereby adjudged to him, no interest could properly be allowed upon the same, and the payments made by Andrews and Pierce should be applied to the principal.

193 *An account was taken of the debt due on Mercer's judgment, and of the payments made by Andrews and Pierce; from which it appeared, that the payments, if applied to the principal, reduced the debt to 614 dollars: but, if interest were computed on the debt from the date of the judgment, and the payments applied first to the discharge of the interest, and the overplus to the principal, the balance of the debt, due in January 1809, was 7510 dollars, principal; and this was the balance which Mercer's administrator claimed, with interest from January 1809.

The chancellor decreed, that the defendant Norborne Beale should pay the plaintiffs only the balance of 614 dollars, with interest thereon from the 25th June 1792, the date of the judgment. And from this decree Mercer's administrator appealed to this court.

The cause was argued here by Johnson for the appellant, and Stanard for the appellees; and many interesting topics were discussed, which arose incidentally in the argument of the two principal questions presented by the answer of Norborne Beale; namely, 1. the question as to interest on the judgment; and 2. the question as to the effect of the 57th section of the statute of wills of 1792, relied on by Beale as a bar to the claim;* whether that provision

*The provision on which the question arose, was first enacted in December 1792, and was in these words: "No action of debt shall be brought against any executor or administrator upon a judgment obtained against his testator or intestate, nor shall any scire facias be issued against any executor or administrator to revive such judgment, after the expiration of five years from the qualification of his executor or administrator: and all such judgments after the expiration of five years, upon which no proceedings shall have been had, shall be deemed to have been paid and discharged;" with a saving in favor of persons non compos mentis, femes covert, infants, imprisoned, or out of the commonwealth. In the revision of 1792, this provision was made part of the statute of wills; 1 Old Rev. Code, ch. 92, § 57; Pleasants's ed. 167. But in the revision of 1819, it was detached from the statute of wills, and with some amendment inserted in the statute of limitations: 1 Rev. Code of 1819, ch. 128, § 17, p. 492.

In the statute of limitations of 1792, there was another provision then first introduced, in these words: "Judgments in any court of record, where execution hath not issued, may be revived by scire facias or an action of debt brought thereon, within ten years next after the date of such judgment, and not after; or where execution hath issued and no return is made thereon, the party in

194 was applicable *to the case of a judgment recovered before the enactment? whether it was applicable to a case like the present, in which the funds out of which the claim of the judgment creditor was to be satisfied, came to the hands of the executors not as executors but as trustees, or, at least, not merely as executors, but in the two characters of executors and trustees blended together? and whether the statutory presumption of satisfaction of a judgment against a decedent, from five years non-claim after the qualification of his executor or administrator, was an absolute bar, or might, like other presumptions, be rebutted?

CARR, J. I shall not examine the point discussed with great earnestness and ability at the bar, whether Mercer's judgment against Beale, under all the circumstances of the case, be within the influence of the statute declaring that after five years from the qualification of an executor or administrator, no action of debt shall be brought, or scire facias issued, on any judgment obtained against the testator or intestate? It is unnecessary to consider the point, because the judgment of the chancellor upon it, was against the appellee, and he took no appeal from it, but was satisfied with the decree.

The only question which I think it material to consider, is that respecting the interest: did the chancellor err in refusing to give interest on the whole judgment from its date until final payment? It was a judgment for damages, and did not give interest. It was recovered in June

195 1792; and *an execution was sued out upon it in the same year, which proved ineffectual. From that time till 1816, when this bill was filed, no step was taken; the judgment remained a judgment in damages, carrying no interest as a part of the judgment. The defendant at any time during that period, by paying up the amount of the judgment, £2500. with the costs, would have extinguished the judgment: the plaintiff, by issuing his execution, could never have coerced more than the £2500. and costs. This, then, was the existing demand; and if during the time that it stood upon the judgment and execution thereon, the payment of the sum demanded would have extinguished the whole, it would seem to follow, that a payment of any sum less than the whole, would extinguish the debt to the extent of the sum paid. It appears, that between 1802 and 1809, various payments were made; leaving, of the principal judgment and costs, only a balance of 614 dollars. This sum the chancellor has decreed to Mercer's administrator with interest from the date of the judgment. It is contended that, on this bill, filed in 1816, long after the pay-

whose favor the same was issued, shall) may obtain other executions, or move against any sheriff &c. for not returning the same, for the term of ten years from the date of such judgment, and not after;" with a saving in favor of persons non compos mentis &c. 1 Old Rev. Code, ch. 76, § 5, p. 108; 1 Rev. Code of 1819, ch. 128, § 5, p. 489. This provision has been held to be prospective: i. e. not to apply to judgments existing before it took effect. *Lyons v. Gregory*, 3 Hen. & Munf. 337; *Day v. Pickett*, 4 Munf. 104.—Note in Original Edition.

ments, a court of equity ought to have treated this judgment exactly as if it had carried running interest upon its face; computing interest on the judgment to the time of the payments, and applying the payments first to the discharge of the interest. I cannot think so. Suppose the payments had equalled the amount of the judgment and costs; could this bill have been sustained claiming to have a re-settlement, and the payments so applied as to give interest on the whole judgment from its date? This, I suppose, would hardly be contended for. It is the unquestionable right of a debtor owing two debts, to direct to which of them any payment he may make shall be applied; but here such direction would have been absurd; there was but one debt; every payment must have been just as clearly and necessarily applicable to that, as if the debtor had said, "this money is paid towards your judgment against me;" and as

that judgment was one principal
196 sum bearing no interest, *every hundred pounds paid towards it lessened that principal by so much. True, if the creditor at any time should choose to bring an action or (in a proper case) file a bill to enforce this judgment, he might in his second judgment or decree recover interest; but this could only be on such portion of the judgment, as had not been extinguished by prior payments; it could not unsettle those payments, or alter, in the least, their application. I think, therefore, that the chancellor was right, and that his decree should be affirmed.

TUCKER, P. The appellant complains, that by the decree of the court of chancery, his claim has been reduced from 7510 dollars due in January 1809, to 614 dollars, by the refusal of interest upon his judgment; while the appellee, claiming the protection of a provision of the statute of limitations, objects that a decree for any portion of the demand should have been rendered against him. These present the points on which the decision of this court is called for. I shall take them up in the order in which they have been just stated.

1. As to the appellant's title to interest upon his judgment. That a court of equity will under circumstances give interest on a judgment sounding only in damages and not carrying interest in terms, cannot be denied. The cases of *Beall v. Silver* and *Chamberlayne v. Temple*, 2 Rand. 401, 384, cited at the bar, are decisive authorities upon that point. Nor does the allowance of interest depend merely on the fact, in those cases, that there were fraudulent conveyances thrown in the way of the creditor, which proved a barrier to the collection of his debt. I think it may be more broadly stated, that where a creditor would be entitled, in debt upon his judgment, to recover interest, but is forced for any cause, to resort to equity for his redress, he ought to have the same measure of redress there, unless there be special reasons rendering such redress unreasonable or unjust. In this case the complainant has been compelled *to come into
197 equity, instead of suing at law upon his judgment; and we must, therefore, inquire what he would have been entitled to

recover at law, in an action of debt upon the judgment.

That in an action of debt upon a judgment, the plaintiff may, in the shape of damages, recover interest upon his demand, is a proposition too plain to have required proof. It is one of the functions of such an action,—one of its main designs; and in England, where even on contracts bearing interest in terms, the judgment of the court carries it down only to its own date, it is a most important remedy for a creditor, who, for years after his judgment, has been baffled in his attempts to render it available. Formerly, indeed, it would seem that interest was only computed to the time of the action brought; a practice condemned by lord Mansfield in *Robinson v. Bland*, 2 Burr. 1085, where he said, that, in justice, interest should be carried down to actual payment, but as that could not be, it should come as near it as possible, that is, to the judgment, when the demand is completely liquidated. But as by the english practice, even as corrected, the interest stopped short of justice, it was permitted to be recovered in an action of debt upon the judgment, where the creditor had been unreasonably delayed in the recovery of his money. Yet these actions have nevertheless been looked upon with a very watchful eye, being considered as vexatious and oppressive; per Grose, J., in *Entwistle v. Shepherd*, 2 T. R. 79. The resorting to a new suit, instead of pursuing the various executions given by the law for enforcing the first judgment, would indeed merit the reprobation of the courts; and the holding up a judgment for years, with a view to the recovery of accumulated interest in a new action, would certainly give the creditor no claim to the exercise of the discretionary powers of a court and jury in his favor. To modify the expression of the lord chancellor, in reference to carrying down interest beyond the report of the master, "if it

was once understood to be of course,
198 that after liquidation *of the debt, the accumulated sum would carry interest, those who ought to be most active in prosecuting the [demand] would then become negligent," in the expectation of interest; and would lie by until by the accumulation the defendant would be ruined. It may be said, indeed, that he can at all times absolve himself by payment; but where the judgment does not carry interest in terms, he very naturally looks to the delay as the forbearance of his creditor, and waits until the issue of an execution calls upon him to make payment. In the practice of this country, it may be safely affirmed, that no defendant who delays the voluntary discharge of a judgment, and awaits the visit of the officer, conceives that he is thereby subjecting himself to a new demand for accumulated interest, upon a judgment which carried no interest. Be this as it may, while it is readily conceded, that interest on a judgment not carrying interest may be given, it is as confidently affirmed, that it is not matter of course. The authorities and the reason of the thing concur in sustaining this proposition. If interest is not allowable upon rent, where there is sufficient distress upon the prem-

ises, because the landlord always has his remedy in his own hands, (*Dow v. Adams*, 5 Munf. 51,) there would seem to be equal reason for refusing it to a creditor, who, instead of enforcing his judgment by execution, when his debtor is full handed and his property easily reached, proceeds to harass him by a new action upon a judgment. So, if a judgment be rendered of assets quando acciderint, the supposition at the time of the judgment, is, that there is nothing to pay, and therefore no one to make payment; and thus, there being no default, no damages can be given; for damages always imply a previous wrong. Hence, in a case like this, interest was refused in a court of equity; *Deschamps v. Vanneck*, 2 Ves. jr. 716.

The authorities concur in considering interest, in an action of debt upon a judgment, as matter of discretion, not as matter of right in all cases. Nay more, it 199 is matter for the *jury, under the direction of the court, not matter for the decision of the court, independent of the jury. For the demand is for damages by occasion of the detention of the debt, and damages are always matter of assessment by the jury. And though the interest is the measure of those damages, and usually determines the amount of them, yet interest is one thing and damages another. Interest is matter of contract: damages are assessed for a tort or wrong done in withholding the debt; they are given for breach of contract, not in pursuance of it. Hence, the court will not undertake to assess those damages, or to compute the interest without the intervention of that tribunal whose peculiar province it is to assess damages for a tort of whatever description. Hence, too, though it is the practice, in actions upon bills and notes where there is judgment by default, instead of executing writs of inquiry, for the court to refer it to a master to see what is due for principal and interest; yet, in an action of debt on a judgment, this will not be done; for, as lord Kenyon said, in *Nelson v. Sheridan*, 8 T. R. 395, "it should be left to a jury to consider whether any and what damages should be given. Perhaps they may think that in this case no damages at all ought to be given." The case of *Roe v. Apsley*, 1 Sid. 442, had indeed been decided otherwise (against the opinion of the chief justice, 2 Wms. Saund. 108, in notes) but that case must now be considered as overruled. In the case of *Deschamps v. Vanneck*, the lord chancellor, moreover, speaking of the practice in equity as to this matter, declares, that upon inquiry he found that the master [in chancery] never taxed interest upon a judgment; and further, that he had found upon inquiry, that no interest is computed upon a judgment, in an action upon such judgment at law.

Nor is it merely not a matter of course that interest shall be allowed upon a judgment; it is often matter of serious speculation, whether it will be allowed in the shape of damages or not. I am certainly not aware of any case, in which interest has been allowed in the shape of damages, 200 *upon a judgment for damages in tort; as for slander, battery or

trespass. Such a case, it would be difficult, I imagine, to find in the english books. So far from such allowance, it was, to say the least, at this time exceedingly doubtful, whether interest in damages can even be allowed in an action upon a judgment on matter of contract, where the original cause of action did not carry interest. In the exchequer chamber, such interest is refused on an affirmance on a writ of error; 3 Price, 250; 6 Taunt. 244. And in an action of debt upon a judgment on a contract not carrying interest, a judge at his chambers, in the case of *Butler v. Stoveld*, 1 Bing. 368, 8 Moore, 412, made an order to stay proceedings in the action, on payment of the amount recovered, with costs, but without interest.

It may not be amiss to observe, moreover, that, in England, it is now established as a general principle, that interest is allowed by law only upon commercial securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances; *Higgins v. Sargent*, 2 Barn. & Cres. 348; 9 Eng. C. L. R. 101. Like opinions have been expressed by lord Ellenborough in 1 Camp. 50, 12 East, 410, and 15 East, 223. And in *Higgins v. Sargent*, Holroyd, J., says, "Independently of these authorities, I am of opinion, upon the principles of the common law, that interest is not payable upon a sum certain payable at a given day" [interest not being contracted for]. "The action of debt was the specific remedy appropriated by the common law for the recovery of a sum certain. Now, in that action, the defendant was summoned to render the debt, or shew cause why he should not do so. The payment of the debt satisfied the summons, and was an answer to the action. If this, therefore, had been an action of debt" [it was covenant for a sum certain] "the payment of the principal sum would have been a good defence, because the interest is no part of the debt, but is claimed only as damages, resulting from the non-

201 payment of the debt. *Where, indeed, the interest becomes payable by virtue of a contract, express or implied, then it becomes part of the debt, and it would be no answer to the action of debt, for the defendant to shew, that he had paid the principal sum only." So in the action of debt upon this judgment: the original writ (I speak of the matter according to the original common law forms of proceeding) would have commanded the payment of the exact sum due by the judgment, and the payment of that sum, without interest, would have been an answer to the action and satisfaction of the writ; for in the original writ and process in debt, there are no damages laid. 3 Black. Comm. Append. III. The damages are for the first time set forth in the declaration.

From what I have said, and from the authorities adduced, I think it will clearly appear, 1. that interest may be given, in the form of damages, upon many demands not carrying interest in terms, and among others upon a judgment in a matter of contract; but, 2. that this is not matter of course, but of discretion, to be exercised by

the jury, under the superintendence of the court. And if these propositions are true, then it is obvious, that until an action of debt is brought upon a judgment not carrying interest, the plaintiff's demand against the defendant is for the amount of that judgment alone; or, at most, that there is a possible, contingent, potential demand for interest, to be recovered in the shape of damages, if in a future action upon the judgment, such damages should be allowed.

Let us now recur, for a moment, to the character of the demand in this case. It is not a demand of interest upon so much of the said debt as has been unpaid, which a jury might allow and the court of chancery has properly allowed; but it is a demand, that all the payments which have been made towards satisfaction of the judgment, should be now converted, by the decree of the court, into payments not in part of an actual, subsisting, ascertained and recognized demand, but in part of this potential, uncertain, and contested demand of interest; a demand which was not

202 admitted, *was not ascertained, would certainly be contested, and might be adjudicated against the creditor, whenever he should assert it. Such an use of the doctrine of the application of payments, it is believed, can neither find a precedent in the past, nor would it be likely to be followed as a precedent for the future. The difficulties also to which such a construction would lead, are too formidable to be overlooked. If the doctrine be true, then although every cent of a judgment has been paid, the creditor may nevertheless sue for the amount, convert the payments to the interest and resuscitate the exanimate judgment. The consequence is, that the real estate of a decedent, which was only bound for the specific sum, and could never be responsible for damages, is, by this magical operation, still held bound for the original amount, provided the accumulation of interest has absorbed all the payments. The executor, too, after he has paid off the amount of the original judgment, finds he was paying interest while he thought he was paying principal. He finds the debt of record undiminished, because his payments are withdrawn from the principal, which is a debt of record, to be applied to these speculative, potential damages, which certainly are not a debt of record; and, having been thus, by construction, made to pay a less than simple contract debt (for it is a debt merely in posse), when he really supposed he was paying a record debt (the principal in the judgment), he is charged with a devastavit, and made to answer to other creditors for the misapplication of the funds.

Nor is this all. It cannot be affirmed, that interest can be included in an execution on a barren judgment. If then the execution is paid off through the officer, the debt is discharged; but, according to the doctrine now advanced, if paid off voluntarily, the payments must first be considered as payments of interest. If this be so, then the result will be, that no prudent man,—certainly no prudent executor, will ever pay off a judgment, except through

the officers of the law; and thus, the decedent's estate will be wasted in costs, commissions and sales under execution.

203 *Upon the whole, I am clearly of opinion, that interest was properly refused, except upon the unsatisfied portion of the judgment.

I shall only add that our statutes can have no influence upon the question; 1. because it is probable, that the case of debt upon a judgment was not in the contemplation of the legislature, or designed to be comprehended by the word contract in the statute of 1804-5, 1 Rev. Code, ch. 128, § 80, p. 508, and 2. even if it had been, the subject of interest is still left discretionary with the jury; and the foregoing reasoning is as applicable as ever.

We come next to consider the defence under that clause of our statute which was first introduced at the revival of 1792, being then the 57th section of the statute of wills, but inserted in the statute of limitations at the revival of 1819, 1 Rev. Code, ch. 128, § 17.

The application of this clause to the present case was first denied, upon the ground that the judgment at law was anterior to the enactment of the provision, and was not therefore affected by it. Had the defendant relied upon the 5th section of the statute of limitations, the objection would indeed have been conclusive, for it has been decided, and no doubt very properly, that this provision had not a retroactive operation, and did not embrace judgments previously obtained. *Day v. Pickett*, 4 Munf. 104. Had it been construed otherwise, a judgment ten years old at the date of the statute, would have been absolutely barred by it, and the right would have been annihilated, by an utter privation, not by a mere limitation, of the remedy. But in the construction of the provision in question, no infraction of the right will necessarily ensue, though the judgment be anterior to it, provided we construe it to require the qualification of the executor to be posterior. In the 5th section, the judgment is made the terminus, or point of time, from which the limitation shall be reckoned. In this clause, the qualification of the executor is made the terminus. Now it is manifest, that, if we fix the terminus

204 *posterior to the statute, whether that terminus be the judgment or the qualification of the executor, the creditor will always have the full time allowed by the statute for enforcing his right. Thus, in this case; as the qualification was after the statute, the creditor had more than five years after the passing of it, within which to assert his remedy. On the other hand, if the terminus be anterior to the statute (which might have been the case under the 5th section, had it been considered as retroacting upon anterior judgments) the right itself would have been infringed, in every case where the limitation had expired before the passing of the act. Construing the 17th section, then, (as I do) as retroacting on the judgment, only in case of the qualification of executors subsequent to the act, it seems to me, that the legislative intention is ef-

feuctuated, while an invasion of private right is sedulously avoided.

The object and intention of this statute, having been made a subject of much commentary, I will offer very succinctly my views upon the subject. The 5th section of the statute, though certainly designed originally, to meet the cases of judgments running out of date, and perhaps those cases only, yet is broad enough in its terms to reach the case of judgments abated by death, and which were sought to be revived by or against the representatives of decedents. But the legislature, I presume, thought that clause insufficient for the protection of executors and administrators, on whom the law imposes the duty of taking notice of judgments, wherever rendered in our numerous courts. The time of ten years was too long, and moreover there was a class of cases not within the 5th section: I mean judgments on which executions had issued, but were returned no effects; such cases were not within that provision; *Gee v. Hamilton*, 6 Munf. 32. To remedy these two evils, the other provision was introduced,—shortening the time to five years, in the case of executors, and moreover extending the bar to all judgments whatever, even to those in which the presumption of payment was rebutted
205 by the return of no *effects on an execution. Since this act, no judgment can be revived, or be the foundation of an action of debt, against the executor, after the expiration of five years, unless the persons entitled were non compos &c. No promise of payment, no assumpsit or acknowledgment, could have the effect of removing the bar. Such assumpsits may serve as the foundation of a new action, or may take a debt out of other clauses of the statute, but not out of those which limit the right of reviving judgments by debt or scire facias. *Day v. Pickett*, before cited.

But how then is the law as to the heir? It is contended, that this clause applies only to the executor, and does not reach the case of the heir, who can only protect himself under the 5th section, after ten years have elapsed. It struck me as singular, that where a judgment against a defendant abated by his death, it could not be enforced against his executor after five years, but might be enforced against the heir, by scire facias and elegit, at any time within ten years. For it is obvious, that the statute which gave the elegit, subjected, by that writ, the personality as well as the realty to the creditor's demand: and the cases upon it have decided, that if, upon an elegit, it appears to the sheriff that there are goods and chattels sufficient to satisfy the debt, the sheriff ought not to proceed to extend the lands. 2 Bac. Abr. Execution, C. 2, p. 711; 2 Inst. 395. Hence it would seem to have been the design of the statute, to charge the realty by the elegit, only in aid of the personality, or in the event of the personality proving deficient. Yet by the provision of the statute in question, the personality would seem to be protected, while the realty

is left to be proceeded against without its aid. Upon looking into the books upon this subject, however, I think the difficulty vanishes; for it has been expressly decided, in *Panton v. Hall, Carth. 107*, that no scire facias to revive a judgment will lie against the heir, until a nihil has been returned against the executor; and this opinion of lord Holt is recognized as the law of the subject, 2 Wms. Saund. 72, o. p. If it be
206 so, then the *clause in question, in protecting the executor from the scire facias after five years, is a shield also to the heir, as it ought to be.

I think, therefore, that, if this were the case of an ordinary demand against the executor and heir of a decedent, the plea of this statute would avail either of them; and I am moreover of opinion, that if the demand against Norborne Beale in reference to the personalty, could be considered as a demand against him in the character of distributee, to compel him to refund, he would in that character be entitled to resort for the defence of the portion of the estate in his hands, to the plea of this statute; since the claim would in effect be against him through the executor. But, I apprehend, such is not the character of this suit. A cursory view of a few facts in the case, will prove this. In June 1792, the judgment, which is the foundation of the present suit, was rendered. Immediately after the judgment, a fieri facias issued upon it, which was returned, "no property to be found, but what is under a deed of trust to N. Burwell and others for the payment of debts therein expressed." This deed of trust was executed in March 1792, during the pendency of the suit for Mercer's demand, and about the time of the judgment, Beale left the country. By this deed of trust, Beale conveyed to trustees, all the debts, dues and demands, due or to become due to him; and his one fourth part of Providence Forge, to be secured by them, and afterwards sold, in trust to pay certain specified debts; and then such other debts, due before the date of the deed, as Beale should acknowledge under his hand and seal, or as B. Holmes, after Beale's death, should certify under his hand and seal, to be justly due, excluding, in express terms, all other debts. The terms of this trust, however it may have been designed, would render the conveyance void as to creditors, if the nature of the property conveyed was such that it could have been reached by an execution. The retaining a full power over the fund,
the excluding from participation any
207 creditor unless the debtor *should acknowledge the sum due, and the express exclusion of all other debts from the benefit of the trust, while, on the one hand, it utterly negated the idea that Mercer was one of the cestui que trust, was calculated to hinder and delay, if not to defraud, those creditors who had not found favor with the debtor. It is not unlike the case in 2 Johns. Ch. Rep. 565, where the conveyance was set aside in favor of creditors, whose demands were not secured. If such be the character of the deed upon its face, then this court I conceive must pronounce it void, even though fraud is not

alleged in the pleadings: in *Bayard v. Hoffman*, 4 Johns. Ch. Rep. 450, there was no such allegation.

In this case, however, the conveyance is of debts due &c. and an interest in a landed estate which is not very distinctly described, and the ascertainment of which seems to have been rendered useless by *Norborne Beale's* declaration, that the funds in his hands were ample to pay whatever the plaintiff was entitled to recover. Now, it is true that according to the English law, bonds, bank bills and the like evidences of debt, cannot be taken by execution, because they are said to be choses in action and are not assignable; *Ca. Temp. Hardw. 53*. But in Virginia bonds are assignable, and even if transferred without assignment and by mere delivery, the right to them passes to the transferee. I am, therefore, by no means prepared to deny or affirm, that the bonds of a defendant can be taken in execution. Still less am I prepared to say, that a debtor may transfer an immense estate to trustees, in money, bonds, bills, stock and other such intangible funds, and that they cannot be reached by bill in equity. The opinion of chancellor Kent, in the case before cited of *Bayard v. Hoffman*, is decidedly in favor of the aid of a court of equity to a creditor so situated; and, sustained by his opinion, and by the three cases on which he relies, though they have been certainly questioned by various dicta of English judges, I incline to think, that where a creditor is in pursuit of his demand, and the debtor transfers his choses in action, money, stock or

208 *other funds, which cannot be reached by execution, to trustees for his own benefit, leaving no property out of which the debt can be made, the creditor is entitled to demand the assistance of equity in getting at the property. This opinion is further sustained, I think, by the provision of our statute, which subjects every estate held in trust, to the demands of the creditors of the cestui que trust.

In this case, then, immediately on the return of the execution, no effects, except what are covered by a deed of trust, Mercer had a right to file his bill in equity against the trustees, demanding payment of his demand, after satisfying the demands secured by the deed. The death of Beale did not affect this right. The issue of his execution had given Mercer a lien on the equitable interest, which could not be affected by that event; and though, upon general principles, in such a suit, the executors were necessarily parties, yet the demand would not have been against them but against the trustees. And such, in fact, I conceive to be the actual state of this case. To the trustees, the plea of the 57th section of the statute of 1792 would have been of no avail, and in relation to this matter *Norborne Beale* stands in their shoes, as he has received the trust property. The plea of that statute, therefore, did not avail him.

On the whole I am of opinion that the decree is altogether right, and must be affirmed.

CABELL, J., said, he dissented from his brothers, as to the question respecting in-

terest: that he thought, interest ought to be computed and allowed on the judgment from its date, and the payments applied, as the appellant claimed they ought to be. But he did not enter into the discussion of the point.

Decree affirmed.

209

**Thorntons v. Fitzhugh*.

January, 1838.

(Absent CABELL, J.)

Decrees—Final—Right to Appeal after Three Years.—Testator bequeaths, that his executor shall pay his daughter \$25. per annum so long as she shall remain single; and devises and bequeaths to his son, all his estate, real and personal, which shall remain after payment of debts and legacies; the son is the executor; he takes under the will large real and personal estate, either of which is amply sufficient to satisfy all legacies; he sells the real, wastes the personal, and dies insolvent: upon a bill by the daughter against the purchaser of the real estate, and two sons of a deceased surety of the executor in his executorial bond, holding estate of the surety, the chancellor decrees, that the sons should each pay one half of the annuities in arrear, and the costs of suit, reserving liberty to the plaintiff, if the decree should prove unavailing against either, to resort to the court for a further decree against the other, and ordering the cause to be retained in court for the purpose of taking further accounts as to the annuities to accrue in future: *Held*, notwithstanding the reservation, this is a final decree, from which no appeal can be taken after the lapse of three years from its date.

Legacies—Personalty Primarily Liable to Payment.—It seems, though the legacy was charged both on the real and personal estate, in the hands of the devisee and legatee of the residue, yet the personalty was primarily applicable to the legacy, and the decree was right in subjecting the surety of the executor, before the purchaser of the real estate.

Annuity—Arrears—Interest.—It seems, that on the bequest of an annuity by will in 1791, while the legal rate of interest was only five per cent. though the annuity fall in arrear after interest was raised to six per cent., yet only five per cent. ought to be allowed on such arrears.

William Fitzhugh of Marmion, who died in 1791, by his last will and testament devised and bequeathed, inter alia, as follows—"I leave my son Philip Fitzhugh all my estate, real and personal, which shall remain after payment of my legal debts, the support of my wife, and the legacies herein bequeathed"—and, in the sequel, he bequeathed, that his executors should pay his daughters Elizabeth and Anna Fitzhugh, the sum of £25. per annum, each, while they should remain single. The testator's son Philip was the executor; and Presley Thornton and John Thornton were his sureties in his executorial bond. He received under his father's will a large real and personal estate, either of which was much more than sufficient for the payment of all 210 *the legacies, and among the rest the

***Decrees—When Final**.—On this question the principal case is cited in the following: *Foot-note* to *Young v. Skipwith*, 2 Wash. 300; *Foot-note* to *Harvey v. Branson*, 1 Leigh 108; *Cocke v. Gilpin*, 1 Rob. 38; *Nelson v. Jennings*, 2 Pat. & H. 381; *Foot-note* to *Paup v. Mingo*, 4 Leigh 163; *Fleming v. Bolling*, 8 Gratt. 298, and *note*; *Foot-note* to *Rogers v. Strother*, 27 Gratt. 417; *Rawlings v. Rawlings*, 75 Va. 87; *Manion v. Fahy*, 11 W. Va. 493; *Gillespie v. Bailey*, 12 W. Va. 80; *Core v. Strickler*, 24 W. Va. 605.

See monographic note on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

***Appeals**.—See monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 268.

***Legacies**.—See monographic note on "Legacies and Devises" appended to *Early v. Early*, *Gilm.* 124.

annuities of £25. to his two sisters: but he sold all the real, and wasted all the personal estate, and died in 1807, utterly insolvent, so that he never had any personal representative. At his death, the annuity to Anna, who still remained single, had been several years in arrear and unpaid. And, in 1810, she exhibited her bill in the superior court of chancery of Fredericksburg, against the purchasers of the real estate; in which, after setting forth her rights, and alleging that her brother Philip died insolvent, that his sureties in his executorial bond, Presley and John Thornton, were also both dead insolvent, and that there was no personal representative either of the executor or of his sureties, she claimed to charge the annuities then in arrear and due to her, and those to become due afterwards, on the lands devised to Philip, in the hands of the purchasers thereof. The purchasers, in their answer, insisted, that the personal estate of the testator, which came to the hands of Philip Fitzhugh, the executor, as well as devisee and legatee, of the testator, was liable, in the first instance, to the annuities, and ought to have been applied to the satisfaction of them by him as the executor, and that his sureties in his executorial bond ought to be charged with the annuities, by reason of his waste of the personal estate, in exoneration of the real estate in the hands of the purchasers; and they alleged, that the sureties left estate sufficient to satisfy the annuities due to the plaintiff.

In 1815, she filed a supplemental bill, in which she shewed, that the surety Presley Thornton left no estate whatever, and never had any personal representative; but that the surety John Thornton left estate sufficient to pay all the annuities due or to become due to her; that this surety died intestate, and his widow Susan Thornton was his administratrix, and that she was now dead, and John T. Lomax was her administrator; and that the estate of the surety John Thornton was now in the hands of his two sons, heirs and distributees, Philip Thornton and John Thornton the younger: and she made Lomax administrator

211 of Susan *Thornton the administratrix of John Thornton the surety, and his two sons, heirs and distributees, parties defendants; and prayed a decree against them for her annuities. The defendants Philip Thornton and John Thornton the younger answered, and admitted that they had received of the estate of their father John Thornton the surety, property amply sufficient to pay the annuities due or to become due to the plaintiff, if the estate of this surety was liable to make good the annuities, in exoneration of the real estate of the testator in the hands of the purchasers from Philip Fitzhugh the devisee thereof; but they insisted that the real estate in the hands of the purchasers ought to be charged with the annuities; or that, if the court should give the plaintiff relief against them, it ought to give them indemnity out of the real estate in the hands of the purchasers, in like manner as if the real estate were still in the hands of Philip Fitzhugh, the devisee, or his heirs.

The cause was long pending in the court of chancery. At length, it was ascertained by the report of a commissioner, that there was due the plaintiff for the arrears of her annuities from 1808 to 1825 (both inclusive) the sum of £450. principal, and £229. 10. 0. interest computed on the annuities after the rate of six per cent. per annum, making a total of principal and interest, £679. 10. 0.

Whereupon, the chancellor, in May 1826, decreed, that the defendant Philip Thornton should pay the plaintiff, one moiety of the sum appearing by the report to be due to her, namely, the sum of £339. 15. 0. with interest after the rate of six per cent. per annum on £225. part thereof, being principal, from December 1825, till paid; and that the defendant John Thornton the younger should pay her the other moiety, £339. 15. 0. with like interest on £225. the principal, till paid; and that each of these defendants should pay her one half of her costs of suit. And if the decree should prove unavailing, in whole or in part, either against Philip or John Thornton, liberty was reserved to the plaintiff, to apply to the court for a further decree 212 against *either of those defendants; and the cause was ordered to be retained in court, for the purpose of taking further accounts as to the annuities that might in future accrue to the plaintiff.

And on the 8th May 1827, the chancellor, on the motion of the plaintiff, ordered the same defendants, each, to pay her the sum of £12. 10. 0. with six per cent. interest from December 1826 (being a moiety of the annuity for the year 1826) and a moiety of the costs of her motion.

In March 1830, more than three years after the date of the decree of May 1826, but within three years from the date of the order of May 1827, the defendants Philip and John Thornton presented a petition to this court, praying an appeal from those decrees; which was allowed.

And now the cause was argued by John-son and Leigh for the appellants, and by Harrison and Stanard for the appellee, and for the purchasers of the real estate, upon three points—1. Whether the court of chancery ought not to have charged the annuities on the real estate of the testator in the hands of the purchasers from Philip Fitzhugh the devisee thereof, instead of subjecting the estate of the surety of Philip Fitzhugh the executor, bound in his executorial bond?—2. Whether interest on the annuities ought to have been given at all?—and 3. Whether, as these annuities were given by will in 1791, when the legal rate of interest was only five per cent., if interest should be allowed at all, it was right to allow more than five per cent.?

But the cause went off upon an objection taken by the counsel for the appellee,—that the appeal was barred by the statute of limitation of appeals, and ought to be dismissed, as the appeal had been allowed after three years from the decree of May 1826; they insisting, that that was a final decree in the cause, and the order of May 1827 nothing more than an order to carry the preceding final decree into effect. This objection presented two questions—1. Whether the decree of May 1826 was

213 final or interlocutory? *(for if it was final, the appeal from it was clearly barred) and 2. Whether, if the appeal from the decree of May 1826 was barred, an appeal would lie from the order of May 1827, so as to bring the principle of that order in review before this court?

CARR, J. This case presents at the outset, a question of jurisdiction. If the decree of May 1826 was interlocutory merely, the case is properly before us, but if that was a final decree, the appeal was improvidently allowed, as more than three years had elapsed from the date of the decree to the application for the appeal. We have had many cases here, where the question turned on the character of the decree. Without going into a particular examination of them, I shall avail myself of some of the conclusions which some of my brethren have drawn from them. In *Alexander v. Coleman*, 6 Munf. 339, 340, judge Cabell said,—“I have examined with great attention every case in this court on the subject of interlocutory decrees, from *Young v. Skipwith*, 2 Wash. 300, to the present time.”—“They were all without exception, decided on the same general principle, that every decree which leaves any thing to be done in the cause by the court, is interlocutory as between the parties remaining in court.” In *Royall v. Johnson*, 1 Rand. 427, judge Green said,—“I have carefully examined all the cases decided in this court, which I can find reported, upon the question of the interlocutory or final character of decrees”—“It is sufficient to say, that in all of them it was apparent, that the court intended to proceed further in the cause, and that it was necessary to do so, in order to put a final end to the controversy, between the parties, as to whom the decree was made.” In *Harvey v. Branson*, 1 Leigh 108, the court laid it down, that a decree which left no subject to be disposed of, no question to be decided by the court, was, in its nature, final; and judge Brooke very correctly added, “as to the reservations in this decree, those, and all similar reservations, are, in my view, simply provisions

214 for the execution *of the decree, as one final and conclusive, not reservations of any points for future consideration and decision.” These cases seem to me to take the true and clear distinction: where any thing is reserved by the court for future adjudication, in order to settle the matters in controversy, the decree is interlocutory; but where, upon the hearing, all these matters are settled by the decree, such decree is final, though much may remain to be done, before it can be completely carried into execution, and though, to effectuate such execution, the cause is retained, and leave given the parties to apply for the future aid of the court. It is well known that until 1798, there was no appeal from interlocutory decrees; the prior statutes gave them from final decrees only. These laws did not define what should be taken as final decrees. The phrase was perfectly familiar to every student of the english law, and in the sense there settled, it was no doubt used by our legislature. We may then look to the english cases, to ascertain that sense. In England, no appeal could

be taken except from final decrees. Yet do the books teem with cases, where the chancellor having at the hearing decreed upon the matters in controversy, an appeal is immediately taken to the house of lords, though various details are directed in execution of the decree, the cause retained, and leave given to the parties to apply to the court. These details are never considered as affecting in the slightest degree the finality of the decree: indeed, it is a settled rule, that the appeal does not suspend the proceedings under the decree, unless it is so ordered on particular motion, by the chancellor, or the house of lords; *Gwynn v. Lethbridge*, 14 Ves. 585; *Waldo v. Caley*, 16 Ves. 206; *Willan v. Willan*, Id. 216. In *Waldo v. Caley*, a testator gave his personal estate to his executors, in trust to pay to his wife the neat income, interest &c. and enjoined it upon his wife to lay out one half her income yearly in charities with the advice and assistance of his executors; the wife and executors differed about their power in selecting the objects of charity: the master of the rolls decided,

215 *that the wife had the sole power, and was only in her discretion to ask the advice of the executors; that she was bound to lay out the half of her income yearly in charities; and declining, in this case, the usual course of having a scheme for applying the charity drawn up and laid before the master, he said,—“The purpose may be answered by reserving to any of the parties liberty to apply, as there shall be occasion, so that if at any time there shall be ground for supposing, that the fund has not been fairly expended, the court may be called on to interfere.” Here, we see liberty reserved to any of the parties during the whole life of the widow, and thus, the cause retained for that whole period, so far as was necessary for that purpose: yet an appeal was immediately taken. I shall cite one more case—*Morice v. Bank of England*, Ca. Temp. Talbot, 218, 2 Bro. P. C. new ed. 465. (Let it be premised, that in England, final decrees bind assets in the hands of executors, but interlocutory decrees have no such effect, *Perry v. Phelps*, 10 Ves. 34.) Certain creditors of Morice filed a bill against his executrix, praying the payment of their debts; she answered, confessing the bill; and the decree was, that an account of the personal assets be taken, and that those debts be paid in a course of administration: the bank, subsequently, sued at law and got a judgment against the executrix, as she could not in that court plead the decree: she filed her bill bringing the whole matter into equity, and praying protection: the chancellor decided, that the decree being first in time, had preference: an appeal was taken to the house of lords, where it was insisted that the decree was not final, being a mere order to take an account of the assets, and to pay the debts in a course of administration; but the decree of the chancellor was affirmed, thereby pronouncing this a final decree. And in *Perry v. Phelps*, lord Eldon shews the difference between this, and an interlocutory decree; this being a decree “ordering payment of sums, liquidated by the statement in the bill, and *the ad-

mission in the answer," which rendered it a final decree, though coupled with an order for an account of the personal assets &c. The supreme court of the U. States can only receive appeals from final decrees. In the case of *Ray v. Law*, 3 Cranch, 179, the court held, that a decree for a sale under a mortgage, is such a final decree as may be appealed from.

Let us now examine the decree before us. Looking to the nature of the controversy, I apprehend, that but for the liberty reserved to the plaintiff to resort to the court, to have an order for her annuities which should afterwards fall due, there could have been no possible doubt that the decree of May 1826 was final. It had given to the plaintiff her whole claim, with all her costs. True, it had not decreed over against the land, in case the personal fund should prove deficient; and if she had been dissatisfied with this, she might have appealed. It is also true, that the decree had not, in words, decided the matter of ultimate responsibility between the two classes of defendants; but had it not in fact settled that point? The representatives of the personal fund had prayed the court, if it should judge the land ultimately answerable, to decree against it directly, in exoneration of them; which the court ought certainly to have done (according to *West v. Belches*, 5 Munf. 187, and that class of cases) if it had considered the land liable over to the personal sureties. When, then, instead of doing this, the court decreed solely and exclusively against the personal sureties, did it not just as plainly declare, that the land is not liable over to them, as if it had said so in so many words? and is not the practical effect of the decree (supposing it to have stopped there) precisely the same? subjecting the appellants to pay the whole claim, refusing them a resort to the land, and thus, in effect, putting the purchasers of the land out of court. If this was wrong, that does not affect the finality of the decree. The mode of correction was an appeal. But the decree did not stop there: it provided, that if the

217 *decree should prove unavailing, in whole or in part, either against Philip or John Thornton, liberty was reserved to the plaintiff to apply to the court for a further decree against either of those defendants; and ordered the cause to be retained in court for the purpose of taking further accounts as to the annuities that might in future accrue to the plaintiff. It surely cannot be contended, that the reservation of liberty to the plaintiff, affects, in the least, the character of the decree: it was a provision for the benefit of the plaintiff, looking solely to the execution of the decree, and rendering it effectual. Did the retaining of the cause in court, for the purpose indicated, render the whole decree interlocutory? Unquestionably not, if we look to the meaning of the court. The cause was not retained to enable any of the parties to look back, or touch what had been done, but merely to enable the plaintiff to get decrees for her annuity as it should fall due. I presume there never was a decree for a running annuity, which did not in some form of words (and the

form matters not) reserve to the annuitant this liberty. It answers to the *scire facias*, which issued, after judgment in the old writ of annuity, as new sums grew due. And if retaining the cause for this purpose, prevents the decree from being final, it follows (as was forcibly urged by counsel) that there never can be a final decree in a case like that before the court; for, during her whole life, she will be applying from year to year, and at her death, the whole matter, annuity and all, is at an end. A conclusion so monstrous as this can never be fairly attributed to the law.

I conclude that this was a final decree, and not having been appealed from within three years, cannot now be touched by this court. The appeal should be dismissed, as improvidently allowed.

Taking this view of the case, it is not material to decide whether, on the merits, the decree be right or wrong? I will say, however, that my impression is, that the chancellor was correct in subjecting first the personal estate, and consequently the estate of the surety in the executorial bond.

218 *BROOKE, J. It is the settled principle of this court, that if the whole matter put in controversy by the pleadings is decided, the decree is final, and not interlocutory, although there are reservations embracing matters in execution of the decree, and although there may be a controversy growing out of the execution of it; as in the case of *Harvey v. Branson*, 1 Leigh, 108. Nor is it of any consequence whether the whole matter in controversy is decided by the decree, negatively or affirmatively:—whether the errors, if any, are errors of omission or commission, they do not affect the character of the decree. In *Perry v. Phelps*, 10 Ves. 34, there is much learning on this subject, and many cases examined, in the opinion of the lord chancellor; and all of them, I think, may be brought within the principles before stated. In the case before us, if the plaintiff had not sought to charge the lands in the hands of the purchasers, and had sued the sureties of the executor, on the bond for the due administration of the personal estate, the judgment for the annuities already due would have reserved the right of the plaintiff to sue out a *scire facias*, toties quoties, for the future annuities as they should fall due; and yet the judgment must have been held to be final. If, in this case, this had not been necessary,—if there had been no future sums to become due,—it is impossible to conceive what matter in controversy would have remained to be settled by the court. The exclusive decree against the sureties of the executor, without any intimation that the land in the possession of the purchasers, was to be subjected in any event (whether right or wrong) negatively decided that the land was, in no event, to be subjected to the payment of the annuity; and it appears to me to have been a casual omission, that the bill was not dismissed as to the purchasers of the real estate. The appeal not having been prayed in time, was improvidently allowed, and must, therefore, be dismissed.

My impression too is, that the decree is

correct upon the merits, except in allowing six instead of five per cent. interest.

219 *TUCKER, P. In the examination of this case, we are met at the threshold by an objection to our jurisdiction over the subject. It is said, on the one hand, that the appeal has been improvidently allowed, since more than three years had elapsed from the date of the decree before the application for the appeal. In answer to this objection, it is contended, that the decree, in this case, is not final but interlocutory, and that the limitation in the statute applies only to the case of a final decree. The first question, then, to be examined, is, whether this be a final decree or not?

I heartily concur in the principles laid down on this subject in *Royalls v. Johnson*, 1 Rand. 421, and *Harvey v. Branson*, 1 Leigh, 108. In the former of those cases, it was decided, that where a decree is made as to one of several defendants, whose interests are not at all connected with each other, with a direction for the payment of costs as to that defendant, such decree is final as to him, although the cause may be still pending in court as to the rest. And in the latter, it is most truly said, that when a decree makes an end of a case, and decides the whole matter in contest, costs and all, leaving nothing further for the court to do, it is certainly a final decree. According to these principles, I was strongly impressed with the belief, that the decree in this case was final, until I had an opportunity of accurately examining the record. That examination has resulted in an opposite conviction, the reasons of which I shall endeavour succinctly to state.

1st, In this case, the cause is not out of court as to any of the parties. The entry is, "the court doth order this cause to be retained here for the purpose of taking further accounts as to future annuities." The cause being retained, the parties are all of course retained in court with it. Not only is there no decree at all as to the purchasers of the real estate before the court, but the appellants themselves have still a day in court: the cause being retained, they are not dismissed from the tribunal at whose bar they were commanded to appear. In this regard, the case differs

220 most essentially from the other cases, in which there is "liberty reserved to resort to the court for its further interposition." In those cases, the party availing himself of that liberty, files his petition, upon which process must issue, as his adversary has no day in court. But here, the cause being retained, the parties are still in court, and must attend to the progress of the cause at their peril. A cause continued in court under these circumstances, can scarcely be said, I think, to be finally decided.

But 2ndly, does the "decree, in this case, make an end of the cause, and decide the whole matter in contest, costs and all?" in the language of the court in *Harvey v. Branson*. To ascertain this, it will be necessary to advert to the pleadings in the case, and the points of controversy thereby presented. The plaintiff claimed to charge both the real estate in the hands of the

purchasers, and the sureties of the executor, as responsible for the personality wasted by him, with her demand. Then, out of this claim on the part of the plaintiff, a question arose between the defendants as to which was ultimately to bear the burden. And this question was as much a part of the *lis contestata* to be settled by the court, as the demand of the plaintiff itself. For it is the established principle of the court, that where the pretensions of the defendants are fairly before it, if the plaintiff has a right to charge them both, the decree will either be rendered directly against the party who ought ultimately to be liable, or if, as sometimes happens, the decree is taken against the other, he will be entitled to a decree over. *West v. Belches*, 5 Munf. 187; *M'Neil v. Baird*, 6 Munf. 316; *Morris v. Terrel*, 2 Rand. 6; *Hubbard v. Goodwin*, 3 Leigh, 492. Now, in this case, the respective rights and obligations of the co-defendants are completely ascertained by the pleadings and proofs between the plaintiff and those defendants. The question between them was, therefore, to be decided as part of this cause. Has it been so decided? I think not. The court has, indeed, decreed the plaintiff's demand against the sureties of the executor, who were

221 *doubtless liable in the first instance, but it has not pronounced upon the demand propounded by their answer, that the real estate should be made answerable over to them, in case they should be subjected in the first instance to the plaintiff's demand. So far from deciding this question between those parties, nothing is said about it, and both parties are yet before the court, awaiting its judgment upon the matter. It cannot be denied, I think, that as the cause is retained in court, as the parties are of course retained in court, and as an important and indeed vital question between the defendants, is yet unsettled, which the court ought to have decided, it may yet go on to decide that question.

It has been suggested, that the omission to decree over, was error in the decree, and did not enure to make the decree interlocutory. I do not think so. As it was entirely uncertain whether the decree against the appellants would or would not be available, the court could neither, at the date of this decree, have decreed in favor of the appellee against the purchasers of the land, who were only liable ultimately, if liable at all, nor could it have decreed over against the purchasers of the land in favor of the appellants, as they had then paid nothing. I think it more reasonable to consider these questions reserved, as all the parties were before the court, than gratuitously to impute to that tribunal, the error of omitting to dispose of an important question in the cause.

But it may be said, that, although the contest between the defendants as to their respective liabilities, has not been settled, the rights of the plaintiff as against the appellants have been finally adjudicated, that therefore the decree is final as between those parties, and that no decree as between the defendants can affect the appellee: and

the case is thus supposed to be brought within the influence of the principle of *Royalls v. Johnson*. It is necessary to advert to the peculiarity of this case. The contest between the defendants, which, we have seen, the court was as much bound to adjust, as that between the plaintiff and the defendants, *did not grow out of the pleadings between them, but out of the pleadings between the plaintiff and them. If the decree puts an end to the cause as to the plaintiff, and puts her out of court, it puts all the defendants out of court of course. There being no cross cause as between the defendants, they can only be retained in court, and their pretensions decided, upon the foundation of a subsisting bill of the plaintiff against them; and if that bill be considered as put out of court by this decree, as a final decree, there is no foundation left, upon which the court can proceed to decree between the defendants.

I am, therefore, upon the whole, of opinion, that the decree in this case must be taken to be interlocutory, and so the appeal has been regularly allowed. But the other judges are of a different opinion on this point, and the appeal is to be dismissed. And I the less regret that disposition of the cause, though it is contrary to my own judgment on the point, since I am of opinion, on the merits, that the decree, taking it as a decree settling the controversy between the co-defendants, is right, and that the decree ought to be affirmed; except as to the allowance of six instead of five per cent. interest, in which respect the decree is erroneous, the plaintiff's claim having had its origin in a will made in 1791, when the legal rate of interest was only five per cent.

223 **Berkshire v. Evans and Others.*

January, 1833.

(Absent TUCKER, P. *)

Equity Jurisdiction—Agents—Accounting.†—A private unchartered company, associated for the purpose of carrying on business as a bank, though such associations are contrary to law, shall be entertained in a court of chancery, in a suit against its cashier, for an account of his agency.

Evans and others, the stockholders or partners in an unchartered company formed in 1815, at Morgantown in Monongalia, called the Monongalia Farmers Company, exhibited their bill in the superior court of chancery of Clarksburg, against Berkshire, who had been the clerk of the company and intrusted with the care of its funds, charging that he had appropriated part of the funds to his own use, and praying an account of his agency, and a decree for the balance that should be found due thereon. Berkshire, in his answer, denied the defalcation laid to his charge; and, alleging, that the company was associated to carry

on business, and had in fact carried on business, as a bank, and only as a bank, without authority of law, and in violation or evasion of the statutes prohibiting the circulation of private bank notes, and was therefore an illegal association, and that he, though called the clerk of the company, was in truth its cashier,—he insisted, that this suit of the plaintiffs could not be entertained against him to enforce the performance of his contract with this illegal company, as its cashier.

It appeared, by the articles of association, by the bond given by the clerk for the faithful discharge of his duties, and by the accounts filed as exhibits in the cause, and indeed it was impliedly admitted in the bill, that this was a private company, associated to carry on business as a bank, and none other, and which, in fact, traded only as a bank; and that Berkshire was the cashier: that this was one of those unchartered banks, of which so many were formed

224 *about the same time, for the purpose of trading as banks, and circulating private bank notes, in violation or evasion of the statutes of 1792 and 1804, 2 Rev. Code, ch. 207, and which were suppressed by the statute of 1816, Id. ch. 208.

The chancellor ordered Berkshire to render an account of his transactions as clerk of the company; and by the account taken and reported accordingly, it appeared, that Berkshire was indebted to the company, 364 dollars; upon which the chancellor decreed, that he should pay the plaintiffs that sum with interest. And, on an appeal taken by Berkshire to this court, the decree was affirmed.

. *Langhorne v. Hobson.*

February, 1833.

Married Women—Deeds—Acknowledgment—Privy Examination—Compliance with Statute.—In the commission for the privy examination of a feme covert touching a deed executed by husband and wife, and in the certificate of the privy examination and acknowledgment of the wife, under the statute of 1792, 1 Old Rev. Code, ch. 90, § 6 it is not necessary, that the requisitions of the statute be literally followed, to make the deed binding on the wife: it is enough, if they be substantially complied with.

Same—Same—Same—Same—What Constitutes.—What shall be regarded as a substantial and sufficient compliance with the requisitions of the statute, to make the deed binding on the wife.

Same—Same—Signing before Recordation.—Deed of husband and wife is first recorded as to the husband; then a commission for the privy examination of the wife is issued, and executed; and then the commission and privy examination of the wife are recorded: the deed is hereby perfected as to the wife, though it does not appear that she

***Married Women—Deeds—Acknowledgment—Privy Examination—Compliance with Statute.**—This question is fully discussed in the following, citing the principal case: *foot-note* to *McClanahan v. Siter*, 2 Gratt. 280; *Grove v. Zumbro*, 14 Gratt. 514, and *note*; *foot-note* to *Ware v. Cary*, 2 Call 263; *foot-note* to *Harvey v. Borden*, 2 Wash. 156; *Hockman v. McClanahan*, 87 Va. 37, 12 S. E. Rep. 230; *Virginia Coal & Iron Co. v. Robertson*, 88 Va. 118, 13 S. E. Rep. 330; *Hurst v. Leckie*, 97 Va. 563, 34 S. E. Rep. 464; *Blair v. Sayre*, 29 W. Va. 610, 2 S. E. Rep. 100; *Lalldley v. Central Land Co.*, 30 W. Va. 512, 4 S. E. Rep. 709.

Same—Same—Same—Official Character of Person Taking.—The principal case is cited in *foot-note* to *Ware v. Cary*, 2 Call 263; *foot-note* to *Harvey v. Borden*, 2 Wash. 156. See monographic notes on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 159, and "Deeds" appended to *Flott v. Com.*, 12 Gratt. 564.

*He decided the cause in the court of chancery.
†**Equity Jurisdiction—Agents—Accounting.**—For discussion of this question, see citing the principal case, *Coffman v. Sangston*, 21 Gratt. 270, and *note*; *foot-note* to *Thornton v. Thornton*, 31 Gratt. 212; *Bank v. Jeffries*, 21 W. Va. 508; *Ravenswood, etc.*, R. Co. v. *Woodyard*, 46 W. Va. 558, 33 S. E. Rep. 287. See monographic note on "Agencies" appended to *Silliman v. Fredericksburg, etc.*, R. R. Co., 27 Gratt. 119.

had signed and sealed it at the time when it was recorded as to the husband.

This was a writ of dower unde nihil habet, brought in the circuit court of Cumberland, by Susanna Langhorne, widow of William Langhorne deceased, against Thomas Hobson, to recover dower of land of her deceased husband, now claimed and held by Hobson. Hobson pleaded, that William Langhorne, the husband, in his lifetime, and the plaintiff Susanna his wife, by deed of bargain and sale, dated the 25th November 1807, and duly executed by her *as well as by her husband, according to the statute in such case made and provided, conveyed the land whereof the plaintiff claimed dower, to the defendant in fee, by which deed, so duly executed by the plaintiff, she conveyed and released to the defendant her right of dower in the land. And upon this plea, an issue was made up.

The point thus put in issue, and the only point in controversy, was, whether the plaintiff had duly executed the deed of the 25th November, 1807, under which the defendant claimed, so as to make it her deed as well as her husband's, according to the statute of 1792? At the trial, the plaintiff filed two bills of exceptions to opinions of the court—

The first stated that the defendant, to sustain the issue on his part, offered in evidence,—1st, A deed of bargain and sale, dated the 25th November 1807, purporting, in the premises, to be the deed of William Langhorne and Susanna his wife of the county of Cumberland, and appearing
226 *to be signed and sealed by the wife as well as the husband, whereby the land of which she now claimed her dower, described as lying in that county, was conveyed to the defendant, in fee. 2ndly, A commission, issued by the clerk of the county court of Cumberland, dated the 2nd May 1809, and directed to John Woodson and Samuel Hobson (without describing

them as justices of the county, though they were so in fact) by which, after reciting the execution of the deed by Langhorne and wife, and that she could not conveniently travel to the county court to make acknowledgment thereof, the commissioners were empowered to receive the acknowledgment, that the wife should be willing to make before them, of the deed, which was annexed to the commission; and then the commission proceeded in these words—“And we do, therefore, command you, that you do personally go to the said Susanna, and receive her acknowledgment of the said conveyance, and examine her privily and apart from the said William Langhorne, her husband, whether she doth the same, freely and voluntarily, without his persuasions or threats; and whether she be willing that the same shall be recorded in our said county court of Cumberland; and when you have received her acknowledgment and examined her as aforesaid, that you distinctly and openly certify us thereof in our said court, under your seals, sending then there the said deed and this writ.” 3rdly, A certificate of the two justices and commissioners, under their hands and seals, indorsed on the commission, in these words—“In obedience to the within commission to us directed, we have personally waited on the within named Susanna Langhorne, wife of the within named William Langhorne, and examined her privily and apart from her said husband; and she the said Susanna acknowledged the deed hereto annexed, to be her act and deed, and declared that she did the same freely and voluntarily, without the persuasion or threats of her said husband, and also relinquished her right of dower in the land within mentioned conveyed by the said deed, and is willing

227 that the same with *this her acknowledgment should be recorded in our county court of Cumberland—we the subscribers having read the said deed and explained the same to the said —” [here, there was a blank].—“All which” (it was stated in this bill of exceptions) “had been duly recorded in the county court of Cumberland.” And 4thly, The testimony of Samuel Hobson, one of the commissioners, the other John Woodson being dead, that Hobson's signature to the certificate was written by himself, and Woodson's signature by him, to authenticate the same as their joint official act. Whereupon, the plaintiff's counsel moved the court to exclude the commission and the certificate thereon indorsed, from going in evidence to the jury, on the ground, that the commission and certificate were not duly conformable with the statute in such case made and provided: but the court overruled the objection, and admitted the evidence: to which the plaintiff's counsel excepted.

The second bill of exceptions stated, that the deed of bargain and sale of Langhorne and wife (in the first bill of exceptions mentioned) was offered in evidence, with the certificate of the clerk of the county court, thereon indorsed, in these words—“Cumberland, December court, 1807, this deed was acknowledged and ordered to be recorded”—and that the commission for

*Old Rev. Code, ch. 90, § 6; Pleasant's ed. p. 157, 8. The words of the statute, are—“When husband and wife have sealed and delivered a writing, purporting to be a conveyance of any estate or interest, if she appear in court, and being examined privily and apart from her husband, by one of the judges thereof, shall declare to him that she did freely and willingly seal and deliver the said writing, to be then shewn and explained to her, and wishes not to retract it, and shall before the said court acknowledge the said writing, again shewn to her, to be her act,—or if before two justices of the peace of that county in which she dwelleth, if her dwelling be in the United States of America, who may be empowered by commission, to be issued by the clerk of the court wherein the writing ought to be recorded, to examine her privily, and take her acknowledgment, the wife being examined privily and apart from her husband by those commissioners, shall declare that she willingly signed and sealed the said writing, to be then shewn and explained to her by them, and consenteth that it may be recorded, and the said commissioners shall return, with the commission, and thereunto annexed, a certificate under their hands and seals of such privy examination by them, and of such declaration made and consent yielded by her,—in either case, the said writing, acknowledged also by the husband, or proved by witnesses to be his act, and recorded together with such her privy examination and acknowledgment before the court, or together with such commission and certificate, shall not only be sufficient to convey or release any right of dower thereby intended to be conveyed or released, but be as effectual for every other purpose, as if she were an unmarried woman.”—Note in Original Edition.

the privy examination of the wife, and the certificate of her privy examination, were also offered in evidence (without stating, in this bill of exceptions, that these had also been recorded); whereupon the plaintiff's counsel moved, that the deed, commission and certificate, should be excluded from going in evidence to the jury, because the deed had not been recorded together with the privy examination, after it had been signed by the wife, and acknowledged by her to be her act and deed, as certified by the commissioners: but the court overruled this objection also, and admitted the evidence: to which the plaintiff's counsel excepted.

There was a verdict and judgment for the defendant; from which the plaintiff appealed to this court. And now,
228 *the cause was argued here, by Taylor for the appellant; there was no counsel for the appellee.

Taylor said, that the commission which issued from the clerk's office under which the privy examination of the wife was made, did not conform with the provisions of the statute. The statute required that the deed should be shewn to the feme covert, and explained to her, by the commissioners; the commission did not require them to shew and explain it to her: and if they did so, in fact, they exceeded the authority given them by the commission. The statute required, that the feme covert should declare before the commissioners, that she had willingly signed and sealed the deed; the commission in this case, did not require, that she should be asked, whether she had willingly signed and sealed it, or even whether she had signed it, or sealed it, at all, but only whether she then acknowledged it. But if the commission was in proper form, and gave authority to the commissioners to do every thing that the law required, still it is plain, the commissioners did not perform the duties imposed on them by the statute; at least, it does not appear by their certificate, that they did: they neither certified, that they shewed her the deed, nor that she declared to them she had willingly signed and sealed it, or that she wished not to retract it. If the form of this commission, and certificate of privy examination, be sufficient, and shall be adjudged to be a compliance with the statute; then, a deed executed by the husband, without the signature or seal of the wife, if two justices of the peace, to whom a commission shall be issued to take and certify the privy examination of the wife, shall certify that she acknowledged the deed before them, and consented that it might be recorded, although her name and seal may be affixed to the deed, at any time afterwards, by any person, without her knowledge or consent, such deed would convey her inheritance, or possibility of dower, against the plain words and obvious meaning of the statute.

The provisions of the statute were designed to protect the rights *of the wife, not only against any fraud or imposition which the husband might be disposed to practise upon her, but against fraud and imposition from every quarter, and even against her own hasty and

inconsiderate acts; and it was with this intent that it required, in case of a privy examination of a feme covert taken out of court, the presence of at least two commissioners, being justices of the peace, to act jointly and not separately: it required the commissioners to shew the feme covert the deed, in order that a spurious conveyance might not be imposed upon her: it required, that they should explain the conveyance to her, that she might not part with any right which she did not willingly and deliberately intend to part with: it also required, that she should inform the commissioners, that she had willingly signed and sealed the conveyance, and that she wished not to retract it, not that she acknowledged to them a writing to be her deed, at the time neither signed nor sealed by her, to be used as authority by the grantee, or any other person, to set her name and seal to it at any after time, and thereby make it an effectual conveyance or release of her rights. The statute obviously authorized the feme covert to annul her previous acts of signing and sealing, if she desired to retract them, at the very period of privy examination. The case of *Ware v. Cary*, 2 Call, 263, is not an authority for the judgment of the circuit court. It is true, the commission and privy examination, in this case, are like the commission and privy examination in that: but there, the commission and privy examination were in conformity with the statute of 1748, ch. 1, § 6, 5, Hen. Stat. at large, p. 410, under which the deed was executed, and the privy examination taken: here, the commission and privy examination were still conformed with the statute of 1748, though the deed was executed by the husband, and the privy examination of the wife was taken, not under that statute, but under the statute of 1792, which made many material alterations in the law on the subject, and enacted new provisions, manifestly for the purpose of more effectually guarding and pro-

230 tecting *the rights and interests of femes covert. The enacting of these new provisions by the statute of 1792, evinced the legislative sense of their importance; but if the commission and privy examination, in this case, shall be held good, they being exactly in form and substance what the statute of 1748 required, it must be because the new provisions of the statute of 1792, not one of which was complied with, should be regarded as wholly idle and nugatory. It has been well said, that "it is clear, upon well received principles, that this statute must be strictly pursued; for it is an innovation upon the common law; and, moreover, it prescribes a mode in which a person may convey, who was before disabled to convey: that mode must, therefore, be pursued; and as we do not pursue it, if we vary from it, so it follows, that it must be strictly complied with." 1 Tucker's notes on Blac. Comm. book 2, ch. 17, p. 259.

As to the second bill of exceptions, he said, the question whether the opinion of the circuit court therein stated, was correct or no, depended on the construction of the statute of 1792; the words of which, in relation to this point, were—"In either case,

the said writing, acknowledged also by the husband, or proved by witnesses to be his act, and recorded together with such privy examination and acknowledgment before the court, or together with such commission and certificate, shall not only be sufficient to convey or release any right of dower thereby intended to be conveyed or released, but be as effectual for every other purpose, as if she were an unmarried woman." The circuit court (as he understood the bill of exceptions) decided, that at the time the deed in question was admitted to record upon the acknowledgment of William Langhorne, the husband, it was not necessary, that it should have been signed and sealed by the wife, but that her signature and seal put to the deed at or before the privy examination, would make it a good and sufficient deed to bind her interests. The statute most certainly required, that the deed should be signed and sealed by the wife, as well as

231 when it was *the deed of the husband only, but after it had been signed and sealed by the wife. If the deed was signed and sealed by the husband only, and was admitted to record upon his acknowledgment, and was afterwards signed and sealed by the wife, it became by this subsequent signing and sealing of the wife, a new and a different deed from the deed of the husband which had been recorded. It was this new deed which only became the deed of the husband and wife, by her subsequently signing, sealing and delivering it, that the statute required should be recorded, to bind the rights of the wife; but it never was recorded, and therefore did not bind her rights.

Sed per curiam, the opinions of the circuit court are correct, and the judgment is affirmed.

Gore v. Buzzard's Adm'rs.

February, 1833.

Liability of Master for Transactions Carried on by Slave.—A person sends raw hides to a tanner, and receives tanned leather in return, by his slave: *Held*, he is responsible to the tanner for the difference between the value of the raw material and the manufactured article, notwithstanding the dealings were conducted on his part wholly through the agency of the slave. It appearing that the slave acted by verbal directions of his master.

Assumpsit*—Declaration—Allegations—Proof.—In assumpsit, there are two counts: one for the agreed price of goods sold; the other, quantum valebant for the same; on the general issue, the proof is, that plaintiff, being a tanner, received raw hides from defendant, and credited him for the value, and sent him in return tanned leather, and debited him with the value thereof, and the debt claimed is the balance appearing due the tanner on these dealings: *Held*, the proof is properly applicable to, and sustains the declaration.

Assumpsit by Buzzard's administrators against Gore, in the county court of Frederick. The declaration contained, 1. the common count of indebitatus assumpsit for the agreed price of goods sold and delivered by the plaintiffs' intestate to the defendant, and 2. a count of quantum valebant for *the same goods. The 232 defendant pleaded non assumpsit, and the statute of limitations; but, it seemed,

no effort was made to sustain the latter plea.

At the trial, the defendant filed a demurrer to evidence, in which the plaintiffs joined. The evidence therein stated, was—That for some four or five years preceding the death of Buzzard, who was a tanner, Gore was in the habit of sending raw hides to Buzzard's tannery, and getting tanned leather from him; but he never transacted any part of these dealings in person, his raw hides having been always brought to the tannery, and the tanned leather always sent to him, by his slaves, without any written order from him, and indeed without a word passing between him and Buzzard on the subject; that since Buzzard's death, Gore had dealt with two other tanners in the neighbourhood, in the same manner, through the agency of his slaves; he always sending his raw hides and the tanners sending back tanned leather, by the slaves, without written orders from Gore, or a word said by him to the tanners; and the accounts of these tanners for the debts so contracted by Gore through the agency of his slaves, had been settled by him without dispute: that the items of Buzzard's account, namely, the charges for tanned leather sent Gore by his slaves, and the credits for raw hides brought by them, were first set down on a slate, and thence posted in a book by Buzzard himself; but Gore's dealings with Buzzard, as charged in those accounts, amounted to about the same per annum, as his dealings with the other two tanners afterwards: that, in fact, it was the habit of Gore, to send his raw hides to some tannery, and to receive tanned leather in exchange, by his slaves, only giving verbal directions to them, to deliver the raw hides, and bring back what tanned leather he wanted: that, after Buzzard's death, Gore desired a witness to apply to his administrators for his account; which being sent him, he examined it, and said, he would not pay interest (which the administrators had charged) but that if they would give him the credits he was entitled to, he would pay the principal, 233 *if any should be due: and that Gore procured the assignment of a bond of one of Buzzard's administrators, saying, he expected the amount of that bond would be enough to meet the claim of Buzzard's estate against him.

The jury found a verdict for the plaintiffs, subject to the opinion of the court on the demurrer to evidence. The county court gave judgment on the demurrer for the defendant. Buzzard's administrators appealed to the circuit court, which reversed the judgment of the county court, and gave judgment for them. And then Gore appealed to this court.

Nicholas, for the appellant. 1st, The evidence did not sustain either count of the declaration. If it proved any contract, it was not a contract for the sale of tanned leather by Buzzard to Gore, either for a price certain and agreed, or for the reasonable value, but a contract for the exchange or barter of raw hides for tanned leather, from time to time. The customer or the manufacturer, as the case might be, was only bound to make good the difference be-

*Assumpsit.—See monographic note on "Assumpsit" appended to *Kennaird v. Jones*, 9 Gratt. 183.

tween the value of the manufactured articles furnished by the one, and the raw material furnished by the other, if and whenever such difference should occur, by the delivery of like articles. 2ndly, The law of Virginia, 1 Rev. Code, ch. 111, § 19, p. 426, provides, that "no person whatever shall buy, sell or receive, of, to or from, a slave, any commodity whatever, without the leave or consent of the master, owner or overseer of such slave," and imposes a penalty on any person dealing with a slave without such leave or consent. It would defeat the policy of this statute, and be of mischievous consequence, if a person may be allowed to carry on (as Buzzard did in this case) dealings for a series of years, with the slaves of his neighbor, receiving raw materials from them, and delivering the manufactured article they ask for, without a word said by or to the owner on the subject, before, during, or after such dealings, and then to recover from the owner what may be due on the transaction.

234 *upon the implied leave or consent of the owner to the dealings of his slaves. The policy of the statute cannot be effectuated, but by requiring a person who deals with a slave, to have the express leave or consent of the owner, before or at the time of the dealings. Therefore, the evidence is insufficient in law to prove, that the agency of Gore's slaves in these dealings with Buzzard, was authorized by Gore; and the judgment of the county court was right,—as the judgment of a county court will generally be found to be, in all cases involving a question of police.

Johnson, contra. Supposing the objection arising from the agency of the slaves out of the way, the dealings fairly to be inferred from the evidence, consisted in sales of raw hides by Gore to Buzzard, and sales of tanned leather by Buzzard to Gore; for there is evidence, that Buzzard gave Gore credit for the value of the raw hides, and charged him with that of the tanned leather, in money; and that this account being rendered to Gore, he made no objection to the items of debit, but only claimed credits beyond what were allowed him, of which however, he never adduced any proof. And this evidence, moreover, suffices to prove a distinct admission by Gore, that the agency of his slaves in these dealings, was authorized by him; that his slaves received the tanned leather he wanted, which constituted the items of debit in the account, by his leave and consent, or rather by his express direction previously given to them. The authorized agency of Gore's slaves in his dealings with Buzzard, is also proved by the evidence of his dealing in that manner with two other tanners, and of his habit of dealing through the agency of his slaves,—of giving verbal directions to them to deliver his raw hides at the tannery, and to receive the tanned leather he wanted. The statute referred to, does not prohibit the receiving of goods from the owner by the hands of his slaves; nor does it require that the leave or consent of the owner to the dealings of his slaves, even on their own account, shall be in writing. The just inference from the evidence in this case, is, that Gore's slaves acted

235 *in these dealings by his directions and for him; in other words, by his leave and consent expressly and previously given: but, certainly, such leave and consent might have been implied from his subsequent conduct, without direct positive proof.

CARR, J. A demurrer to evidence is always a dangerous course; and here, I think it was particularly ill-advised. For the evidence stated in the demurrer, giving it only fair play, and drawing the inferences which a jury should reasonably have drawn from it, is quite sufficient to establish the appellee's claim to recover. The facts proved furnish the strongest grounds to infer, that for a series of years Gore was in the habit of getting his leather from Buzzard's tannery; that though his slaves were his agents, or rather his instruments, for carrying raw hides to the tanner, and bringing back tanned leather, yet it was he who sent the raw material and received the manufactured article; and that he was to pay the difference, if any, between the values of what he thus bought and sold. When Buzzard's administrators rendered the account, at Gore's instance, he examined it, and did not object to any of the charges against him; he only objected to the charge of interest, and said that if they would give him the credit she was entitled to, he would pay the principal. This was a plain admission of the justice of the account, except as to the interest, and as to the credits he claimed, which, however, he never attempted to prove; and this admission alone, affords a decisive answer to the whole argument for the appellant. The judgment of the circuit court is right.

The other judges concurred. Judgment affirmed.

236

*Watson v. Lyle's Adm'r.
Same v. Robertson.

February, 1837.

Escheat of Debtor's Land—Petition of Creditor—Affidavit—Evidence.—Upon a petition under the statute 1 Rev. Code, ch. 83, § 14 by the creditor of a person whose lands have been escheated, the creditor is required to make affidavit that the amount of his demand is bona fide due, but this requisition of the statute does not dispense with the necessity of other evidence: the court can only render judgment for such sum as is proved to be due.

Appellate Practice—Judgment for Whole Demand, When Whole Not Proved—Effect.—If judgment has been rendered for the whole amount of the demand, when the whole is not proved to be due, and it is uncertain to what part the proof extends, an appellate court will reverse the judgment and dismiss the petition.

Escheat of Debtor's Land—Right of Escheator to Plead Statute of Limitations.—The escheator who is defendant to the petition has the same right to plead the statute of limitations in bar of the petition, that a representative of the debtor would have to plead the statute in bar of an action.

Same—Same—Exception.—Where the exception in the statute of limitations, of accounts which concern the trade of merchandise between merchant and merchant, will apply to accounts, no item of which has arisen within five years.
Statute of Limitations—Exception—Dealings between Merchant and Merchant—Proof—Case at Bar.—Re-

The principal case is cited in *Anderson v. Com.* 18 Gratt. 301.

***Escheat.**—See monographic note on "Escheat" appended to *Sands v. Lynham*, Escheator, 7 Gratt. 201.

†**Dealings between Merchant and Merchant—Statute of Limitations—Exception.**—If the items of the

lication to the plea of the statute of limitations, that the accounts concerned the trade of merchandize between merchant and merchant: no evidence is adduced to prove that either party was a merchant during the time of the dealings between them, nor any evidence of the character of those dealings but that furnished by the account of the petitioner: in which account, the debits to the alleged debtor, consisted of two items for cash paid him on account of bills of exchange, one item for goods sold him, and the other items for cash advanced to or for him, and there was a single credit for the proceeds of a bill of exchange bought of him: HELD, that the replication was not supported by the evidence, and the demand therefore was barred by the statute.

James Lyle administrator of James Lyle the elder deceased, who was the surviving partner of Lyle & M'Creddie, presented a petition to the county court of Albemarle, at August term 1821—shewing, that Robert Miller, a merchant of that county, was indebted to Lyle & M'Creddie, on an unsettled and running account, common among merchants, in the sum of 141 dollars, and died without settling the account, leaving no personal estate to pay the debt, but seized of a parcel of land in Albemarle, which had

237 been regularly escheated to the commonwealth, by office found, *for want of heirs of the decedent, and had been sold by the escheator, who still held the proceeds of sale in his hands; and, therefore, praying, that Watson, the escheator, should be made defendant, and should be directed to pay the debt due the petitioner from the decedent, out of the proceeds of sale of the escheated land, according to the statute, 1 Rev. Code, ch. 82, § 14, p. 297.*

In the account exhibited with the petition, the debits to Miller consisted of two items for cash paid him on account of bills of exchange, one item for goods sold him, and the other items for cash advanced to or for him; and there was a single credit, for the proceeds of a bill of exchange bought of him. And the first item in the account

account between merchant and merchant are all on one side, the claim will not be within the reason or principle of the exception, which intended open and current accounts, where there were mutual dealings and mutual credits or debits. *Roots v. Salt Co.*, 27 W. Va. 491, citing *Wortham v. Smith*, 15 Gratt. 487, 494; *Watson v. Lyle*, 4 Leigh 238, 249.

The principal case is also cited in *Coalter v. Coalter*, 1 Rob. 86. See monographic note on "Limitation of Actions" appended to *Herrington v. Harkins*, 1 Rob. 501.

*The statute provides, that "When any person shall die indebted, seized of lands which shall become escheated to the commonwealth, not having personal property sufficient to pay such debts, the creditor may exhibit his petition before the court of the county or corporation, in which such escheat shall take place, or in the superior court of law for such county, making the escheator of such county or corporation a party defendant, who shall defend such claim; and the said court shall proceed to judgment according to the right of the case, and render the same for such sum as shall appear to be due to such petitioner, if any thing; and it shall be the duty of such escheator, on such judgment being rendered, to satisfy and pay the amount thereof, if the proceeds of the sale be sufficient, and yet in his hands; and if the same shall be paid into the treasury, the auditor shall, and is hereby required, on a copy of such judgment, properly authenticated, being filed, to issue a warrant; and the treasurer shall pay the amount, or so much as has been received on account of such sale: Provided, That the slaves and other personal estate shall be previously applied in the payment of the debts of the said decedent, and that every such creditor shall annex an affidavit to the said petition, stating that the amount of his or her demand is bona fide due and owing at the time of preferring the petition."—Note in Original Edition.

was dated in October 1803, and the last in August 1806.

At the same term of the county court, Robertson surviving partner of Bridges & Robertson, presented a petition to the court against Watson the escheator; exactly similar to that of Lyle's administrator, mutatis mutandis; in which he prayed, that the escheator should be directed to pay him a debt of 2837 dollars, being the balance due from Miller to Bridges & Robertson, on an unsettled running account between them.

238 *There were two accounts exhibited with the petition, in this case. The first was an account of dealing between Miller and Bridges & Robertson, commencing in July 1811, and ending in September 1814, at which time Miller died; and the credits to Miller consisted of one item for tobacco, and nine items of cash received from him, and the debits consisted of a few items for goods sold him, and numerous items of cash advanced to or for him. In the other account, raised between Miller's estate after his death and Bridges & Robertson, the first item was dated in October 1814, and the last in August 1816: and in this account, Miller's estate was charged with the balance due from him in his lifetime, and some other moneys which became due after his death, in consequence of dealings which commenced in his lifetime, and also with all the moneys disbursed for the estate, by Bridges who was Miller's administrator, as having been in fact disbursed by Bridges & Robertson; and the estate was credited with the moneys received by Bridges, the administrator, for Miller's estate; shewing the balance of 2837 dollars claimed in the petition, as due Bridges & Robertson. In the first of these accounts, there were seven charges, amounting to more than 1800 dollars, for advances by Bridges & Robertson to take up notes and acceptances of Miller; and, in the last, charges to the amount of 744 dollars, for a note of Miller for 698 dollars, with interest and charges of protest, paid by Bridges & Robertson after Miller's death.

The escheator pleaded the act of limitations, in both cases, to which the petitioners replied, that the accounts concerned the trade of merchandize between merchant and merchant.

In the case of Lyle's administrator, there was no evidence to prove, that either Lyle & M'Creddie, or Miller, during the time of the dealings between them, were merchants, and no other evidence of the character of the dealings between these parties, but that which the account furnished. In Robertson's case, there was proof, that from the year 1803, Miller was engaged, principally, as a merchant *in trade, and that, for some years previous to his death, he was engaged in speculations in the produce of the country, and in the manufacture of cotton cloth; but the only proof that the dealings between these parties, were dealings between them as merchant and merchant, was that furnished by the accounts.

Each of the petitioners verified the allegations of his petition by his own affidavit: each of them, moreover, adduced affidavits

mission in the answer," which rendered it a final decree, though coupled with an order for an account of the personal assets &c. The supreme court of the U. States can only receive appeals from final decrees. In the case of *Ray v. Law*, 3 Cranch, 179, the court held, that a decree for a sale under a mortgage, is such a final decree as may be appealed from.

Let us now examine the decree before us. Looking to the nature of the controversy, I apprehend, that but for the liberty reserved to the plaintiff to resort to the court, to have an order for her annuities which should afterwards fall due, there could have been no possible doubt that the decree of May 1826 was final. It had given to the plaintiff her whole claim, with all her costs. True, it had not decreed over against the land, in case the personal fund should prove deficient; and if she had been dissatisfied with this, she might have appealed. It is also true, that the decree had not, in words, decided the matter of ultimate responsibility between the two classes of defendants; but had it not in fact settled that point? The representatives of the personal fund had prayed the court, if it should judge the land ultimately answerable, to decree against it directly, in exoneration of them; which the court ought certainly to have done (according to *West v. Belches*, 5 Munf. 187, and that class of cases) if it had considered the land liable over to the personal sureties. When, then, instead of doing this, the court decreed solely and exclusively against the personal sureties, did it not just as plainly declare, that the land is not liable over to them, as if it had said so in so many words? and is not the practical effect of the decree (supposing it to have stopped there) precisely the same? subjecting the appellants to pay the whole claim, refusing them a resort to the land, and thus, in effect, putting the purchasers of the land out of court. If this was wrong, that does not affect the finality of the decree. The mode of correction was an appeal. But the decree did not stop there: it provided, that if the

217 *decree should prove unavailing, in whole or in part, either against Philip or John Thornton, liberty was reserved to the plaintiff to apply to the court for a further decree against either of those defendants; and ordered the cause to be retained in court for the purpose of taking further accounts as to the annuities that might in future accrue to the plaintiff. It surely cannot be contended, that the reservation of liberty to the plaintiff, affects, in the least, the character of the decree: it was a provision for the benefit of the plaintiff, looking solely to the execution of the decree, and rendering it effectual. Did the retaining of the cause in court, for the purpose indicated, render the whole decree interlocutory? Unquestionably not, if we look to the meaning of the court. The cause was not retained to enable any of the parties to look back, or touch what had been done, but merely to enable the plaintiff to get decrees for her annuity as it should fall due. I presume there never was a decree for a running annuity, which did not in some form of words (and the

form matters not) reserve to the annuitant this liberty. It answers to the scire facias, which issued, after judgment in the old writ of annuity, as new sums grew due. And if retaining the cause for this purpose, prevents the decree from being final, it follows (as was forcibly urged by counsel) that there never can be a final decree in a case like that before the court; for, during her whole life, she will be applying from year to year, and at her death, the whole matter, annuity and all, is at an end. A conclusion so monstrous as this can never be fairly attributed to the law.

I conclude that this was a final decree, and not having been appealed from within three years, cannot now be touched by this court. The appeal should be dismissed, as improvidently allowed.

Taking this view of the case, it is not material to decide whether, on the merits, the decree be right or wrong? I will say, however, that my impression is, that the chancellor was correct in subjecting first the personal estate, and consequently the estate of the surety in the executorial bond.

218 *BROOKE, J. It is the settled principle of this court, that if the whole matter put in controversy by the pleadings is decided, the decree is final, and not interlocutory, although there are reservations embracing matters in execution of the decree, and although there may be a controversy growing out of the execution of it; as in the case of *Harvey v. Branson*, 1 Leigh, 108. Nor is it of any consequence whether the whole matter in controversy is decided by the decree, negatively or affirmatively:—whether the errors, if any, are errors of omission or commission, they do not affect the character of the decree. In *Perry v. Phelps*, 10 Ves. 34, there is much learning on this subject, and many cases examined, in the opinion of the lord chancellor; and all of them, I think, may be brought within the principles before stated. In the case before us, if the plaintiff had not sought to charge the lands in the hands of the purchasers, and had sued the sureties of the executor, on the bond for the due administration of the personal estate, the judgment for the annuities already due would have reserved the right of the plaintiff to sue out a scire facias, toties quoties, for the future annuities as they should fall due; and yet the judgment must have been held to be final. If, in this case, this had not been necessary,—if there had been no future sums to become due,—it is impossible to conceive what matter in controversy would have remained to be settled by the court. The exclusive decree against the sureties of the executor, without any intimation that the land in the possession of the purchasers, was to be subjected in any event (whether right or wrong) negatively decided that the land was, in no event, to be subjected to the payment of the annuity; and it appears to me to have been a casual omission, that the bill was not dismissed as to the purchasers of the real estate. The appeal not having been prayed in time, was improvidently allowed, and must, therefore, be dismissed.

My impression too is, that the decree is

correct upon the merits, except in allowing six instead of five per cent. interest.

219 *TUCKER, P. In the examination of this case, we are met at the threshold by an objection to our jurisdiction over the subject. It is said, on the one hand, that the appeal has been improvidently allowed, since more than three years had elapsed from the date of the decree before the application for the appeal. In answer to this objection, it is contended, that the decree, in this case, is not final but interlocutory, and that the limitation in the statute applies only to the case of a final decree. The first question, then, to be examined, is, whether this be a final decree or not?

I heartily concur in the principles laid down on this subject in *Royalls v. Johnson*, 1 Rand. 421, and *Harvey v. Branson*, 1 Leigh, 108. In the former of those cases, it was decided, that where a decree is made as to one of several defendants, whose interests are not at all connected with each other, with a direction for the payment of costs as to that defendant, such decree is final as to him, although the cause may be still pending in court as to the rest. And in the latter, it is most truly said, that when a decree makes an end of a case, and decides the whole matter in contest, costs and all, leaving nothing further for the court to do, it is certainly a final decree. According to these principles, I was strongly impressed with the belief, that the decree in this case was final, until I had an opportunity of accurately examining the record. That examination has resulted in an opposite conviction, the reasons of which I shall endeavour succinctly to state.

1st, In this case, the cause is not out of court as to any of the parties. The entry is, "the court doth order this cause to be retained here for the purpose of taking further accounts as to future annuities." The cause being retained, the parties are all of course retained in court with it. Not only is there no decree at all as to the purchasers of the real estate before the court, but the appellants themselves have still a day in court: the cause being retained, they are not dismissed from the tribunal at whose bar they were commanded to appear. In this regard, the case differs

220 most essentially from the other cases, in which there is "liberty reserved to resort to the court for its further interposition." In those cases, the party availing himself of that liberty, files his petition, upon which process must issue, as his adversary has no day in court. But here, the cause being retained, the parties are still in court, and must attend to the progress of the cause at their peril. A cause continued in court under these circumstances, can scarcely be said, I think, to be finally decided.

But 2ndly, does the "decree, in this case, make an end of the cause, and decide the whole matter in contest, costs and all?" in the language of the court in *Harvey v. Branson*. To ascertain this, it will be necessary to advert to the pleadings in the case, and the points of controversy thereby presented. The plaintiff claimed to charge both the real estate in the hands of the

purchasers, and the sureties of the executor, as responsible for the personality wasted by him, with her demand. Then, out of this claim on the part of the plaintiff, a question arose between the defendants as to which was ultimately to bear the burden. And this question was as much a part of the *lis contestata* to be settled by the court, as the demand of the plaintiff itself. For it is the established principle of the court, that where the pretensions of the defendants are fairly before it, if the plaintiff has a right to charge them both, the decree will either be rendered directly against the party who ought ultimately to be liable, or if, as sometimes happens, the decree is taken against the other, he will be entitled to a decree over. *West v. Belches*, 5 Munf. 187; *M'Neil v. Baird*, 6 Munf. 316; *Morris v. Terrel*, 2 Rand. 6; *Hubbard v. Goodwin*, 3 Leigh, 492. Now, in this case, the respective rights and obligations of the co-defendants are completely ascertained by the pleadings and proofs between the plaintiff and those defendants. The question between them was, therefore, to be decided as part of this cause. Has it been so decided? I think not. The court has, indeed, decreed the plaintiff's demand against the sureties of the executor, who were

221 *doubtless liable in the first instance, but it has not pronounced upon the demand propounded by their answer, that the real estate should be made answerable over to them, in case they should be subjected in the first instance to the plaintiff's demand. So far from deciding this question between those parties, nothing is said about it, and both parties are yet before the court, awaiting its judgment upon the matter. It cannot be denied, I think, that as the cause is retained in court, as the parties are of course retained in court, and as an important and indeed vital question between the defendants, is yet unsettled, which the court ought to have decided, it may yet go on to decide that question.

It has been suggested, that the omission to decree over, was error in the decree, and did not enure to make the decree interlocutory. I do not think so. As it was entirely uncertain whether the decree against the appellants would or would not be available, the court could neither, at the date of this decree, have decreed in favor of the appellee against the purchasers of the land, who were only liable ultimately, if liable at all, nor could it have decreed over against the purchasers of the land in favor of the appellants, as they had then paid nothing. I think it more reasonable to consider these questions reserved, as all the parties were before the court, than gratuitously to impute to that tribunal, the error of omitting to dispose of an important question in the cause.

But it may be said, that, although the contest between the defendants as to their respective liabilities, has not been settled, the rights of the plaintiff as against the appellants have been finally adjudicated, that therefore the decree is final as between those parties, and that no decree as between the defendants can affect the appellee: and

the case is thus supposed to be brought within the influence of the principle of *Royalls v. Johnson*. It is necessary to advert to the peculiarity of this case. The contest between the defendants, which, we have seen, the court was as much bound to adjust, as that between the plaintiff and the defendants, "did not grow out of the pleadings between them, but out of the pleadings between the plaintiff and them. If the decree puts an end to the cause as to the plaintiff, and puts her out of court, it puts all the defendants out of court of course. There being no cross cause as between the defendants, they can only be retained in court, and their pretensions decided, upon the foundation of a subsisting bill of the plaintiff against them; and if that bill be considered as put out of court by this decree, as a final decree, there is no foundation left, upon which the court can proceed to decree between the defendants.

I am, therefore, upon the whole, of opinion, that the decree in this case must be taken to be interlocutory, and so the appeal has been regularly allowed. But the other judges are of a different opinion on this point, and the appeal is to be dismissed. And I the less regret that disposition of the cause, though it is contrary to my own judgment on the point, since I am of opinion, on the merits, that the decree, taking it as a decree settling the controversy between the co-defendants, is right, and that the decree ought to be affirmed; except as to the allowance of six instead of five per cent. interest, in which respect the decree is erroneous, the plaintiff's claim having had its origin in a will made in 1791, when the legal rate of interest was only five per cent.

223 **Berkshire v. Evans and Others.*

January, 1833.

(Absent TUCKER, P.)*

Equity Jurisdiction—Agents—Accounting.—A private unchartered company, associated for the purpose of carrying on business as a bank, though such associations are contrary to law, shall be entertained in a court of chancery, in a suit against its cashier, for an account of his agency.

Evans and others, the stockholders or partners in an unchartered company formed in 1815, at Morgantown in Monongalia, called the Monongalia Farmers Company, exhibited their bill in the superior court of chancery of Clarksburg, against Berkshire, who had been the clerk of the company and intrusted with the care of its funds, charging that he had appropriated part of the funds to his own use, and praying an account of his agency, and a decree for the balance that should be found due thereon. Berkshire, in his answer, denied the defalcation laid to his charge; and, alleging, that the company was associated to carry

on business, and had in fact carried on business, as a bank, and only as a bank, without authority of law, and in violation or evasion of the statutes prohibiting the circulation of private bank notes, and was therefore an illegal association, and that he, though called the clerk of the company, was in truth its cashier, —he insisted, that this suit of the plaintiffs could not be entertained against him to enforce the performance of his contract with this illegal company, as its cashier.

It appeared, by the articles of association, by the bond given by the clerk for the faithful discharge of his duties, and by the accounts filed as exhibits in the cause, and indeed it was impliedly admitted in the bill, that this was a private company, associated to carry on business as a bank, and none other, and which, in fact, traded only as a bank; and that Berkshire was the cashier: that this was one of those unchartered banks, of which so many were formed
224 *about the same time, for the purpose of trading as banks, and circulating private bank notes, in violation or evasion of the statutes of 1792 and 1804, 2 Rev. Code, ch. 207, and which were suppressed by the statute of 1816, Id. ch. 208.

The chancellor ordered Berkshire to render an account of his transactions as clerk of the company; and by the account taken and reported accordingly, it appeared, that Berkshire was indebted to the company, 364 dollars; upon which the chancellor decreed, that he should pay the plaintiffs that sum with interest. And, on an appeal taken by Berkshire to this court, the decree was affirmed.

Langhorne v. Hobson.

February, 1833.

Married Women—Deeds—Acknowledgment—Privy Examination—Compliance with Statute.—In the commission for the privy examination of a feme covert touching a deed executed by husband and wife, and in the certificate of the privy examination and acknowledgment of the wife, under the statute of 1792, 1 Old Rev. Code, ch. 90, § 6, it is not necessary, that the requisitions of the statute be literally followed, to make the deed binding on the wife: it is enough, if they be substantially complied with.

Same—Same—Same—Same—What Constitutes.—What shall be regarded as a substantial and sufficient compliance with the requisitions of the statute, to make the deed binding on the wife.

Same—Same—Signing before Recordation.—Deed of husband and wife is first recorded as to the husband; then a commission for the privy examination of the wife is issued, and executed; and then the commission and privy examination of the wife are recorded: the deed is hereby perfected as to the wife, though it does not appear that she

***Married Women—Deeds—Acknowledgment—Privy Examination—Compliance with Statute.**—This question is fully discussed in the following, citing the principal case: *foot-note* to *McClanahan v. Siter*, 2 Gratt. 280; *Grove v. Zumbro*, 14 Gratt. 514, and *note*; *foot-note* to *Ware v. Cary*, 2 Call 263; *foot-note* to *Harvey v. Borden*, 2 Wash. 156; *Hockman v. McClanahan*, 87 Va. 37, 12 S. E. Rep. 230; *Virginia Coal & Iron Co. v. Robertson*, 88 Va. 118, 13 S. E. Rep. 350; *Hurst v. Leckie*, 97 Va. 568, 34 S. E. Rep. 464; *Blair v. Sayre*, 29 W. Va. 610, 2 S. E. Rep. 100; *Laidley v. Central Land Co.*, 30 W. Va. 512, 4 S. E. Rep. 709.

Same—Same—Same—Official Character of Person Taking.—The principal case is cited in *foot-note* to *Ware v. Cary*, 2 Call 263; *foot-note* to *Harvey v. Borden*, 2 Wash. 156. See *monographic notes* on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 159, and "Deeds" appended to *Flott v. Com.*, 12 Gratt. 564.

*He decided the cause in the court of chancery.
***Equity Jurisdiction—Agents—Accounting.**—For discussion of this question, see citing the principal case, *Coffman v. Sangston*, 21 Gratt. 270, and *note*; *foot-note* to *Thornton v. Thornton*, 31 Gratt. 212; *Bank v. Jeffries*, 21 W. Va. 508; *Havenswood v. Co. v. Woodyard*, 46 W. Va. 558, 33 S. E. Rep. 287. See *monographic note* on "Agencies" appended to *Silliman v. Fredericksburg*, etc., R. R. Co., 27 Gratt. 119.

had signed and sealed it at the time when it was recorded as to the husband.

This was a writ of dower unde nihil habet, brought in the circuit court of Cumberland, by Susanna Langhorne, widow of William Langhorne deceased, against Thomas Hobson, to recover dower of land of her deceased husband, now claimed and held by Hobson. Hobson pleaded, that William Langhorne, the husband, in his lifetime, and the plaintiff Susanna his wife, by deed of bargain and sale, dated the 25th November 1807, and duly executed by her *as well as by her husband, according to the statute in such case made and provided, conveyed the land whereof the plaintiff claimed dower, to the defendant in fee, by which deed, so duly executed by the plaintiff, she conveyed and released to the defendant her right of dower in the land. And upon this plea, an issue was made up.

The point thus put in issue, and the only point in controversy, was, whether the plaintiff had duly executed the deed of the 25th November, 1807, under which the defendant claimed, so as to make it her deed as well as her husband's, according to the statute of 1792? At the trial, the plaintiff filed two bills of exceptions to opinions of the court—

The first stated that the defendant, to sustain the issue on his part, offered in evidence,—1st. A deed of bargain and sale, dated the 25th November 1807, purporting, in the premises, to be the deed of William Langhorne and Susanna his wife of the county of Cumberland, and appearing
226 *to be signed and sealed by the wife as well as the husband, whereby the land of which she now claimed her dower, described as lying in that county, was conveyed to the defendant, in fee. 2ndly, A commission, issued by the clerk of the county court of Cumberland, dated the 2nd May 1809, and directed to John Woodson and Samuel Hobson (without describing

them as justices of the county, though they were so in fact) by which, after reciting the execution of the deed by Langhorne and wife, and that she could not conveniently travel to the county court to make acknowledgment thereof, the commissioners were empowered to receive the acknowledgment, that the wife should be willing to make before them, of the deed, which was annexed to the commission; and then the commission proceeded in these words—“And we do, therefore, command you, that you do personally go to the said Susanna, and receive her acknowledgment of the said conveyance, and examine her privily and apart from the said William Langhorne, her husband, whether she doth the same, freely and voluntarily, without his persuasions or threats; and whether she be willing that the same shall be recorded in our said county court of Cumberland; and when you have received her acknowledgment and examined her as aforesaid, that you distinctly and openly certify us thereof in our said court, under your seals, sending then there the said deed and this writ.” 3rdly, A certificate of the two justices and commissioners, under their hands and seals, indorsed on the commission, in these words—“In obedience to the within commission to us directed, we have personally waited on the within named Susanna Langhorne, wife of the within named William Langhorne, and examined her privily and apart from her said husband; and she the said Susanna acknowledged the deed hereto annexed, to be her act and deed, and declared that she did the same freely and voluntarily, without the persuasion or threats of her said husband, and also relinquished her right of dower in the land within mentioned conveyed by the said deed, and is willing

227 that the same with *this her acknowledgment should be recorded in our county court of Cumberland—we the subscribers having read the said deed and explained the same to the said —” [here, there was a blank].—“All which” (it was stated in this bill of exceptions) “had been duly recorded in the county court of Cumberland.” And 4thly, The testimony of Samuel Hobson, one of the commissioners, the other John Woodson being dead, that Hobson's signature to the certificate was written by himself, and Woodson's signature by him, to authenticate the same as their joint official act. Whereupon, the plaintiff's counsel moved the court to exclude the commission and the certificate thereon indorsed, from going in evidence to the jury, on the ground, that the commission and certificate were not duly conformable with the statute in such case made and provided: but the court overruled the objection, and admitted the evidence: to which the plaintiff's counsel excepted.

The second bill of exceptions stated, that the deed of bargain and sale of Langhorne and wife (in the first bill of exceptions mentioned) was offered in evidence, with the certificate of the clerk of the county court, thereon indorsed, in these words—“Cumberland, December court, 1807, this deed was acknowledged and ordered to be recorded”—and that the commission for

*Old Rev. Code, ch. 90. § 6: Pleasant's ed. p. 157. 8. The words of the statute, are—“When husband and wife have sealed and delivered a writing, purporting to be a conveyance of any estate or interest, if she appear in court, and being examined privily and apart from her husband, by one of the judges thereof, shall declare to him that she did freely and willingly seal and deliver the said writing, to be then shewn and explained to her, and wishes not to retract it, and shall before the said court acknowledge the said writing, again shewn to her, to be her act,—or if before two justices of the peace of that county in which she dwelleth, if her dwelling be in the United States of America, who may be empowered by commission, to be issued by the clerk of the court wherein the writing ought to be recorded, to examine her privily, and take her acknowledgment, the wife being examined privily and apart from her husband by those commissioners, shall declare that she willingly signed and sealed the said writing, to be then shewn and explained to her by them, and consenteth that it may be recorded, and the said commissioners shall return, with the commission, and thereunto annexed, a certificate under their hands and seals of such privy examination by them, and of such declaration made and consent yielded by her,—in either case, the said writing, acknowledged also by the husband, or proved by witnesses to be his act, and recorded together with such her privy examination and acknowledgment before the court, or together with such commission and certificate, shall not only be sufficient to convey or release any right of dower thereby intended to be conveyed or released, but be as effectual for every other purpose, as if she were an unmarried woman.”—Note in Original Edition.

the privy examination of the wife, and the certificate of her privy examination, were also offered in evidence (without stating, in this bill of exceptions, that these had also been recorded); whereupon the plaintiff's counsel moved, that the deed, commission and certificate, should be excluded from going in evidence to the jury, because the deed had not been recorded together with the privy examination, after it had been signed by the wife, and acknowledged by her to be her act and deed, as certified by the commissioners: but the court overruled this objection also, and admitted the evidence: to which the plaintiff's counsel excepted.

There was a verdict and judgment for the defendant; from which the plaintiff appealed to this court. And now,
228 *the cause was argued here, by Taylor for the appellant; there was no counsel for the appellee.

Taylor said, that the commission which issued from the clerk's office under which the privy examination of the wife was made, did not conform with the provisions of the statute. The statute required that the deed should be shewn to the feme covert, and explained to her, by the commissioners; the commission did not require them to shew and explain it to her: and if they did so, in fact, they exceeded the authority given them by the commission. The statute required, that the feme covert should declare before the commissioners, that she had willingly signed and sealed the deed; the commission in this case, did not require, that she should be asked, whether she had willingly signed and sealed it, or even whether she had signed it, or sealed it, at all, but only whether she then acknowledged it. But if the commission was in proper form, and gave authority to the commissioners to do every thing that the law required, still it is plain, the commissioners did not perform the duties imposed on them by the statute; at least, it does not appear by their certificate, that they did: they neither certified, that they shewed her the deed, nor that she declared to them she had willingly signed and sealed it, or that she wished not to retract it. If the form of this commission, and certificate of privy examination, be sufficient, and shall be adjudged to be a compliance with the statute; then, a deed executed by the husband, without the signature or seal of the wife, if two justices of the peace, to whom a commission shall be issued to take and certify the privy examination of the wife, shall certify that she acknowledged the deed before them, and consented that it might be recorded, although her name and seal may be affixed to the deed, at any time afterwards, by any person, without her knowledge or consent, such deed would convey her inheritance, or possibility of dower, against the plain words and obvious meaning of the statute.

The provisions of the statute were designed to protect the rights
229 *of the wife, not only against any fraud or imposition which the husband might be disposed to practise upon her, but against fraud and imposition from every quarter, and even against her own hasty and

inconsiderate acts; and it was with this intent that it required, in case of a privy examination of a feme covert taken out of court, the presence of at least two commissioners, being justices of the peace, to act jointly and not separately: it required the commissioners to shew the feme covert the deed, in order that a spurious conveyance might not be imposed upon her: it required, that they should explain the conveyance to her, that she might not part with any right which she did not willingly and deliberately intend to part with: it also required, that she should inform the commissioners, that she had willingly signed and sealed the conveyance, and that she wished not to retract it, not that she acknowledged to them a writing to be her deed, at the time neither signed nor sealed by her, to be used as authority by the grantee, or any other person, to set her name and seal to it at any after time, and thereby make it an effectual conveyance or release of her rights. The statute obviously authorized the feme covert to annul her previous acts of signing and sealing, if she desired to retract them, at the very period of privy examination. The case of *Ware v. Cary*, 2 Call, 263, is not an authority for the judgment of the circuit court. It is true, the commission and privy examination, in this case, are like the commission and privy examination in that: but there, the commission and privy examination were in conformity with the statute of 1748, ch. 1, § 6, 5, Hen. Stat. at large, p. 410, under which the deed was executed, and the privy examination taken: here, the commission and privy examination were still conformed with the statute of 1748, though the deed was executed by the husband, and the privy examination of the wife was taken, not under that statute, but under the statute of 1792, which made many material alterations in the law on the subject, and enacted new provisions, manifestly for the purpose

of more effectually guarding and protecting
230 *the rights and interests of femes covert. The enacting of these new provisions by the statute of 1792, evinced the legislative sense of their importance; but if the commission and privy examination, in this case, shall be held good, they being exactly in form and substance what the statute of 1748 required, it must be because the new provisions of the statute of 1792, not one of which was complied with, should be regarded as wholly idle and nugatory. It has been well said, that "it is clear, upon well received principles, that this statute must be strictly pursued; for it is an innovation upon the common law; and, moreover, it prescribes a mode in which a person may convey, who was before disabled to convey: that mode must, therefore, be pursued; and as we do not pursue it, if we vary from it, so it follows, that it must be strictly complied with." 1 Tucker's notes on Blac. Comm. book 2, ch. 17, p. 259.

As to the second bill of exceptions, he said, the question whether the opinion of the circuit court therein stated, was correct or no, depended on the construction of the statute of 1792; the words of which, in relation to this point, were—"In either case,

the said writing, acknowledged also by the husband, or proved by witnesses to be his act, and recorded together with such privy examination and acknowledgment before the court, or together with such commission and certificate, shall not only be sufficient to convey or release any right of dower thereby intended to be conveyed or released, but be as effectual for every other purpose, as if she were an unmarried woman." The circuit court (as he understood the bill of exceptions) decided, that at the time the deed in question was admitted to record upon the acknowledgment of William Langhorne, the husband, it was not necessary, that it should have been signed and sealed by the wife, but that her signature and seal put to the deed at or before the privy examination, would make it a good and sufficient deed to bind her interests. The statute most certainly required, that the deed should be signed and sealed by the wife, as well as

231 by the husband, and be recorded, not when it was *the deed of the husband only, but after it had been signed and sealed by the wife. If the deed was signed and sealed by the husband only, and was admitted to record upon his acknowledgment, and was afterwards signed and sealed by the wife, it became by this subsequent signing and sealing of the wife, a new and a different deed from the deed of the husband which had been recorded. It was this new deed which only became the deed of the husband and wife, by her subsequently signing, sealing and delivering it, that the statute required should be recorded, to bind the rights of the wife; but it never was recorded, and therefore did not bind her rights.

Sed per curiam, the opinions of the circuit court are correct, and the judgment is affirmed.

Gore v. Buzzard's Adm'rs.

February, 1833.

Liability of Master for Transactions Carried on by Slave.—A person sends raw hides to a tanner, and receives tanned leather in return, by his slave: HELD, he is responsible to the tanner for the difference between the value of the raw material and the manufactured article, notwithstanding the dealings were conducted on his part wholly through the agency of the slave. It appearing that the slave acted by verbal directions of his master. **Assumpsit*—Declaration—Allegations—Proof.**—In assumpsit, there are two counts: one for the agreed price of goods sold; the other, quantum valebant for the same; on the general issue, the proof is, that plaintiff, being a tanner, received raw hides from defendant, and credited him for the value, and sent him in return tanned leather, and debited him with the value thereof, and the debt claimed is the balance appearing due the tanner on these dealings: HELD, the proof is properly applicable to, and sustains the declaration.

Assumpsit by Buzzard's administrators against Gore, in the county court of Frederick. The declaration contained, 1. the common count of indebitatus assumpsit for the agreed price of goods sold and delivered by the plaintiffs' intestate to the defendant, and 2. a count of quantum valebant for *the same goods. The defendant pleaded non assumpsit, and the statute of limitations; but, it seemed,

no effort was made to sustain the latter plea.

At the trial, the defendant filed a demurrer to evidence, in which the plaintiffs joined. The evidence therein stated, was—That for some four or five years preceding the death of Buzzard, who was a tanner, Gore was in the habit of sending raw hides to Buzzard's tannery, and getting tanned leather from him; but he never transacted any part of these dealings in person, his raw hides having been always brought to the tannery, and the tanned leather always sent to him, by his slaves, without any written order from him, and indeed without a word passing between him and Buzzard on the subject; that since Buzzard's death, Gore had dealt with two other tanners in the neighbourhood, in the same manner, through the agency of his slaves; he always sending his raw hides and the tanners sending back tanned leather, by the slaves, without written orders from Gore, or a word said by him to the tanners; and the accounts of these tanners for the debts so contracted by Gore through the agency of his slaves, had been settled by him without dispute: that the items of Buzzard's account, namely, the charges for tanned leather sent Gore by his slaves, and the credits for raw hides brought by them, were first set down on a slate, and thence posted in a book by Buzzard himself; but Gore's dealings with Buzzard, as charged in those accounts, amounted to about the same per annum, as his dealings with the other two tanners afterwards: that, in fact, it was the habit of Gore, to send his raw hides to some tannery, and to receive tanned leather in exchange, by his slaves, only giving verbal directions to them, to deliver the raw hides, and bring back what tanned leather he wanted: that, after Buzzard's death, Gore desired a witness to apply to his administrators for his account; which being sent him, he examined it, and said, he would not pay interest (which the administrators had charged) but that if they would give him the credits he was entitled to, he would pay the principal,

233 *if any should be due: and that Gore procured the assignment of a bond of one of Buzzard's administrators, saying, he expected the amount of that bond would be enough to meet the claim of Buzzard's estate against him.

The jury found a verdict for the plaintiffs, subject to the opinion of the court on the demurrer to evidence. The county court gave judgment on the demurrer for the defendant. Buzzard's administrators appealed to the circuit court, which reversed the judgment of the county court, and gave judgment for them. And then Gore appealed to this court.

Nicholas, for the appellant. 1st, The evidence did not sustain either count of the declaration. If it proved any contract, it was not a contract for the sale of tanned leather by Buzzard to Gore, either for a price certain and agreed, or for the reasonable value, but a contract for the exchange or barter of raw hides for tanned leather, from time to time. The customer or the manufacturer, as the case might be, was only bound to make good the difference be-

*Assumpsit.—See monographic note on "Assumpsit" appended to Kennalrd v. Jones, 9 Grant 183

tween the value of the manufactured articles furnished by the one, and the raw material furnished by the other, if and whenever such difference should occur, by the delivery of like articles. 2ndly, The law of Virginia, 1 Rev. Code, ch. 111, § 19, p. 426, provides, that "no person whatever shall buy, sell or receive, of, to or from, a slave, any commodity whatever, without the leave or consent of the master, owner or overseer of such slave," and imposes a penalty on any person dealing with a slave without such leave or consent. It would defeat the policy of this statute, and be of mischievous consequence, if a person may be allowed to carry on (as Buzzard did in this case) dealings for a series of years, with the slaves of his neighbor, receiving raw materials from them, and delivering the manufactured article they ask for, without a word said by or to the owner on the subject, before, during, or after such dealings, and then to recover from the owner what may be due on the transaction,

234 *upon the implied leave or consent of the owner to the dealings of his slaves. The policy of the statute cannot be effectuated, but by requiring a person who deals with a slave, to have the express leave or consent of the owner, before or at the time of the dealings. Therefore, the evidence is insufficient in law to prove, that the agency of Gore's slaves in these dealings with Buzzard, was authorized by Gore; and the judgment of the county court was right,—as the judgment of a county court will generally be found to be, in all cases involving a question of police.

Johnson, contra. Supposing the objection arising from the agency of the slaves out of the way, the dealings fairly to be inferred from the evidence, consisted in sales of raw hides by Gore to Buzzard, and sales of tanned leather by Buzzard to Gore; for there is evidence, that Buzzard gave Gore credit for the value of the raw hides, and charged him with that of the tanned leather, in money; and that this account being rendered to Gore, he made no objection to the items of debit, but only claimed credits beyond what were allowed him, of which however, he never adduced any proof. And this evidence, moreover, suffices to prove a distinct admission by Gore, that the agency of his slaves in these dealings, was authorized by him; that his slaves received the tanned leather he wanted, which constituted the items of debit in the account, by his leave and consent, or rather by his express direction previously given to them. The authorized agency of Gore's slaves in his dealings with Buzzard, is also proved by the evidence of his dealing in that manner with two other tanners, and of his habit of dealing through the agency of his slaves,—of giving verbal directions to them to deliver his raw hides at the tannery, and to receive the tanned leather he wanted. The statute referred to, does not prohibit the receiving of goods from the owner by the hands of his slaves; nor does it require that the leave or consent of the owner to the dealings of his slaves, even on their own account, shall be in writing. The just inference from the evidence in this case, is, that Gore's slaves acted

235 *in these dealings by his directions and for him; in other words, by his leave and consent expressly and previously given: but, certainly, such leave and consent might have been implied from his subsequent conduct, without direct positive proof.

CARR, J. A demurrer to evidence is always a dangerous course; and here, I think it was particularly ill-advised. For the evidence stated in the demurrer, giving it only fair play, and drawing the inferences which a jury should reasonably have drawn from it, is quite sufficient to establish the appellee's claim to recover. The facts proved furnish the strongest grounds to infer, that for a series of years Gore was in the habit of getting his leather from Buzzard's tannery; that though his slaves were his agents, or rather his instruments, for carrying raw hides to the tanner, and bringing back tanned leather, yet it was he who sent the raw material and received the manufactured article; and that he was to pay the difference, if any, between the values of what he thus bought and sold. When Buzzard's administrators rendered the account, at Gore's instance, he examined it, and did not object to any of the charges against him; he only objected to the charge of interest, and said that if they would give him the credit she was entitled to, he would pay the principal. This was a plain admission of the justice of the account, except as to the interest, and as to the credits he claimed, which, however, he never attempted to prove; and this admission alone, affords a decisive answer to the whole argument for the appellant. The judgment of the circuit court is right.

The other judges concurred. Judgment affirmed.

236

*Watson v. Lyle's Adm'r.

Same v. Robertson.

February, 1837.

Escheat of Debtor's Land—Petition of Creditor—Affidavit—Evidence.—Upon a petition under the statute 1 Rev. Code, ch. 82, § 14 by the creditor of a person whose lands have been escheated, the creditor is required to make affidavit that the amount of his demand is bona fide due. but this requisition of the statute does not dispense with the necessity of other evidence: the court can only render judgment for such sum as is proved to be due.

Appellate Practice—Judgment for Whole Demand, When Whole Not Proved—Effect.—If judgment has been rendered for the whole amount of the demand, when the whole is not proved to be due, and it is uncertain to what part the proof extends, an appellate court will reverse the judgment and dismiss the petition.

Escheat of Debtor's Land—Right of Escheator to Plead Statute of Limitations.—The escheator who is defendant to the petition, has the same right to plead the statute of limitations in bar of the petition, that a representative of the debtor would have to plead the statute in bar of an action.

Same—Same—Exception.—Where, whether the exception in the statute of limitations, of accounts which concern the trade of merchandize between merchant and merchant, will apply to accounts, no item of which has arisen within five years.

Statute of Limitations—Exception—Dealings between Merchant and Merchant—Proof—Case at Bar.—Rep.

The principal case is cited in *Anderson v. Com.*, 18 Gratt. 301.

***Escheat.**—See monographic note on "Escheat" appended to *Sands v. Lynham, Escheator*, 37 Gratt. 291.

***Dealings between Merchant and Merchant—Statute of Limitations—Exception.**—If the items of the

lication to the plea of the statute of limitations, that the accounts concerned the trade of merchandize between merchant and merchant: no evidence is adduced to prove that either party was a merchant during the time of the dealings between them, nor any evidence of the character of those dealings but that furnished by the account of the petitioner: in which account, the debits to the alleged debtor, consisted of two items for cash paid him on account of bills of exchange, one item for goods sold him, and the other items for cash advanced to or for him, and there was a single credit for the proceeds of a bill of exchange bought of him: HELD, that the replication was not supported by the evidence, and the demand therefore was barred by the statute.

James Lyle administrator of James Lyle the elder deceased, who was the surviving partner of Lyle & M'Creddie, presented a petition to the county court of Albemarle, at August term 1821—shewing, that Robert Miller, a merchant of that county, was indebted to Lyle & M'Creddie, on an unsettled and running account, common among merchants, in the sum of 141 dollars, and died without settling the account, leaving no personal estate to pay the debt, but seized of a parcel of land in Albemarle, which had been regularly escheated to the commonwealth, by office found,* for want of heirs of the decedent, and had been sold by the escheator, who still held the proceeds of sale in his hands; and, therefore, praying, that Watson, the escheator, should be made defendant, and should be directed to pay the debt due the petitioner from the decedent, out of the proceeds of sale of the escheated land, according to the statute, 1 Rev. Code, ch. 82, § 14, p. 297.*

237 In the account exhibited with the petition, the debits to Miller consisted of two items for cash paid him on account of bills of exchange, one item for goods sold him, and the other items for cash advanced to or for him; and there was a single credit, for the proceeds of a bill of exchange bought of him. And the first item in the account

account between merchant and merchant are all on one side, the claim will not be within the reason or principle of the exception, which intended open and current accounts, where there were mutual dealings and mutual credits or debits. *Roots v. Salt Co.* 27 W. Va. 491, citing *Wortham v. Smith*, 15 Gratt. 487, 494; *Watson v. Lyle*, 4 Leigh 236, 249.

The principal case is also cited in *Coalter v. Coalter*, 1 Rob. 85. See monographic note on "Limitation of Actions" appended to *Herrington v. Harkins*, 1 Rob. 501.

*The statute provides, that "When any person shall die indebted, seized of lands which shall become escheated to the commonwealth, not having personal property sufficient to pay such debts, the creditor may exhibit his petition before the court of the county or corporation, in which such escheat shall take place, or in the superior court of law for such county, making the escheator of such county or corporation a party defendant, who shall defend such claim; and the said court shall proceed to judgment according to the right of the case, and render the same for such sum as shall appear to be due to such petitioner, if any thing; and it shall be the duty of such escheator, on such judgment being rendered, to satisfy and pay the amount thereof, if the proceeds of the sale be sufficient, and yet in his hands; and if the same shall be paid into the treasury, the auditor shall, and is hereby required, on a copy of such judgment, properly authenticated, being filed, to issue a warrant; and the treasurer shall pay the amount, or so much as has been received on account of such sale: Provided, That the slaves and other personal estate shall be previously applied in the payment of the debts of the said decedent, and that every such creditor shall annex an affidavit to the said petition, stating that the amount of his or her demand is bona fide due and owing at the time of preferring the petition."—Note in Original Edition.

was dated in October 1803, and the last in August 1806.

At the same term of the county court, Robertson surviving partner of Bridges & Robertson, presented a petition to the court against Watson the escheator; exactly similar to that of Lyle's administrator, mutatis mutandis; in which he prayed, that the escheator should be directed to pay him a debt of 2837 dollars, being the balance due from Miller to Bridges & Robertson, on an unsettled running account between them.

238 *There were two accounts exhibited with the petition, in this case. The first was an account of dealing between Miller and Bridges & Robertson, commencing in July 1811, and ending in September 1814, at which time Miller died; and the credits to Miller consisted of one item for tobacco, and nine items of cash received from him, and the debits consisted of a few items for goods sold him, and numerous items of cash advanced to or for him. In the other account, raised between Miller's estate after his death and Bridges & Robertson, the first item was dated in October 1814, and the last in August 1816: and in this account, Miller's estate was charged with the balance due from him in his lifetime, and some other moneys which became due after his death, in consequence of dealings which commenced in his lifetime, and also with all the moneys disbursed for the estate, by Bridges who was Miller's administrator, as having been in fact disbursed by Bridges & Robertson; and the estate was credited with the moneys received by Bridges, the administrator, for Miller's estate; shewing the balance of 2837 dollars claimed in the petition, as due Bridges & Robertson. In the first of these accounts, there were seven charges, amounting to more than 1800 dollars, for advances by Bridges & Robertson to take up notes and acceptances of Miller; and, in the last, charges to the amount of 744 dollars, for a note of Miller for 698 dollars, with interest and charges of protest, paid by Bridges & Robertson after Miller's death.

The escheator pleaded the act of limitations, in both cases, to which the petitioners replied, that the accounts concerned the trade of merchandize between merchant and merchant.

In the case of Lyle's administrator, there was no evidence to prove, that either Lyle & M'Creddie, or Miller, during the time of the dealings between them, were merchants, and no other evidence of the character of the dealings between these parties, but that which the account furnished. In Robertson's case, there was proof, that from the year 1803, Miller was engaged, principally, as a merchant* in trade, and that, for some years previous to his death, he was engaged in speculations in the produce of the country, and in the manufacture of cotton cloth; but the only proof that the dealings between these parties, were dealings between them as merchant and merchant, was that furnished by the accounts.

Each of the petitioners verified the allegations of his petition by his own affidavit: each of them, moreover, adduced affidavits

of witnesses to prove the justice of his claim.

The evidence of the claim of Lyle's administrator was quite sufficient.

The evidence of Robertson's claim consisted of the affidavit of a witness, proving, 1. That the witness had compared the accounts filed by the petitioner with the books of Bridges & Robertson, and found the greater part of them charged in the hand writing of one Scott, a clerk of the house (who had since gone to Scotland, and was reported to be dead), though the witness could not designate which of the items were in Scott's hand writing; and that a small part in the commencement of the account, was entered on the books in the hand writing of Triplett, another clerk of the house, who was now a resident of Kentucky. 2. That Bridges & Robertson did, within the knowledge of the witness, advance considerable sums of money for Miller, and that he died indebted to them to a large amount, besides the two notes filed in the cause. 3. That Bridges & Robertson paid one note of Miller, indorsed by them, for 200 dollars, due at the Farmers Bank on the 3rd September 1814. And 4. That Bridges, as Miller's administrator, after his death, took up another note of Miller for 698 dollars, by giving Bridges & Robertson's note for the same amount, which was charged to Miller's estate, in the second account of Bridges & Robertson filed in the cause.

It was proved, that Miller's personal estate was not sufficient to pay the claims of the petitioners or any part thereof. It appeared, that Miller died about the last of September 1814; and that his land in

Albemarle, was regularly escheated
240 *to the commonwealth, by inquest of office found the 9th August 1817.

In each of the cases, there was a case agreed, and order entered by consent, waiving all irregularities in pleading, and in the manner of taking the evidence, and submitting for the decision of the court, upon the evidence filed in each case,* the following points—1. Whether there was sufficient proof, that Miller did not leave sufficient personal estate to pay the debts claimed by the petitioners, respectively, or either of them? 2. Whether there was sufficient proof that the accounts of the petitioners, or either of them, were such accounts as concerned the trade of merchandize between merchant and merchant, within the meaning of the statute of limitations, 1 Rev. Code, ch. 128, § 4, p. 488? "there being no other evidence of the nature and character of the claims, respectively, except the face of the accounts, and the affidavits; though the original existence of Robertson's accounts, as it respected the negotiable notes, was not denied." 3. Whether, under the circumstances of these cases, the statute of limitations was pleadable in bar of the claims of the petitioners, or of either of them?

*The reporter states the cases, in this particular, as the president of the court seems to have understood them. As the reporter understands the records, each case (and especially Lyle's) was submitted upon the evidence filed in both, so as to make the evidence in each evidence in the other.
—Note in Original Edition.

and 4. Whether upon the whole case, judgment should be given for the petitioners, or either of them, or for the escheator?

The county court adjudged, in the case of Lyle's administrator, that the escheator should pay him 131 dollars, with interest thereon from the 1st September 1806, till paid, and his costs, out of the proceeds of Miller's land, in his hands; and, in Robertson's case, that the escheator should pay him 2837 dollars, with interest thereon from the 1st September 1816 till paid, and his costs, out of the proceeds of the escheated land, or so much thereof as should remain after satisfying the debt adjudged to 241 Lyle's administrator. *From these judgments, Watson the escheator appealed to the circuit court, which affirmed them; and then he appealed to this court.

The causes were argued here by the attorney general for the appellant, and by Taylor for the appellees.

I. The first question was, whether there was proof of Miller's personal estate being insufficient to pay the debts? But of this there was hardly room to doubt; and the court had no doubt.

II. The next question was, whether the debts claimed by the appellees, respectively, were proved?

There was no doubt, that that claimed by Lyle's administrator, was proved. But, as to the debt claimed by Robertson, the attorney general said, that (excepting the two notes for 200 dollars and 698 dollars) the evidence was too vague to prove any thing. The witness said that the greater part of the items were entered in the hand writing of one clerk, but instantly contradicted himself by admitting that he could not designate the items entered by him, and that a small part were entered in the hand writing of another clerk; so that it was impossible to understand which were the items, to which the proof of entry in the hand writing of the clerks, applied.

Taylor answered, that the claim of the creditor was verified by his own affidavit; which was all that the statute in such cases required. Then, there was the affidavit of the witness, the obvious meaning of which was, that all the items were charged in the hand writing of the two clerks, the greater part in that of one, and a small part in that of the other; and when he said, that he could not designate which of the items were charged in the hand writing of Scott, his meaning was, that, though he had examined the books, and found the greater part of the items charged in Scott's hand writing, yet, not having the books, but only the copy of the accounts filed in the cause, before him, at the time of his affidavit, he could not then designate the 242 items entered by *Scott. There were charges in the two accounts, for notes and acceptances of Miller taken up by Bridges & Robertson, to the amount of more than 2500 dollars; the original existence of which (it was expressly stated in the case agreed) was not denied; and surely this fact, coupled with the other evidence, was enough to prove a debt to as large an amount as that which the county court adjudged to this creditor. At all events, the claim was proved to the amount of the

notes and acceptances; and if the judgment was wrong in giving the whole balance claimed, this court, proceeding to give the judgment which the court below ought to have given, ought to give judgment for the amount that was proved. Besides, the eachedor did not contest the original justice of the claim; he rested his defence wholly on the statute of limitations.

The attorney general replied, that the last point submitted to the court by the case agreed (namely, whether judgment ought to be given for the petitioners, or for the defendant) presented the question whether there was sufficient proof of the claim.

III. The third point was, whether these were accounts concerning the trade of merchandize between merchant and merchant, within the meaning of the exception in the statute of limitations?

The attorney general argued, 1st, As to the case of Lyle's administrator, that it was well settled, that the exception in the statute applies only to open, current accounts, not to stated accounts, or to notes or bills. 2 Wms. Saund. 127, note 6; Ramchander v. Hammond, 2 Johns. Rep. 200. The account of Lyle & M'Creddie was not an open, current account; the debits were very few, and there was only a single credit, and that for the proceeds of a bill of exchange; and the last item was dated as early as 1806. The dealings then ceased, and the account was closed; it was thenceforth, in effect, a stated account; and the statute of limitations began to run. Besides, there is no evidence in the case

of Lyle's administrator, that Miller, 243 the debtor, *was a merchant; nor is there any thing in his dealings with Lyle & M'Creddie at all peculiar to mercantile business. 2ndly, In Robertson's case, the last account (that raised between Miller's estate after his death, and Bridges & Robertson) certainly was not an account between merchant and merchant. And in the preceding account, of dealings during Miller's lifetime, many of the largest debits were charges of notes and acceptances of Miller, taken up by Bridges & Robertson, all of which constituted liquidated demands.

Taylor answered, 1st, That the account on which the claim of Lyle's administrator was founded, was not the less an open or current account, because the dealings had ceased: the distinction was between open or current accounts and stated accounts: stated accounts were such accounts only as have been, in some way or other, settled between the parties; all other accounts were open or current accounts. It was true there was no evidence filed by Lyle's administrator, to prove that Miller was a merchant; but the fact was proved by the evidence filed in Robertson's case; and by the case agreed in Lyle's case, the evidence in Robertson's was made evidence in Lyle's also. Here, then, were dealings between merchants; one party advancing cash to the other, and not buying, but taking, a bill of exchange from him, the proceeds of which when received were to be put to his credit. This transaction was, in its character, peculiarly mercantile. 2ndly, The account of Bridges

& Robertson with Miller in his lifetime, was plainly an account between merchant and merchant, unless the advances of cash by merchant to merchant in a course of dealing were contrary to the mercantile character of the transaction; which he thought it impossible to maintain. The charges for Miller's notes and acceptances, were not for his notes and acceptances to Bridges & Robertson, but for cash advanced by them to take up his notes and acceptances to others. But, he insisted, the act of limitations could, in no view, be a bar to Robertson's claim. The oldest item in the 244 *first account of Bridges & Robertson was dated in 1811; and Miller died in 1814, that is, within five years; so that there was, then, no bar to a claim against Miller's administrator, and he appropriated Miller's assets to it. Upon that first account, and upon the second account raised after Miller's death, no claim could be asserted for payment out of the proceeds of his land, till the land was escheated and sold, and the proceeds in the eachedor's hands. Therefore, the statute of limitations could not begin to run for the eachedor, until the escheat, which took place in 1817; and Robertson's petition was filed within five years after, namely, in 1821. The uniting of the two claims, on the account against Miller in his lifetime, and that against Miller's estate, was not improper in this case; for the statute, which gave this summary proceeding by petition, directed that the court should proceed to judgment according to the right of the case; a phrase always used in our statutes, to dispense with technical forms.

IV. The attorney general contended, that the escheator might properly avail himself of the statute of limitations in his defence. The statute which gave the remedy against him, directed, in general terms, that he should defend the claims; and thus authorized and required him to make any and every defence which might affect the legal justice of the claims. The escheator, in effect, represented the estate of the deceased debtor; for, notwithstanding the escheat and sale of the land, if any heir of the decedent should afterwards appear within ten years, and prove his right, he would be entitled to the net proceeds of the sale, by the new provision of the statute, enacted in 1819, 1 Rev. Code, ch. 82, § 19, p. 298.

Taylor answered, that the escheator represented the commonwealth, and as the statute of limitations did not run against her, so neither was it an available defence for her. The provision of the statute which gave the remedy against the escheator, was enacted in 1804: Sess. Acts of 1803-4, ch.

77, § 3. Before that statute, the creditors of a decedent *whose lands had 245 escheated to the commonwealth, always applied by petition to the legislature, for payment of their debts, out of the proceeds of the escheated lands; and if an heir appeared after the opportunity for asserting his rights at law had gone by, he also applied by petition to the legislature, for the money. They were both applications to the equity of the government. If the creditor proved his debt, it never was heard that

the legislature rejected his petition, because he had not come within the time of limitation of actions; and in reference to the possible future claim of an heir, it never was imagined, that he had a better claim on the equity of the government, than a creditor whose claim was just, though it had not been asserted within the statute of limitations. The only object both of the statute of 1803-4, which gave the remedy to the creditor against the escheator, and of the new provision of 1819, which gave the remedy for the heir, if one should appear, was, to provide a judicial remedy, in place of the petition to the legislature; and the intent was, that justice should be administered by the courts upon the same principles on which it had always been administered by the legislature. The legislature never intended, that the escheator might avail himself of the defence of the statute of limitations, to which it had never paid the least respect in its dispensations of equity, in such cases; that the escheator might avail himself of that statute, which the debtor himself might never have chosen to plead. And, he said, the statute of limitations had never been held an available defence for any one but the debtor himself or his representatives. Upon this principle, in England, though none but a creditor can sue out a commission of bankruptcy, it was no objection to the commission, that the claim of the petitioning creditor was more than six years old; *Quantock &c. v. England*, 5 Burr. 2068; *Mavor &c. v. Pine*, 2 Carr. & Payne, 91, 12 Eng. C. L. R. 41. But if the statute of limitations was an available defence for the escheator, from what time did the statute run in respect to him? Certainly, only from the time when

the proceeds of the escheated land
246 *came to his hands, since, until then, the creditors could institute no judicial proceeding. Otherwise, if the escheat was delayed (as was very often the case) for more than five years after the decedent's death, the remedy of every creditor by simple contract would be barred. The creditors, in the present cases, being simple contract creditors, they had no claim for satisfaction out of their deceased debtor's land. Their right, as well as their remedy, to get satisfaction out of the land, was given by the statute; and, by the statute, neither the right nor the remedy accrued till the proceeds of the escheated land had been collected by the escheator. Both of the creditors in these cases, resorted to their remedy within five years after the escheat; and, therefore, the defence of the statute of limitations failed as to both.

TUCKER, P. The claims of the petitioning creditors to have satisfaction out of the proceeds of the escheated lands, are resisted on two grounds—that the debts are not proved; and that the claims are barred by the statute of limitations.

1st, As to Lyle's case, the court holds that the debt is sufficiently proved; and the only questions in that case are those which arise out of the plea of the statute of limitations. To the defence founded on the statute, two answers have been given: 1. that the escheator as representing the commonwealth, cannot plead the statute; and 2. that the

account is between merchant and merchant, and not within the bar of the statute.

In deciding the first of these questions, I do not think it necessary to examine, generally, whether the commonwealth is within the statute of limitations. I incline to think she is not. But, in this case, the statute has constituted the escheator the defendant in the action, and has directed that he shall defend the suit. That defence is not against a claim exhibited against the commonwealth, but against the estate of a decedent, escheated to the state, which the liberal spirit of our laws permits to be charged with any just demands against that decedent. Of these claims the com-
247 monwealth *and her officers have, and can have, no personal knowledge.

Whether they were just in their origin, or have been paid, may be, and in the nature of the thing, must usually be, unknown to them; and if paid, it may be out of their power to furnish the evidence, either oral or documentary, to establish the payment. The papers of the decedent do not fall into the hands of the escheator; and where he leaves no heirs and no personal estate, there is no one on whom the duty would devolve, of preserving the vouchers which might prove the satisfaction of a demand. Cases like this call most loudly for the protection of the statute against stale and antiquated claims; and if there be any instance, in which we are to make a practical application of the principle, that cases within the mischiefs of a statute, are to be regarded as embraced by its provisions, that instance is afforded here. The petition, indeed, is not one of the actions designated in the statute; but it is precisely analogous to the action of assumpsit upon a merchant's account; and in the same spirit in which a court of equity regards the statute as running against a bill, though bills are not mentioned in the statute, a court of law ought to regard it as running against this petition; which is, in effect, an action to recover the amount of an open account. The object of the statute was to limit stale demands of certain descriptions (accounts among others) whatever might be the nature of the suit instituted for their recovery.

It is said, indeed, that no one can plead the statute of limitations, but a party to the transaction, and cases under the bankrupt laws in England, have been cited to sustain the position. It is unimportant to examine those cases here. Nothing is better established, than that where an executor declines, as he may do in his discretion, to plead the statute, a creditor of the estate may, nevertheless, insist upon it before the master; *Ex parte Dewdney*, 15 Ves. 498. It would be strange indeed, if it were otherwise; for when there is likely to be a deficiency of assets, those who are interested

in them ought to be at liberty to protect them by *every legal defence.
248

So here, the commonwealth, having liberally admitted demands upon the land, it is at least reasonable that those demands should be clearly established, and that she should be permitted, through her escheator, to protect the estate from unjust claims, by the same defences the decedent's administrator would have had. Or, considering her

in the light of an heir or mortgagor, against whom a simple contract creditor seeks to marshal the assets, she would be entitled through her officer to the defence of the statute. So, if before this statute, the lands of a mortgagor had escheated to the commonwealth, and the mortgagee being paid out of the personalty, the simple contract creditors had sought to charge the land, there can, I think, be no doubt that the commonwealth, standing in the shoes of the mortgagor, would have a right to the defence of the statute of limitations. But the case here, is infinitely stronger. The commonwealth, through her officer, is here, in part, in a fiduciary character. By her law, notwithstanding the escheat and sale of the land, and the payment of the proceeds into the treasury, any person shewing title to the land may at any time within ten years assert his claim; and if it be established, shall be entitled to receive the net proceeds of the purchase money. The commonwealth, then, stands here as the representative of the estate. The defences of the estate, by her officer, are indeed, in the first instance, defences of her own right, but they may peradventure turn out to be defences of the rights of some unknown heir. She must, therefore, be looked on as to these defences, as defending for the heir, and as entitled to plead what an heir might rely on, who was resisting an attempt to charge his land with a simple contract debt, by a bill to marshal assets. I am therefore of opinion, that the plea of the statute of limitations was an available plea in this case, unless the appellees can bring themselves within the exceptions of the statute.

This is attempted by replying, that the account is an account between merchant and merchant concerning the trade
249 *of merchandize; and the influence of this replication is resisted on two grounds (in the case of Lyle's administrator). 1st, It is said, that cases of notes and bills are not within the exception. But this is not an action upon a bill or note; the bill was sold by Miller, and the full amount being credited, it must be presumed to have been paid. There is then no demand upon the bill. The demand is for the excess of the account above the bill. 2ndly, It is said, this is an account stated or closed in 1806. But, though the dealings then ceased, the account is not for that reason an account stated. An account stated is where the accounts between the parties have been either actually settled, or are presumed to be so from the circumstance of a party's retaining, for a long time, without objection, the account of the other party, which has been presented to him, shewing a balance against him. By the settlement (or implied admission which is considered equivalent) it has become an ascertained debt. All intricacy of account, or doubt as to which side the balance may fall, is at an end; and thus the case is neither within the letter nor the spirit of the exception. 2 Wms. Saund. 127, d. e. note 7; Freeland v. Heron &c., 7 Cranch, 147. The cases have indeed been contradictory as to the question, whether open accounts are or are not barred

(though they be between merchant and merchant) where the last item is above five years standing. Chancellor Kent is in favor of the bar in such cases; Carter v. Murray, 5 Johns. C. R. 522, and a like opinion is intimated in Jones v. Pengree, 6 Ves. 580; Duff v. East India Co., 15 Ves. 198; Barber v. Barber, 18 Ves. 286. Yet in Foster v. Hodgson, 19 Ves. 179, 185, the whole matter seems to be again unsettled in England. But in *Mandeville v. Willson*, 5 Cranch, 15, the supreme court was clearly of opinion, that it is not necessary that any of the items, in the case of merchant's accounts, should come within the five years. This is, I think, the reasonable doctrine; for otherwise, there is no perceivable difference between merchants' accounts and others; since, even be-

250 tween *common persons, if there be items within five years, the statute does not bar. See also *Catling v. Skoulding*, 6 T. R. 189, 192.

In Lyle's case, then, I do not think the bar would apply strictly as such, if the replication were true. But what evidence is there in this case, that the account concerned the trade of merchandize between merchant and merchant? Absolutely none. There is no proof that the parties were merchants; and the account contains no charge of merchandize.* In this case, then, the bar, I conceive, is complete.

Then, 2ndly. As to Robertson's case. This, though less exposed to the objection of the staleness of the demand, is yet more fundamentally defective than the other. Its defects are in the proofs of the demand, and the nature of the claims. The proof of the demand is altogether defective, because it is certain that the whole account is not proved, and it is uncertain to what part, or to what amount, the proof extends. The witness swears, that the greater part of the items were charged by Scott, and that a small part was charged by Triplett; of the rest there is no proof. Can we divine what items were entered by these two clerks? Or can we ascertain, from this vague testimony, how much their charges will amount to in the aggregate? It is impossible. If so, then it may be that the very entries made by these witnesses may have been those which related to the bills and notes, and which may, therefore, probably be unprotected by the exception in the statute; or those which were made after the intestate's death, which for other reasons may be objected to. And, moreover, as the aggregate amount of what was entered by those clerks is not proved, it is not perceived how the sum could be ascertained for which the judgment should have been entered. Accordingly, we find, the court, being unable to distinguish, gave a judgment for the whole account, whereas
251 it is very *clear that the whole account was not proved. I am, therefore, of opinion, that in this case also the judgment is erroneous.

Believing it possible that something may be due in Robertson's case, I have reflected upon the practicability of sending the

*There was one charge for goods sold; note by reporter.

cause back for further proceedings. But as the case is at law and not in equity, I do not see how it can be done. The parties have put their rights upon this issue and this evidence; and they must abide it.

Judgments reversed in both cases, and petitions dismissed.

252

*Elder v. Elder's Ex'or.

February, 1833.

Slaves—Emancipation—Election—**Case at Bar**.—Testator bequeathed, that his negro woman C. and her child A. and C.'s increase be given to G. D. in trust to be sent to the colony of Liberia, provided the expense of sending them would be defrayed by the colonization society; and that the rest of his negroes who might be willing to go, should also be left in trust to said G. D. to be sent to Liberia in same manner; but that those who should prefer to stay here, should be given, within twelve months, to his brother. Testator's estate being involved in debts, which the other personal assets did not suffice to pay, the executor hired out the slaves for several years, to raise a fund out the profits to pay debts: **HELD**.

1. **Same—Same—Necessity for Election in Prescribed Time**.—This was an effectual emancipation of such of the slaves as preferred to go to Liberia; and it was not necessary to perfect their title to freedom, that they should elect to go within the year, provided they made such election when it was offered to them,—or that the colonization society should agree to defray the expense of sending them, provided any person would agree to do so.

2. **Same—Same—Effect as to Those Born after Death of Testator**.—The slaves born after the testator's death and while the executor held their mothers in slavery, were also emancipated.

3. **Same—Same—Right of the Mother to Elect for Infant**.—As to the infant slaves incapable to make election for themselves, it was right to take the election of their mothers for them.

4. **Same—Right of Executor to Hire Out to Pay Debts**.—The executor did right in hiring the slaves out, in order to raise a fund out of their profits to pay testator's debts, and consequently in forbearing to offer the slaves their election to go to Liberia within the year; for.

5. **Same—Emancipation—Right of Executor to Refunding Bond**.—When slaves emancipated by will, are set free by the executor, he is not entitled to a refunding bond to indemnify him against the claims of the testator's creditors, though the manumitted slaves are, notwithstanding manumission, subject to debts; and,

6. **Debts of Testator—Liability of Freed Men**.—The burden of debts ought to be distributed among such freed men as equally as practicable.

Herbert Elder, late of Petersburg, died in June 1826, having by his last will and testament, after directing that all his debts should be paid, and bequeathing some trivial legacies, bequeathed and provided as follows: "It is my will that my negro woman Clara, and her child Ann Eliza, and Clara's increase, be given to Gabriel Dissosway, in trust to be sent to Africa to the colony at Liberia, provided the expense of sending them will be defrayed by the col-

onization society—And it is my further will, that the remaining part of my negroes who may be willing to go, shall be left in trust to the said Gabriel Dissosway, 253 to be sent to the colony *at Liberia, in the same manner as Clara and her increase—Those of them who prefer staying, shall be given, within the space of twelve months after my decease, to my brother John Elder and his heirs forever—And it is further my will and desire, that all my remaining property not mentioned or disposed of in the above items, shall be given to my brother John Elder and his heirs forever—Lastly, I appoint my friend Minton Thrift executor of this my last will and testament." Thrift qualified as the executor in the hustings court of Petersburg at July term 1826.

In March 1828, the residuary legatee exhibited his bill in the superiour court of chancery of Richmond, against Thrift the executor, and Dissosway the trustee,—setting forth the will of his brother: charging, that the debts of the testator were few and trivial, and his other personal estate besides slaves, was much more than enough to pay them; that the slaves conditionally emancipated by the will, had never elected to go to Liberia; but that, on the contrary, the executor having fully explained the will to them, and their rights under it, they had declared they would not go to Liberia, and preferred to remain in Virginia in slavery; and that they had remained here for near two years since the testator's death: claiming the slaves, therefore, as the property of the plaintiff: and praying an account of Thrift's administration, a decree for the slaves and their increase, and for the surplus of the assets.

Thrift answered, that the testator died much indebted; that he had in vain exerted himself to collect the assets, and pay the debts, within the year after his testator's death; that some debts were still due, and known to be so, and others were claimed but contested; that the slaves, being liable for the debts, which the other personal estate should prove inadequate to pay, and being unable to give the executor a bond to make good the debts for which they might be held liable, and the executor thinking the sale of any of the slaves to raise a fund to pay the debts, would have been an injustice toward them, he had, therefore, hitherto continued

254 *to hold them all, and hire them out, to raise a sufficient fund for debts from the profits, and this with the approbation of the trustee Dissosway; that, under these circumstances, he had not yet given the slaves their election, to go to Liberia or remain in slavery in Virginia, though he had explained their rights to them under his testator's will, and he did not doubt, that when they should be allowed to make their election, they would prefer to go to Liberia, rather than remain the slaves of the plaintiff in Virginia.

The chancellor by consent of parties, ordered an account of the executor's administration, and appointed five gentlemen of Petersburg, or any three of them, commissioners, to examine, privily and impartially, all the slaves of the testator's estate, and

***Slaves—Emancipation—Election**.—See what is said in *foot-note* to Bailey v. Poindexter, 14 Gratt. 132. The principal case is cited at pp. 193, 194, 196, 204, 206, 210, 211, 212; Williamson v. Coaler, 14 Gratt. 404, 410; Jones v. Jones, 92 Va. 593, 24 S. E. Rep. 255.

†**Same—Same—Increase**.—For discussion of this question, see the principal case cited in Osborne v. Taylor, 12 Gratt. 127, 128, 129, and *foot-note*: *foot-note* to Binford v. Robin, 1 Gratt. 327; *foot-note* to Lucy v. Cheimant, 2 Gratt. 36; Erskin v. Henry, 9 Leigh 194, 197, 198; Anderson v. Anderson, 11 Leigh 621, 622; Wood v. Humphreys, 12 Gratt. 336, 351; Taylor v. Collins, 12 Gratt. 398; Hunter v. Humphreys, 14 Gratt. 397.

‡**Same—Same—Rights of Creditors—Chancery Jurisdiction**.—On this point, the principal case is cited in *foot-note* to Ruddell v. Benn, 10 Leigh 467; *foot-note* to Woodley v. Abby, 5 Call 326; Jincey v. Winfield, 9 Gratt. 713. See monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

to ascertain from each individual, and report to the court, whether he or she was willing to go to Liberia.

The accounts of the executor's administration were reported in 1829, shewing that he had been fairly administering the estate during the interval since the testator's death; that there was a balance of 92 dollars due from the executor to the estate at the end of the year 1828; that the administration was not completed, there being yet some debts due the estate to collect, and some claimed from it which were not yet liquidated; and that the executor had hired out the slaves for the year 1829, on condition that they should be returned to him at any time during the year, when called for, to be sent to Liberia.

The commissioners returned a list of the slaves (other than Clara and her children) specifying their names, sexes and ages; that there were fourteen of them; of whom eight were under age of twenty-one years, six between fourteen and twenty, one six, and one two years of age: and that they had examined them according to the directions contained in the order of the court; that upon that examination, the terms of the testator Herbert Elder's will being fully explained to them, one of them named Mingo refused to accept his freedom on the terms proposed, but all the rest
255 *declared, that they preferred to accept their freedom and go to Liberia; that, however, in respect to the two infants of six and two years of age, who were incapable of determining for themselves, they had considered it their duty to take the election of their mother for them, as their election.

And the defendant filed a document in the cause, in these words: "Office of the colonization society, Washington, December 23, 1829. At a meeting of the board of managers of the american colonization society, June 11th 1826, the following resolution was adopted—Resolved, that the resident agent state, in reply to the letter of Mr. Dissosway, that the society with pleasure accept the late Herbert Elder's slaves on the terms proposed in his will, and will transport the persons left by him as soon as they can prepare an expedition—Teste R. R. Gurley, secretary."

The plaintiff excepted to this document, as evidence; which exception was overruled. And the court directed the commissioner to state and report the sequel of the executor Thrift's accounts of administration.

The commissioner reported the executor's accounts to the end of the year 1830, shewing a balance in his hands, principal and interest, of 454 dollars, which consisted entirely of the hires of the slaves for the years 1829 and 1830, and that the administration was not yet quite completed.

In this state of the cause, it was transferred to the circuit superior court of law and chancery of Petersburg; and that court, upon a hearing in November 1831, decreed, that the executor Thrift should deliver to the plaintiff, the slave Mingo who had elected not to go to Liberia, upon the plaintiff giving bond to the executor, if required by him, in the penalty of 250 dol-

lars, with condition to refund in case the assets should be necessary for debts of the testator; and that he should deliver to the defendant Dissosway all the other slaves of the testator, upon his giving bond to the executor, if required by him, in the penalty of 4000 dollars, with like condition to refund if the assets should be necessary
256 *for debts. And the court directed accounts of the sequel of the executor's administration, till it should be completed.

From this decree the plaintiff John Elder, by petition to this court, prayed an appeal; which was allowed.

Spooner and Taylor, for the appellant.
W. M. Atkinson and Stanard, for the appellee.

CARR, J. In the construction of wills, we are to find out the meaning, the intention, the will, of the testator; and unless that violates some principle of law, it must be carried into execution. To my mind it is just as clear as any form of words could make it, that this testator wished, that all his slaves should be given up to Dissosway, to be transported to Liberia, there to be free, if the colonization society would pay the expenses of removal; unless any of them should prefer to stay here and be slaves—and such (he willed) should be the slaves of his brother, the appellant. I do not believe he had an idea of making their election within twelve months, a condition, which, under all circumstances, should be strictly performed, and on failure of which they should be the slaves of his brother. He thought it probable, I suppose, that the choice would be submitted to them within the twelve months; and meant, that all who, upon such submission, should express a preference for remaining, should thereupon be handed over to his brother. The executor has explained this matter fully. He certainly had, for the creditors, the paramount right of assenting or not to this bequest, and of saying when he could with safety assent. He tells us, that he found the state of the debts such, that he could not discharge them without selling some of the negroes, or hiring them out. He very properly preferred the latter; and this making delay inevitable, he did not think it proper to submit to them, at once, the question of election. In the meantime, the appellant filed this bill—and then the subject being before the court, the
257 chancellor very properly *appointed commissioners to examine the negroes. Those commissioners have reported, that all but one have elected to go to Liberia; that two of them were too young (one being six and the other two years old) to make a choice; and that in these cases, they had taken the choice of their mothers. In this, I think, they acted very properly. It is certain, that the testator did not, on account of their infancy, intend to condemn them to unconditional slavery; and who so proper to decide for them as their mother?

It was said, that the children born since the testator's death must be slaves, because their mothers were so at their birth. But admitting the fact, the consequence does not seem to follow: for the testator willed, that all the rest of his slaves shall be given to Dissosway, to be taken to Liberia.

Now, if these children were born slaves, they were the slaves of the testator, and come within the bequest as well as their mothers. It is not worth while then to inquire whether they were born free or not.

It was also said, there is no evidence of the willingness or the ability of the society, to pay the expense of transportation. I think there is such evidence of willingness as justifies the decree; and as to the ability, the testator required no guaranty for that.

With respect to the hires, I do not think that a question before us. This is an appeal from an interlocutory decree, and in such cases, we have often said, that the appeal is only from what the chancellor has done, not from such parts of the case as he has not yet acted upon—as to these, when the cause goes back, he may make such decree as all parties will be satisfied with. At any rate, he has as yet done nothing with respect to the profits, which can be appealed from.

It is objected by the appellee's counsel, that the chancellor ought not to have required that Dissosway should give bond to refund, if debts should afterwards come against the estate. I had thought, at first, that this point was not before us, as the appeal was taken by the other party; but, upon 258 *reflection, I think we ought to take notice of it; for it is a requisition which vitally affects the negroes, since the failure to give the bond, would frustrate the intention of the testator as to their freedom, and they being no parties to this proceeding, could not appeal from it; nor could their trustee do so, as he has never been before the court; and the executor would not appeal from it, for it is in his favor. It seems incumbent on us, therefore, to see whether the decree is right in this respect.

When a testator wills freedom to his slaves, it is, as a general rule, clearly not in the executor's power to demand a refunding bond: for who is to give it? Nobody; and thus the will might always be frustrated. The law shews that this is so, by giving to the creditors a resort to the slaves themselves, in case of defect of assets. The executor, too, if he finds the existing state of the debts demands it, may retain them, and hire them out, till he has raised a sufficient fund to pay the debts; and this, more especially in the case before us, where they are by the directions of the will to be removed beyond the reach of after claims. But even here, I do not think he can demand, or the court direct, that Dissosway shall give a refunding bond. The testator as he never meant to give Dissosway any beneficiary interest in the slaves, as little intended to subject him to any loss or risk; and, if he had so intended, could impose on him no such obligation. The direction, then, that the slaves shall be given to Dissosway, to be sent to Liberia, gives no more right to the executor to demand security, than if they had been set free at once. And of this the executor seems fully sensible; for in his answer, he says, that while his anxious desire to further the benevolent intentions of his testator, and his conviction that no one would give the usual refunding bond, if he let the slaves go to Africa, induced

him to determine to dispense with that bond, from those who should go thither, yet ordinary prudence forbade his doing so, at least until all the claims that he had notice of against the estate, were settled.

Accordingly, he has hired them out, 259 *until we find, that, after paying the demands against the estate, he had at the last settlement, which was brought down to the 31st December 1830, a balance of 449 dollars in his hands; and there being two years hires of the negroes since, he must have now upwards of 1000 dollars, beyond all known claims on the estate. In this state of things, it was clearly wrong, I think, to put it in his power to demand of Dissosway an indemnifying bond in the penalty of 4000 dollars. This would, in all probability, wholly defeat the will. While the fund now in his hands, shall remain with the executor, it surely furnishes ample security against outstanding debts; and when, upon a final hearing, it shall be disposed of, as it probably will be according to the principles established in *Paup v. Mingo*, (ante, p. 163,) the court will not suffer it to be taken from him, without requiring of the person to whom it shall be decreed, bond and security to refund. I think, then, so much of the decree as requires this bond of Dissosway, if the executor chooses to demand it, is wrong, and should be corrected.

It was urged, that we ought now to take precautions, and make provisions insuring the due execution of that part of the will, which looks to the transporting these persons to Liberia; that we ought to require bond and surety for carrying them, or to pronounce that unless transported within a reasonable time, they should be given up to the appellant as his property. I do not think we are called on, at this time, to take any such step. It would be premature, and might operate injuriously and unjustly. We cannot possibly foresee, what circumstances may occur, or how they may influence, the question hereafter. All that we can safely do now, is to direct the circuit court, to which we shall send back this interlocutory decree, to reserve to the parties, liberty to resort to the court for its further aid, if at any future time such aid, in their opinion, shall become necessary for the due execution of the testator's will. Under such leave, if the appellant shall find that the transportation of the negroes is not likely to take place, or is unrea- 260 sonably *delayed, he may bring the subject before the court, and that which cannot now be foreseen, may then be decided, upon the actual circumstances of the case.

CABELL, J. The intention of the testator to emancipate his slaves, is too evident to require argument; and it is equally clear, that there is nothing illegal in the mode which he has adopted, for the execution of that intention. Slaves may be emancipated by deed or will, at the pleasure of their owners: but they forfeit their freedom unless they remove, within twelve months, beyond the limits of the commonwealth. It can, therefore, be no objection to the emancipation, in this case, that the

testator has directed it on the condition of their willingness to go to Liberia.

As to the objection that Dissosway, the trustee, may fail to perform, or may violate, the trust, there is no reason to suspect such violation. The testator who knew him, has confided to him the execution of his benevolent intentions; and we ought not to deprive him of all power to execute them, on the mere allegation that he may, possibly, act improperly.

The will imposed no obligation on the slaves to express their willingness to go to Liberia, until they were properly called on to make their election. If the residuary legatee wished to avail himself of the rights which would accrue to him, on their refusal to go to Liberia, it was his duty to take measures for compelling them to make their election.

I approve of the principle declared by this court, in the case of Isaac v. West, 6 Rand. 652, that every instrument conferring freedom, should be construed liberally, in favor of liberty. And under the influence of this principle, I am of opinion, that, even if the colonization society should be unable or unwilling, to transport these people to Liberia, they would still be entitled to their freedom, provided any other person would furnish the means of sending them there. The testator did not mean to burden his estate with this expense; but he cared not who else might bear it.

261 *I think the children born since the death of the testator, are entitled to their freedom, equally with their mothers. If the mothers, are to be considered, by relation, as free from the death of the testator, then the children, following the condition of the mothers, were free at their birth—or, if the children were born slaves, they were the slaves of the testator, and, as such, they passed by the will, with their mothers, to be sent to Liberia.

It is not to be believed, that this benevolent testator, in emancipating the mothers, intended to separate from them their infant children, and to consign them to slavery. He intended that the election of the mothers should decide the destiny of their infant offspring.

But the decree is erroneous in the particulars mentioned by my brother Carr, and I concur in the correction of it proposed by him.

BROOKE, J., concurred.

TUCKER, P. The first questions in this case, turn upon the intention of the testator and the legality of that intention. Of the intention, I think, there can be no reasonable doubt. It has become a matter of history that a colony has been established at Liberia for the reception of emancipated slaves, and that slavery is there unknown. The testator, in reference to this well known state of things, devises his slaves to a trustee, for the purpose of being sent to that colony. If his will be executed in terms, they must be free; and it is therefore equivalent, to say that he willed that they should be free. However, or by whatever words, the intention is expressed, that intention must prevail; for there is no prescribed form in which the benevolent design to emancipate a slave is required to be

expressed. As little doubt exists of the legality of this intention. The slaves were not to be free until they should be sent to Liberia; and they were not to be sent there against their consent. It is not perceived,

that there is anything in the policy of 262 the *law, as there certainly is not in its statutory provisions, which forbids an emancipation by transportation to a free colony.

That such transportation will necessarily operate as an emancipation, has been questioned in the argument, because the slaves may be brought back to Virginia, and then upon the principle decided by lord Stowell in the case of The mongrel woman Grace, they will be slaves again. But this argument is refuted by two considerations: 1, that bringing them back by force or against their will, would not restore them to their original status; for it is the voluntary return to their own country in slavery, from which it is implied, that the original status was not changed during their residence in a land where slavery is unknown: and 2. to bring them back again into slavery, would be directly to frustrate the testator's will, that they should be free, and is therefore not an admissible supposition.

It was next contended, that the gift of freedom by this will, depends upon the performance of two precedent conditions, with which that gift has been clogged; namely, that they shall make their election in the space of a year, and that the expense of transportation shall be paid by the colonization society. As to the first, the phraseology of the will is not exactly what the argument supposes. It is, as to the remaining slaves besides Clara and her family, as follows: "Those who are willing to go shall be sent to Liberia; those who prefer staying, shall be given, within twelve months after my decease, to my brother John Elder." By this clause, it was argued, the testator intended to create a condition, and that his slaves should only be free on condition. But what was that condition? It was that they should be willing to be transported. But, surely, there is nothing from which we can infer, that the time of declaration of their willingness, was of the essence of the condition. Contemplating that the affairs of his estate would speedily admit of the execution of this bequest, desirous to hasten that execution, on the one hand, and to pass over the property at once to his brother,

on the other, if they should refuse to 263 go, he *fixes on the twelve months, as the probable time when they should be delivered to him. If the affairs of the estate should unexpectedly prevent an assent of the executor to this bequest of freedom within the year, or if the slaves should have been kept in ignorance of his benevolent intentions, until the year had gone by, can we believe, for a moment, that it was his design that they should lose their right to the boon he bequeathed to them? I think not. But this is not all. The will does not say they must elect within the year. It declares, that those who prefer to stay shall be given within twelve months after his death, to

his brother. The question then would be, have any preferred to stay within the twelve months; and if not, then the gift over cannot take effect, if we are to give this rigorous construction to the clause. But the truth is, such a construction is incompatible with a fair view of the testator's designs; of the nature of the case; and of the character of the beneficiaries. They were ignorant slaves: they could not be free without the executor's assent, and the great object of their master was to effect their liberation, as soon as it was probable that assent could be safely given. Whenever the executor was prepared to assent to this legacy of freedom, the testator gave them a choice: that choice implied that the proposition should be submitted to them; submitted by that individual (the executor) who still held them in his hands. Until that was done, they were not, I conceive, called upon to declare, whether they were willing to go, or preferred to stay. I, therefore, think there is no obstacle to the execution of the will in their favor, arising out of the delay. Then, as to the provision, that the expenses should be defrayed by the colonization society. There is no assignable reason for supposing the testator made it a *sine qua non*, that that society should pay the expenses. His object was merely to provide that his estate should not be charged with them. But be this as it may, the case is not that of a bill by the slaves, to carry the trust into execution, in which they would have to prove that the society or some other

264 *person was ready to incur the charge; but it is a bill by Elder, to reduce them to slavery, in which the onus would be upon him to shew, that the society had refused to defray the expenses; for that is easily proved, if it be true. I think, therefore, there is nothing in this objection.

As to the increase born since the testator's death, they were born slaves, as their mothers are yet slaves; but they fall as fully as their mothers, within the general expression, "the rest of my negroes," and of course are equally the objects of the trust. How their election shall be ascertained has been a subject of difficulty. In these anomalous cases respecting slaves, we must be guided by reason and good sense, in the absence both of authority and analogy. The course which was taken in the court below, seems to me both natural and judicious, and is therefore approved.

As to the hires: these must be brought into the account of the estates. I cannot distinguish this case from *Paup v. Mingo*. *Dissosway* was a mere trustee, and takes nothing but in that character. He is, therefore, not entitled to the hires; nor are the slaves or the executor so entitled.

Upon the whole, I think the decree is right in all substantial points; though I do not concur in the correction of its details proposed by the other judges. I should have preferred a decree, directing the circuit court, to limit some reasonable time, within which the trustee *Dissosway* (or in case of his refusal or failure to execute the trust, such other fit person as may be willing to execute the same, to be appointed by the

court) shall proceed to transport the slaves, who assent to be transported, to Liberia, agreeably to the directions of the will; and to require from *Dissosway* (or such other trustee) bond with surety in an adequate penalty, with condition, either to execute the trust to the best of his ability within the time so limited, or to deliver the slaves (deaths and accidents excepted) to the appellant as his property. I concur in the opinion of the other judges, that the circuit court erred in requiring the refunding bond, which in cases of emancipation, cannot properly be demanded; and that liberty should be reserved to the parties, to resort to the court, at any time hereafter, for its aid, in any future event which may render it necessary and proper.

The decree entered by the court, declared, that there was no error in so much of the decree, as directed the executor to deliver the slave *Mingo* to the appellant, on the terms therein stated, and to deliver the other slaves to *Dissosway*, to be by him sent to Liberia; but that so much of the decree as suspended the delivery of these slaves to *Dissosway*, till he should give bond and security in the penalty of 4000 dollars, to refund in case debts should subsequently come against the estate, was erroneous; this court being of opinion, that, under the circumstances of this case, no such bond should be required—and that liberty ought to be reserved to the parties, to apply to the court for its further aid, if, at any future time, such aid should, in the opinion, become necessary for the due execution of the testator's will.

Decree reversed, with costs to the appellee, as the party substantially prevailing, and the cause remanded to the circuit superior court of *Petersburg &c.*

266. *Bird v. Wilkinson.

February, 1853.

Bill of Sale—Intended as Security for Money—Unrecorded—Bona Fide Purchaser—Effect.—L. executes a bill of sale of a slave to B. which bill of sale, though absolute on its face, was in fact intended as a mortgage: the bill of sale, though intended

***Bill of Sale—Intended as Security for Money—Effect.**—In *Poling v. Flanagan*, 41 W. Va. 195, 23 S. E. Rep. 687, it is said: "It is very evident from the evidence that the bill of sale, though simply such, passing the legal title, and silent as to any right of redemption, was simply a security for the payment of money due *Poling Bros.*, so intended by the parties, and therefore, in the view of equity, a mortgage. *McNeel's Exrs v. Auldridge*, 34 W. Va. 748, 12 S. E. Rep. 851; *Bird v. Wilkinson*, 4 Leigh 266."

Also, in *Klinck v. Price*, 4 W. Va. 9, the court said: "Without referring to the evidence in detail, it is clear the proofs in the record show that the conveyance was made to secure the payment of money to *Klinck* and is therefore, in effect, a mortgage. *Ross v. Norvell*, 1 Wash. 14; *Thompson v. Davenport*, 1 Wash. 125; *Robertson v. Campbell*, 3 Call 421; *Chapman's Adm'x v. Turner*, 1 Call 280; *King v. Newman*, 2 Munf. 40; *Dabney v. Green*, 4 Hen. & M. 101; *Pennington v. Hanby*, 4 Munf. 140; *Bird v. Wilkinson*, 4 Leigh 266."

See monographic note on "Mortgages" appended to *Forkner v. Stuart*, 6 Gratt. 197.

+**Deeds of Trust—Unrecorded—Bona Fide Purchasers.**—A deed of trust unrecorded is void as against subsequent purchasers without notice. *Weinberg v. Rempe*, 15 W. Va. 858, citing *McClanahan v. Siter*, 2 Gratt. 300; *Bird v. Wilkinson*, 4 Leigh 266; *Beck v. De Baptists*, 4 Leigh 349.

The principal case is also cited in *Cox v. Wayt*, 26 W. Va. 817. See monographic note on "Deeds of Trust" appended to *Cadwallader v. Mason*, Wythe 188.

as a mortgage, was never recorded; and possession of the slave was never delivered to or acquired by the vendee, and could not be at the time the deed was executed, the slave being then a runaway; but the vendor afterwards got possession of him, without the knowledge or consent of the vendee, and then sold him to C. a fair purchaser, for valuable consideration, without notice of the previous bill of sale to B.: HELD, that the bill of sale from L. to B. must be taken for what it was intended to be, a mortgage, which was void as against the subsequent fair purchaser, because it was not recorded according to the statute of conveyances, 1 Rev. Code, ch. 99, § 4.

In an action of detinue for a negro man slave named Phil, brought by Bird against Wilkinson, in the circuit court of Henrico, there was a special verdict stating the following case:

John Lunsford, by bill of sale, executed on the 6th August 1822, conveyed the slave Phil, with two others, to Bird. The bill of sale was absolute on its face, and expressed to be made in consideration of 1300 dollars paid by Bird to Lunsford; but it was, in fact, a conditional conveyance, being intended and received as a collateral security for the due application by Lunsford, of a sum of 1300 dollars put into his hands by Bird, to purchase slaves for the latter; it was intended to have the effect of a mortgage or deed of trust. This bill of sale was never recorded. It did not appear, that Lunsford had applied the 1300 dollars put into his hands by Bird, to the purchase of slaves for him, or had returned the money to Bird; no evidence was adduced by either party, as to those points. The slave Phil was not delivered to Bird, at the time the bill of sale was executed; he was then a runaway, so that no actual delivery could have been then made; nor did Bird ever after acquire actual possession of him. But Lunsford got possession of him, and had him secured in the jail of Lancaster; whether with the knowledge or consent of Bird, or not, did not appear.

267 *On the 10th September 1822, Lunsford executed another bill of sale to Osmond Johnson; whereby, in consideration of 400 dollars, he conveyed to him, this slave Phil and sundry others; and, shortly afterwards, he gave Johnson an order on the jailor of Lancaster, for the delivery of the slave to him; and he was delivered to him accordingly. Johnson, thus having the possession, sold the slave to Wilkinson, for a valuable consideration actually paid, and delivered possession to Wilkinson immediately. This was done before this suit was instituted. It was not found that Johnson purchased without notice of the bill of sale previously executed by Lunsford to Bird; but it was found, that Wilkinson was a fair purchaser from Johnson, without notice of Lunsford's bill of sale to Bird. And the question referred to the court, was, Whether, upon this state of the case, Bird was entitled to the slave?

The circuit court held that he was not, and gave judgment for Wilkinson; from which Bird appealed to this court.

Robinson and Scott, for the appellant. The decisions of this court have recognized the general principle of *Edwards v. Harben*, 2 T. R. 587, and *Hamilton v. Russell*, 1 Cranch 309, that an absolute bill of sale of goods is fraudulent per se, as to creditors, unless possession accompanies and

follows the deed. But *Edwards v. Harben* is now doubted in England; *Steward v. Lombe*, 1 Brod. & Bing. 506; 5 Eng. C. L. R. 167. And there, the court established the principle, that the sale will be valid, if such possession be given as the nature of the case admits of. So, if the property is absent at sea, or for any other cause it is impossible for the vendee to take possession, this impossibility is an answer to the presumption of fraud that might otherwise arise. *Conrad v. Atlantic Ins. Co.*, 1 Peters 449; *Gardner v. Howland*, 2 Pick. 599. In the case cited from Peters, the propriety of the rule that the fact of possession not accompanying and following the deed, is fraud per se, is left an open question; so that *Hamilton v. Russell* is not now

268 considered *more conclusive in the supreme court of the United States than *Edwards v. Harben* is in England. In *Beals v. Guernsey*, 8 Johns. Rep. 348, and *Butts v. Swartwood*, 2 Cowen 431, sales were sustained, where the vendor's possession continued no longer than convenience required. Like principles have been recognized by the judges of this court, in *Land v. Jeffries*, 5 Rand. 216, 252, 259, 271, 603, and in *Clayton v. Anthony*, 6 Rand. 304. In the case now before the court, the slave was a runaway at the time of the sale, so that it was impracticable for the vendor to give, or for the vendee to take, actual possession immediately. The fact of inability to deliver or take possession, is an excuse for non-delivery; and that inability being found here, the sale is valid. To hold otherwise, were in effect to hold, that personal property cannot pass by sale, unless it be capable of being delivered at the time of sale. The circumstance of Lunsford having regained the possession of the runaway slave, cannot affect Bird's title; for Lunsford took the possession without his knowledge or consent, and without any right to exercise that or any other act of ownership over him; and Lunsford's sale to another could pass no title as against Bird.

There is, however, another objection to Bird's title, which will be mainly relied on—that the bill of sale under which he claims, though absolute on its face, was in fact a mortgage or deed of trust, and is void as to subsequent purchasers without notice, because it was not recorded according to the statute, 1 Rev. Code, ch. 99, § 4, p. 362. But this objection to a bill of sale, that though absolute on its face, it was intended only as a mortgage, is not matter for a court of law; *Robinson v. M'Donnell*, 2 Barn. & Ald. 134; *Stark. Law of Ev. part IV. vol. 3, pp. 1002, 1009, n. 2.** The remedy is in a court of equity; *Ross v. Norvell*, 1 Wash. 14. A party ought not to be permitted to claim a benefit from the omission to record a deed, as to whom the registry of it would have been of no

269 avail, if it had been *duly made. If the bill of sale, in this case, had been recorded, and it had been proved that it was in fact intended as a mortgage, this would not have afforded an excuse for the non-delivery of possession to the vendee (per *Green, J.*, 5 Rand. 251,) nor would it

have made the deed valid as a mortgage. The rule should work both ways. Here, the bill of sale has not been recorded as a mortgage; and it ought not to be regarded as a mortgage, merely to favor a subsequent purchaser, when he would not have been affected by it as a mortgage, if it had been recorded. It may be of mischievous consequence, to extend the statutes of registry so far as to require deeds to be recorded as deeds of trust or mortgages, which are not so expressed on the face of them: nor is there any necessity for it. For, if the deed be absolute on its face, the rights of creditors and subsequent purchasers are protected by the rule which requires that possession shall accompany and follow the deed, if practicable, or as far as practicable: it is only where the deed is not absolute, but is on its face a deed of trust or mortgage, so that the possession may lawfully be separated from the property, that the law does or ought to require that it shall be recorded. This subject was touched in *Land v. Jeffries*; and the judges, so far as they expressed opinions upon the point, regarded the statute as applying to such deeds only as are trusts or mortgages on their face; 5 Rand. 221, 272, 615. The counsel for the appellant also cited and commented on *Dey v. Dunham*, 2 Johns. Ch. Rep. 182, 191; *James v. Johnson & Morey*, 6 Id. 417, 432; *James v. Morey*, 2 Cowen 246, S. C. and *Coterell v. Purchase*, Ca. Temp. Talbot 61.

The attorney general and Lyons, for the appellee. In any view that can be taken of the case, the bill of sale from Lunsford to Bird must be regarded as fraudulent and void as against Wilkinson, a subsequent fair purchaser, for value paid, without notice. The bill of sale to Bird must be taken for what it purports to be, an absolute sale, or for what it was really intended, a mortgage. As an absolute sale, it
270 *was fraudulent and void, because possession did no wise accompany and follow the deed, and the parties in truth intended that the vendor should retain the possession. The circumstance that the slave was a runaway cannot excuse the non-delivery of the possession, and so bring the case within any of the exceptions to the rule of *Edwards v. Harben*: because, in the first place, the vendee took no steps whatever to obtain the possession; and, in the next place, the circumstance that the instrument was in truth intended as a mortgage, affords a conclusive answer to the argument, that the actual delivery of possession was impracticable, and therefore not necessary to the validity of the transaction; since it shews, that it was designed that Lunsford should not deliver the possession, as a vendor, but that he might retain it, as a mortgagor. If this bill of sale be taken as a mortgage, as a conveyance with a secret trust, according to the real intent of the parties, it was void, not only because the taking a bill of sale in form, where the real transaction is a mortgage, tends to deceive and injure others, and is therefore fraudulent, but also for the conclusive reason, that it was not recorded; *Shields v. Anderson*, 3 Leigh 729, 737. If the deed

had expressed the real contract between the parties, the law would have required that it should be recorded, in order to give it validity against creditors and subsequent purchasers: the mortgagee could not exempt himself from the duty of recording it, by the omission to express in the instrument the real terms of the contract.

CARR, J. If the transaction between Lunsford and Bird had been, what the bill of sale purports, an absolute sale of slaves, the question would fairly have arisen, whether the fact of the slave in question being at the time a runaway, excused the actual delivery, and whether the subsequent assertion of his right by Bird, and the other facts found, cleared him of the imputation of fraud? It was contended, that a court of law must take this as a bill of sale; and *Robinson v. M'Donnell* was cited in support of the position; 271 *but to my mind, it does not support it. There, Bell & Clarkson executed a bill of sale for two ships to the Sharps: they retained possession, and acted as owners: the Sharps became bankrupts, and their assignee took possession of one of the ships: at a subsequent time, Bell & Clarkson became bankrupts, and their assignees brought trover for the ship. At the trial, it was proved, that the real consideration of the bill of sale was, that the Sharps should accept Bell & Clarkson's bills to the amount of £12,000, and that the ships were to be a security for their advances upon such acceptances, but were to remain with Bell & Clarkson, until they made default in providing for the acceptances; which they had not done, when the bankruptcy of the Sharps happened, and their assignees took possession of the ship. The plaintiffs were nonsuited at nisi prius, and a rule was moved for at bar, to enter a judgment for them; which, on argument, was refused. Chief justice Abbot said—"I think that it was not competent for Bell & Clarkson to avail themselves of the parol agreement, in contradiction to their own deed. The bill of sale might be void upon the statute of Elizabeth, as against creditors, but not as against the parties who executed it; and their assignees are in this respect, in no better situation." It will be remarked, that the point of the decision was, that a party shall not avail himself of a parol agreement, in contradiction of his own deed; and so far from deciding that a court of law could not, at the instance of any one, receive such evidence, the court decided in effect, that it might; for the chief justice added, that the bill of sale, though good between the parties, might have been void as against creditors; which could only be by their shewing the facts, and disclosing the true nature of the deed. In the case before us, it is not Lunsford the grantor, who seeks to shew, that the bill of sale is in truth a mortgage, but a subsequent purchaser without notice from Lunsford; and as our statute enacts that as to all such purchasers, mortgages shall take effect and be valid, from the time they are proved or acknowledged, and
272 *delivered to the clerk to be recorded, and from that time only, it would seem to follow, that, in whatever court such

purchaser is impleaded, he may avail himself of all proper evidence to prove, that the deed, however absolute on its face, is in truth a mortgage; and therefore of no validity as to him, because unrecorded: and then it would devolve on the other party, to prove notice upon him. The evidence then being admissible, the question is, do facts found in the special verdict, prove this a mortgage? And that indeed is no question; for it is found, in so many words, that "it was intended to have the effect of a mortgage or deed of trust;" and whether the one or the other, we know that the effect, in respect to the recording, and subsequent purchasers, is precisely the same.

I do not think it necessary to notice any other point. This is an action of detinue for a slave brought by a mortgagee on an unrecorded mortgage, against a subsequent purchaser for a valuable consideration without notice—and the judgment is for the defendant. I think it must be affirmed.

CABELL, J. As the deed from Lunsford to Bird, although absolute on its face, was intended by the parties, at the time of its execution, to operate only as a mortgage or deed of trust, I am of opinion, that, not having been recorded according to law, it is void as to subsequent purchasers without notice. On this ground, without considering any other, I think the judgment is right and ought to be affirmed.

BROOKE, J. It is the admitted principle of the common law, that the title to personal property passes by the actual delivery, or by a constructive delivery of it, as in the case of *Pleasants v. Pendleton*, 6 Rand. 473, and many like cases. Mortgages and deeds of trust of personal property, which are directed by statute to be recorded, (by which the title passes without actual delivery), do not impair this principle of the common law. A bill of sale of 273 personal property "absolute on its face, is not within the statute, and need not be recorded to give any greater validity to it; and if recorded, it does not affect this common law principle. The possession of the property must accompany it, to make it a valid transfer of the title; unless, indeed, there are unavoidable circumstances (such as in the case of the transfer of a ship at sea) shewing that delivery was impracticable at the time, and that such circumstances made no part of the contract; for, otherwise, if the circumstances which prevented the delivery, made a part of the contract, they ought to be stated on the face of the bill of sale, and it ought to be recorded, in order to give it validity. As regards creditors and subsequent purchasers, where that is not done, the sale or transfer is fraudulent per se; that is, it is prima facie evidence of fraud, which is conclusive until evidence to explain it is introduced; (see my opinion in *Land v. Jeffries*). But, in the case before us, it appears by the special verdict, that it was not the intention of the owner, Lunsford, to deliver the slave in question to the appellant, though it is found that he was a runaway at the time, but to transfer to him the title of this and two other slaves, as a security for the due application of

1300 dollars, to be laid out in the purchase of other slaves for the appellant. This was one of those secret trusts, which the statute requiring mortgages and deeds of trust to be recorded, intended to inhibit, as to creditors and subsequent purchasers. Therefore, the second bill of sale to Johnson, under whom the appellee claims the same slave, accompanied by delivery of the possession, must prevail, notice to Johnson of the previous bill of sale to Bird, being negatived by the finding of the jury. As to the question raised at the bar, whether evidence of the secret trust was proper at law, there can be no doubt. The bill of sale is only evidence of the title; as to third persons, it does not pass the title of itself, as in the case of a deed recorded for that purpose, in which case, resort is had to a court of equity to remove the deed out of the way of proceedings at law. But its validity may be questioned, by creditors or subsequent purchasers, at law as well as in equity. *Stratton v. Minnis*, 2 Munf. 329. The judgment must be affirmed.

TUCKER, P. This is, I think, a very clear case against the appellant. The special verdict finds, that the deed under which the plaintiff claims, which is absolute upon its face, was intended and received as a conditional conveyance; that it was intended only to secure the payment of the sum of money specified therein. It was, therefore, in fact, nothing but a mortgage. Now, if it had been a mortgage on its face, it would have been void as to the subsequent purchaser, because it had not been recorded. So far as that purchaser is concerned, it would never have taken effect at all; because mortgages "take effect as to subsequent purchasers from the delivery to the clerk, to be recorded, and from that time only." Can it be then, that the falsehood of the conveyance, places the plaintiff in a better situation, than if the deed had been draughted according to the truth of the case? Can it be that even a fair deed would be considered void, because it is hidden from the eyes of purchasers, and that this deed is good, which, even when seen, hides in impenetrable secrecy from every eye, except those of the parties concerned in the transaction, its real character? I cannot think it. Every well received maxim must be overturned before it can be so: Suppression must become a merit, and falsehood a virtue; and a guilty party must be permitted to take advantage of his own wrong. So far from the absolute form of the deed making the appellant's case better, it stamps it in my judgment with stronger features of fraud, as respects purchasers and creditors. Independently of express adjudications upon the subject, it is but a corollary from the principles established in *Twine's* case. It is a transaction calculated to work a double fraud; to deceive a double set of creditors and purchasers; creditors and purchasers both of the grantor and grantee. To those of Bird, he is held out as the absolute owner of the slave; and when a creditor seeks to charge it, or a purchaser acquires it, this 275 *secret defeasance is brought forward to defeat them. To the creditors of

Lunsford, on the other hand, the property is held out as the absolute property of Bird, while there is a secret trust between the parties, covering the equity of redemption of Lunsford in the mortgaged subject. What transaction can be more directly fraudulent? If I convey my estate to another, without any consideration, upon a secret trust for my benefit, the deed is indelibly stamped with fraud, in all contests with my creditors: Because my grantee covers my property from them. If they confide in the good faith of the transaction, they are led to suppose, that that property is not chargeable with their debt. And if this be so, where there is no consideration, how does it differ where there is a false consideration? where there is an equity of redemption, which the creditor would have a right to subject to his demand, which, by the falsehood of the deed, is hidden from his view?

The authorities, I think, very strongly sustain this view of the case; but it is unnecessary to examine them.

Judgment affirmed.

276

***Raynolds v. Gore.**

February, 1833.

Bail—Insufficient—Waiver of Objection.—On a *capias ad respondendum*, on which appearance bail is required, the sheriff takes insufficient bail, but the plaintiff proceeds against the bail, and recovers judgment against him as well as the principal, without objecting to the sufficiency of the bail, at the rules or in court, at or before the first term after the return day of the writ, or at any time pending the suit: **Held**, the plaintiff cannot afterwards maintain an action against the sheriff for taking insufficient bail.

Bail Bond*—Failure to Insert Name of Bail—Waiver of Objection.—A bail bond is executed by the principal and the bail, though the name of the bail is not inserted in the body of the bond (there being a blank left for his name) which, in other respects, is a regular bail bond, and the plaintiff proceeds on the bond and recovers judgment against the bail as well as principal, and this judgment stands unreversed: **Held**,

1. This is the bond of the bail, though his name is not inserted in the body of it; and,
2. **Same—Same—Same—Right to Action against Sheriff.**—If it were a defective bond, the plaintiff having a judgment on the bond against the bail, could not maintain an action against the sheriff for returning a defective bail bond.

Case in the circuit court of Frederick, by Jane Raynolds against Joshua Gore late sheriff of that county, for official negligence in executing process. The declaration alleged, that Raynolds having sued out a *capias ad respondendum*, in an action of *assumpsit*, against one Hooker, on which appearance bail was required by an order of a justice of the peace of Frederick, this process, with an order requiring bail, was put into the hands of one of Gore's deputies to be executed, and Hooker was by him thereupon arrested; and that the sheriff did not faithfully perform the duty imposed on him by the order requiring appearance bail. The negligence imputed to the sheriff, in the two material counts, was—1. that the appearance bail he took, was insufficient; and 2. that he took an imperfect bail bond, not obligatory on the person whom he accepted as appearance bail, and so, in effect,

failed to take bail at all. By reason whereof, though the plaintiff recovered judgment by default against Hooker and the appearance bail returned by the sheriff, she failed in recovering the amount adjudged to her against them. To these two counts Gore pleaded the general issue.

277 *At the trial, the plaintiff filed two bills of exceptions to instructions given by the court to the jury.

1. The first stated, that the plaintiff gave in evidence the record of her action against Hooker, by which it appeared, that the sheriff returned upon her process against him, that he had executed the same, and that one Russell was the appearance bail; whereupon regular proceedings were had against Hooker, and Russell as his appearance bail; judgment by default was recovered against them for the damages assessed in a writ of inquiry, upon which a *fieri facias* was sued out against both jointly, and proved unavailing. But the plaintiff did not, at any time, during the pendency of her suit against Hooker, take any exceptions to the sufficiency of Russell as his appearance bail in that suit. Whereupon, the court, on the motion of Gore's counsel, instructed the jury, that even if they should find that Russell was insufficient bail at the date of the bail bond, yet, as to that point, they should find for Gore, upon the issue joined upon the first count in the declaration above stated, because Raynolds, having failed to take exceptions to the sufficiency of Russell, as appearance bail for Hooker in her action against him, during the pendency thereof, within the time prescribed by the statute,[†] could not now in this action against the sheriff, take advantage of the insufficiency of the appearance bail taken by him in the action against Hooker: to which opinion the plaintiff excepted.

2. It appeared by the other bill of exceptions, that the name of Russell was not inserted in the body of the bail

278 *bond taken and returned by the sheriff in Raynolds's action against Hooker: the bail bond ran thus—"Know all men by these presents, that we W. Hooker and — are held and firmly bound unto Joshua Gore sheriff of Frederick" &c. But the bond was signed, sealed and delivered by Russell, and was a regular bail bond in all respects, except that Russell's name was not inserted in the blank. Whereupon, the plaintiff's counsel moved the court to instruct the jury, that this was not the bond of Russell, because his name no where appeared in the body of it, and that if it was not Russell's bond, they ought to find for the plaintiff, in this ac-

*Statutory Bonds—Validity.—See monographic note on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107. The principal case is cited in Beery v. Homan, 8 Gratt. 52.

[†]1 Rev. Code, ch. 128, § 45, 46, p. 500. The statute, after providing, that if the appearance bail returned by the sheriff be objected to by the plaintiff, and be adjudged insufficient by the court, and the defendant shall fail to give special bail, the sheriff shall thereupon be considered a party to the proceedings, and together with the appearance bail, shall be subject to the same judgment and recovery as the appearance bail alone would have been subject to.—provides, further, that "objections to the sufficiency of appearance bail shall be taken either at the rules, or in court, at or before the first term after the return day of the writ, and not thereafter: they shall be decided by the court without delay, and the burden of proof shall lie on the party affirming the sufficiency."—Note in Original Edition.

tion, on the issue joined on the second count above stated. But the court refused to give such instruction; and instructed the jury, on the contrary, that though Russell's name did not appear in the body of the bond, yet not being excluded from it, and having been executed by him, it was his bond; and further, that, as the plaintiff in her action against Hooker, had proceeded on this bond as Russell's bond, and recovered judgment against Hooker and Russell as his appearance bail, which judgment was still in full force, it was not competent to her, in this action, to call in question the validity and effect of the bail bond. To this opinion also the plaintiff excepted.

There was a verdict and judgment for the defendant; from which the plaintiff appealed to this court.

Nicholas argued, for the appellant, that, at common law, an action on the case lay against a sheriff for any default in the performance of his official duty, and, in particular, for neglecting to take bail when required, and of course, for taking insufficient bail; and that the proceeding against the sheriff given by the statute of Virginia, in case of insufficient appearance bail taken and returned by him, did not deprive the plaintiff of his common law remedy, if he chose to resort to it. As to the objection to the validity of the bail bond, because the name of the bail no where appeared in the body of it, he cited *Harrison v. 279 Tiernans*, 4 Rand. *177, where it was held, that a bail bond blank as to the sum to be paid, was a mere nullity; and *Smith v. Crooker*, 5 Mass. Rep. 538.

THERE WAS NO COUNSEL FOR THE APPELLEE.

PER CURIAM. There is no error in the directions given by the circuit court to the jury. Judgment affirmed.

Markham v. Guerrant & Watkins.

February, 1833.

(Absent BROOKE, J.)

Conveyance in Trust for Maintenance of Grantor and Family—Expenditure of Income in Less Than a Year—Case at Bar.—J. M. by deed conveys land and slaves and other personality to W. F. in trust, for the support and maintenance of J. M. and L. his wife, and their children and family during the joint lives of J. M. and his wife, and the life of the longest liver of them, remainder to their children, with full power to the trustee to manage the estate, and to sell any part of the trust subject to pay the debts of J. M. then due; J. M. in the space of seven months contracts a debt to mer-

***Conveyance of Property in Trust for Maintenance of Grantor and Family—Rights of Cestuis Que Trust.**—In the principal case a husband conveyed property in trust for the support of himself and wife and children. The husband contracted debts, without the assent of the trustee, and his creditors sought to subject the trust subject to the payment of their demand. It was held that the husband could not derange the plan of the trust, and thereby affect injuriously the interests of the other *cestuis que trust*. For this proposition the principal case is cited in *foot-note* to *Perkins v. Dickinson*, 3 Gratt. 385; *Nickell v. Handy*, 10 Gratt. 341. 347. See discussion of this question of blended trusts in *foot-note* to this last case, where the principal case is cited. *Johnston v. Zane*, 11 Gratt. 570, and *note*; *Armstrong v. Pitts*, 13 Gratt. 243; *Penn v. Whitehead*, 17 Gratt. 515; *Brown v. Lambert*, 33 Gratt. 265; *Bain v. Buff*, 76 Va. 374; *French v. Waterman*, 79 Va. 625; *Salomone v. Kelley*, 80 Va. 99; *Hutchinson v. Maxwell*, 100 Va. 160, 40 S. E. Rep. 658; *Tyack v. Berkeley*, 100 Va. 296, 40 S. E. Rep. 907; *Guernsey v. Lazear*, 51 W. Va. 323, 41 S. E. Rep. 408; *note* in 3 Va. Law Reg. 734. See also *Nixon v. Rose*, 12 Gratt. 429, and *Summers v. Bean*, 13 Gratt. 422, both citing the principal case.

chants for goods furnished to an amount equal to whole yearly profits of trust estate: **HOLD.**

1. **Same—Same—Prospective Profits—Right of Equity to Charge.**—That such debt contracted by J. M. cannot be properly charged by a court of chancery on the prospective profits of the estate, so as to bereave J. M.'s wife and children of support; and

2. **Same—Same—Same—Right of Trustee to Pledge.**—That the trustee could not pledge the prospective profits of the trust estate necessary for the current support of the *cestuis que trust*, to such a debt, if contracted even by the trustee himself, for their past support: much more the debts contracted by one of the *cestuis que trust* without the trustee's consent or knowledge.

3. **Equity Practice—Infant Cestuis Que Trust—Sale of Property for Support.**—But, it seems, a court of chancery may authorize the sale of the personal property of infant *cestuis que trust*, in cases where such sale is absolutely necessary for their support.

By deed, dated the 25th June 1810, and duly recorded in the county court of Goochland in July following, John Markham conveyed to William Fleming, George Markham and Thomas Harris, a parcel of land in Goochland, and thirteen slaves and some other personal property, in trust —“that they should make the utmost possible profits from the said estate, by cultivating the land or otherwise at

280 *their discretion, for the purpose of paying all the said John Markham's just debts, and for the support and maintenance of the said John Markham and Lucy his wife, and their children and family, during their joint lives and the life of the said Lucy; and at her death, in case the said John should then be dead, that then the whole of the said estate both real and personal be equally divided among all the children of the said John and Lucy then living, and the legal representatives of such of them as may then be dead: with full powers in the meantime to the said trustees, or any or either of them, to employ or hire an overseer or overseers, at their discretion, to look after and direct the said slaves for the better management and improvement of the said estate; and also to keep in repair the houses already on the premises, and to build and erect thereon such other house or houses as to them or either of them shall seem necessary for the better securing the crops or improving the said estate; and further for the said trustees or either of them to sell any part or parts of the said estate (except the land during the life of the said Lucy) as may be judged necessary and expedient for the purpose of paying the debts of the said John Markham now due and owing to any person or persons whatever.”

Guerrant & Watkins exhibited their bill, in the superiour court of chancery of Richmond against William Fleming and George

In *Doswell v. Anderson*, 1 Pat. & H. 194, it is said: “With regard to the account of Dr. Fleming, that stands on a different footing. It seems to be a reasonable one. The services were rendered to the beneficiaries and the trust slaves, and, no doubt, were necessary for their preservation. There was no improper dealing between him and any of the beneficiaries. When a physician is called on to visit the sick, humanity, and often urgent necessity, require his immediate attendance. He cannot stop to enquire from whence his pay is to come, or to bargain with a trustee; and concurring, as we all cordially do, in the decision of the court of appeals, in the case of *Markham v. Guerrant & Watkins*, 4 Leigh 279, I am of opinion, that this account, on the authority of that case, should be paid, even if it should be necessary to sell a portion of the trust property for the purpose.”

Markham the surviving trustees, Lucy the widow of John Markham then dead, and their children, eleven in number, all but two of whom were infants—setting forth the deed of trust; alleging, that between the first of April and the last of October 1818, they, relying on the credit of the trust estate, had furnished sundry necessary supplies of merchandize, to John Markham (in his lifetime) and his family, for their domestic use, to the amount of 344 dollars; that, on application to Fleming, the trustee, he had assumed the payment of the debt out of the trust estate, by a letter to the plaintiffs, which they exhibited with their bill; that John Markham had
281 lately died, leaving no property *what-ever, but the trust estate; and praying, that the trustee should render an account of the trust estate, and that the plaintiffs' demand might be provided for and paid, either out of the profits, or by a sale of a part of the trust subject for the purpose.

Fleming answered, that he had been, from the first, the only acting trustee, the trustee Harris having died shortly after the execution of the deed, and G. Markham having declined the trust; that he was largely in advance to the trust; that many of the slaves had been sold to pay the debts of John Markham due at the date of the deed of trust; that there remained of the trust subject, only the land and three labouring slaves, and many young ones that required support; that the supplies alleged by the plaintiffs to have been furnished by them, were made without his knowledge or consent, and having regard to the trust property, were enormous in amount; that as to his alleged assumpsit to pay the plaintiffs' claim out of the trust subject, the fair construction of his letter exhibited by them to prove the assumpsit, was, that he only consented that the plaintiffs' account, so far as it should appear just, might be paid out of the profits of the estate, as they might arise; that he had no competent authority, as trustee, to apply the principal to the payment of this debt: and he stated some specific objections to the plaintiffs' account.

The trustee George Markham answered, that he had never undertaken the trust, and had on the contrary declined it.

Lucy Markham, the widow, in her answer, admitted that the plaintiffs furnished her husband with goods to a large amount. And Bernard Markham, one of the children, said in his answer, that he was not in Virginia during the time of the dealings between the plaintiffs and his father; he believed, part of the articles charged in the plaintiffs' account was procured for the use of his father's family, but to what amount he was ignorant; and he referred to, and relied upon, the answer of the trustee Fleming.

282 *Fleming died pending the suit, and it was revived against his executor, and the cause regularly matured for hearing against the other defendants.

The letter of the trustee Fleming, exhibited with the bill, was addressed to the plaintiff Guerrant; it was dated the 1st November 1818, and was in these words: "Dear

sir, I have received your letter of yesterday's date; and in answer thereto, say, that I had but a slight view, for a few minutes only, of the account you sent over by Mr. Markham, who took it away, and I have never seen it since; however, sir, if you will agree to wait till the next crop, I will assume the payment of it out of the trust estate; and I am free to allow, that every thing that shall be made on that estate for market, whilst I remain a trustee, shall be applied to furnish necessaries for the family, though not at the will or caprice of John Markham himself, who was here to-day, and is generally much deranged in his mind. I became a trustee for the estate in July 1810, and have never disposed of a dollar's worth of the profits of the estate, except 120 bushels of wheat, delivered at Dover mills in November 1810, to Isaac Webster, to pay him in part for 300 dollars he advanced to redeem one of Mr. Markham's negroes then under execution: the balance of the 300 dollars I paid to Mr. Webster out of my own pocket, and since have advanced for the estate near 1000 dollars more, and 314 dollars of it, since last December; and yet he says he neither owes me or any other person a dollar. I will endeavour to get the account from John Markham, and if I fail, shall apply to you for a copy of it at a future day. (Signed) W. Fleming."

According to the report of a commissioner made in pursuance of an interlocutory order in the cause, the profits of the trust estate, were 300 dollars per annum.

Whereupon, the court, declaring that the plaintiffs' demand was properly chargeable on the trust subject conveyed by the deed of the 25th June 1810, and ought to be paid out of the rents and profits thereof in such manner as should be least injurious to the interests of the cestui que trust,

283 *and that Fleming the only acting trustee being dead, there was no person charged with the execution of the trust,—therefore decreed, that the marshal of the court should take possession of the trust subject, real and personal, and annually rent and hire out so much thereof as should be necessary to raise the annual sum of 150 dollars (having regard to the convenience and interest of the widow Lucy Markham and her family) and annually collect the rents and profits, and, after paying his own charges and expenses, pay the plaintiffs annually on the 1st June, 150 dollars, until the debt due them (adjudged to be 257 dollars) with interest thereon from October 1818, should be paid; provided, that if Lucy Markham the widow, or after her death, the defendants who should then become entitled to the trust subject, or any person for them should, in each year successively, give bond with surety to the marshal, to make the annual payment of 150 dollars to the plaintiffs, then they should not be disturbed in their possession, respectively, of the trust subject.

From this decree, on the petition of Lucy Markham the widow, an appeal was allowed by this court.

The cause was argued by Stanard for the appellant, and Rhodes for the appellees, upon the following points—

I. Whether there was any sufficient proof to establish the demand of the appellees on John Markham? and whether the letter of the trustee Fleming to the appellee Guerrant of the 1st November 1818, amounted to an assumpsit of the debt?

II. Supposing the demand established as against Markham,—whether any such debt contracted by him, could be charged on the prospective profits of the trust estate, so as to bereave his wife and children, especially after his death, of the use of those profits for their support and maintenance? The whole profits appearing from the estimated amount thereof, and the number of persons to be maintained out of them, to be inadequate to supply more than a bare subsistence to the cestuis que trust.

284 *III. Supposing the letter of the trustee Fleming, to amount to an assumpsit of the debt, whether any act or assumpsit of the trustee, could rightfully pledge the prospective profits of the trust subject necessary for the current support of his cestuis que trust, to pay debts contracted even by the trustee himself for their past support? much more debts contracted by one of the cestuis que trust, now no longer entitled to the profits or any part thereof, against the will and without the knowledge of the trustee?

CARR, J. The appellants allege in their bill, that they furnished supplies of merchandize to the amount of 344 dollars, for the use of Markham and his family, between the first of June and the last of October 1818, and that they furnished these supplies on the credit of the trust estate. Yet it is clear, these dealings took place without any previous directions from Fleming (the only acting trustee) to them, to credit Markham for the goods, or any communication with him on the subject. Was this a safe and prudent course in the plaintiffs? Could they charge the trust subject by crediting Markham, without the knowledge or assent of the trustee? Look at the circumstances of the case; the manifest occasion and intention, and the provisions, of the deed of trust. Here was a man with a wife and eleven children, whose habits and course were likely to waste his estate, and bring his family to want; to arrest this evil, and take out of his hands, the management of his affairs, and the power of dissipating his property, he is prevailed on to execute this deed, by which he strips himself of every atom of his estate; making provision for debts already contracted, but expressly disabling himself from so incurring future debts, as to make the property (no longer his) liable for them. This he had a right to do, and it was done openly; the deed was duly recorded, and the facts, of necessity, known to these appellants; for they state, that they dealt upon the credit of the trust fund, and make the deed and exhibit. By this deed they were told, that this was a permanent

285 *fund, the profits of which alone could be taken for the yearly maintenance of this large family; for it is clearly expressed, that the parties could not sell an atom of the principal except for the payment of the existing debts of Markham.

Nor was the trustee as in the case of Scott v. Loraine, 6 Munf. 117, bound to permit the cestuis que trust "to receive, take and enjoy all the interest and profits of the estate," thereby rendering it safe to deal with them to the amount of those profits; but the whole profits here, were to be applied by the trustees to the payment of the debts and support of the family. In Scott v. Loraine, the purpose of the deed was merely to intercept the marital rights, and shield the property from the husband's creditors: here it was to shield it from the improvidence and waste of the cestuis que trust, and to make that which, under their management, would have been dissipated in a short time, a permanent fund, which should, from its profits, furnish some support to the family during the life of the father and mother, and then be divided among their children; whereby they gained a vested interest, which, so far at least as the land was concerned, could not, even by a court, be divested during their infancy, except for debts of the grantor, existing at the date of the deed. The commissioner estimated the annual profits of this fund, at only 300 dollars; and we know that such estimates are generally beyond the mark. However this may be, it behooves every one, who deals on the credit of a fund like this, to look to the deed, and see how much can be disbursed; and to make his bargain beforehand with the trustee. In this case, then, I do not think, that the appellees, by their dealings with the family, acquired any right to charge the trust fund: if they did, every other person who chose to let the cestuis que trust have goods or property, would have the same right; and thus the check interposed by the deed would be destroyed, and one year's extravagance swallow up the revenue of years to come, and leave the wife and children to starve.

286 *The appellees, however, do not rest their claim on the sole ground of this dealing with the family. After closing the account, they made application by letter to the trustee; and they rely on his answer as an assumpsit of the debt. This letter acknowledges the receipt of their's of the day before; and says he had had but a slight view of their account, which Markham had carried away with him, but that if they will agree to wait till the next crop, he will assume to pay them out of the trust estate, being willing, while he remains trustee, that every thing that should be made on that estate for market, should be applied to furnish necessities for the family, though not at the will or caprice of Markham, who is generally much deranged in his mind. This, it will be observed, is rather a proposition to assume, provided the creditors would wait, that an actual assumpsit. But take it for an assumpsit; to what does it amount? A promise to pay out of the produce of the next crop made on the trust estate, for market. Could the trustee bind the fund in this way? Could he incur in one year, debts to the amount of several years profits, and thus by anticipation absorb the support of future years? I incline strongly to think not. He is intrusted with the fund, not to squander at

will, but to husband, protect, and apply it according to a sound discretion, to the support of the family from year to year. In regard to this point, his duty resembles a good deal that of a guardian; who, we know, is not suffered in any year to go beyond the profits of his ward's estate, without the express permission of the court. Here was a yearly fund of 300 dollars, for the yearly support of the family; to constitute which support, many articles would be necessary, besides merchandize; and yet we see, that, in the term of six months, these merchants have raised an account of more than the whole annual income; and that income, for the current year, having been already spent, this debt is to be thrown upon the next year's revenue. The whole, will not pay it: how, then, was the family to be supported? The deed gives no

power to the trustee to break in upon
287 *the principal. Could he thus by anticipation rob the family of their support? I would much sooner say, that he should be personally bound by any such promise, than that he should bind the fund; and if before opening an account with the family, these merchants had applied to the trustee to know how far they might go in trusting the *cestuis que trust*, and he had said, "you may let them have goods to the amount of 300 dollars," I would have held him personally liable in the first place, and have left him to reimburse himself from any annual surpluses, after supporting the family, if any such should chance to occur. But they have taken no such prudent course; they have gone on at their own risk, to furnish goods to this family, to a most extravagant amount, compared with their income; and they must abide the consequences of their own imprudence.

Another objection to the claim of the appellees, is, that they have not established their account. They rely for this, on the trustee's letter, and the answer of some of the defendants; but these, in my mind, are very inadequate to the purpose. The letter cannot be fairly considered as the slightest acknowledgment of the justice of the items in the account; for the writer expressly says, that he had had but a few moments to look at it, and that he must get it again. He evidently had no idea of admitting the items; but merely meant to say, that he was willing the profits of the estate should be applied to what might be found due. So Mrs. Markham, in her answer, merely says that the plaintiffs furnished her husband with goods to a large amount; but this is wholly indefinite, and no more proof of the account rendered, than of one double its amount, and consisting of items wholly different. So of the answer of B. Markham; it amounts to nothing like proof. The trustee in his answer objects strongly, both to the enormous amount of the account, compared with the income, well known to the plaintiffs, and also to many items in it; and disclaims all idea of intending to admit by his letter, any more than should be proved to be due.

288 *Upon the whole, I think the decree should be reversed and the bill dismissed, without prejudice to any other

remedy to which the appellees may be advised to resort.

CABELL, J. I concur in the opinion of judge Carr; understanding it, as we all do, not to deny the power of a court of chancery, to authorize the sale of the personal property of infant *cestuis que trust*, in cases where such sale shall be absolutely necessary for their support.

TUCKER, P. I concur also, with the same qualification.

289

*Nicholas v. Burruss.

February, 1833.

(Absent BROOKE, J.)

Wills—Slaves—Emancipation—Case at Bar.—Testator bequeaths, that all his slaves who at the time of his death should be 40 years of age, should serve one year and no longer, and then be emancipated; all who should then be 30 and under 40, should serve till they should be 40, and then be emancipated; all who should be 20 and under 30, should serve till they should be 35, and then be emancipated; and all under 20, should serve till they should be 31, and then be emancipated:

Same—Same—Same—Suit for Freedom—Assent of Executor—Sufficiency of Proof.—In an action at law, brought by one of the slaves, who was under 20 at testator's death and now 31, to recover his freedom, the defendant demurs to the evidence, which consists, 1. of the testator's will; 2. proof that the executor, not long after testator's death assented to liberation of four slaves who were then by the will entitled to freedom; 3. proof, that, in the opinion of witnesses, and as the executor himself had said, in open court, the testator's estate, other than his slaves, was amply sufficient for payment of his debts, though executor's accounts of administration had never been settled; and 4. proof, that the pauper plaintiff was, in the executor's presence, sold under execution on a judgment against the executor for a debt of the testator, under which sale defendant claims: **Held**, from such evidence, stated in demurrer to evidence, the assent of the executor to the emancipation of the plaintiff under his testator's will, may fairly be inferred: and, therefore, the plaintiff is entitled to judgment of freedom.

Same—Same—Same—Same—Necessity for.—Quære, whether upon a will emancipating slaves, the executor's assent to the bequest is necessary to perfect the right to freedom? And per TUCKER, P., it is so: and without such assent, no action at law can be maintained by the freedmen to recover freedom.

This was a suit in forma pauperis, brought in the county court of Goochland, by Nicholas, a negro pauper, against Bur-

***Slaves—Emancipation by Will—Suit for Freedom—Assent of Executor.**—In *Reid v. Blackstone*, 14 Gratt. 385, it is said: "The slaves of a testator emancipated by his will, are a part of his assets, which his personal representative is entitled to receive, and bound to apply if necessary to the payment of his debts. They cannot recover their freedom of the personal representative in an action at law, without proving his assent to their emancipation." TUCKER, P., in *Nicholas v. Burruss*, 4 Leigh 288, 295; *Anderson's Ex'ors v. Anderson*, 11 Leigh 616; 2 Lomax Ex'ors 286-288, new edition. He has a right to withhold his assent until he can ascertain that they will not be required for the payment of debts."

Same—Same—Same—Jurisdiction.—As to the jurisdiction in such case, the principal case is cited in *Foot-note* to *Dempsey v. Lawrence*, Gilm. 333. See principal case also cited in *Foot-note* to *Woodley v. Abby*, 5 Call 336; *Wood v. Humphreys*, 12 Gratt. 340; *Jincey v. Winfield*, 9 Gratt. 718.

Same—Same—Same—In Future.—In *Manns v. Givens*, 7 Leigh 715, it is said, in all emancipations to take place in *future* we have examples of persons held in abject slavery, in whom there is the existing germ of freedom, requiring time alone to mature it, citing *Pleasants v. Pleasants*, 2 Call 356; *Nicholas v. Burruss*, 4 Leigh 289.

Executors—Assent to Particular Interest—Effect upon Bequest Over.—On this question, the principal case is cited in *Lynch v. Thomas*, 3 Leigh 682; *Osborne v. Taylor*, 12 Gratt. 132. See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

ness, for the recovery of the plaintiff's freedom. The pleadings were in the usual form, and an issue joined on the question whether the plaintiff was bound or free. Upon the trial the defendant demurred to the evidence, which was set forth at large in the demurrer, and was as follows:

1. The plaintiff gave in evidence the last will and testament of John Peyton, dated the 9th October 1801, and duly recorded in the county court of Fluvanna; whereby he devised and bequeathed as follows—"It is my will and desire that the tract of land on which I now live together with my
290 *tract of land in the county of Prince William, as also the interest which may be drawn on my certificates, as also the slaves I may die possessed of, with all the stock of horses, &c. and the household furniture and plantation utensils of every kind, shall remain undisposed of until the death of Mrs. Mary Duncan with whom I now live, for the purpose of supporting her and her children. It is my will and desire, that all my slaves who at the day of my death shall be forty years of age and upwards, shall serve for one year, and no longer, and then be emancipated; all those who shall be thirty years of age and under forty, to serve until they be forty years of age, and no longer, and then be emancipated; all those who shall be twenty years of age and under thirty, to serve until they shall be thirty-five years of age, and then be emancipated; and all who shall be under twenty years of age, to serve until they shall be thirty-one years of age, and no longer; and if during the servitude of any of the female slaves, they shall have any child or children, such child or children in like manner shall serve, the males until they are twenty-one, and the females until they be eighteen years of age, and no longer, and then be emancipated." The testator then devised 1000 acres of land in the western country for the use of his slaves, and 3000 acres of western lands to three devisees, in equal shares: he devised that his land in Fluvanna, and another parcel of land lying in Prince William, and his stock of horses &c. should be sold, after Mrs. Duncan's death, and bequeathed the proceeds of the sale in legacies; he also bequeathed other pecuniary legacies; and, as to his slaves between the death of Mrs. Duncan and the periods at which they were to be emancipated, he bequeathed them to a nephew and five children of Mrs. Duncan; and he gave the residue of his estate to Mrs. Duncan's children. John Quarles, an executor named in the will, duly qualified as such.

2. The plaintiff adduced evidence, that the executor, Quarles, in the year 1801, shortly after the testator's death,
291 *came to the county court, and being asked by the court, whether he considered the testator's estate sufficient for the payment of his debts, answered in the affirmative, and at the same time, in open court, assented to the liberation of four of the testator's slaves (other than the plaintiff) who by his will were then entitled to be emancipated:* and that, in the opinion

of a witness examined to that point, the testator left property sufficient to pay all his debts, besides the slaves emancipated by him, but there was no account of the executor's administration adduced to prove the fact. There were 4000 acres of land in the western country, and 600 acres of land in Virginia, still held by his devisees. But proof was adduced by the defendant, that the testator had been a merchant for many years, and had had many transactions.

3. Evidence was adduced, that the plaintiff, Nicholas, was one of the testator's slaves emancipated by his will, but whose actual manumission was postponed to a distant day when he should attain the prescribed age, and that the executor Quarles died before he had attained to that age; but there was no direct evidence adduced, that the executor had ever at any time given his assent to the plaintiff's recovery of his freedom, in this or any other form.

And then, 4. the defendant shewed in evidence, a fieri facias, sued out by one Lightfoot, in October 1810, on a judgment of the county court of Fluvanna, recovered by him against Quarles the executor of the testator Peyton, for 57 dollars with interest and costs, to be levied of the goods and chattels of the testator in the executor's hands; and proved, that this execution was levied on the plaintiff Nicholas, then in the executor's hands as part of his testator's

estate, and that the plaintiff was sold
292 by the sheriff at auction for 135 *dollars, out of which the execution was satisfied; and that Quarles attended this sale, and invited a person present to bid for the property, stating that the title was good except as to a claim of R. B. Peyton's children. Under this sale, the defendant claimed.

And this being all the evidence in the cause, the defendant demurred thereto, and the plaintiff joined in the demurrer.

Whereupon, the jury found a verdict for the plaintiff, subject to the opinion of the court on the matters of law arising on the demurrer. The county court held, that the law on the demurrer was for the plaintiff, and gave judgment that he was a free man. The defendant appealed to the circuit court, which reversed the judgment; and then the plaintiff appealed to this court.

The cause was argued by the attorney general, assigned counsel for the pauper appellant, and Nicholas for the appellee.

There were several very interesting points discussed at the bar, with much earnestness and ability, but not decided by the court—Whether, upon the construction of the statute authorizing the emancipation of slaves, 1 Rev. Code, ch. 111, § 53, 54, 55, 56, it be necessary, in the case of emancipation by will, in order to entitle the slave to his freedom, that the executor should assent to the bequest? or whether the right to freedom is not immediately vested in the freedman, by the will and by force of the provisions of the statute, independently of any assent of the executor to

date of this proceeding, for the testator's will bears date the 9th October 1801; and supposing he died in the after part of that year, yet the slaves of forty years of age and upwards, at his death, who were the first to be emancipated, were to serve one year, and then be emancipated.—Note in Original Edition.

*There seems to have been some mistake in the

the bequest? Whether, even supposing the assent of the executor to be necessary, the freedman may not, upon the construction of the statute concerning pauper suits, Id. ch. 124, p. 481, maintain a pauper suit at law to recover his freedom, before and without assent to the bequest given by the executor? And whether, in such case, the court of law may not, and ought not, to proceed upon equitable principles, and adjudge freedom, if a case be made out in which a court of equity would decree it?

293 *But the cause was decided on another point taken by the attorney general; namely, that it might fairly be inferred from the evidence set forth in the demurrer to evidence, that the executor Quarles did assent to the bequest of freedom to all the slaves emancipated by his testator's will. *Green v. Judith*, 5 Rand. 1; *Hansbrough's ex'ors v. Thom*, 3 Leigh 147. The argument on this question of fact, is stated at length in the opinion of the judges.

CARR, J. It is well settled, that in considering the evidence, in cases of demurrers to evidence, the court will draw any inference against the demurrant, which could fairly be drawn by a jury. It does this of necessity, because it is put in the place of the jury; and it does it the more freely, because it is considered not favorable to justice, to encourage this withdrawal of the facts from the appropriate tribunal. The will of the testator Peyton, provides, that such of his slaves as were then 40 years old and upwards, should serve one year and no longer, and then be emancipated; and emancipates such of his slaves as were younger, prospectively, in classes, as they should attain to particular ages. Not long after the will was proved, in 1801, the executor, in open court, declared his assent to the liberation of four slaves, then entitled to their freedom under the will; and being asked by the court, said he considered the estate sufficient to pay the debts. It is also proved by other testimony, that the estate was fully sufficient, without the slaves, for the payment of all the testator's debts; and that, at the time of the trial, there were, forming a part of his estate, 4000 acres of land in the western country, and 600 acres in Virginia. Notwithstanding these facts, an execution on a judgment obtained against the executor, was levied on the plaintiff, who was under the age prescribed by the will for his manumission, and had still some years to serve, when the execution was levied (how many we do not exactly know) and under this execution he was sold for 135 dollars; the executor attending the sale, and the rather en-

294 couraging *it than otherwise. The executor died subsequently, and before the plaintiff attained to the age appointed for his manumission. Upon these facts, there can be no doubt, that, in equity and justice, the plaintiff is entitled to his freedom. The only doubt is, whether being in a court of law, we can, without violating its forms and principles, mete out that justice to him. The point of doubt is, whether the jury might fairly have inferred, from the evidence, the executor's assent to

the emancipation? I think it might. With respect to what shall constitute such assent, the law has prescribed no specific form: a very slight assent is held sufficient; and it may be either express or implied. Any expression or act done by an executor, which shews his concurrence or agreement to the thing bequeathed, will amount to an assent; and as an assent is but a perfecting act, the executor cannot, after he has once given it, revoke it. A house and land held by lease, is devised to A. for part of the term, and to B. for the residue; the assent to A's legacy, enures to B. also. 4 Bac. Abr. Legacies, L. p. 444-6; Toll. Law ex'ors, book 3, ch. 4, § 2, p. 307; *Plow. 521, 540; Wentw. Off. ex'ors 234. Now, according to these authorities, it seems to me, that, by proclaiming in court the sufficiency of the estate to pay all debts, and assenting to the freedom of the slaves then of the proper age, the executor has done that perfecting act, which shewed his concurrence with the bequest, and which enured equally to all the slaves: for, in point of right to freedom, they all stood on the same ground, and the bequest was but as one; and we know, that, if the estate had not been in a situation to free them all, as they came to the age designated, no court would permit the executor to manumit some and make slaves of others, but the burden of servitude would have been equally distributed. If it should be said, that the sale of the negro afterwards in the presence of the executor, shews that he had not assented; I answer, no; it could not shew

295 that, for the former act must speak for itself. The most it could *shew, would be an intention in the executor to recall the assent formerly given; which, as we have seen, he had no right to do. But I do not think we are forced to conclude that it shewed even this; for, it is to be observed, that the will was of record; the declaration of the executor had been made in open court; and in addition to this, the negro was sold but for 135 dollars; not more than three years hire; and he had probably a longer term than that to serve. Under these circumstances, may we not infer, that the price was regulated by the knowledge of these facts, and the consequent right of the plaintiff? I think, in common charity to the executor, this may be inferred. Placing the cause upon this ground. I am relieved from considering the other points raised, and argued with great ability, by the attorney general; and as they are grave and important, and new points, and only three judges are present, I choose, so far as I am concerned, to leave them open. I approve the judgment of the county court.

CABELL, J., concurred.

TUCKER, P. This case has been very ably argued, upon various interesting points; but I am inclined to think it must turn at last upon the evidence set forth in the demurrer, and the general principles of law in relation to demurrers to evidence.

That a slave emancipated by will, cannot successfully assert his freedom by a proceeding in a court of law, without the pre-

*Gordon's American edl. Philadelphia 1824.

vious assent of the executor to his emancipation, has certainly been the general impression of the profession in Virginia. I think it a correct one. The analogy is strong and apt, between emancipation and a specific legacy. Emancipation is a legacy of freedom to the slave, on the one hand, and, on the other, an abstraction of the value of the slave from that fund (the personality) which, from the foundations of the common law, has been held sacred to the discharge of the debts of the testator.

296 The anomalous character *of this species of property, and the liberal and beneficent spirit in which the law of emancipation has been administered, has given rise, indeed, to some distinctions between the legacy of freedom and an ordinary specific legacy. Thus, for instance, an emancipated slave is not required to give a refunding bond; and, in case of deficiency of assets, though the specific legatees may be compelled to abate proportionably, emancipated slaves would only be compelled to abate as between themselves. In other words, all other specific legacies must be swept, before an emancipated slave can be subjected to the debts at all. Yet I think it cannot be questioned, that, in general, a legacy of freedom has been looked upon by the courts as of the character of a specific legacy. If so, until the executor assent, it cannot be demanded by action at law, unless some act of the legislature, or some principle of convenience, shall establish a difference in favor of the suitor for freedom.

That a specific legatee shall not recover his legacy at law, without the assent of the executor, is a principle that grows out of the character of his trust, the nature of his interest in the personal estate, and the imperfection of common law proceedings. The executor is, especially, a trustee for the creditors of the decedent. The law casts the whole of the personality upon him, at the instant of his testator's death, and enjoins the payment of the debts of the estate as the first duty to be fulfilled, after discharging the sacred obligation of interring the deceased. In the performance of this duty, he is to disregard all the commands even of the testator's will in conflict with it. He is not to lessen the fund for the payment of the creditors, by fulfilling his benevolences, or even supporting his bereaved family. Until the debts are paid, nothing is to be abstracted. The testator is required to be just before he is generous; and even the act of emancipation must yield to the demands of creditors.

To effect the objects of this trust, the law casts the property upon the executor. It considers him the absolute owner; and though after the discharge 297 of all the debts, he *may be compelled by the proper tribunal to pay the legacies and make distribution, even this cannot be done until an investigation has been made of the affairs of the estate, and the state of the demands against it. And even then, though a balance may appear against him, the legatee or distributee must give a refunding bond, before he can insist upon payment. The necessity for this investigation, and the further necessity for

adjusting the pretensions of legatees in case of abatement, and of the persons entitled to the residuum when distribution is to be made, conspire to render a court of common law an unfit tribunal for the legatee who sues without the previous assent of the executor; and hence the jurisdiction is now, without contradiction, admitted to be vested in courts of equity exclusively.

To the case of a slave who claims his freedom under the will of his master, all the reasons which confine the jurisdiction of suits for legacies before assent, apply with additional force. For (as we have all seen from the case of *Patty v. Colin*, 1 Hen. & Munf. 519, and the recent cases of *Dunn v. Amey*, 1 Leigh 465, and *Paup v. Mingo*, ante 163,) many formidable difficulties arise in these suits for freedom, peculiar to them, and insuperable unless by the aid of a court of equity. I am of opinion, therefore, that a slave cannot recover his freedom under a will, in a court of law, without proving the assent of the executor, if, as I shall attempt to shew, such assent is necessary.

It seems to have been supposed, however, in the argument, that by the statute concerning pauper suits, a slave may, if he pleases, assert his right to freedom in a court of law, and adopt the common law process, and yet be permitted to go into all those matters which belong peculiarly to a court of equity, and to have such redress as that court could afford him. This would certainly be very inconvenient, and is as certainly, I think, an incorrect interpretation of the statute. That a court of equity has jurisdiction, in proper cases, of suits for freedom, no longer admits of dispute, after the repeated 298 decisions of this court, and the *cases in which the jurisdiction has been entertained. *Dempsey v. Laurence*, Gilm. 333, and *Dunn v. Amey*, and *Patty v. Colin*, just cited. Yet if we look to the act itself, though there would seem reason to doubt the jurisdiction of the superiour courts of chancery, there is none for supposing that the slave was to be confined to the courts of law alone. As I think the act has been much misunderstood, it may not be amiss to offer my idea of its construction.

Until this act was passed, the remedy of a person held in slavery for the recovery of his freedom, was unregulated. The writs of *habeas corpus* and *de homine replegiando* were, among others, resorted to. They were vexatious in their character; and the latter has been accordingly repealed, while the provisions in relation to the former rendered it an objectionable and improper remedy for the trial of the right of a slave to his freedom. Therefore, by the act of 1795, ch. 11, a plain and easy remedy was provided. The preamble distinctly evinces, that it was suggested, less by an anxiety to facilitate the remedies of the slave, than by "the great and alarming mischiefs, which had arisen in other states of the Union, and were likely to arise in this, by voluntary associations of individuals" (commonly known under the appellation of emancipation societies) "who had, in many instances, been the means of depriving masters of their property in slaves, and in others occasioned them heavy expenses in tedious and unfounded law suits." Accord-

ingly, its scheme seems to have been to require in the incipient stages of the proceeding, some evidence of the probability of his right, before he should be either removed from his master's possession, or entitled to call upon him to answer his complaint. Therefore, it provided, that the complaint should either be made to a magistrate out of court, or to the district (now circuit) or county or corporation court, and not elsewhere; a negative provision inserted for the master's benefit, not for that of the slave. Upon offering his petition to the court, he is required to set forth the material facts of his case, supported by affidavit or otherwise;

299 whereupon *counsel are appointed, who are required to make an exact statement of the case, with their opinion thereupon; and the court, accordingly, makes an order allowing or refusing the prayer of the petitioner to bring suit. The form in which this suit is to be brought, is not prescribed. But the statute having authorized the application to two courts, one of which had complete equitable jurisdiction, there is nothing from which we are necessarily to infer, that the legislature intended to obliterate the distinctions of jurisdiction, in the case of suits for freedom, more than in other cases. When the slave applied to counsel to draw and present his petition, that counsel, according to the nature of the case, should prefer the petition to the court of law, or to that court which combines in itself the powers both of law and chancery. If the claim should admit of being prosecuted in a court of law, it might be presented either to the county or circuit court. If equity alone could administer a relief, it ought to be presented to the county court, where it might be tried on the chancery side; and though it may be admitted there can be no mere equitable right to freedom, yet it has also been admitted that cases may occur where the suitor may need the aid of a court of equity.

Such I have no doubt was the scheme of the act, and accordingly I can see no reason for supposing, that a suit for freedom may be tried in a court of law upon equitable principles and equitable modes of proceeding. Nor does the idea receive countenance, as was supposed, from the language of the statute concerning pauper suits, that the court "shall appoint, in pauper suits, all proper officers &c." and so, may appoint auditors to settle the administration account. For this clause was not a part of the act of 1795, ch. 11, and therefore cannot bear upon it, even if the inferences drawn by the counsel were at all admissible. I am, therefore, of opinion, upon the whole matter, that if the necessity for the assent of the executor to the legacy of freedom, stands upon the footing of the assent to other specific legacies, that assent is necessary to be proved, in order *to entitle the slave to recover his freedom, by action in a court of law.

I have already endeavoured to shew, why it is that the assent of the executor to a specific legacy, is essential to its vesting as a legal right. The executor holding the estate upon the sacred trust of appropriating it first to the discharge of debts, will

never be compelled to deliver it over, until by his assent it is admitted, or by a judicial proceeding it is established, that there is no longer a necessity to withhold it. The latter lays the ground of the jurisdiction of equity in the matter; the former is the only ground on which that of courts of law has ever rested. Now, the reason for the executor's assent, is as strong in the case of a bequest of freedom as in any other. Whether, metaphysically, we can with propriety call it a legacy, it is not important to consider. Practically, it is a withdrawal from the personal fund, destined by law for payment of debts, of a part of that fund; and there is the same necessity in this as in the case of other specific legacies, for establishing, either by the assent of the executor, or the settlement of his administration account before a proper and competent tribunal, that it is no longer necessary to retain the fund.

It was said, however, that the legislature has pointed out the only method in which emancipated slaves shall be subjected to the payment of the debts of their former owners: that they shall be "liable to be taken by execution to satisfy the antecedent debts" of such owner: and it is contended, that the executor has nothing to do with an emancipated slave; that he constitutes no part of the assets, and that he can only be reached by the direct execution of the creditor. These are novel doctrines, and though sustained with great ability, we must not rashly subscribe to them. It is not necessary, that I should at this time go into a full examination of them; as, owing to the absence of two of our brethren, the court cannot settle a new principle, or overthrow those which have been long established. Whenever we are called upon,

imperatively, to pronounce upon them, 301 many grave *considerations will present themselves. We shall have to look to the possible effect of a change of the current of decisions upon slave rights, acquired by purchase from executors, even where their testator's estates have been overwhelmed with debt; we shall have to explain in what manner the creditor is to proceed, to get an execution against a slave, or to get a judgment against the executor, when that executor had no assets in his hands according to this system of opinions; we shall have to decide, whether it could have been intended to permit a dispersion of the slaves of a testator emancipated by his will, to the prejudice of his creditors, or to require that although it should be altogether clear that the debts would sweep the whole, there should be no sale of them to pay the debts except under the hammer; a proceeding equally injurious to the estate, and inhuman towards the slaves. We shall also have to enquire, whether it really could have been the design of the legislature, in 1782, when the emancipation act was first passed, altogether to exonerate slaves emancipated by the will from the payment of the testator's debts; for the provision expressly making emancipated slaves subject to the debts of the owner, contained in the 54th section of the statute concerning slaves, was not enacted till 1792. If then, emancipation is not to be considered, under

the 5th section, as subordinate to the rights of the executor devolving upon him at the instant of the decedent's death, under the general principles of the common law, which postpone all the benevolences of the testator to his just debts, then there were ten years during which a man might by will have defrauded his creditors of their demands, by an universal emancipation of his slaves. It may at least be doubted, whether such was ever considered to be the intention of the law. Upon much reflection, and upon an examination of the case of *Woodley v. Abby*, 5 Call 336, which arose on an emancipation prior to the statute of 1792, I incline to think, that the proviso contained in the 54th section, was added to meet the case of emancipation by deed; slaves emancipated by will being

302 *considered, independently of that provision, as assets in the executor's hands, until his assent was given to the bequest of freedom.

I am, then, clearly of opinion, that the assent of the executor must be shewn in this case, to sustain the demand of the plaintiff.

But, upon a careful examination of the testimony, I think the jury would have been justified in inferring that assent from the facts proved. The proofs not as full, indeed, as could be wished; but it certainly establishes the right of the slave to recover his freedom by bill in equity; and I would not, therefore, require as rigorous proof as might otherwise be demanded. From the testimony in the cause, it might well and fairly have been argued, that the estate was amply sufficient to pay the debts, without charging the slaves; that the executor knew this; that knowing it, he assented at once to the emancipation of four who had then attained the proper age: that this assent to the freedom of four of the slaves is perhaps an assent to that of the rest; that if Nicholas had, at that time, been of the proper age, he would have expressly assented to his freedom; that a design to enslave him tortiously forever, could not have been fairly inferred against a man, who had so promptly manifested a just design to carry the will into execution; that when he was taken by execution, he had still some time to serve; that he was a negro man in the prime of life; and that having sold for the insignificant sum of 135 dollars, it was fair to presume he was not sold for life, but only for his remaining term of service. The testimony, that the executor stated the title to be good, except so far as it was questioned by a particular claimant, being the testimony of the demurrant, cannot weigh against these inferences: and the jury might have concluded, without doing violence to the evidence in the cause, that the residue of Nicholas's term alone was sold, and that it was so understood at the time of the sale. If so, those facts would amount to an assent on the part of

the executor, and establish his right to freedom, which could *not be divested by the levy of the creditor's execution; *Burnley v. Lambert*, 1 Wash. 308.

Judgment of the circuit court reversed, and that of the county court affirmed.

Lipscomb's Adm'r v. Davis's Adm'r.

February, 1833.

(Absent BROOKE, J.)

Debt on Judgment—Statute of Limitations—Effect as to Forthcoming Bond.—The statute of limitations, 1 Rev. Code, ch. 128, § 5, whereby the remedy on a judgment by debt or scire facias is limited to ten years, is no bar to a motion on a forthcoming bond of more than ten years standing.

Forthcoming Bond—When Has Force of a Judgment.*

—It seems, that a forthcoming bond has not the force of a judgment, till it is returned forfeited and filed in the clerk's office; and even after it is filed, it is only in a partial sense, that it has the force of a judgment before execution upon it is awarded.

B. Davis administratrix of R. Davis deceased, having, in July 1806, sued out a writ of fieri facias, upon a judgment recovered by her in the county court of King William, against R. Madison and T. Butler, and this execution having been duly levied by the sheriff on the property of Madison, he with M. Lipscomb his surety, gave a forthcoming bond dated the 8th July 1806, payable to the administratrix, for the forthcoming and delivery of the property at the day and place appointed for the sale thereof. The sheriff made return upon the execution, that he had levied it, and had taken a forthcoming bond, which had "not been complied with," but there had come to his hands a subpoena in chancery returnable to the ensuing August term of the county court, with an injunction to stay proceedings as to part of the debt.† Whether the forthcoming bond was returned with the execution, or not, did not appear.

304 *Henry Davis, the administrator of B. Davis the obligee in this bond, in 1826, gave a notice to the administrator of Lipscomb, the surety therein bound, of a motion to be made in the county court at its July term of that year, for an award of execution on the forthcoming bond. The motion was made accordingly; but the county court, being of opinion that recovery on the bond was barred by the statute of limitations, overruled it, and gave judgment for the defendant; from which the plaintiff appealed to the circuit court, which reversed the judgment, and remanded the cause to the county court, with directions, in substance, to disregard the bar of the statute of limitations. And then Lipscomb's administrator appealed to this court.

The cause was argued here, by Johnson for the appellant, and Claiborne for the appellee.

As the statute of executions, which authorizes the taking of forthcoming bonds for the delivery of property taken in execution at the day and place of sale (1 Rev.

***Forthcoming Bond—When It Has the Force of a Judgment.**—A forfeited forthcoming bond has the force of a judgment only from the time the bond was returned to the clerk's office. *Cabell v. Given*, 30 W. Va. 760, 5 S. E. Rep. 442, citing the principal case at page 770. See also, citing the principal case, *Allen v. Hart*, 18 Gratt. 734. See monographic notes on "Statutory Bonds" appended to *Goolsby v. Strother*, 21 Gratt. 107, and "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

†It appeared that this suit in chancery, and the injunction awarded therein, remained unnoticed by both of the parties and the court, till September term 1818, when the injunction was dissolved. But this fact was not regularly stated as part of the county court record; and in the view of the case taken by this court, was wholly immaterial.—Note in Original Edition.

Code, ch. 134, § 16, p. 530,) provides, that the sheriff shall return such bond, if forfeited, to the clerk of the court from which the execution issued, there to be safely kept, and to have the force of a judgment; and as the statute of limitations (*Id.* ch. 128, § 5, p. 489,) limits the remedy upon judgments, by scire facias or action of debt, to ten years; the question discussed at the bar, was, whether the motion on this forthcoming bond was barred by the statute?

TUCKER, P. This case turns upon the question, whether the 5th section of the statute of limitations applies to motions upon forthcoming bonds. For although, if no reason had been assigned for the judgment, we must have affirmed it, as there is no bill of exceptions, yet as the county court rests its decision upon the statute of limitations, it must be reversed if there be no part of that statute applicable to the case. It is contended to be within the 5th section relating to judgments.

305 *The statute of executions, it is true, provides that the officer taking a forthcoming bond shall return it to the clerk's office, to be there safely kept, and to have the force of a judgment. The filing previous to the motion, is not indeed essential to it, *Eppes's ex'ors v. Colley*, 2 Munf. 523, but the bond must be filed when the judgment is given, and until filed, it will not, I presume, have the force of a judgment. Were it otherwise, these newly created judgments, instead of being deposited in a fixed and known office, for examination and as notice to all concerned, would be ambulatory in the pockets of the plaintiffs or the sheriffs, to the great prejudice of executors and administrators, who must look to them as debts of superior dignity, and to the entrapping of purchasers of the lands of the debtor, or his sureties, which would be overreached by these judgments in abmuscade. I am inclined, therefore, to think, that the bond can only have the force of a judgment after it has been filed; and as this bond does not appear to have been filed until the motion, the statute could not even have commenced running, when the court admitted it to be a bar of the demand. When execution has been awarded, then indeed the case is within the principle, and perhaps within the letter of the statute; and if the plaintiff omits to take out execution for ten years, his remedy is gone forever.

Admitting, however, that the bond has, to some intents, the force of a judgment as soon as it is filed, I think it obvious, that it has not all the effect of a judgment until there has been an award of execution. No execution can be sued on it, at the mere will of the party; the authority of the court must first be obtained by motion. And even after the lapse of a year, that authority may be obtained by motion. Moreover, it cannot be obtained by scire facias, but the motion and the action of debt are the only remedies. Then, again, though the statute gives to the bond the force of a judgment, still it looks upon it, until execution has been awarded, in a far different light. A judgment is certain, fixed and conclusive. It can

306 only be controverted *by a proceeding in error; and execution is accordingly awarded upon the demand of the party, without the authority or leave of the court. And, as he has this uncontrolled power to pursue his debtor by execution, a presumption of payment arises from his failure to do so. The forthcoming bond, on the other hand, is not final and conclusive. It was foreseen that these instruments, taken by ministerial officers, would be exceedingly liable to errors, and hence the intervention of the court was required, to ascertain the validity of this new species of judgment. No execution can issue upon it but on motion; for the regularity of the bond may be questioned, a performance of its conditions averred, even the execution of it denied. It has not, therefore, until the award of execution, the most important characteristics of a judgment. Nor does an equally strong presumption arise from the failure to move for an award of execution, as from a failure to sue out execution. To the latter there is no conceivable impediment. To the former there may be; as, for instance, the difficulty of finding the defendant, or his absence from the country, and the like; difficulties, which, if the case is within the 5th section of the statute of limitations, from no excuse for delay, since the bar of that section is absolute. There is yet another consideration: if a forthcoming bond be faulty, an action of debt may be brought upon it; which is clearly not within the statute. Has not the plaintiff the same right if the bond is good? If he chooses to bring debt upon the bond, for the purpose of holding his adversary to bail, instead of serving a notice on him, which might have the effect of a notice to abscond, could his right be denied? And if the action would lie, could it be barred by the 5th section of the statute, when the party has elected to consider the bond, as a common law bond, and not as a judgment? I should think not. And, upon the whole, I am well satisfied that this provision of the statute of limitations does not apply to a forthcoming bond before the award of execution. But when upon motion, execution is awarded, it ac-

307 quires all the *characteristics of a judgment, and from that moment is within the statute. The party can never after elect to consider it as a common law bond; he has fixed its character as a judgment; he can now take out execution at his pleasure. If he fails to do so within the year, he is driven to his scire facias; and if his failure continues for ten years, he is barred forever.

The other judges concurred. Judgment of the circuit court affirmed.

308 **Eubank and Others v. Ralls's Ex'or. Same v. Sandige Assignee &c.*

February, 1833.

(Absent BROOKE, J.)

Records—Entry of Judgments—Clerical Mistake—Correction.—*Judgment upon nil dicit in county court.

*Records—Clerical Errors—Correction.—For the proposition that clerical errors may be corrected at a subsequent term of the court, the principal case is cited in *foot-note* to *Price v. Com.*, 38 Gratt. 819.

entered on the minute book, "for specialty and costs," and then entered at large, by the clerk, in the order book for debt with interest from 1st March 1817, the date of the specialty, though the day of payment appointed in the condition was the 1st March 1818; the clerk, in his entry in the order book, following, not the condition of the bond, but a memorandum thereon indorsed, that the debt if not punctually paid should bear interest from the date of the bond: **Held**, 1. It was error to give interest from the date of bond, instead of the day of payment; and 2. this error was a clerical mistake, amendable by the court, at a subsequent term.

Same-Same-Same-Same.—A like error in entering an office judgment in the county court, in debt on a like bond; and **Held**, a clerical mistake, amendable in like manner.

Same-Same-Same-Same.—A like error in entering an office judgment in circuit court, in debt on a like bond; and **Held**, a clerical mistake, amendable in like manner.

Same-Technical Mistake in Judgment—How Amendable.—Quære, whether a mere mistake, technically in the judgment of the court itself, be not amendable, in like manner as clerical mistakes, under the provisions of the statute, 1 Rev. Code, ch. 128, § 108-10?

Writs of Error—Statute of Limitation—How Relied on.—The statute of limitations of writs of error, if it apply to writs of error coram nobis, cannot be relied on without being pleaded; and.

Same-Same—Application to Writ of Coram Nobis.—Quære, whether it does apply to writs of error coram nobis?

Execution on Erroneous Judgment—Reversal—When Restitution Awarded.—Where execution, has been levied and returned satisfied, on judgment which is erroneous and afterwards reversed or corrected, restitution cannot be awarded, unless it appear that the money has been paid to plaintiff.

Circuit Superiour Courts of Law and Chancery—Jurisdiction.—The present circuit superiour courts of law and chancery have jurisdiction to correct mistakes in judgments of the former circuit courts of law—**Held**, in *Garland v. Marx* reported in a note.

There were four cases between these parties, on writs of supersedeas to judgments of the circuit court of Amherst, which being nearly alike in their circumstances, were argued and considered together.

Eubank and two others executed four bonds to Caleb Ralls, all dated the 20th December 1817, and all for the same penal sum of 1548 dollars, with condition, respectively, for the payment of 774 dollars, on 309 or before the 1st day of *March in the years 1818, 1819, 1820 and 1821. On each of these bonds, there was an indorsement in these words: "Memorandum—If the within bond is discharged within thirty days after due, no interest will be required; if not, interest from the date;" which was signed and sealed by the obligee and obligors. The witnesses to the execution of

the bonds, were different from those to the execution of the memorandums.

1st case. In 1819, an action was brought by Ralls against the three obligors, in the county court of Amherst, on the first bond payable the 1st March 1818. The declaration claimed the penalty, without taking notice of the condition or memorandum indorsed. The defendants appeared, and pleaded payment, but afterwards relinquished the plea; whereupon, at November term 1819, the following entry was made on the minute book of the court—"Plea waived, and judgment for specialty and costs." But the judgment, as entered at large on the order book by the clerk, was for the penal sum of 1548 dollars, to be discharged by the payment of 774 dollars with interest from the 20th December 1817, the date of the bond (according to the memorandum), instead of the 1st March 1818, the day of payment appointed in the condition. Upon the judgment as entered in the order book giving interest from the 20th December 1817, a fieri facias was sued out, and levied on the property of the defendants; a forthcoming bond taken in exact pursuance of the execution; the forthcoming bond forfeited; execution awarded thereupon for the debt and interest as computed in the bond; and execution sued out, and returned by the sheriff satisfied. But whether the money was paid over by the sheriff to the plaintiff, did not appear.

2nd case. An action was brought by Ralls's executor, id 1819, in the county court of Amherst, on the second bond payable on the 1st March 1819. In this case too, the declaration claimed the penalty, without taking notice of the condition or memorandum. The defendants did not appear, and judgment by default for want of appearance, was entered 310 *against them by the clerk in the office, and at November term 1819 confirmed; which office judgment confirmed, as entered at large, was for the penalty, to be discharged by the payment of 774 dollars with interest from the 20th December 1817, the date of the bond, instead of the 1st March 1819, when the money was due according to the condition. And upon this judgment there was the same process of execution as in the first case, and the execution on the forthcoming bond was returned satisfied; but it did not appear, whether or no this money had been paid over by the sheriff to the plaintiff.

3rd case. An action was brought in the county court of Amherst, in 1821, by Pullet Sandige assignee of Caleb Ralls, on the fourth bond payable on the 1st March 1821. In this case the declaration claimed the penalty with interest from the date of the bond. The defendants appeared, and pleaded payment, but afterwards relinquished their plea; whereupon, at May term 1822, the following entry was made on the minute book of the court—"Plea waived and judgment for specialty and costs." But the judgment as entered at large on the order book by the clerk, was for the penalty, to be discharged by the payment of 774 dollars with interest from the 20th December 1817, the date of the bond, instead of the 1st March 1821, the day appointed in

where there is a collection of authorities on this subject. On this question, the principal case is also cited in *Shelton v. Welsh*, 7 Leigh 177; *Saunders v. Lipscomb*, 90 Va. 652, 19 S. E. Rep. 450; *Shadrack v. Woolfolk*, 32 Gratt. 714.

The proceeding to correct such errors is by motion to the court in which they occurred. *Snead v. Coleman*, 7 Gratt. 306, citing *Eubank v. Ralls*, 4 Leigh 208; *Shelton v. Welsh*, 7 Leigh 175; *Digges v. Dunn*, 1 Munf. 56. To the same effect, the principal case is cited in *Goolsby v. St. John*, 25 Gratt. 157. The principal case is cited in dissenting opinion of *Allen, J.*, in *Greensville Justices v. Williamson*, 12 Leigh 106.

***Execution on Erroneous Judgment—Reversal—Restitution.**—For the proposition that, where execution has been levied and returned satisfied, on a judgment which is erroneous and afterwards reversed or corrected, restitution cannot be awarded, unless it appear that the money has been paid to the plaintiff, the principal case is cited in *Erskine v. Henry*, 6 Leigh 385; *Fawkes v. Davison*, 8 Leigh 560.

See monographic notes on "Executions" appended to *Paine, Surv.*, etc., v. *Tutwiller*, 27 Gratt. 440, and "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

the condition for the payment. There was a *feri facias* sued out on this judgment also, and levied, a forthcoming bond given and forfeited, and an award of execution thereupon; but what, or whether there were any, proceedings afterwards had in this case, did not certainly appear.

In August 1826, Eubank and others gave notice to Ralls's executor, of motions to be by them made in the two first cases, and to Sandige, the assignee of Ralls, of a motion in the third case, at the ensuing November term of the county court, to amend and correct the record of the three judgments respectively, so as to make the first a judgment for the debt with interest from the 1st March 1818, the day of pay-

311 the first bond, instead of the 20th December 1817, the date of the bond; and the second, likewise, a judgment for the debt with interest only from the 1st March 1819, when it was payable; and the third, a judgment for the debt with interest only from the 1st March 1821, when it was payable. The motions were accordingly made; and upon the hearing of them, the county court,—considering that the judgments had been erroneously entered by the clerk through mistake, for the several debts with interest from the 20th December 1817, the date of the bonds, instead of interest only from the dates appointed in the several conditions thereof for the payment of the money, according to what the court held to be the true construction and legal effect of the obligations,—ordered the records to be amended and corrected, respectively, as proposed by Eubank and others; and, moreover, ordered the forthcoming bonds, and the executions sued out thereon, and returned satisfied, in the two first cases, and the forthcoming bond in the last case, to be quashed. From these orders Ralls's executor and Sandige, respectively, appealed to the circuit court; which, holding that the question arising on the bonds and the memorandums indorsed thereon (the question, namely, whether the dates from which the debts should bear interest, ought to be ascertained by the conditions of the bonds, or by the memorandums indorsed on them) was of a judicial nature, and, therefore, that the errors complained of were not clerical mistakes, which the county court could correct,—reversed the judgments of the county court, and overruled the motions. And then Eubank and others applied to this court for writs of *supersedeas* to the judgments of the circuit court; which were allowed.

4th case. Upon the third of the bonds payable the 1st March 1820, a suit was brought very shortly after the debt fell due, by Sandige as assignee thereof, in the circuit court of Amherst. In this case, as in the two first, the declaration claimed the penalty, without taking any notice of the condition or memorandum indorsed.

312 The defendants did not appear, and judgment by default was entered by the clerk, and confirmed September term 1820; which office judgment confirmed, as entered at large, was for the penalty to be discharged by the payment of 774 dollars, with interest from the 20th December 1817,

the date of the bond, instead of the 1st March 1820, the day of payment appointed in the condition. But it did not distinctly appear, whether the office judgment was entered at large on the order book, on the last day of the term, and signed among the other orders by the judge, or whether it was entered at or after the term, as of the last day thereof, without being signed by the judge. On this judgment there was the same process of execution as in the two first cases, and the execution on the forthcoming bond was returned satisfied; but it did not appear that the sheriff had paid the money to the plaintiff.

In January 1827, Eubank and others gave notice to Sandige, of a motion to be made at the ensuing April term of the circuit court, to amend and correct the record of the office judgment, so as to make it a judgment for the debt with interest only from the 1st March 1820, the day of payment appointed by the condition of the bond, instead of the 20th December, the date thereof. The motion was made; and the judge, upon the hearing, being of opinion that the error complained of was not a clerical mistake, but a judicial error, which could be corrected only by an appellate court, overruled it. To this judgment also, this court, on the petition of Eubank and others, allowed a *supersedeas*.

The causes were argued here by Stanard for the plaintiffs in error, and by Johnson for the defendants.

I. The first question was, whether the original judgments were wrong, in giving the bank interest from the date of the bonds, which the memorandums indorsed thereon provided should be paid, in case the debts were not punctually paid at the dates appointed in the condition?

Stanard said two of the judgments were entered on the minute book of the county court (which was the record) 313 *for the debts due by the specialties, and costs; the other two were office judgments and of course ought properly to have been for the debts appearing due by the bonds, and costs. In entering the judgments at large, the clerk ought to have conformed with the legal construction and effect of the obligations, and instead of giving back interest from the date thereof, should have given interest only from the days of payment appointed in the conditions. The back interest provided for in the memorandums, was in the nature of a penalty. *Waller v. Long*, 6 Munf. 61.

Johnson questioned the correctness of the adjudication in *Waller v. Long*; but he endeavoured to distinguish this case from that, because, he said, it was to be inferred, from the circumstance of the subscribing witnesses to the execution of the memorandums, not being the same persons who attested the execution of the bonds, that the memorandums were new contracts entered into at a different and subsequent date.

II. The next question was, whether supposing the judgments wrong in giving the back interest, it was an error of the court, which could only be corrected by an appellate tribunal, or a clerical mistake which the same court might properly correct, on motion or writ of error *coram nobis*?

On this question, Stanard cited *Commonwealth v. Winstons*, 5 Rand. 546, and *Garland v. Marx*,* which, he said, were in point to shew that the errors complained of here, were clerical mistakes, amendable by the same court on motion.

Johnson on the other hand, contended that the errors complained of here, were, in their nature, judicial errors of the court, involving too a very doubtful point of law, which, therefore, could only be corrected by an appellate court. He cited *Bent v. Patten*, 1 Rand. 25, and argued, that the cases at bar fell within the principle of that case, and were distinguishable from the cases of *Commonwealth v. Winstons* and *Garland v. Marx*.

314 *III. Johnson insisted, that the motions to amend, in the 1st, 2nd and 4th cases, wherein final judgments were entered more than five years before notice given by the appellants of their motions to correct the alleged errors, were barred by the statute of limitations, 1 Rev. Code, ch. 128, § 19, p. 492.† This objection presented the general question, whether writs of error *coram nobis*, or motions, to correct clerical mistakes in proceedings in the same court, were within the statute? But Stanard also maintained, that whether the statute embraced such cases or no, it could not be relied on here, because it had not been pleaded in the court below.

IV. The last point was, Whether the county court, after correcting the errors as to the back interest, and quashing the executions on which the debts with the excess of interest had been levied, ought not to have proceeded further, and awarded restitution?

TUCKER, P. There being, in these four cases, only one or two minor points of difference, I shall consider them, as they have been argued, all together.

The first question is common to them all; and after having carefully considered it, I am satisfied that the case of *Waller v. Long* is decisive upon the point. I shall, therefore, dismiss it without further remark.

The provision, then, exacting interest in default of punctual payment, being in the nature of a penalty, and to be disregarded accordingly, it is clear there is error somewhere in those proceedings. It seems to have been somewhat questioned, whether the error was in the entry of the judgment, and so proper to be amended upon motion; or in the

315 *execution, and so to be corrected upon a motion to quash. I do not think it important; for though the notice is to amend and not to quash, yet it gave sufficient information of the plaintiff's object to justify either motion. I am, moreover, of opinion, that the proper motion was to amend. For it appears, that when this motion was made, the complete

record, made up from the minutes, was erroneous in the point in question: with this the execution corresponded; and, of course the execution could not be quashed, until, the record itself was corrected. So that, although the judgment of the court upon the minutes, was correct, the record of the judgment, as entered at large, which it was sought to amend, was erroneous, and was the proper object of correction.

Was this error amendable upon motion? or was it such an error in law, as can be only amended by writ of error from a superiour tribunal? There seems to have been some difficulty, in drawing the line between clerical errors, and errors in law or in the judgment of the court. I am not, at this time, prepared to say that it can or cannot be distinctly defined *a priori*. But this, at least, may safely be affirmed, that from the english statute of 14 Ed. 3, stat. 1, ch. 6, which is said to have been the first statute of amendment, down to our statute of 1819, 1 Rev. Code, ch. 128, § 108, p. 512, the legislative will has leaned to the amendment of mere misprisions, without the necessity of encountering the expense and trouble of a writ of error. Such is obviously the policy evinced in this last statute. The principles of the common law inhibited the allowance of a writ of error in the same court in which the judgment was rendered, for any error in the judgment of the court itself; for, if that were allowed, it would be infinite. But where the error was in the process, or a misprision of the clerk, it might be corrected by the same court, without involving inconsistency, or leading to endless contests about what the record ought to be. In this spirit, the statute of 1819, above quoted, not

316 confining itself to clerical errors, or errors in the process, or to the *mere ministerial acts of the officer of the court, extends to the very judgment of the court itself: it provides, that "where, in the record of the judgment, there shall be any mistake &c. and among the records of the proceedings, there shall be any verdict, bond, bill, note or other writing of the like nature or kind, whereby such judgment may be safely amended, the court in which such judgment shall be rendered, shall amend it according to the very right of the case." Here, it is clearly manifested, that though the error be in the judgment itself, if there appears to have been a mistake in it, it shall be amended. Thus, if a verdict be rendered for £100. and the judgment on it entered for 100 dollars, there is an obvious mistake, which may be corrected under the statute of 1819, by the verdict, to which it may be fairly presumed the court designed to conform. This statute, I think, relieves us from much of the former difficulty in relation to the distinction between clerical errors and errors in the judgment of the court. For, if it appears, that there is a mere mistake, miscalculation or misrecital, the statute is imperative, that the correction shall be made. But if, upon the inspection of the proceeding, the matter complained of appears to have proceeded from error in the opinion of the court, and not from mere mistake, the case is not within the statute:

*Reported in a note at the end of this case.

†The words of the statute are—"No writ of error or supersedeas shall be granted to any judgment of a court of law, after the expiration of five years from the time when such judgment shall have been made final: saving to all persons non compos mentis, infants, femes covert, imprisoned, or out of the U. States in the service thereof or of this state, three years after their several disabilities removed."—Note in Original Edition.

for the mistake, whether of the clerk or of the judge, to which the statute refers, is not an error of judgment, but an error in which the judgment has no participation.

Since this statute, then, I conceive, there are two classes of errors amendable by the same court in which the judgment is rendered: 1. all such errors as were deemed clerical, or were amendable before the act; and 2. all such mistakes even in the judgment of the court, as can be amended by any verdict, bond, note, or bill &c. in the record.

The wisdom of the statute, and the policy of construing it according to its spirit, is very obvious, when we look to the consequence of permitting mere mistakes to be amendable only by writ of error from 317 an appellate tribunal. The *expense of the proceeding, the tying up a just demand for a long time, for an error which the inferior court would itself acknowledge the instant it was pointed out, the accumulation of appeals in this court, and the consequent increase of the evil of delay, all conspire to sustain the propriety of leaving the inferior courts to correct whatever is merely referable to mistake, and of confining the powers of the appellate courts to those errors which cannot properly be revised by the tribunal which has committed them, because it had deliberately committed them. I am happy, therefore, to find that the three judges who sat in *Commonwealth v. Winstons*, 5 Rand. 546, concur in the explicit admission, that the statute of 1819 comprehends the mistakes of the court as well as those committed by the clerk.

Was there, in the cases before us, a mere clerical mistake? or was there an error in the judgment of the court?

First, as to the cases in the county court. One of these is the case of an office judgment, confirmed for specialty and costs. In the other two, the entry on the minute book is, "Plea waived and judgment for specialty and costs." All of these are strictly correct and justified the clerk when he should extend the minutes, and make up the complete record from them, in entering the judgment for the penalty in the respective specialties, to be discharged by the payment of the sum due with interest, not from the 20th December 1817, the date of the bonds, but from the respective times of payment. Up to the judgment then, inclusive, there was no error. The error is since the judgment, in its extension by the clerk in the complete record. Now this extension was strictly a clerical act, and was therefore amendable even independent of the statute of 1819.

Then, as to the judgment of the circuit court. In that case, there was an office judgment entered erroneously for interest from the 20th December 1817, instead of the 1st March 1820. Now, I take it, this was clearly amendable by the circuit court, under another provision of the statute, 1

Rev. Code, ch. 128, § 77, that "the 318 court shall have *control over all proceedings in the office during the preceding vacation, may correct any mistakes or errors which may have happened

therein, and may for good cause shewn, set aside any of the rules or proceedings, and make such order concerning the same as may be just and right." Why? because these are clerical proceedings merely. The office judgment, therefore, though entered by the clerk, might have been corrected by the court. It was not however corrected; and not being set aside at the succeeding term, the clerk seems to have proceeded according to the provisions of the statute of 1792 (1 Old Rev. Code, ch. 66, § 42; Pleasants's edi. p. 80), and to have entered the judgment at large, either actually on the last day of the term, or as of the last day of the term, which, under that statute, would have sufficed; *Digges's ex'or v. Dunn's ex'or*, 1 Munf. 56. I do not think it clearly appears, whether it was actually entered among the orders signed by the judge or not. Suppose it was, yet the judgment so entered was not the act of the court; it was a ministerial act of the clerk, in obedience to the express command of a statute no longer in force. It may be doubted how far the court, even under that statute, could have entered a judgment, variant in a single title, from the office judgment, unless that judgment was either set aside, or a motion made to correct it. But under the act of 1819, 1 Rev. Code, ch. 128, § 79, the matter is still more clear. That directs, that office judgments not set aside during the term, shall be "considered as final judgments of the last day of the term." It does not pursue the statute of 1792, in requiring them to be entered as of the last day of the term. Therefore, they do not now pass at all under the supervision of the court, nor are they entered upon the record. Hence, the entry of the judgment is still the mere act of the clerk, and as such amendable. For the law considers the erroneous entry of the office judgment, as a mere misprision of his, and authorizes the court to amend it. Now, if it was his misprision originally, we have the authority of 319 judge Cabell, in his very *elaborate and most able opinion in *Commonwealth v. Winstons*, for saying that what was a mere misprision of the clerk in its origin, does not cease to be so, even where the entry has been read in court and signed by the judge; much less where he has nothing to do with it.

Upon the whole, therefore, I am of opinion, that the error in all these cases was amendable.

The other questions discussed in this case, seem to me to present no difficulty. The record of the judgments in all the cases, being erroneous, and the executions corresponding therewith, the former was very properly made the point of attack. But it was a necessary consequence of the correction of the record of the judgments, that the executions should be quashed, whatever may have been the proceedings under them. Nor was there any bar to the motion arising from the statute of limitations of writs of error and supersedeas, for that act if it applies to writs of error coram nobis, or to motions of the nature of them, was neither pleaded nor relied on in the court below. If it had been, the party

might have brought himself within some one of the exceptions.

As to a writ of restitution, which this court is asked to award, as being part of the judgment which the courts below ought to have given, I am of opinion, that nothing appears in this case, to warrant such a judgment below. In those cases in which a levy appears to have been made, there is no evidence that the money was paid to the plaintiff. The sheriff does not so return. It seems to me, therefore, to be one of those cases in which the writ of restitution after reversal can only be awarded upon the party's suing out his scire facias, or perhaps upon a notice specially stating that a motion for restitution would be made. It is said in Tidd's Practice, p. 1072, that when the plaintiff has execution, and the money is levied and paid, and the judgment is reversed, the party shall have restitution without a scire facias; because it appears on the record, that the money

is paid, and there is a certainty 320 of what was lost; otherwise, *where it was levied, but not paid, for then there must be a scire facias, suggesting the matter of fact, viz. the sum levied &c. This is the language of the case in 2 Salk. 588. See also 2 Wms. Saund. 101, y; 6 Com. Dig. Plead. 3, B. 20, p. 466. I understand it as meaning, that the money must have been paid over to the plaintiff; for if it is yet in the hands of the sheriff, it seems not reasonable that there should be judgment for the amount against the plaintiff. He neither has the money nor can he recover it; for his remedies against the sheriff [in England] are either by rule, by action of debt on the return, or by action of assumpsit for money had and received, neither of which could be pursued by him, I presume, after his judgment is reversed, or his execution quashed for irregularity. On the other hand, there could be no difficulty on the part of the defendant. He might compel restitution from the sheriff (if he had not paid over the money) either by scire facias or by rule: for he is certainly entitled to it, and the court would compel the officer, if the money was yet in his hands, to pay it to the proper person, or if it had been paid into court, according to the exigency of the execution, it would be paid to the defendant by its order. I am, therefore, of opinion, that there should be no award of restitution by this court, but the party may proceed below by rule against the sheriff, or the plaintiff, as the case may be, to recover back the excess he may have been compelled to pay on the executions.

CARR, J. Agreeing with the general propositions of the president, and the conclusions to which he comes in the main, I should not have said anything in the case, but to prevent the inference (which might be drawn from my silence) that I consider the case of Commonwealth v. Winstons as overruling Bent v. Patten. I am pretty sure, that such was not the intention of my brethren, and know it was not my own. We considered the cases distinguishable; as I also think Bent v. Patten dis- 321 tinguishable from the cases *now before us; and without saying that I should have gone with the majority in

that case, I mean simply to declare that I do not consider myself as overruling it. I think the errors in the cases before us clearly clerical, and properly amendable by the same court in which the judgments were entered. I consider the executions and all proceedings on them properly quashed, after correcting the judgments. But I do not think this court can award restitution, as there is no return shewing that the money has been paid to the plaintiffs.

CABELL, J., concurred in opinion, that the judgments of the circuit court were erroneous.

In the first three cases, judgments of the circuit court reversed, and those of the county court affirmed—in the last case, judgment of the circuit court reversed, and judgment entered to amend the record of the office judgment, and to quash the execution and proceedings thereon.*

*The case of Garland v. Marx. (referred to in the argument of this case) ruled March 1832, was thus: Debt, in the circuit court of law of Amherst (under the statute concerning foreign bills of exchange, 1 Rev. Code, ch. 128, § 2, p. 485, and the act of incorporation of the Farmers' bank, 2 Id. ch. 100, § 15, clause 18, p. 90) by Joseph Marx against Gustavus Rose, the maker, and John Rose and David Garland, the indorsers, of a promissory note negotiable at the Farmers' bank for 2150 dollars. The capias was returned executed on John Rose and Garland, but as to Gustavus Rose that he was no inhabitant; whereupon it was ordered that the suit should abate as to him. The declaration was as usual, against all three defendants, but the proceedings were only against the two on whom the process had been served. These two defendants appeared and pleaded to issue, and there was a verdict and judgment for the plaintiff; but in the caption of the judgment entered in the order book, the case, through inadvertence, was stated as one between Joseph Marx, plaintiff, and Gustavus Rose, John Rose and David Garland, defendants; so that the judgment appeared in the entry as a judgment against all three defendants, though the suit had abated as to Gustavus Rose. Garland appealed from the judgment, and gave an appeal bond, the condition of which recited the judgment according to its caption in the order book, as one against Gustavus Rose, John Rose and David Garland. While the appeal was pending in this court, Marx moved the circuit superior court of law and chancery of Amherst, to correct and amend the entry of 322 the judgment, so as to make it a judgment against John Rose and Garland only: and the court ordered the amendment accordingly. And then, Marx, the appellee, moved this court for a rule to dismiss the appeal, unless another and a proper appeal bond should be given by the appellant,—upon the ground, that as the condition of the appeal bond taken in the circuit court of law, recited the judgment as one against three defendants, when in truth it was a judgment against only two, the bond was therefore naught, and no suit could be maintained on it, in case the judgment should be affirmed.

In the argument of this motion, by Johnson for the appellee, and Stanard for the appellant, two points were made: 1. Whether the error in the judgment was a clerical one, such as the circuit court of law, if it still existed, would have been competent to amend, on motion, at a term subsequent to that at which it was entered? and 2. Whether, since the new organization of the judicial system, by the statute of April 1831, Sess. Acts of 1830-31, ch. 11, p. 42, it was competent for the circuit superior court of law and chancery, to amend such an error in the entry of a judgment of the former circuit court of law?

TUCKER, P. The judgment in the court below, in this case, having been corrected upon motion, in a point in which it was confessedly erroneous, and that correction producing a variance between the judgment as amended and the recital of the judgment in the appeal bond, it is apprehended there would be a fatal objection to a recovery upon the bond. That it would be so, there is no doubt. The counsel for the appellee, therefore, considering the appeal as now depending without an appeal bond, in effect, asks a rule to dismiss the appeal, un-

less the appellant shall enter into a new bond corresponding with the judgment as it now stands amended. To this rule various objections have been presented.

1. It is denied, that the present circuit superior court of law and chancery had jurisdiction to amend any error, upon motion, in the judgment of the former circuit court of law. We cannot accede to this opinion. The statute of 1830-31, ch. 11, § 55, Sess. Acts, p. 60, provides, that all judgments of the former circuit courts of law, which remain wholly or in part unexecuted, shall be executed by the respective circuit superior courts of those counties wherein the court was held, by which the same may have been rendered. The present circuit superior court, then, has jurisdiction to proceed to execute this yet unexecuted judgment. It has jurisdiction over the case. It would be going far to say, that it has the power to execute the said judgment, on the part of the plaintiff, and yet it is without jurisdiction to act upon that judgment, as justice requires, on the part of the defendant. The jurisdiction to execute the judgment, carries with it the right to exercise the accustomed powers of the court over the judgment, in adjusting the rights of the parties. But again: The new courts are invested with jurisdiction over all causes arising within their respective jurisdictions, which were cognizable in the circuit courts of law formerly existing. Id. § 23, p. 48. Now, the former circuit courts of law had jurisdiction to correct this error, if it was a clerical error, upon "motion. Therefore, the

323 present court has that power. Nay more; upon the attempt of the plaintiff to enforce this judgment, a cause of action would at once arise on the part of the defendants, to correct any error in it by the ordinary means of a motion or writ of error coram nobis. We think, therefore, there is no doubt on this point.

2. It is said, this is not a clerical error, and, therefore, the circuit superior court of law and chancery had not a right to correct it; and if so, that we must consider it as if it had not been corrected, and then the bond will not vary from the judgment, and so no new bond will be necessary. The line of distinction is not very clearly marked, between clerical errors and errors in the judgment of the court; nor will the court, in this case attempt to define it. The court is of opinion, upon an inspection of this record, that the error here must be considered as clerical. The writ as to Gustavus Rose had been returned no inhabitant; and the suit was therefore abated as to him. The declaration was indeed against all three, but all the proceedings were, as they ought to have been, against the two on whom the writ was returned executed. They only gave bail; they only could plead; they only did plead; the issue was joined as to them only; the verdict was against them only. Then came the erroneous entry of the judgment; in which the name of Gustavus Rose was inserted, by mistake, in the caption of the entry. His name is not found in the entry itself; yet as the words "the said defendants" are found there, they refer, in strictness, to the names in the caption; and herein consisted the error. That this error was not actually in the judgment of the court, cannot be denied; for Gustavus Rose had been out of the cause, ever since the return of the writ, and all the proceedings had been against the other two defendants only. There is nothing to constitute it, technically, an error in the judgment of the court, against the obvious and real state of the facts. The case of Wren v. Thomson, 4 Munf. 380, establishes no such proposition. If we take the facts of that case,—not as the statement of the reporter gives them, but as the court considered them (however erroneously), there could be no doubt the error there, was not clerical. The court said "the facts in the record prove that the appellant was a defendant in both actions. The declarations include him as a defendant in the suits. The record states that he appeared by counsel and pleaded; the recognizance of special bail includes him, and it cannot be presumed without his consent; the judgments of the court include him;" for the judgments were against the defendants expressly, in the plural number, which must have included the appellant, as there was only one other party besides himself. It is very true, that as to one of the cases, the court seems to have mistaken the facts. If the reporter has not grossly misstated them; for he says, that, in that case, there was no plea filed or appearance entered, except that the defendant on whom the writ was executed in proper person came and acknowledged the plaintiff's action; which could not have justified the judgment against the other, on whom it was ordered not to be served; Ward v. Johnson, 1 Munf. 45. But the law of the case taken upon the state of facts supposed by the court, was doubtless settled very correctly. It presented a matter for

correction by writ of error in law, not by motion or writ of error coram nobis.

324 "The correction of the error. In the present case, having thus been regular, and the appeal bond thereby vacated, because it does not now correspond with the existing judgment, the question is, What is now to be done? I have had strong doubts, and still have, whether we ought to take up the case piecemeal, and decide upon the character of this entry before we look into the whole record. If that were so, then there could be no new appeal bond required, until the court was ready to pronounce upon the whole case, and then it would be unnecessary, and the requisition frivolous. But my brethren are of opinion, that the question presented by this motion, should be decided before we take up the whole case. Acquiescing (though with strong doubts) in this, it follows, that another appeal bond must be given. At present there is no bond, and the appellant cannot have a right to take the chances of success, and indeed of delay, without giving the assurance required by law, of his performing the judgment of this court.

As to the form of the bond, there is no difficulty. It must recite, that the party had appealed from the judgment as it now stands amended, and must bind him to prosecute his appeal with effect and pay the condemnation of the court in case of affirmation; precisely as he would do, if the appeal were now for the first time granted. Thus, he will be liable to damages. I conceive, not only from the date of such bond, but from the time of his original appeal. For, if it should turn out that there is no other error than that of form which has been corrected, the law prescribes, that the judgment shall be affirmed; and that affirmation must be attended by the usual consequences,—costs and damages. And this is precisely in conformity with the design of the statute, which intended to discourage expensive appeals to this court where the party might have had redress in the court below. But if substantial error appears, then the reversal of the judgment will absolve the party from the damages and costs.

The rule is to be made absolute—allowing the appellant reasonable time to execute and file the new appeal bond.—Note in Original Edition.

325 *Marsteller and Wife and Others v. Coryell.

February, 1833.

(Absent BROOKE, J.)

Demurrer to Evidence*—Inferences—Case at Bar.—On the trial of an action of trespass *quare clausum fregit*, brought by the heirs of R. A., the defendant demurs to the plaintiffs' evidence; and, by the evidence stated in the demurrer, it appears, that R. A. died seized; there is no positive proof, that the plaintiffs, his heirs, ever entered after his death; but there is proof, that the defendant's possession did not commence till a year after R. A.'s death: **Held**, that, on this evidence in a demurrer to evidence, it may fairly be inferred, that R. A.'s heirs entered into possession immediately upon their ancestor's death; and that, therefore, they are entitled to recover.

This was an appeal from a judgment of the district court held at Hay Market, rendered in May 1808. The cause had remained in this court, neglected by the parties, ever since until this term.

It was an action of trespass *quare clausum fregit*, brought by Marsteller and wife and others against Coryell, for a trespass on a half acre lot of land in the town of Alexandria. The defendant pleaded the general issue. And upon the trial, he demurred to the evidence of the plaintiffs, who joined in the demurrer.

The evidence, set out at large in the demurrer, shewed, That the title of the lot in question was originally vested in the trustees of the town of Alexandria, and that they, by deed dated the 13th May 1765, conveyed the same to James M'Leod. That James M'Leod, by a verbal contract, sold

*Demurrer to Evidence.—See monographic note on "Demurrer to the Evidence" appended to Tut v. Slaughter, 5 Gratt. 364.

the lot to one Joseph Watson, and put him in possession, but made no conveyance thereof. That Watson, by verbal contract likewise, sold it to Edward Rigdon and put him in possession; Rigdon died in 1772, having by his will devised this lot to his widow Elizabeth Rigdon; who sold it, by verbal contract, and delivery of possession, to Richard Arell. That, in the meantime, James M'Leod had died, leaving Robert M'Leod his son and heir at law; and that Robert M'Leod, by deed dated the 15th

September 1784, conveyed the lot to 326 Arell. That Arell continued to hold possession during his life, and died in actual possession, leaving the plaintiffs his heirs at law. And that the defendant entered upon the lot about a year after Arell's death. This was the trespass complained of. There was no evidence to shew, that Arell's heirs ever actually entered upon the premises after his death; nor any evidence to shew in whom the actual possession was, or that any one was in actual possession, during the interval between the death of Arell, and the taking of possession by the defendant.

Verdict for the plaintiffs for 1230 dollars, subject to the opinion of the court, on the demurrer to evidence, whether the plaintiffs were entitled to recover in this action? The court held that they were not, and gave judgment for the defendant; from which the plaintiffs appealed to this court.

Nicholas, for the appellants.

Botts and Briggs, for the appellee.

TUCKER, P. The trustees of the town of Alexandria conveyed the premises in question to James M'Leod, who died leaving Robert M'Leod his heir at law; he conveyed to Richard Arell, who died leaving the plaintiffs his heirs at law. Thus, the title is complete. Arell had received possession from a purchaser by verbal contract under James M'Leod, held possession for many years, without interruption, till his death, and died in possession. Coryell took possession a year afterwards; which was the trespass complained of. The point on which the district court decided the cause, was, doubtless, that there was no entry by Arell's heirs after his death; for until entry, the heir cannot maintain trespass against an intruder. But, as there is proof that Arell died in possession, we think that, on a demurrer to evidence, an actual possession in his heirs eo instante that he died, may fairly be presumed; and, therefore, that the plaintiffs were entitled to recover in this action.

Judgment reversed, and judgment entered for the appellants.

327 *Janey's Ex'or v. Latane and Others.

February, 1833.

(Absent BROOKE, J.)

Charitable Bequests—Validity*—Case at Bar.—Testator bequeaths to the school commissioners and their successors of South Farnham district, Essex county, for the schooling of the poor children of

that district, 1000 dollars, to be put out at interest, and the interest only to be applied for the schooling of said poor children: there are school commissioners of the county of Essex, and testator was one of them at his death, but they are not a corporate body; there are no school commissioners of South Farnham district, nor any such district, that being only the name of an ancient parish: HELD, the bequest is void.

Joseph Janey, by his last will and testament, bequeathed as follows: "I give to the school commissioners and their successors of South Farnham district, Essex county, for the schooling of the poor children of that district, 1000 dollars, to be put out at interest at six per centum per annum, and the interest only to be applied for the schooling of said poor children."

Henry Latane and five others, exhibited their bill in chancery against Thomas Gresham the executor of Janey, in the circuit superior court of Essex, exhibiting Janey's will, and alleging, that they, together with the testator Janey in his lifetime, has been duly appointed school commissioners for the county of Essex, by the county court, in September 1831; that they and Janey had acted as such during his life, and the plaintiffs were still in office, performing the duties prescribed by law; that Essex county had been laid off into two districts, one called St. Ann's and the other South Farnham; and that the testator, Janey, had acted as school commissioner, with the plaintiffs, in the south Farnham district, from the date of his appointment till his death, the testator residing in South Farnham, and the plaintiffs in St. Ann's; and praying, that Janey's executor should be decreed to pay the legacy of 1000 dollars to the plaintiffs, to be by them appropriated according to the bequest.

328 *Gresham, the executor, in his answer, admitted the bequest in his testator's will, and that he had assets sufficient to pay the legacy; that the plaintiffs were, as they alleged, the surviving school commissioners for the county of Essex, duly appointed by the county court, and that his testator had been, in his lifetime, and continued till his death, one of the school commissioners for the county. But he denied, that the county had ever been, as the plaintiffs alleged, divided by the school commissioners, into two districts, according to the provisions of the statute of February 1829, to amend the several acts concerning the literary fund, though the county of Essex had anciently been divided into two parishes, called South Farnham and St. Ann's, the lines of which were still well known, and his testator in his lifetime resided in the former parish. And he insisted, that there was no such body of men, known to the law, as "the school commissioners and their successors of South Farnham district, Essex county;" and that the legacy to them in his testator's will, was void for uncertainty.

There was no replication to the answer; and the cause was heard, by consent, on the bill, the will therewith exhibited, and the answer: whereupon the court decreed,

*Charitable Bequests—Validity.—On this question, see discussion in *foot-note* to Gallego v. Attorney General. 3 Leigh 450. The principal case is cited in the following: Com. v. Levy, 23 Gratt. 40; Protestant Episcopal Ed. Soc. v. Churchman, 80 Va. 768; Wilson

v. Perry, 29 W. Va. 189. 1 S. E. Rep. 315; Wilmoth v. Wilmoth, 34 W. Va. 436, 12 S. E. Rep. 734; Pack v. Shanklin, 43 W. Va. 316, 37 S. E. Rep. 394.

See monographic note on "Charities" appended to Kelly v. Love, 20 Gratt. 124.

that the defendant should, out of the assets of his testator in his hands, pay the legacy of 1000 dollars to the plaintiffs. The defendant applied to this court for an appeal from the decree; which was allowed.

Johnson, or the appellant, said, that the statute of 1888-9, Supp. to Rev. Code, ch. 28, § 1, p. 40, authorized the school commissioners of any county, if they thought proper, to divide their county into districts, of not less than three nor more than seven square miles; but Essex county had never been so divided into districts; there was no such district as South Farnham, which was only the name of an ancient parish. There were not, and could not be, any school commissioners for South Farnham district; first, because there was no such district; and next, because, if there had been,

329 *the school commissioners never were, and could not be, appointed for a particular district, but always for the whole county, under the provisions of the general statute concerning the literary fund, 1 Rev. Code, ch. 33, § 13-19, p. 87-89. Neither were the school commissioners a body corporate: they had no law to govern them in the administration of any fund for the education of the poor, except that part of the literary fund, and the proceeds of glebe lands, dedicated by law to that object: so that, in the administration of private donations, they would be governed by no other law than that which would govern any other individuals. The school commissioners, in the administration of the fund committed to them by law, were to select objects from any part of their county, in their discretion. There was, he said, no legal method of ascertaining the "poor children of South Farnham district;" and this case fell within the principles on which the case of Gallego's ex'ors v. Atto. General was decided, 3 Leigh 450.

Briggs, for the appellees, said, it was true, that the school commissioners were not a body corporate, that they were appointed for the whole county, not for particular districts, and that Essex county might not have been formally divided into districts; but he thought it would be quite too technical, to disappoint the charity of the testator on such grounds. For, as he was, in his lifetime, one of the school commissioners, and died in the office, his very will shewed, that the county had been, in fact, divided into districts, and that he knew it; and, applying the words of the bequest to the known state of facts, his obvious purpose was, to give the legacy to the school commissioners of the whole county, to be appropriated to the education of the poor children of South Farnham district, in which he resided. And then, the whole question was, whether the school commissioners could take as such? Why not? They were a body of men known to the law; they were, especially, a body of men known to the testator; they were school commissioners for the whole county of Essex, and therefore, for each and
330 every *part of it; for South Farnham as well as the other parts of the county. The testator had a right to give his property to them, if he pleased, and to rely on them to execute the trust he thought

proper to repose in them, whether the law charged them officially with the execution of such a trust, or not. The court, if it saw fit, might require security from them for the faithful administration of the fund. Then, as to the objects of the testator's bounty, there would, he said, be little difficulty in saying, that they should be such poor children of South Farnham district, as the school commissioners should select as proper persons to be educated in the primary schools; and the effect would only be, to add one or two to the number of poor children in that district, to receive the advantage of such education.

The Court (dubitante CARR, J.), held that the bequest was void, and therefore reversed the decree, and dismissed the bill.

Rixey v. Bayse.

March, 1833.

(Absent TUCKER, P.)

Slander*—Discrediting Witnesses—Evidence of Particular Acts of Hostility—Admissibility.—In trial of action of slander, defendant, to discredit testimony of two witnesses of plaintiff's, offered evidence of particular acts of hostility of those witnesses towards him: HELD, such hostility could only be proved by proving acts of hostility, and therefore the evidence was proper.
Witnesses—Impeachment—Particular Instances of Falsehood—Admissibility.—But when the general reputation of a witness for veracity is in question, the party impeaching his veracity, cannot go into evidence of particular instances of falsehood.

Upon the trial of an action for slander, brought by Bayse against Rixey, in the circuit court of Culpeper, two bills of exceptions were filed by the defendant, to opinions of the court excluding evidence which he wished to adduce.

331 *The first stated, 1. that, the plaintiff having examined two witnesses on his part, named Mershon and Benier, and a witness introduced by the defendant being under examination, his counsel, with a view to shew that the plaintiff's witnesses, Mershon and Benier, entertained ill feelings towards the defendant, asked the defendant's witness, whether Mershon and Benier had not, before this trial, written and circulated papers derogatory of the defendant? The plaintiff's counsel objected to the inquiry, and the court thinking it improper, would not suffer it to be answered. 2. The defendant's counsel (with the same view) asked the witness, whether Mershon and Benier had done any thing evincing ill feelings towards the defendant, and if so, what they had done? The witness having answered the first part of this question in the affirmative, and going on, in answer to the latter, to speak of the papers referred to in the first question above mentioned, the plaintiff's counsel objected to the evidence, and the court stopt the witness, and would not suffer him to speak of those papers. 3. The defendant (still with the same view) asked the witness, whether he had ever heard Mershon and Benier repeat certain words, which they or either of them acknowledged they had

*Slander.—See monographic note on "Libel and Slander" appended to Bourland v. Eldson, 8 Gratt.

27. †Witnesses.—See monographic note on "Witnesses" appended to Claiborne v. Parrish, 2 Wash. 146.

written and published concerning the defendant, and which he offered to prove were violently abusive of him? The plaintiff's counsel objected, that the question was improper, and the court sustained the objection. And then, 4. the defendant offered testimony to prove the fact, that Mershon and Benier had written and published papers very derogatory from his character and abusive; but the plaintiff's counsel objected to the evidence, and the court excluded it. To which opinions of the court, the defendant excepted.

The second bill of exceptions stated, that, the defendant intending to impeach the credit of the plaintiff's witness Mershon, on the ground of his hostility towards the defendant, the plaintiff to sustain Mershon's credit, introduced a witness named Tutt, who testified that he was well acquainted with Mershon, that his character for veracity was *fair, and that his testimony in a court of justice was worthy of credit. On cross examination, Tutt said, that having heard, shortly before, that Mershon had been making some statements concerning himself, for which he determined to call him to account upon sight, he had accordingly called upon Mershon, who denied having ever made such statements, with which denial he, Tutt, was satisfied. Whereupon, the defendant's counsel put this question to Tutt — "Did you derive the information of Mershon's having made the statements about you, which he afterwards denied having made, from gentlemen in whose veracity you placed the most implicit confidence?" The plaintiff's counsel objected to the question, and the court sustained the objection; to which the defendant excepted.

Verdict and judgment for the plaintiff for 300 dollars; from which Rixey appealed to this court.

Stanard for the appellant.

Briggs for the appellee.

BROOKE, J. The court is of opinion, that the circuit court erred in excluding a portion of the evidence, stated in the first bill of exceptions, the object of which was to prove particular facts, shewing that the witnesses, who had been examined by the plaintiff, had ill feelings towards the appellant. It is true, particular facts are not permitted to be proved, to impeach the credit of a witness when supported by general reputation; but hostility towards one of the parties is not, in its nature, a matter of general reputation; and if proved at all, must be proved by particular facts or circumstances. The objection to the opinion of the circuit court stated in the second bill of exceptions, is not well founded. The court was right in refusing to permit the witness Tutt to answer a question intended to prove a particular fact, in order to discredit a witness, to whose general character for veracity he had before borne testimony. The credit

of a witness can be impeached by general evidence *only, and not by evidence as to particular facts. Stark. Law Ev. part 2, § 28, vol. 1, p. 145; 3 Id. part 4, vol. 3, p. 1753.

The judgment is to be reversed, and the cause remanded to the circuit court

for a new trial, upon which the appellant is to be permitted to give evidence of particular facts or circumstances, shewing that the plaintiff's witnesses entertained ill feelings towards him.

Elam v. Keen.

March, 1883.

[26 Am. Dec. 322.]

(Absent TUCKER, P.)

Gift of Bond in Suit—Delivery of Attorney's Receipt—Validity.*—The owner of a bond which was in suit, and for which the owner held an attorney's receipt, told the plaintiff that he might have the bond, and delivered him the attorney's receipt for it, instead of delivering the bond itself, which was then filed in the suit in court; no consideration was given by the plaintiff for the bond: HELD, this was a valid gift of the bond to the plaintiff, and he is entitled to recover the money collected upon it.

Assumpsit, by Keen against Elam, in the circuit court of Chesterfield, for money had and received by the defendant to the plaintiff's use. Pleas, non assumpsit, and the statute of limitations. Verdict and judgment for the plaintiff, for 183 dollars, with interest &c.

At the trial, the plaintiff gave in evidence the last will and testament of Elisha Keen deceased, whereby he devised and bequeathed his whole estate to his mother Elizabeth Keen; who was also his executrix. And then he adduced testimony, proving that Elizabeth Keen, the executrix, being possessed of a bond executed to her testator, which was then in suit, and holding an attorney's receipt for the same, the bond being filed among the papers in the suit, told the plaintiff that he might have the bond, and gave him the

334 *attorney's receipt for it. And then the defendant shewed, that he was the administrator de bonis non with the will annexed of Elisha Keen, and the executor of Elizabeth Keen. Whereupon, his counsel moved the court to instruct the jury that the gift made as above mentioned, if without consideration, was void in law, and that the plaintiff was not entitled, in consequence thereof, to recover the proceeds of the bond in this action; but the court refused to give such instruction. The defendant excepted to the opinion; and appealed from the judgment to this court.

Rhodes, for the appellant, argued, that the gift of the bond by Elizabeth Keen to the appellee, under which he claimed, being

*Gifts—Delivery.—In Yancey v. Field, 85 Va. 760, 8 S. E. Rep. 721. It is said, the gift of a bond may be affected not only by a delivery of the bond itself, but by a delivery out of the donor's control of an instrument without which he could not recover the fund from his debtor or agent. This is illustrated by the case of *Elam v. Keen*, 4 Leigh 333, in which case the donor, holding an attorney's receipt for a bond in suit, which was filed with papers in the court, told the plaintiff he could have it, and delivered to him the receipt, and this was held a sufficient delivery to constitute a valid gift. To the same effect, the principal case is cited in *Lee v. Boak*, 11 Gratt. 187, 188; 1 Va. Law Reg. 874.

In *Clarke v. Hageman*, 18 W. Va. 728, the principal case is cited to the point that a note or draft may be assigned by the transfer of the attorney's receipt. In *Hulings v. Hulings Lumber Co.*, 38 W. Va. 381, 18 S. E. Rep. 681, the principal case is cited on the question of equitable assignment. The principal case is reported in 26 Am. Dec. 322, with note.

See monographic note on "Gifts" appended to *Barker v. Barker*, 2 Gratt. 344.

a mere parol gift, without actual delivery to the donee of the thing given, could not pass the title to him; and that the delivery of the attorney's receipt for the bond, was not tantamount to actual delivery of the bond. The possession of the attorney's receipt, did not authorize the appellee to demand of the attorney, either the bond itself, or the proceeds of it, when collected; it was nowise an assignment of the bond. He cited *Ewing v. Ewing*, 2 Leigh 337; *Irons v. Smallpiece*, 2 Barn. & Ald. 552; *Bunn v. Markham*, 7 Taunt. 244, 2 Eng. C. L. R. 81; *Ward v. Turner*, 2 Ves. sr. 431, 442; *Duffield v. Elwes*, 1 Sims. & Stu. 239.

Taylor, contra, maintained, that the delivery of the attorney's receipt for the bond was equivalent to the delivery of the bond itself; it was a symbolical delivery of it. There can be no doubt it was so intended, since there was no other imaginable purpose for which it could have been delivered. And the bond not being in the actual possession of the donor at the time, but being filed in court, the only mode of delivering it, was by delivering the attorney's receipt for it, to the donee. He cited, and examined, *Pleasants v. Pendleton*, 6 Rand. 473; *Jones v. Selby*, Prec. in Chan. 300; *Drury v. Smith*, 1 P. Wms. 404; *Snellgrove v. Baily*, 3 Atk. 214; *Cotteen v. Missing*, 1 Madd. Ch. Rep. 176, 183; *Noble v. Smith*, 2 Johns. Rep. 52, 56; *Pierson v. Pierson*, 7 Id. 26; *Grangiac v. Arden*, 10 Id. 293; *Cook v. Husted*, 12 Id. 188.

CARR, J. That no valid gift of a chattel can be made, without delivery of the thing given, or something equivalent to such delivery, is settled law, as this court decided in *Ewing v. Ewing*, upon the authority of many cases there cited. The question is, has there been such delivery here? In contracts of sale, a constructive or, symbolical delivery is sufficient to pass the right to the chattel sold, and put it at the risk of the vendee: the cases cited in *Pleasants v. Pendleton* prove this. But lord Hardwicke, in *Ward v. Turner*, denies (as a general proposition) that such delivery is sufficient to render a gift valid. There are many things, of which actual, manual tradition cannot be made, either from their nature, or their situation at the time: it is not the intention of the law, to take from the owner the power of giving these: it merely requires that he shall do what, under the circumstances, will in reason, be considered equivalent to an actual delivery. Thus, in *Jones v. Selby*, A. called up two of his servants, and sent for his relative Mrs. W. who had been his housekeeper many years, and to whom he had by his will given £500. and said, in their presence, "I give to my cousin Mrs. W. this hair trunk, and all that is contained in it;" and he delivered her the key thereof, and bid the servants take notice and remember it &c. Three years after, A. made another will by which he gave Mrs. W. £1000. but took no notice of the gift of the trunk. He died soon afterwards; and four days after, upon opening the trunk in the presence of several persons, there was found in it several rings, pieces of gold, and

among other things a tally upon the government for £500. This was considered a sufficient delivery of the tally, though the subsequent will was taken as a satisfaction. Upon this case, lord Hardwicke, in *Ward v. Turner*, comments thus: "The only case in which such a symbol seems to be held good, is *Jones v. Selby*, but I am of opinion, that amounted to the *same thing as delivery of possession of the tally, provided it was in the trunk at the time. Therefore, it was rightly compared to the cases upon 21 Jac. 1, *Ryal v. Rowles* [1 Atk. 165,] and others. It never was imagined on that statute, that the delivery of a mere symbol, in the name of the thing, would be sufficient to take it out of that statute: yet notwithstanding, delivery of the key of bulky goods, where wines &c. are, has been allowed as delivery of the possession, because it is the way of coming at the possession, or to make use of the thing: and therefore, the key is not a symbol, which would not do." In *Nobel v. Smith*, chief justice Kent says, "The cases in which the delivery of a symbol has been held sufficient to perfect the gift, were those in which it was considered equivalent to actual delivery; as the key of a trunk, of a room, or of a warehouse, which was the true and effectual way of obtaining the use of the subject." Upon these authorities, and the reason of the case, I am of opinion (though certainly not without doubts) that the delivery of the receipt, accompanying the gift of the bond, made it a valid gift. The bond itself could not be delivered: it was in court; in the custody of the law. The receipt was its representative. We must presume it described the bond accurately, and stated that it was received to be put in suit; and that when collected, the attorney would account for it. As in the case of the key, the delivery of this receipt, "was the true and effectual way of obtaining the use of the subject." Speaking from my own experience, I should say an attorney requires no better order for the payment of money he has collected on a bond, than the receipt he has given for the bond: when he takes this in, with a receipt upon it for the money, he feels himself safe. I think, therefore, the circuit court did not err in refusing to give the instruction to the jury asked by the appellant.

CABELL, J., concurred.

337 *BROOKE, J. I think the circuit court was clearly right in refusing to give the instruction to the jury. A parol gift of a personal chattel, is distinguishable from a sale, in this, that until it is perfected by the delivery of the article or of some equivalent for it, the donor may retract the gift. The old common law on this subject, differed much from the rule of the civil law, which seems to have been adopted by the judges in England, from a pretty remote period. In *Clayton* 135, it was said, that if A. being at York gives a horse to J. S. he may have trespass for the horse: or, as is said 6 Bac. Abr. *Trover* C. p. 683, if the person, in whom there is a general property in goods which lie at York, give them to J. S. who is in London, and before he obtains possession of them,

a stranger converts them, J. S. may have trover for them. But this doctrine has been long since changed, and the rule of the civil law preferred. By the common law, trover will not lie until the property is changed; and the decisions have settled, that a gift without delivery or some equivalent does not change the property. As long as the donor may retract the gift, the donee can have no action concerning it.

The gifts, in the case before us, was proved to have been made by Mrs. Keen to the appellee; and the attorney's receipt for the bond, the subject of the gift, then in suit, was delivered to the donee. This was as effectual as the delivery of the bond itself. The attorney was bound to respect his receipt: he could not have refused to pay the money collected on the bond, or to deliver the bond itself, if demanded, to the donee. In the case of *Ward v. Turner*, the doctrine is very fully examined by lord Hardwicke. That was the case of a donation causa mortis of receipts for South Sea stock, which was held invalid. His first objection was, that there was but one witness, whereas the civil law, from which the doctrine was taken, required five; but this he did not rely on. In conclusion, he said, that the gift there was merely legatory, and amounted to a nuncupative will, and contrary to the statute of frauds. He

338 seems to admit the authority *of *Jones v. Selby*, where a tally for £500. was given by the delivery of the key of a trunk, in which it was found; though he intimates, that lord Cowper went, in that case, on the ground of a satisfaction or ademption. This doctrine was examined by this court, in *Ewing v. Ewing*, where it is said that there is no distinction between gifts causa mortis and gifts inter vivos (like that now before us), except that in the former case, the gift does not take effect until the death of the donor, in the latter, it takes effect immediately.

Judgment affirmed.

Fleming's Ex'or v. Dunlop & Buchanan & C.

March, 1833.

(Absent CABELL, J.)

Judgments—Revival—Statute of Limitations.—Judgment recovered by D. P. & Co. against F. in September 1810, and execution sued out in the same month, and another in October 1815, but neither returned; to a scire facias to revive the judgment against F.'s ex'or, sued out in July 1826, defendant pleads in bar, the statute of limitations, 1 Rev. Code, ch. 128, § 5.—plaintiffs reply the two executions sued out in September 1810, and October 1815: on demurrer to this replication: HELD, the statute is a bar to the scire facias.

Same—Debt—Statute of Limitations.—But it seems,

***Judgments—Revival—Statute of Limitations.**—In *Hutcheson v. Grubbs*, 80 Va. 255. It is said, the time, however, within which executions and writs of scire facias could be issued on judgments was prescribed by statute; and in *Fleming v. Dunlop*, 4 Leigh 338, it was said by JUDGE CARR, that where no execution issued within the prescribed time the judgment was annihilated. To the same effect, the principal case is cited in *Ayre v. Burke*, 82 Va. 340, 4 S. E. Rep. 618; *Dabney v. Shelton*, 82 Va. 351, 4 S. E. Rep. 618; *White v. Offield*, 90 Va. 339, 18 S. E. Rep. 436; *Werdenbaugh v. Reid*, 20 W. Va. 562.

***Same—Action of Debt—Limitation.**—But it seems by the opinion of TUCKER, P., in the principal case, that debt would lie on the judgment and the statute would not be a bar to that action. For this proposition, the principal case is cited in *Herrington v. Harkins*, 1 Rob. 600, 601, and note.

See monographic notes on "Judgments" appended

by the opinion of TUCKER, P., that debt would lie on the judgment, and the statute would not be a bar to that action.

Dunlop & Buchanan, surviving partners of Dunlop, Pollock & Co. sued out a scire facias in July 1826, against Moseley the executor of Fleming, to revive a judgment, recovered in September 1810, by Dunlop, Pollock & Co. against Fleming in his lifetime, in the circuit court of Henrico. The defendant pleaded, 1. no such record; and 2. that the judgment in the scire facias mentioned, was recovered in September 1810, and no execution thereon had ever been sued out and returned, and no execution, scire facias or action of debt, had been sued out or brought 339 *within ten years next before the date of this scire facias. The plaintiffs put in the general replication to the first plea; and to the plea of the statute of limitations, they replied, that an execution was sued out on the judgment on the 19th September 1810, returnable the 1st November following, and another execution on the 4th October 1815, returnable the 16th December following. To this replication the defendant demurred generally.

The court having found on inspection that there was such a record, the only question was, upon the demurrer, whether the plea of the statute of limitation was a bar to the scire facias? The circuit court held, that it was not, and gave judgment for the plaintiffs. The defendant appealed to this court.

The cause was argued here by Taylor and Johnson for the appellant, and P. N. Nicholas and R. C. Nicholas for the appellees. The question was, whether the 5th section of the statute of limitations, 1 Rev. Code, ch. 128, p. 489, provides any limitation to a scire facias, or action of debt, upon a judgment on which an execution has been sued out, and no return made thereon?

CARR, J. This question has perplexed me exceedingly; and the opinion which I shall now give, is by no means confidently entertained.

At common law, no scire facias lay in personal actions. Where the plaintiff had suffered the year and day to pass without taking out execution, he was driven 340 to an action of *debt on his judgment. To remedy this inconvenience, was one of the objects of the statute of Westm. 2, ch. 45, which gave the scire facias in personal actions, not as a substitute for the action of debt, but as a cumulative remedy. The statute prescribed no limitation of time, after which the scire facias should be barred: but the courts,

to *Smith v. Charlton*, 7 Gratt. 425, and "Limitation of Actions" appended to *Herrington v. Harkins*, 1 Rob. 591.

*This section, first enacted in 1792, is in these words: Judgments in any court of record within this commonwealth, where execution hath not issued, may be revived by scire facias or action of debt brought thereon, within ten years next after the date of such judgment, and not after: or where execution hath issued, and no return is made thereon, the party in whose favor the same was issued, shall and may obtain other executions, or move against the sheriff or other officer, or his or their security or securities, for not returning the same, for the term of ten years from the date of such judgment, and not after.—Note in Original Edition.

in regulating the practice, established, that if the judgment were less than seven years old, the plaintiff might sue out a scire facias as matter of course; if more than seven years, but under ten, he could not have the scire facias without a side bar rule; if above ten, and under twenty years old, there must be a motion under counsel's hand, supported by an affidavit that the judgment remained unsatisfied; and if the judgment be more than twenty years standing, there must be a rule to shew cause on a similar affidavit. *Hardisty v. Barny*, Salk. 598; 2 Wms. Saund. 72, f. Where execution had issued within the year, the plaintiff might sue out other executions, at any time, without a scire facias, provided the first execution had been returned and filed, and continuances entered; but if the first execution had not been returned and filed, though the continuances were entered on the roll, a second execution would be quashed. Thus, in *Blazer v. Baldwin*, 2 Wils. 82, within a year after the judgment, a *feri facias* was sued out, and was continued upon the roll, from easter term 1757 to trinity term 1758, and the defendant being this term taken on a ca. sa. issued upon the judgment, it was moved that this is irregular, there neither being any scire facias to revive the judgment, nor any execution returned by the sheriff, to warrant the entry of the continuances on the roll: the court held that the defendant must be discharged out of custody, and the plaintiff must pay the costs of this application, for that it was irregular to continue an execution on the roll which was never returned or filed.

The statute of Westm. 2, in regard to writs of scire facias, was in force with us, I believe, down to the last revival of 1819, subject to such modifications as were
341 introduced *by our statutes from time to time. In the revision of 1792, that which stands now as the 5th section of our statute of limitations, was first enacted; it has ever since continued to be law. It is under the last clause of this section, that the case before us arises. The original judgment was obtained in September 1810, and the scire facias was sued in 1826, sixteen years after the judgment; but an execution was sued out in September 1810, and another in 1815, neither of which has ever been returned. Is the statute a bar to the scire facias? The cause was very well argued; and I was strongly inclined to think with the appellee's counsel, that this scire facias might be maintained, upon the distinction so impressively urged by them, between a judgment on which no execution had issued, and one where execution had been taken out, though it had never been returned. The statute is express, that where no execution has issued, ten years shall bar a scire facias, but it says not a word about a scire facias as applicable to the case where execution has issued, though there has been no return. Further examination, however, has compelled me to change my first impression, and to believe that this scire facias cannot be sustained. The object of the statute seems clearly to have been, to curtail the cases comprehended by each clause of the section,

of some privilege; to limit proceedings on them: and the period it fixes in both cases, is ten years. Where no execution has issued, it makes that period annihilate the judgment. In England, we have seen, the issuing an execution makes no difference, unless it be returned and filed; the judgment is still considered, as if no execution had issued. If our legislature had so considered it, it would doubtless have placed the two cases upon the same ground. But, it is clear to me, the legislature believed, that the execution having gone into the officer's hands, the judgment would continue alive, though there should be no return, and therefore could not be in need of a revival by scire facias, and indeed could not be the subject of such revival. The words of the law shew this; for they

342 consider *the party in whose favor the execution issued, as having, though that execution was not returned, the power of obtaining other executions from time to time; and this power he could only have upon the hypothesis, that it was a case neither requiring nor admitting of a scire facias to revive. The law, then, considered the party as in full possession of the right (indefinite as to time) of renewing his executions, and moving against the officer; and these rights (all he possessed over the subject) the statute proceeds to limit to ten years, and to bar after the lapse of ten years from the date of the judgment. From this view of the law, I must conclude that the appellees cannot maintain their scire facias.

BROOKE, J. The question is, whether this case is within the provisions of the 5th section of the statute of limitations? The remedies in the two cases provided for in the section (namely, 1. where no execution has issued and 2. where execution has issued and no return thereon) are as distinctly marked as language could distinguish them. The error in the argument seems to have been in exploring the law as it stood before the statute, instead of attending to its letter and spirit. The 6th section, saving the remedy in cases of disability &c. seems to ascertain and confirm the construction of the 5th section. As the law stood before the statute, a scire facias could not issue after the expiration of seven years, but on a side bar motion, which was ex parte, without notice; and after ten years, without motion in court, on notice; presumption of payment increasing in strength with lapse of time. And, in a case like that before us, the executions, which have been sued out and not returned, would have been considered in the same light as if no execution had issued; *Blazer v. Baldwin*, 2 Wils. 82. But under our statute, the motions resorted to in the english practice, are dispensed with; and, in the case in which an execution has been sued out and not returned, the liberty to sue out other executions, toties quoties, or to
343 move against the *sheriff, is substituted for the remedy by scire facias, or (it may be) other remedies existing before the statute. This, I think, is the law of this case. But cases may occur, as where execution has issued within the ten years, but not returnable till after, and then not

returned by the sheriff, or where the party may die under execution after the expiration of the ten years; and, in such cases, the 5th and 6th sections may probably receive a more liberal construction, and other executions may be allowed. The judgment should be reversed.

TUCKER, P. The question must, I think, be determined in favor of the appellant.

The proceedings after judgment may be in three states: 1. There may have been no execution issued whatever, within the year; 2. an execution may have been issued, but not returned; and 3. execution may have been issued, and returned. In the first of these cases, the common law presumed the debt to have been paid or released; and would not therefore permit the party after the expiration of the year to sue out execution. He was driven to his action of debt. In the second also, the result would seem to have been the same at the common law; for after the scire facias was given, it was determined, that where no execution was returned and filed, no execution could regularly issue without a scire facias, because the execution could not in such case be regularly kept alive by continuances. In the third case, as from the return it must appear whether the debt had or had not been paid, there was no room for presumption, and therefore the execution might be continued down by continuances entered upon the roll for any indefinite time. The form of the entry in these continuances may be seen in Tidd's Practical Forms, p. 361, and in Lilly's Entries 500. And these continuances were held necessary, and for want of them a scire facias became essential. 11 Vin. Abr. Execution, O. a. pl. 9, p. 8; 6 Bac. Abr. Scire Facias, C. p. 107; Blazer v. Baldwin, 2 Wils. 82; Barnes's 344 *Notes 213. Yet, as the entry of these continuances was a mere matter of form, and the mere act of the party and the clerk, without the renewed executions ever coming to the hands of the sheriff, it was at length decided, that if a good foundation was laid for them, that is, if there had been within the year an execution actually issued and returned no goods or non est inventus, and filed by the sheriff, the plaintiff might enter the continuances on the roll, even after notice given of a motion to quash the execution on the ground that it was out of date. 2 Barnes's Notes 172.

The common law having, after the expiration of the year, driven the plaintiff to his action of debt on his judgment, where execution had not issued, or if issued had never been returned, the statute of Westm. 2, ch. 45, was made to facilitate his remedy by giving him the scire facias. Its language was very general; and the proceeding by scire facias was adopted by the judges to carry its provisions into execution. It contained no limitation whatever; so that, at any time, however remote, the defendant might have been vexed by a scire facias, but for the regulations adopted by the courts, and detailed by judge Carr in the opinion just delivered. Our legislature was not content with leaving this matter to the courts. It has provided

the absolute bar of a statutory limitation. It has declared, that where no execution hath issued, the plaintiff shall not even have his action of debt or scire facias after ten years. Where execution hath issued, and not been returned, the phraseology of the statute is different; and the gist of the question here, is, what is the true interpretation of this clause?

By the common law, in this case as well as in the former, we have seen, that the party could only have proceeded, after the year, by action of debt. For he could not enter the continuances on the roll for want of a return, 2 Wils. 82, and the execution ran out of date for want of the continuances. His only remedy, therefore, was a new original (or an action of debt on the judgment) to which after the statute of

Westm. 2, was added the scire facias, 345 and to these there was no limitation.

For this case also our statute provided a statutory limitation in lieu of the rules of practice adopted by the courts of Westminster. It declares that where execution hath issued and no return is made thereon, the party in whose favor the same was issued, shall and may obtain other executions, for the term of ten years from the date of the judgment, and not after. Now, I understand this clause of the act as an absolute bar to the parties obtaining execution upon the subsisting judgment, in any mode whatever. It may not have taken away the remedy by action of debt, for that did not give the party a new execution upon the old judgment, but it gave him a new judgment. Accordingly it has been held, not to be barred; Randolph v. Randolph, 3 Rand. 490. But it did bar the obtaining any execution on the old judgment after ten years. Now executions on judgments are obtained in two ways, either by the mere direction of the party, or by the award of the court upon a scire facias; and the law declares, in general terms, they shall not be obtained after ten years. It, therefore, prohibits their being obtained in any way, either at the will of the party or by the award of the court on a scire facias. This conclusion is rendered inevitable when we consider, that where execution has issued, but has not been returned, the party could not issue another after the year; he was driven to his scire facias; 2 Wils. 82. The statute, therefore, was not necessary to prevent his obtaining execution, at his own pleasure, from the clerk: that he was already prevented from doing, by the judgment having been suffered to go out of date for want of an execution duly returned and filed, and which could be regularly continued down. But it was necessary to prevent his obtaining execution by scire facias; and this was its effect. If the provision had not this effect, it had no effect; there was no other case for it to operate upon.

It is not easy to perceive why the peculiar phraseology of this clause was adopted, unless we suppose, that there was possibly a doubt in the minds of the committee of revision *of 1792, whether the plaintiff might not have a right to sue out execution at pleasure, where execution had issued though not returned. If so,

it is natural they should have used the broad expressions of this clause, as the more narrow language of the first would not have reached the case.

In *Randolph v. Randolph*, it is said to have been admitted, that a scire facias would lie after ten years, where execution had not been returned, and that the statute in such case is no bar. But this point is taken as a concession of the bar, and does not seem to have been critically examined by the bench. I do not, therefore, feel myself bound by it, as it was unnecessary that it should have been decided; for as the action of debt would have been sustainable upon the judgment in that case, the party was entitled to recover whether the scire facias was barred or not.

Judgment reversed, and judgment entered for the appellant.

Sims v. Harrison and Another.

March, 1833.

(Absent TUCKER, P.)

Slaves—Wrongfully Taken in Execution—Right of Owner to Injunction.*—In every case, in which the owner of slaves wrongfully taken in execution for the debt of another, applies to a court of equity to inhibit the sale of them, the court ought to award an injunction, and if the case be made out, to give relief, though it be neither alleged in the bill, nor proved, that the slaves have any peculiar value.

Randolph Harrison and Samuel Jones exhibited a bill against Edward Sims and the sheriff of Buckingham, in the superiour court of chancery of Richmond,—setting forth, that sundry executions having been sued out on judgments against Charles Irving, and levied by the sheriff of 347 Buckingham, *on three negro girls the slaves of Irving, the plaintiffs purchased these slaves at their full value at the sheriff's sale, and paid the money for them, and then left them on Irving's

plantation, for the convenience of his family (the slaves being favorite house servants) but they were at all times completely under the plaintiffs' control. And that, afterwards, Sims, having sued out a fieri facias on a judgment against Irving, and delivered it to the sheriff, caused it to be levied on the same three slaves; and the sheriff had advertised them for sale to satisfy this execution. Therefore, the bill prayed an injunction to inhibit the sheriff from making such sale.

The chancellor thinking that the plaintiffs' proper remedy was an action at law, denied the injunction; but it was awarded by this court.

Sims then put in his answer, objecting to the jurisdiction of the court of chancery to give relief in such a case; and alleging, that the purchase of the slaves by the plaintiffs, was not made bona fide with their own money, but with money furnished by others for Irving's benefit, and was a mere contrivance to protect Irving's property from his creditors.

The chancellor, still adhering to his first opinion, that the case stated in the bill was not proper for relief in equity; and, suggesting that the cases decided by the court of appeals, on like questions of jurisdiction, reported in 3 *Randolph* (alluding to the cases of *Bowyer v. Creigh*, 3 *Rand.* 25, and *Allen v. Freeland*, *Id.* 170,) had perhaps escaped the notice of the judges of the court of appeals, when the injunction in this case was awarded,—therefore, discharged the injunction, as having been impropvidently awarded. From this order the plaintiffs appealed to this court.

Upon the hearing of the appeal, this court said, that the chancellor was mistaken in supposing that the cases in 3rd *Randolph* on like questions, had escaped its attention; that though there had been some diversity of opinion, whether peculiar value of slave property ought not to be alleged in a bill praying relief in such cases, yet when 348 that matter was *alleged (as it was in this bill) an injunction to inhibit the sale of slaves unjustly taken in execution, ought to be awarded by a court of chancery, notwithstanding that the plaintiff might recover damages at law for the wrongful seizure of his property, or the property itself in an action of detinue; and that, on a review of all the cases on the point, it had been determined by a full court, in *Randolph v. Randolph*, 6 *Rand.* 194, that, in every case in which the owner of slaves wrongfully taken under execution, applies to a court of equity to inhibit the sale of them, the court ought to award an injunction, and, if the case be made out, to give relief, though it be neither alleged in the bill, nor proved, that the slaves have any peculiar value. Therefore, the court sustaining the jurisdiction of the court of chancery in the present case, reversed the order dissolving the injunction, ordered the injunction to be reinstated, and to stand till the hearing, and remanded the cause.

In the sequel of the proceedings in the court of chancery, the allegations of the bill and the perfect fairness of the plaintiffs' purchase, were clearly proved; and

***Chancery Practice—Sale of Property under Execution—Injunction.**—In *Baker v. Rinehard*, 11 *W. Va.* 241. It is said: "In Virginia the decisions seem to establish the principle: 'That a court of equity should not interfere, to prevent a creditor from seizing and selling under his execution any property, which he may think liable to it; unless the property be of such a character that the owner cannot be fully compensated by the verdict of a jury giving him its fair market value; and that this can only be, where the property is of such a nature that it may fairly be supposed to have a peculiar and additional value in the estimation of the owner, the pretium affectionis.' 2 *Rob. Pr.* (old) 225. See *Randolph v. Randolph*, etc., 3 *Munf.* 99; *Wilson and Trent v. Butler*, etc., 3 *Munf.* 559; *Scott et al. v. Halliday*, 5 *Munf.* 103; *Sampson v. Bryce*, 5 *Munf.* 175; *Bowyer*, etc., *v. Creigh*, 3 *Rand.* 25; *Allen v. Freeland*, 3 *Rand.* 175; *Randolph v. Randolph*, 6 *Rand.* 198; *Sims v. Harrison*, 4 *Leigh* 346; *Kelly v. Scott*, 5 *Gratt.* 479; *Summers*, etc., *v. Bean*, 13 *Gratt.* 417. In some of these cases the court rendered no opinion; in others the language used was loose or more general, from which, if the case, in which the language is used, is not particularly examined, it might be inferred, that a court of equity in such cases would interpose when, from the nature of the case, the remedy at law was incomplete, without reference to the peculiar nature of the property. But if the cases themselves are examined, it will appear that the law as laid down by Robinson in his Practice, as quoted above, is fairly inferrible from all the Virginia decisions, and is clearly expressed and laid down in some of them."

See also, citing the principal case, *foot-note* to *Kelly v. Scott*, 5 *Gratt.* 479; *Summers v. Bean*, 13 *Gratt.* 417; *Snoddy v. Haskins*, 12 *Gratt.* 368; *Walker v. Hunt*, 2 *W. Va.* 494. See monographic notes on "Injunctions" appended to *Clayton v. Anthony*, 15 *Gratt.* 518, and "Executions" appended to *Paine*, *Surv.*, etc., *v. Tutwiler*, 27 *Gratt.* 440.

the chancellor, upon the hearing of the cause, perpetuated the injunction. And then Sims appealed to this court—

Which affirmed the decree.

The attorney general for the appellant. Stanard, for the appellees.

349 *Beck's Adm'x v. De Baptists and Others.

March, 1833.

Deeds of Trust—Recordation—Bona Fide Purchaser*—

Case at Bar.—By written articles, Head contracts to sell to Benj. De Baptist, a lot of land, for bricks to be furnished and laid by vendee in walls of a house to be built for vendor; vendee, unable to perform the contract, transfers it, before work begun, to John and William De Baptist, with Head's consent; John and William borrow \$500 of Beck, and give him a deed of trust of the lot to secure the payment; then, John and William furnish the bricks and do the work for Head, according to the contract; but, afterwards, Benjamin sells the same lot to Edward De Baptist, and he sells it to Long, and Benjamin, Edward, John and William all join in conveyance to Long, all the parties having actual notice of Beck's deed of trust; and then Long sells it to Adams, who has no notice of the deed of trust;—the legal title having been retained by Head, as security for performance of the contract on part of vendee, and still remaining in him: HELD, that Beck has the best right to call for the legal title, and to subject the property to the payment of the \$500 secured to him by the deed of trust, if that deed was duly recorded before Adams's purchase, otherwise not.

Upon a bill in the superiour court of chancery of Fredericksburg, exhibited by James Beck in his lifetime, and upon his death pending the suit revived by his administratrix, against Benjamin, John, William and Edward De Baptist, Joshua Long, Thomas Adams and Emanuel Head, the case appearing by the pleadings and proofs, was thus:

By articles of agreement between Emanuel Head and Benjamin De Baptist dated the 19th August 1818, Head contracted to sell and convey part of a lot in the town of Fredericksburg to Benjamin De Baptist, for 100,000 good and merchantable bricks to be furnished and laid by him, in a workmanlike manner, in the walls of a house which Head was then about to build, and 100 dollars in money or groceries, to be paid or delivered by the vendee. Head retained the legal title as a security for the performance of the contract on the part of the vendee.

Benjamin De Baptist, finding himself unable to fulfil the contract on his part, by parol agreement, on the 23rd November 1818, transferred the contract to his brothers

John and William De Baptist, who

350 were to fulfil his agreement *with Head, and thereupon to receive the conveyance of the title from him. To this transfer of the contract, Head was privy and assenting, and wrote an agreement on the articles, stating the transfer and the terms of it, to be signed by all the parties, but it was never in fact signed by any of them. The legal title remaining in Head, it was alleged in the bill, that Benjamin De Baptist executed a deed conveying his

equitable interest to John and William, which deed was afterwards fraudulently suppressed; and there was some, though not conclusive, proof, to shew that such a deed had been executed.

On the 3rd April 1819, John and William De Baptist borrowed 500 dollars of the plaintiff Beck, for the purpose, it seemed, of enabling them to comply with the contract with Head; and conveyed the lot purchased of Head, or rather, in effect, their equitable interest therein, to a trustee, in trust to secure the payment of the 500 dollars to Beck. It was alleged in the bill, and not denied in the answers, and there was moreover strong proof to shew, that this deed of trust from John and William De Baptist was duly recorded in the hustings court of Fredericksburg; but no certificate of the registry of the deed appeared in the record of this suit.

Notwithstanding the transfer of the contract to John and William, Benjamin De Baptist executed a deed conveying the lot (that is all his equitable interest in it) to his brother Edward. This deed bore date the 5th May 1819, and was recorded on the 5th November in that year. It was alleged in the bill, that the deed was antedated, and that it was in fact executed on the day it was recorded; but of this there was no proof.

Meantime, in the course of the year 1819, John and William De Baptist commenced the building of the house for Head, furnishing and laying the bricks in the walls, according to the original contract; but they did not intirely complete the contract on their part; and then, Edward De Baptist undertook and finished the walls.

351 *Whereupon, Head prepared a deed of conveyance of the lot he had sold, to Benjamin De Baptist; which deed was not delivered, because a part of the purchase money was yet to be paid; and afterwards, he was requested by Benjamin, to execute the deed to Edward De Baptist, and by Edward to execute it to Joshua Long. But the balance of the purchase money remaining still unpaid, Head withheld the conveyance, retaining the legal title as security for the debt.

But on the 9th December 1819, a deed of conveyance of the lot was executed to Long, by Benjamin De Baptist, the original vendee, John and William De Baptist, who were first substituted for him, and Edward De Baptist, all joining in the conveyance; thus shewing the knowledge of all parties to the deed, of the intermediate rights of John and William; and there was clear proof, that, at the time this deed was made to Long, Benjamin and Edward De Baptist and Long, all three, had actual and full notice of the deed of trust of the 3rd April 1819, which had been executed by John and William De Baptist to secure the debt of 500 dollars to Beck; and indeed, that it was a main purpose of the transaction, and a purpose in which Long co-operated, to defeat Beck's security.

On the 31st December 1819, Long sold and conveyed the lot to Thomas Adams. The bill charged, that Adams had actual notice of Beck's rights under John and William De Baptist's deed of trust of the

*Deeds of Trust—Unrecorded—Effect as to Bona Fide Purchasers.—On this question, the principal case is cited in *Foot-note* to Bird v. Wilkinson, 4 Leigh 266; Weinberg v. Rempe, 15 W. Va. 858. The principal case is also cited in Cox v. Wayt, 26 W. Va. 817.

See monographic note on "Deeds of Trust" appended to Cadwallader v. Mason, Wythe 188.

3rd April 1819, and that Beck had given him such notice, before he paid the purchase money to Long. But Adams in his answer denied that he had such notice, and there was no proof that he had.

The legal title remaining still in Head, the bill claimed that Beck had the preferable right to call for it; and prayed, that the lot should be subjected to the payment, first, of any balance of the original purchase money that might yet remain due to Head, and then to the payment of the 500 dollars and interest for which it was mortgaged by John and William De Baptist to Beck, by their deed of the 3rd April 1819.

352 *None of the defendants in their answers, pleaded or in any way relief on, the statute of frauds, as affecting the validity of the transfer of the contract or purchase by Benjamin to John and William De Baptist.

It seemed, that Head received full satisfaction of the balance due him during the pendency of the suit in the court of chancery; for he expressly waived an account which had been ordered to ascertain the balance; so that the controversy which remained to be decided, was that between Beck and the other defendants.

The chancellor, on the hearing, dismissed the bill: from which decree, Beck by petition to this court, prayed an appeal; which was allowed.

The cause was argued by Harrison and Stanard for the appellant, and by Johnson for the appellee.

I. The first question was a question of fact; namely, whether, after the parol agreement between Benjamin De Baptist and his brothers, John and William, whereby he transferred to them the benefit of his purchase of the lot from Head, and they undertook to perform the contract on the part of the purchaser, Benjamin made a deed to John and William conveying to them his equitable interest in the subject? The proofs furnished reason to justify an inference, that there was such a deed executed; but the evidence on the point, was certainly not decisive.

II. Supposing no such deed from Benjamin to John and William was executed, and that the transfer of the contract of purchase by him to them, was by parol agreement, the question arose, whether the statute of frauds affected the validity of the parol contract of transfer by Benjamin to John and William, of his equitable interest in the subject under the articles of agreement with Head?

The counsel for the appellant maintained, 1. that the statute of frauds had no manner of application to the case; that the only rights Benjamin had, were those he held under his executory contract with Head, 353 which was in writing, as *the statute required; that the statute applied to the sale of legal titles, or at most equitable titles perfected, not to the transfer of executory rights under executory contracts for the sale and purchase of land; that as the executory contract might have been rescinded or abandoned by parol, so it might be transferred from the purchaser to an-

other by parol. But 2. if the statute of frauds applied to the case, it had not been pleaded, or in any manner relied on. And 3. if the statute applied, and had been formally pleaded, there was such a part performance by John and William, of the contract with Benjamin, whereby his contract with Head was transferred to them, and they substituted as purchasers of the lot in his place, as would suffice to take the case out of the statute.

The counsel for the appellees, argued, 1. that the statute of frauds invalidated the parol agreement between Benjamin and his brothers, John and William. For on Benjamin's part, it was a sale, and on theirs a purchase, of the equitable right to the lot which he had acquired under his contract with Head. If he had performed the contract on his part, and thus acquired a perfect equity in the subject, he would certainly not have been bound by a parol agreement to sell or transfer such an equity in land, upon the same principle that a mortgagor was not bound by a parol agreement for the sale of the equity of redemption. The distinction between the sale of an equitable right in lands under a contract of sale consummated by performance on both parts, and an equitable right depending on an executory contract of sale not yet completed by performance, was, he thought, quite too nice. 2. It was no objection to the defence founded on the statute, that it was not pleaded or relied on in the answers. It could not have been pleaded. The plaintiff did not allege in his bill, that there was a parol agreement between Benjamin and John and William, for the transfer of his rights to them: he alleged a written contract, and that fully executed; namely, a deed from Benjamin to John and William, conveying his equitable right 354 *to them, and the suppression of that deed. He had made out a case in proof, different from that alleged in his bill; and if the statute of frauds applied to the actual case, he could not object that it was not pleaded in defence against the unfounded pretensions of his bill. 3. As to part performance, he said, what had been done by John and William amounted, in effect, to no more than paying the purchase money; and it was well settled, that payment of the purchase money was not such a part performance of a contract for the sale and purchase of lands, as would take the case out of the statute of frauds.

Stanard, in reply, said that the reason why payment of the purchase money was not sufficient part performance to take such a case out of the statute, was, that if nothing more was done, the purchase money afforded an exact measure of retribution, and complete compensation might be given to the purchaser by refunding the money. But here, specific articles of no determinate value, bricks, were to be furnished, and worked up in the walls of a house; there was no certain measure of compensation, and justice could only be done by a specific execution of the contract.

III. There was no doubt, that all the defendants, except Adams, had actual notice of Beck's rights under the deed of trust of the 3rd April 1819; and it was contended

on the one side, and denied on the other, that Adams also had actual notice. In truth, there were circumstances which raised a suspicion that he had; but there was no sufficient proof of the fact. But

IV. The counsel for the appellant insisted, that it was immaterial, whether Adams had actual notice or not; for he, as well as Beck, claimed only an equity, and Beck's was the elder equity. The maxim, they said, was strictly applicable, *Qui prior est in tempore, potior est in jure*.

The counsel for the appellee said, that rule was not applicable in Virginia, to a case like the present, where a mortgagee was asserting his rights under the mortgage, against a subsequent fair purchaser, unless it appeared that the mortgage was duly recorded; for the statute was express, that all mortgages and deeds of trust, to be effectual as against such purchasers, must be recorded. 1 Rev. Code, ch. 99, § 4, p. 362. And there was no certificate exhibited in the court of chancery, of the registry of the deed of trust under which Beck claimed.

Stanard replied, that it was alleged in the bill, and not denied in the answers, and admitted on all hands, in the sequel of the proceedings, that the deed of trust had been duly recorded; but if it was not, that the mortgages or deeds of trust required by the statute to be recorded, were only such as passed the title in the subject.

CARR, J. There is pretty strong evidence, that before the execution of the deed of trust by John and William De Baptist of the 3rd April 1819, under which Beck claims, they had received from Benjamin, a conveyance of his equity under his contract with Head, and that this was shewn to Beck to induce him to make the loan. But I do not consider this point as material. It would only be proof that Benjamin had abandoned his interest in the contract to them; and that is otherwise clearly established.

Subsequent to the execution of the deed of trust to Beck, and with notice of it, Edward De Baptist, another brother, received from Benjamin a deed for this same equity; and all the De Baptists joined in conveying the same to Long, who also had notice of Beck's lien. Long sold to Adams. The legal title being still in Head, Beck filed this bill calling for it, making the De Baptists, Long and Adams parties, and praying to subject the lot to sale in satisfaction of his debt. Head answers admitting the contract, the transfer of it by Benjamin to John and William, and the performance on their part; (he does not in his answer, indeed, admit full payment, but it was afterwards admitted by his counsel.) In this state of the case, there seems to me nothing for the statute of frauds to operate upon. It was not pleaded; but it

was urged, in the argument, as bearing upon the transfer of the contract from Benjamin to his brothers John and William. But I cannot think that this is either within the words or the mischief of the statute. The contract for the sale of lands, which the statute requires to be in writing, is here, the contract between Benjamin and Head; which was reduced to

writing. By furnishing the bricks, building the house, and paying the 100 dollars, Benjamin would have acquired a right to call on Head for the legal title. He transferred to his brothers, the right to stand in his shoes; that is, to do the work, and pay the money: Head accepted them: but this gave them nothing but the privilege of performing the conditions of the written contract; and upon such performance, an equity to call upon Head for the legal title to the lot; a matter (as it seems to me) wholly beside the statute.

The only question, then, is, who has the best right to call for the legal title, which Head is willing to make? Adams relies a good deal, in his answer, on his being a purchaser without notice: but of what is he a purchaser? Not of the legal title, but at most of an equity; which equity, if Beck had acquired before him he must prevail; the rule in such cases being prior in tempore, potior in jure. That Beck was first in time is admitted; but it was objected in the argument, that it no where appears, that his deed was recorded; and that being a deed of trust, it cannot take effect, as to a subsequent purchaser without notice, except from the time of such recording. But I think that upon this record we are bound to take this as a recorded deed. The parties on both sides have so treated it; and the fact is in no shape put in issue. There is evidence also, that it was recorded; and that all parties knew, and never meant to question, the fact that it was recorded. Nor was there any defence for Adams, so natural or ready as to have stated in his answer, that the deed had never been recorded, if the fact had been so; but no such thing is done. Under these circumstances, I feel no doubt, that we must take this as a recorded deed; and that the plaintiff has the best right to call for the legal title, so far as is necessary to the satisfaction of his claim.

357 *TUCKER, P. The legal title to the land conveyed by the deed of trust, in this case, is in Head. There are two antagonizing claimants, each insisting on his preferable right to call for the legal title. The first is Beck, who claims by deed of trust under John and William De Baptist: the other is Adams, who claims also under John and William De Baptist, but likewise sustains his right by claiming under Benjamin. Let us then contrast his rights with those of Beck, under both aspects of his title.

1. Supposing Adams to derive his right from John and William: in this aspect, he has but an equity posterior to that of Beck, to which it must yield, unless he can shew himself a purchaser without notice. This he cannot do, if the deed of trust under which Beck claims, was duly recorded. Whether it was or not, has not been put in issue; and, perhaps, we ought to take for granted, that there was no just objection to it on that score; but it will be safest, in sending the cause back, to leave that matter open to inquiry. If the deed was duly recorded before Adams's purchase, I am clearly of opinion, that it takes precedence of Adams's title, so far as that title is claimed under John and William De Baptist.

2. Supposing Adams to derive his title from Benjamin De Baptist, let us compare the conflicting rights of himself and Beck to call for the legal title. Has Benjamin De Baptist, or Adams as claiming under him, any right whatsoever to call for the title from Head, even if Beck's claim were out of the case? I think not. For, 1. there is now no contract between Benjamin and Head. There was a contract at first, and a contract by which Head agreed to convey him the lot in question. But the parties had a right to abandon, waive or rescind that contract; and that abandonment, waiver or rescission, might be such as to absolve the vendor from it, and to exclude the vendee from a right to a specific performance. Has the vendee Benjamin De Baptist, by his acts in this case, so absolved the vendor? Can

358 he under the circumstances, demand a specific execution by *a conveyance to himself or to those claiming under him? He cannot; for it is proved, that in the fall after the contract, Benjamin called on him to transfer the contract to John and William, and it was agreed that they should have the contract, and build the house, which he had engaged to build. An indorsement was accordingly made on the contract, with the assent of Benjamin, though he did not sign it, and it was afterwards read to John and William, who assented to it, though they did not sign it. Yet they went on to do the work; they went on to borrow money to complete the building; they went on to fulfil the contract. On what ground, then, can Benjamin expect the specific performance of the contract, expressly waived and rescinded by himself, and entered into with his consent by Head with his two brothers. Has he paid any purchase money? Has he given any consideration to entitle him to a conveyance? Has he fulfilled the contract on his part, so as to entitle him to demand performance from Head? By no means. He has never paid one cent; he has never given any consideration; he has never moved one step towards performance.

But suppose a specific performance decreed in his favor or in favor of his vendee: how will the matter stand with Head and John and William De Baptist? As the lot will not go to pay John and William for their work, they must either go unpaid, or they must look to Head, and Head must pay them. But as they entered upon the work, upon the faith of the arrangement made with Head with Benjamin's assent and concurrence, they must not go unpaid, while Benjamin gets the lot for nothing. If Head cannot convey them the lot, he must pay them their money. Then, how will he stand? He will have conveyed away his lot to Benjamin for nothing, and paid the full value of his building to John and William, who really erected it. Can this be tolerated? Shall Benjamin be permitted to waive the contract in behalf of his brothers,—to draw Head thereby into an engagement with them, and then to recant, reassert his right, get the property for nothing, and force Head to pay them 359 for their labour? *It is impossible. Benjamin, therefore, could have no

title to specific performance; and Adams stands but in his shoes.

On the other hand, Benjamin having assented to turn the contract over to his brothers, and Head and the brothers assenting thereto, they became entitled to a conveyance from Head upon fulfilling the contract on their part. This equitable right they conveyed to a trustee to secure to Beck the 500 dollars borrowed of him, it seems, to enable them to comply with their bargain. This sum they must repay to Beck, and the lot is liable for that repayment.

I am, therefore, of opinion to reverse the decree and send the cause back for further proceedings, with instructions that Beck's deed of trust shall have preference over Adams, unless it should appear that the deed of trust was not duly recorded.

CABELL and BROOKE, J., concurred in the opinion of the president, and a decree was entered accordingly.

Hare v. Niblo.

March, 1883.

Capias ad Respondendum—Returnable to Term Generally—Effect.—A capias ad respondendum is made returnable to the next term generally. Instead of the first day of the term as the statute requires: the writ is executed before the term and returned to the first day: an office judgment is entered at rules: at the ensuing term, defendant moves to quash the writ and all the proceedings on it at rules, on the ground that the writ being returnable to term generally, was naught: and the court overrules the motion: *Held*, the motion was rightly overruled.

Debt, in the circuit court of Petersburg, by Niblo against Hare. The writ was made returnable to the next term after its date, generally, instead of the first day of the next term, as it ought regularly to have been. But it was executed before the commencement of the term. After the term,

360 Niblo filed his declaration at the rules; whereupon a conditional judgment by default for want of appearance, was entered against Hare by the clerk, which was confirmed at the succeeding rules; so that the case stood among the office judgments at the then next term. But owing to a vacancy in the office of judge of the court, that term was lost, and all the pending causes stood over till the succeeding term; when Hare's counsel moved the court to quash the writ and all the proceedings had thereon in the office, on the ground that the writ had been made returnable not to the first day of a term of the court, but to the term, generally, and so was irregular. The court overruled the motion. Hare, thereupon, pleaded to the action; and there was a trial, verdict and

***Capias ad Respondendum—Returnable to Term Generally—Effect.**—In *Gas Company v. Wheeling*, 7 W. Va. 29, it is said: "The Revised Code of Virginia of 1819 required that a writ of *capias ad respondendum* should be returnable either to the first day of the next succeeding term, or in the clerk's office to some previous rule day. 1 R. C. ch. 128, § 70. Under this provision it was held by the court of appeals that a writ returnable generally to the 'next term' of a circuit court after its date, not to the first day of the next term, was good. *Hare v. Niblo*, 4 Leigh 359. We submit to the authority of this case, and recognize its application to the case in hand."

For this proposition, the principal case is cited in *White v. Sydenstricker*, 6 W. Va. 49.

judgment for Niblo. And then Hare applied to a judge of this court for a superseas; which was allowed.

Allison, for the plaintiff in error. Formerly, writs in actions in the circuit court, were required to be made returnable to the next court, generally; Rev. Code of 1792, ch. 66, § 21, Pleasants's ed. p. 77, and the process might be served at any time during the term to which it was returnable; Dunbar v. Long's adm'r, 4 Hen. & Munf. 212. In that case, Roane, J., dissented; and the inconvenience of having no particular return day, for such process, was clearly pointed out in his opinion. To remedy this inconvenience, the legislature provided, that every writ of *capias ad respondendum* shall be returnable, at the option of the plaintiff, either to the first day of the next succeeding term, or in the clerk's office to some previous rule day; 1 Rev. Code, ch. 128, § 70, p. 507. The writ in this case, therefore, was clearly naught, and furnished no foundation for any proceedings at rules upon it. The court ought to have quashed the writ and the proceedings upon it in the office; for the statute provides, that the court, in term, shall have control over all proceedings in the office during the preceding vacation, and may correct any mistakes or errors, and for good cause set aside the rules and proceedings, and make such order concerning them as may be just and right; Id. § 77, p. 508. *And if the court shall not be held at the stated term, all pending matters and causes stand over in the same plight to the next term. Id. ch. 69, § 8, p. 230.

Wyndham Robertson, for the defendant in error. The provision of the statute of 1819, requiring that writs shall be made returnable to the first day of the succeeding term, might defeat a writ made returnable to the term generally, in case the writ were executed during the term but after the first day (which as the law formerly stood, was perhaps permissible, according to the judgment in Dunbar v. Long's adm'r); but this new provision does not require the abatement of a writ, which, though made returnable to the term generally, has been in fact executed before the term, and returned to the first day of it, as was the case here. The statute does not require, that the writ shall, on its face, be made returnable, but only that it shall be returnable, to the first day of the term; and if it is in fact executed, and returned the first day, it is enough. Even under the former law, judge Roane thought, that a writ returnable to the term generally, should be intended to be returnable to the first day of the term. But, in truth, this motion to quash the writ for irregularity, was in substance and effect, a plea in abatement of the writ; and, as such a plea could not have been received after office judgment; so neither ought this motion to quash the writ, to have been entertained.

Allison, in reply. If the writ was irregular, all the proceedings on it in the office were also irregular, for they had no foundation but the writ. To say that the motion to quash, is equivalent to a plea in abatement, and therefore cannot be heard after office judgment, were, in effect, to deny

the control of the court over proceedings in the office, in every case in which there has been an office judgment. This would render the provision, which gives the court such control over the proceedings in the office, almost intirely nugatory.

PER CURIAM. The judgment is to be affirmed.

362

*May v. Yancey.

March, 1833.

Arbitrators*—Misconduct—Case at Bar.—Award of arbitrators sought to be set aside, on the ground that the conduct of the arbitrators had the effect of a surprize on one of the parties, and so was misconduct, though no partiality or corruption was imputed to them; and HELD, upon all the circumstances of the case, that there was nothing in the proceedings of the arbitrators to invalidate the award.

In two actions, one of debt and the other of assumpsit, brought by Yancey against May, in the hustings court of Richmond, the parties (after a very long and tedious litigation) agreed to refer the controversy to arbitrators; and rules were entered by consent in both suits, at November term 1829, submitting the matters in difference between them in the two cases, to the final determination of Samuel Dunn and Preston Smith, whose award (or the award of their umpire in case of disagreement) thereupon, should be made the judgment of the court; the arbitrators to proceed on the saturday following, at the city hall, with power to adjourn &c. till the award should be completed, without further notice to either party.

On the 16th January 1830, the arbitrators made an award, stating that they had proceeded, according to the order, after giving due notice to the parties, to receive the testimony offered by them, both being present; and "after receiving from each party a full statement and hearing thereupon," they awarded to the plaintiff Yancey, in the action of debt, 245 dollars, with interest &c. and the costs of the suit, and in the action of assumpsit 227 dollars (without interest) and the costs.

This award having been returned to court, a motion was made by the defendant May to set it aside, on the ground of misbehaviour of the arbitrators; and the evidence he offered to sustain this motion, was the testimony of the two arbitrators themselves.

1. Dunn stated, that the arbitrators met at the time and place appointed in the order of submission: that both parties were before them, and exhibited certain papers and *made explanations concerning the cases: that the arbitrators thought they had all the evidence before them, and that the parties were ready for their decision: that after a consultation between the arbitrators on the subject, May, who lived in a distant county, said to them, that if they should not make up their award whilst he was in Richmond, he wished them not to come to any conclusion until he could appear before them again, for the purpose (as Dunn thought at the time, and yet thought) of making further statements and explanations: that the ar-

*Arbitration and Award.—See monographic note on "Arbitration and Award" appended to Bassett v. Cunningham, 9 Gratt. 664.

bitrators did not inform May, that a further day for him to appear before them would not be allowed, nor was any period designated at which the parties should appear before them again: that the award was not made up during May's continuance at Richmond: that probably, it would not have been made up before the quarterly term of the court in February 1830, but that they were pressed by Yancey to proceed; and they concluded the business without having the parties again before them: that in the latter part of January Dunn received a letter from May, dated Staunton, 25th January 1830, in which May said—

"As to the reference in the cases of Yancey against me, I must request, that you take the papers from Mr. Smith, as you are so much engaged in the day, and after you are quite satisfied, return them to him, if you and he think he had best keep them; then I must request, that you and Mr. Smith will not have a final meeting until I come down, as I am satisfied that I had better see that a full and fair explanation is given, and you know that as Yancey did not attend at the Washington tavern, I would not stay in the room with you and Mr. Smith. I do expect Mr. Smith has looked over the papers, and heard all Yancey had to say; and from what you know of the matter, you will think I ought to be heard by myself or counsel; and you know I could not get any meeting for that purpose, except at the Washington, when I would not attend, after Yancey's writing that he would not attend there; and so I

left Richmond for home, with the
364 expectation *that you would not make up an award until February court, or near that, when I intend to come down, and will be willing to have an end of the matter, as soon as I can be heard before the arbitrators, either by myself with Yancey, or both have counsel—I don't care which. Should he be desirous of having the matter done with sooner, I have no objection, after your taking all the papers to yourself until your are satisfied, and then have a day fixed when you would meet and determine, when our counsel are to attend with you, though I expect you will not take it up until I come down. If you do, I must get the favor of you to tell Mr. Daniel, that I request him to attend for me. As to what Mr. Anderson says, you recollect he was not positive, whether I said that I would not charge any rent until he got possession, or something about the title. You can see, that in January Yancey wrote to me, that Binford said he should not get possession of the Goochland land; he then went up, and got it, and rented it out. After that, in April, he came down, and gave me the obligation for rent, commencing the 1st January 1819; and I went on to pay him off all that I ought. You see, when the conversation passed, he did not expect to get the possession of the Goochland land, and I must have had to look to some one for it. I went up to see Mr. Binford as soon as I received Yancey's note, and told him what I had understood from Yancey, and that I did not care which way, as he Binford was good to me for the rent; when he said he never said any such thing,

nor made no such pretensions. I wish before you act to get Mr. Binford's testimony about that, and about the insurance &c. &c. Please let me hear from you in a few days, and oblige your friend &c."

Dunn proceeded to testify, further, that on receipt of this letter, he communicated its contents to Mr. Daniel (May's counsel) and informed him, that the award had already been made and returned: that he also conferred with the other arbitrator, Smith, who said he had already had trouble enough with the business, and should
365 do nothing more in it: *that he informed May, that the award had been made and returned before his letter was received: that afterwards, and before February term 1830, May exhibited evidence to him, which if it had been shewn him before he made the award, would have intirely changed his opinion, unless it had been counteracted by other evidence: that he asked May why this evidence had not been sooner exhibited; and he said he had overlooked it, and had not found it till after his first appearance before the arbitrators: that the opinion of the arbitrators was formed, principally, on the evidence of a single witness (Anderson) upon a particular point in controversy, which it was necessary to settle before they entered into any investigation of the papers laid before them: that when the parties were before the arbitrators, they both expressed a wish, that the arbitrators should proceed to decide the case at once, upon the evidence then adduced; neither party intimating that he had any further evidence to offer; and May expressing his willingness that the decision should be made, if it should be made when he was in Richmond and present, though he said, at the same time, he should have been glad to have Binford's evidence: that the claim preferred by Yancey, which May alleged that Binford's evidence was necessary to explain, was in fact allowed to Yancey by the arbitrators; it was an item in his account of eleven dollars: that when the parties were before the arbitrators each accused the other of a desire to delay the case. Dunn further testified, that he had informed May, that the award would not be made and returned till near the February term; and it was only in consequence of the earnest request of Yancey, made to the arbitrators when May was not present, that it was concluded and returned sooner.

2. The other arbitrator, Smith, testified, that the parties were both before the arbitrators at their first meeting, from which they adjourned to the Washington tavern: that the witnesses were examined in the presence of the parties, and the papers of both were exhibited; and May handed in a
366 paper containing his views of the case: that he (Smith) believed *that all the evidence was before the arbitrators, otherwise he would not have proceeded to an award; he understood that both parties left the arbitrators, with the expectation that the award would be made upon the evidence and explanations then given; and the arbitrators agreed to proceed to make up the award as soon as they could, without

any further meeting of the parties, or explanation from them: that, according to his recollection, no formal proposition was made by May, that the award should not be made up during his absence from Richmond, and he expressed no wish to be heard again; he thought he should remember such a circumstance, if it had occurred; he remembered, that May said he would be glad to have Binford's testimony, but he did not ask a continuance for the purpose of procuring it, and he appeared to be willing to go on with the case, without Binford's testimony: that the evidence was examined first by him, and then by Dunn, separately, till the mind of each was satisfied: that it was true the award was made up sooner than otherwise it would have been, in consequence of the importunities of Yancey; but he was not permitted to converse with them on the merits; he once commenced a conversation of the kind with Smith, but Smith stopped him, and he did not attempt it again.

Upon this evidence, the hustings court overruled May's motion to set aside the award, and entered judgments according to it. May appealed to the circuit court of Henrico, which affirmed the judgments. And then he applied to this court for writs of supersedeas; which were allowed.

Daniel and Johnson, for the plaintiff in error, said, that the courts had been very liberal in their indulgence to awards, in respect of mistakes of fact, or even of law, imputed to the arbitrators; but in cases in which awards were impugned on ground of misbehaviour of the arbitrators, they had proceeded on different principles, and examined the conduct of arbitrators with great strictness. It was not necessary to

convict them of corruption, or of any
367 decided *partiality. If the arbitrators do any thing improper, or omit to do what propriety requires; if they hear evidence they ought not to hear, or refuse to hear proper evidence when offered; if they fail to perform any of their functions; and, particularly, if they act in such a manner as to surprize either party, and thus in effect to do him injustice; in such cases of misbehaviour, they said, the award ought to be set aside. They cited *Burton v. Knight*, 2 Vern. 514; *Harris v. Mitchell*, Id. 485; *Smith v. Coryton*, cited in *Earle v. Stocker*, Id. 251; *Walker v. Frobisher*, 6 Ves. 70, and *Graham's adm'r v. Pence*, 6 Rand. 529. And they endeavoured to shew, that the conduct of the arbitrators, in this case, had had the effect of a surprize upon May; for, they argued, it had given him reason to expect, that he should have an opportunity of being heard again, before the award was finally made up. And the only reason which induced the arbitrators to disappoint that expectation, was the importunity of Yancey, in the absence of May. It was wrong in them to listen to his importunities; much more to yield to them, after they had given May reason to expect a further hearing. It appeared too, that Yancey had commenced a conversation with the arbitrator Smith alone, on the merits, which Smith put a stop to. because he thought it improper; but he must have said enough to shew, that what he was

saying was not proper for the arbitrator to hear; and so far, at least, that arbitrator heard that which it was improper that he should have heard, and which might have had an undue influence on his mind.

Gustavus Myers and Scott, for the defendant in error, entered into a minute examination of the evidence of the arbitrators, concerning their own proceedings, and maintained that there was no colour for the charge of impropriety in their conduct. Their argument turned, almost entirely on questions of fact; for, they said, every case of this kind must stand on its own peculiar circumstances, so that the adjudication of one case afforded no rule for the decision of another; and hence it would be found, that the authorities,
368 *cited for the appellant were wholly inapplicable. They cited *Ringer v. Joyse*, 1 Marsh. 404.

CARR, J. I have examined the evidence of the arbitrators with great care, and I cannot discover any thing in their conduct, which, according to the principles laid down in *Graham v. Pence*, and the cases there cited, can be held to amount to misbehaviour. In the case of *Walker v. Frobisher*, cited at the bar, the arbitrator, after hearing a good deal of evidence, gave notice to the parties, that he should hear no more, in which they acquiesced; but, afterwards, he examined three witnesses on one side, of which he gave no notice to the other party; and for this lord Eldon (while he acquitted the arbitrator of all intentional wrong) decided, that, on general principles, the award must be set aside. In *Graham v. Pence*, the arbitrators had a meeting, and the defendant asked a continuance for an absent witness, which the arbitrators granted, and then determined to have nothing further to do with the case, and drew up a writing to that effect, which they communicated to the parties; but, afterwards, the plaintiff had a private, ex parte conversation with one of the arbitrators, and prevailed on him to resume the arbitration, and then gave notice to the defendant to attend at a certain time and place: the defendant went, and protested against the arbitrators acting further: he said they had divested themselves of all authority, and that they must return that fact to the court; and so left them. They notwithstanding this went on, and made up an award against the defendant without having his defence, or evidence before them; and for this the court set aside their award. But what have the arbitrators done, in the case before us, which in any respect resembles this? what act that looks like partiality or a departure from duty? The parties were before them; had a full hearing; submitted their evidence, and were willing that the award should then be made. The arbitrators, however, were not ready: they required time to satisfy themselves. Dunn says, that May
369 expressed a wish, that if the *arbitrators did not decide before he left Richmond (he living in Staunton) they should not make up their award until he could be again before them; but Dunn's understanding of this was, not that he wished to introduce further evidence, but

merely to make further remarks and explanations. Smith, the other arbitrator, says, that he heard no wish expressed by May, to be heard again, and that he does not think he could have forgotten such a circumstance; that both parties left the arbitrators with the expectation that the award would be formed upon the evidence and the explanations then given; and both arbitrators agree, that they gave no promise, nor appointed any future time, for another hearing. Now, suppose Dunn's recollection perfectly accurate, to what does it amount? merely, that May wished (if they did not then decide) to make further arguments before them. Did this wish impose an obligation on the arbitrators, to hear him further? Surely not, unless they should find it necessary to their decision. But the arbitrators agree, that their first intention was to make up the award, so as to be ready for the February term of the hustings court; and that they, being much pressed by Yancey, departed from this intention, and made it on the 16th January. Was there any misbehaviour in this? I cannot think so. Yancey had no conversation with them on the subject matter of the arbitration: he merely expressed the wish, that whatever was to be done, might be done without delay: he claimed a sum of money, which to him, no doubt, seemed considerable: he had been at law for it many years: and under these circumstances (though it might not be very delicate) it was quite natural, that he should press to have the business finished. But the arbitrators do not intimate, that this urgency caused them, to hurry over or slight the business at all. The first hearing, when the parties were before them, was in the first week of December; and they did not make their award till the 16th January, nearly six weeks after. Surely, this was time enough; and they tell us, they had the documents, first before the one, and then the other, till they were

370 satisfied; and *then met, and made the award. As to the letter written by May to Dunn, that can have no effect on the case. It was not written till the 25th January, sometime after the award was made and returned to the clerk's office; and even in that letter, he speaks of no new evidence. It consists almost intirely of a long argument on the merits of the case, very improperly addressed to one of the arbitrators. As little influence is due to the declaration of Dunn, that May had since shewn him evidence, which, if it had been before him, would have changed his opinion, unless counteracted by other evidence; for, in the first place, the question before us, is as to the misbehaviour of the arbitrators, upon which this evidence, never before them, can have no bearing; and secondly, if we could be at all influenced by this evidence, it ought to have been filed in the cause. We can never agree, to take the opinion of the arbitrator as to it. Upon the whole, I can see nothing like misbehaviour in the arbitrators, or injustice to the defendant, and am clear that the judgments should be affirmed.

CABELL and BROOKE, J., concurred.

TUCKER, P., said, he inclined to the

opinion, that the judgments were erroneous; but as the other judges were clearly of opinion that they were right, and as the question, in his view of it, was a question of fact on the evidence, it was unnecessary to assign the reasons on which his impressions were founded.

Judgments affirmed.

371 *Harrisons v. Harrison's Adm'r and Others.

April, 1833.

(Absent BROOKE, J.)

Insurance on House—To Whom It Belongs—Liability of Sureties of Administrator.—A house is insured against fire, as being leasehold property, held for a term of 99 years renewable forever; it was, in fact, held by the assured in fee simple; after the death of the assured, it is destroyed by fire: HELD, the money due for the loss belonged to the heirs of the assured, and his administrator having received it, the sureties of the administrator are not responsible for it.

Obadiah Harrison late of Petersburg deceased, in his lifetime, made a declaration for the insurance of a house in that town, in the Mutual Assurance Society against fire on buildings of the state of Virginia, in which declaration he described his estate in the property as being a term of ninety-nine years renewable forever, whereas, in fact, he was seized of a fee simple estate in the property; and he effected a policy of assurance with the society, which, referring to the declaration by him made for insurance, bound the society to make good, to him, his heirs, executors, administrators or assigns, all losses or damages which should happen to the house by accidental fire &c. The policy was a covenant under the seal of the society. Some years after the policy was effected, Harrison died, and Samuel Christian took letters of administration of his estate, and gave an administration bond, in which Donald M'Kenzie and John Osborne were bound as his sureties. Afterwards, in March 1819, the house was destroyed by fire; and the sum of 439 dollars, the net estimated loss, was paid by the society to Christian the administrator.

Upon a bill exhibited in the superior court of chancery of Richmond, by Harrison's children and distributees against Christian the administrator and M'Kenzie and Osborne his sureties, praying a settlement of Christian's accounts of administration, and a decree against him and his sureties for the balance which should be found due from him to his intestate's estate,

—the main question was, whether the 372 money *due from the Mutual Assurance Society upon the policy, and received by Christian, belonged of right to him as the administrator of Harrison, or to Harrison's heirs? If it belonged to Christian as the administrator of the assured, then his sureties in the administration bond were responsible to the distributees, for his due administration thereof; if it belonged to the heirs of the assured, the sureties of the administrator were nowise bound for it to the heirs.

*Insurance.—See monographic note on "Insurance. Fire & Marine" appended to Mut. Assur. Society v. Holt. 20 Gratt. 612.

The chancellor was of opinion, that the money due on the policy of assurance belonged to the heirs of the assured, not to his administrator; and that, consequently, the sureties of the administrator were nowise responsible for it; and it appearing by the accounts of Christian's administration, that there were no other moneys due from the administrator, for which his sureties could be held responsible to the distributees, he dismissed the bill as to the sureties. The Harrisons applied by petition to this court, for an appeal from the decree; which was allowed.

Spooner, for the appellant.

No counsel for the appellee.

TUCKER, P. The appeal being from the dismissal of the bill as to the sureties, and nothing more, Christian is out of the case here. As to the insurance money: the house, it is true, was insured by mistake, as leasehold property. The title of the assured was in fact a fee simple. The policy was, therefore, a covenant for the protection of real estate, though it was by mistake described as a term of years renewable forever. The covenant followed the title to the property, and on the death of Harrison, the assured, devolved to his heirs, for they are expressly named in the policy. The Mutual Assurance Society covenanted to Harrison, his heirs &c. and he bound himself, his heirs &c. to the society. This covenant being broken after Harrison's death, the right to the insurance money was in his heirs. The administrator Christian
373 having received what belonged *to the heirs, he is debtor for the amount to them, not to his intestate's estate. Therefore, the sureties bound in his administration bond are nowise responsible for it. On this point, this court approves the chancellor's decree.

The decree was, however, reversed upon some trivial points of mere detail in the report of the administration account in regard to which exceptions had been taken by the appellants, and overruled by the court; and the cause was remanded with directions in relation thereto.

Heywood v. Covington's Heirs.

April, 1838.

(Absent BROOKE, J.)

Bill for Specific Execution—Effect Where Cause is Still Pending in Lower Court—Case at Bar.—In a suit in the county court in chancery between the heirs of a decedent, the court decrees, that a mill, whereof partition can no otherwise be made, shall be sold by commissioners on a credit of twelve months; the commissioners make the sale and report it; the court, after the twelve months elapsed, confirm the report, and order the commissioners to convey to the purchaser; then, a conveyance is tendered to the purchaser, who refuses to complete the purchase, the mill having been carried away by a fresh within the twelve months; and while the cause is yet pending in the county court, the heirs exhibit a bill in the superior court of chancery against the purchaser for specific execution: HELD, that as the cause in the

county court was still pending, this bill in the superior court could not be entertained.

Judicial Sales—Change in Value of Property before Confirmation.—Quære, whether the purchaser is bound to bear the loss arising to the property from the fresh, within the twelve months, and before the report of sale was confirmed?

William Covington late of Chesterfield, died intestate, seized of a mill and mill seat on Swift creek, and some other real estate, in that county, and leaving six children his heirs at law. The property was so situated, that a fair and equal division thereof could only be made by selling the mill and mill seat, and dividing the proceeds of sale among the parceners; and in a suit
374 in chancery in the county court *of Chesterfield, in which some of them were plaintiffs, and the others defendants, the county court, satisfied that a sale of this property was the only means of making a just division of the estate, decreed, that the mill and mill seat should be sold at auction, on a credit of twelve months, and that the proceeds of the sale should be divided among the parties according to the statute of descents; and appointed commissioners to make the sale and to divide the proceeds accordingly. The commissioners sold the mill and mill seat, in pursuance of the decree, and made report thereof to the court, in which it was stated, that John Boast was the purchaser, at the price of 610 dollars. And after twelve months had elapsed and the purchase money had become due, the court made another interlocutory order, directing the commissioners to execute a deed conveying the property to the purchaser or purchasers at the sale, and to make a report of their proceedings in order to a final decree. The commissioners thereupon executed a conveyance to Boast, the purchaser mentioned in their report of sale; and most of the heirs of Covington executed another deed, conveying the property to Boast and Joseph Heywood, who, as they understood, had in fact been jointly concerned with Boast in the purchase at the sale made by the commissioners. The deed of the commissioners to Boast, was tendered to him. But, in the interval between the sale made by the commissioners, and the interlocutory order of the court directing them to make a conveyance of the property, the mill dam had been swept away, and the mill house removed from its scite, by a fresh; and therefore Boast refused to accept the conveyance tendered to him, and complete the purchase. The commissioners made no report to the court of their proceedings under the last order; nor were any further proceedings ever had in the cause, which remained, and yet remains, in the county court, undetermined, and neglected by the parties.

also, citing the principal case, *Braxton v. Harrison*, 11 Gratt. 64; *Terry v. Coles*, 80 Va. 703.

Same—Change in Value of Property before Confirmation.—See the principal case cited in *foot-note* to *Taylor v. Cooper*, 10 Leigh 317; *Daniel v. Leitch*, 18 Gratt. 211; *Kable v. Mitchell*, 9 W. Va. 513; *Hyman v. Smith*, 18 W. Va. 767.

Same—Confirmation—Effect.—As to the effect of confirmation of a sale made under decree of court, the principal case is cited in *Cocke v. Gilpin*, 1 Rob. 39, and *note; foot-note* to *Hudgins v. Marchant*, 28 Gratt. 177; *Childs v. Hurd*, 25 W. Va. 538; *Childs v. Loudin*, 51 W. Va. 556, 42 S. E. Rep. 639.

See monographic *note* on "Judicial Sales" appended to *Walker v. Page*, 21 Gratt. 686.

***Judicial Sales—Cause Pending in Chancery Court—Jurisdiction.** In *Taylor v. Cooper*, 10 Leigh 320, it is said by TUCKER, P., before confirmation of the report, and while the cause is yet pending in the court of chancery, I am of opinion that to that tribunal alone can the purchaser resort for the adjustment of his rights and the enforcement of his claim. Such was the case of *Crews v. Pendleton*, 1 Leigh 297, and *Heywood v. Covington*, 4 Leigh 373. See

But the heirs of Covington exhibited their bill against Boast and Heywood in the superiour court of chancery of 375 *Richmond, setting forth all the proceedings in the cause in the county court; charging, that, though it appeared by the report of sale made by the commissioners, that the property had been sold to Boast alone, yet Heywood was in fact his partner in the purchase, jointly and equally interested therein; and praying a decree for specific execution of the contract of purchase against both, if in truth they were joint purchasers, or if Boast was the sole purchaser, against him alone.

Boast and Heywood put in a joint answer, in which they stated, that Boast was the sole purchaser at the commissioners' sale, and that it was afterwards agreed between Boast and Heywood, that the latter should be jointly and equally interested in the purchase: that they were, at the time, anxious and ready to complete the purchase immediately; and they applied, repeatedly, both to the commissioners and to Covington's heirs, to make a conveyance of the title, and had deeds prepared to be executed by them, respectively, conveying the same; but neither the commissioners, nor the parties interested, paid any attention to this request, for more than twenty months, and not until the mill dam and the mill had been so injured by a fresh, that it would have required an expenditure of 500 dollars to put them in such a state of repair as to make them fit for use: and that, in consequence of the neglect of the vendors to complete the purchase on their part, by making a conveyance of the title, the vendees had never taken possession of the property, and thought themselves now exempted from any obligation to complete the purchase on their part. And, finally, they pleaded the statute of frauds.

The depositions taken in the cause, left it somewhat doubtful, whether Heywood was originally jointly concerned with Boast in the purchase at the commissioners' sale, or whether Boast was originally the sole purchaser, and Heywood became jointly interested in the purchase by a subsequent verbal agreement between him and Boast?

But upon the whole, it appeared, that, 376 though Boast alone appeared *as bidder at the sale, Heywood was, from the first, jointly interested with him in the purchase.

The chancellor declaring that the plaintiffs were entitled to demand specific execution of the contract from both the defendants, decreed against them both, that they should pay the plaintiffs the purchase money, 610 dollars, with interest from the date when it should have been paid &c. And Heywood applied, by petition, to this court, for an appeal from the decree; which was allowed.

Spooner for the appellant, insisted, 1. That, under the circumstances of the case, the plaintiffs were not entitled to a specific execution; they having been themselves in default, in not promptly executing the contract, and in not taking any step towards the execution of it, on their part, till the property had been most materially injured, and rendered almost valueless.

2. That the vendors ought to bear the loss arising from the injury to the property by the freshes, in the interval between the sale by the commissioners and the confirmation of their report of sale by the county court. And 3. That, seeing that the suit in the county court was still pending there and undetermined, and involved the whole subject in controversy, the superiour court of chancery could not properly entertain this bill.

There was no counsel for the appellees.

TUCKER, P. If the mill and mill dam were materially injured by freshes, after the sale and before the report of sale was confirmed, I should think, upon the authorities, that the loss should not fall upon the vendee, provided there was no fault in him. In *Davy v. Barber*, 2 Atk. 489, *Blount v. Blount*, 3 Id. 636-8, it was held, that a purchaser must pay for lives falling in; if so, he cannot be charged with losses. And in *ex parte Minor*, 11 Ves. 559, and *Twigg v. Fifield*, 13 Id. 517, it was held, that the purchaser ought to be considered as having the purchase only from the time of the confirmation of the report of 377 sale. But in *Anson v. *Towgood*, 1

Jac. & Walk. 619, lord Eldon said the confirmation of the report related back, and thus unsettled the doctrine in *Twigg v. Fifield*. And see the course it behooves the purchaser to pursue to confirm his purchase, *Sugd. Law Vend.* 39, 40.* So that it is possible the purchaser, in this case may not be absolved. But the point cannot now be determined; for the case is clearly *coram non judice*. The superiour court of chancery could not entertain the bill, pending the suit in the county court. Therefore, the decree must be reversed, and the bill dismissed.

Hardman v. Boardman.

April, 1833.

(Absent BROOKE, J.)

Caveat—Right of Senior Patentee to File.—Upon the construction of the 38th section of the general land law, 1 Rev. Code, ch. 86, HELD, that a person holding a perfect legal title to lands by grant from the commonwealth, may maintain a caveat to prevent the issuing of a junior grant to another person.

Daniel Boardman entered a caveat in the land office, against the issuing of a grant to Jacob Hardman for 150 acres of land lying in the county of Lewis, upon a survey made for Hardman and returned to the land office, "because he (Boardman) had

*Ingraham's ed. Philadelphia 1820.

Caveat—Right of Senior Patentee to File.—In *Clements v. Kyles*, 18 Gratt. 473, LEE, J., in his opinion, said, under the influence of the cases of *Harvey v. Preston*, 3 Call 496, *Tanner v. Sadler*, 2 Hen. & M. 370, and *Hardman v. Boardman*, 4 Leigh 377, in all of which a caveat was sustained on the basis of a complete legal title in the caveator, either actually shown or presumed in its favor and of the settled and long continued practice during the period within there have been two revivals of our statute of law without change upon this subject. It must be regarded as no longer a debate of a matter and considered as now fully settled that a party may enforce a complete legal title by caveat against another seeking to obtain a new grant for the same land. To the same effect, the principal case is cited in *foot-note* to *Harvey v. Preston*, 3 Call 496; *Johnson v. Brown*, 3 Call 259.

The principal case is also cited in *Harper v. Baugh*, 9 Gratt. 622. See monographic note on "Caveat" appended to *Warwick v. Norvell*, 1 Rob. 308.

a better right to the land included in the survey," the same having been included in a large survey of 3000 acres, which had been regularly granted to Robert Means by patent dated the 7th May 1795, and by Means conveyed to Boardman, before Hardman's survey, or even the entry was made, on which the survey was founded. Boardman was a citizen and resident of New York; and the caveat was admitted by the register, upon the affidavit, not of Boardman himself but of James Arnold (by whom it was entered) as his agent and attorney in fact, that it was

378 "really and bona fide made with the intention of procuring the land for Boardman, in whose name it was entered, and not in trust for Hardman, against whom it was entered."

A copy of the caveat was filed in the circuit court of Lewis; and Hardman having been regularly summoned, appeared to maintain his right to a grant according to his survey; upon which a jury was impaneled to find the material facts that were not agreed by the parties. The jury found, that almost the whole of the parcel of

379 150 acres included "in Hardman's survey, was included in a survey long before made, of 3000 acres, which had been regularly granted to Robert Means, by patent dated the 7th May 1795, and by Means conveyed to Boardman, by deed dated the 10th February 1806. And, thereupon, the circuit court held, that Boardman had better right to such part of the land included

within Hardman's survey as was included within the survey and grant under which Boardman claimed; and, therefore, adjudged, that no grant should issue to Hardman for so much of the land included in his survey as belonged of right to Boardman. From this judgment, Hardman appealed to this court.

Johnson, for the appellant, objected, 1. That the caveat was irregularly entered, because the affidavit on which it was admitted by the register, was made by an attorney in fact or agent of the caveator; whereas the 43rd section of the land law required that the proceeding should be founded on the affidavit of the caveator himself. And it was obvious, he said, that the caveator was the only person who could make the proper affidavit; since he alone could know that the caveat was entered with the intention of procuring the land for himself, and not in trust for the benefit of the caveatee. 2. He strenuously contended, that the caveat is a remedy provided for persons who claim inchoate and imperfect rights in unappropriated lands: that it was not intended to be given, and it was nowise necessary it should be given, to persons holding perfect title by patent for the lands in controversy. He remarked, that the 38th section of the statute, which gave the caveat, had respect only to waste or unappropriated lands; that the 42nd section, in providing for the case of a judgment upon the caveat in favor of the caveator, prescribed the method by which he should obtain his grant; that the 47th section also served to shew, that the only effect of a judgment in favor of the caveator, was to enable him to obtain a patent; and that the 43rd section required the caveator to file an affidavit (as the

380 foundation "of the proceeding) that

the caveat is entered with intention to procure the lands for himself; an affidavit, which it would have been absurd to require, if the remedy by caveat was intended for a person who had already procured the land, that is, a regular grant for it. Therefore, he concluded, that the 38th section in giving the caveat to a person who had a better right, intended not a better right by actual patent, but a better right to demand a patent. The remedy was a summary one, not well fitted for an examination of titles, and ought not to be encouraged, in cases where the necessity that induced the legislature to provide it, did not exist. It was also, in its nature, an equitable remedy, devised and intended to enable a party to assert rights which he could not assert by action at law, and to prevent another from acquiring a legal title, by patent, for land, for which the caveator had a superiour equitable right to call for the legal title,—to demand the patent. A junior patent could be of no prejudice to the elder grantee; his elder patent would enable him to maintain his title by an action at law against the junior grantee, or to defend it in an action brought by the junior grantee against him. If, then, this were an open question, he thought the court would have no difficulty in deciding, that the remedy by caveat could not lie for a person claiming a perfect

*The general land law, 1 Rev. Code, ch. 86, § 38, p. 329, provides, that "every person for whom any waste or unappropriated land shall be located and laid off, shall within twelve months at farthest, after the survey made, return the plat and certificate of survey into the land office, and may demand of the register a receipt for the same; and on failing to make such return within twelve months, as aforesaid, or if the breadth of his plat be not one-third of its length, as before directed, it shall be lawful for any other person to enter a caveat in the land office against the issuing any grant to him, expressing therein for what cause the grant should not issue; or if any person shall obtain a survey of land to which another hath by law a better right, the person having such better right, may, in like manner, enter a caveat to prevent his obtaining a grant; such caveat also expressing the nature of the right on which the plaintiff therein claims the said land."

§ 42, after directing the mode of proceeding on the caveat, and trying the question of right between the parties, provides, that "if the judgment be in favor of the plaintiff [in the caveat], upon delivering the same into the land office, together with a plat and certificate of survey, and also producing a legal certificate of new rights on his own account, he shall be entitled to a grant thereof; but on failing to make such return, and produce such certificates, within six months after judgment so rendered, it shall be lawful for any other person to enter a caveat for that cause against issuing the grant; upon which subsequent caveat such proceedings shall be had as are before directed in the case of an original caveat."

§ 43 provides, "that no caveat shall be entered, unless the person, at the time of entering such caveat, shall file with the register, an affidavit, that such caveat is really and bona fide made with an intention of procuring the lands for the person in whose name such caveat is entered, and not in trust for the benefit of the person against whom such caveat is entered; and all caveats entered contrary to the directions of this act, shall be absolutely null and void."

§ 47 provides, that "whenever, upon a caveat, the court shall determine in favor of the caveator, all the fees he shall pay into the register's office, in consequence of such determination, in order to obtain his patent, shall be by the register paid to the person who, in the first instance, upon the return of the survey, hath been compelled to pay the fees."—Note in Original Edition.

title by an elder patent. He was aware, however, that caveats had been maintained by persons claiming under elder grants, and that the proceeding had passed under the revision of this court, and had not been disapproved; *Preston v. Harvey*, 3 Call 495; *Archer v. Sadler*, 2 Hen. & Munf. 370; *Preston v. Harvey*, Id. 55. But as the point was not made in the argument of those cases, and therefore could not have been maturely considered by the court, the authority of the adjudications ought not to be regarded as conclusive.

Leigh, for the appellee, said, the objection to the affidavit, if well founded, ought to have been made in the circuit court; it was too late to make it here. But the affidavit made by the attorney in fact, was well enough; his principal
381 *resided in New York; and the attorney, appointed generally, to take care of his rights, might, very probably, have entered the caveat, even without consulting him, and therefore might have known, with perfect certainty, that the proceeding was intended for the benefit of the caveator, not in trust for the benefit of the caveatee. The only purpose for which the affidavit was required, was to guard against collusion between the caveator and caveatee; and that purpose was fulfilled by this affidavit. A similar objection had been taken to an affidavit made to serve as the foundation of an attachment against an absconding debtor, and overruled, in *Kyles v. Connelly*, 3 Leigh 719. Then, as to the main question, he said, the point, though it was not argued at the bar, was certainly involved in the two cases of *Preston v. Harvey*, and in that of *Archer v. Sadler*; and the court could not possibly have decided those cases as it did, without being of opinion, that a person claiming land by elder patent, was entitled to enter a caveat to prevent another person from obtaining a grant of the same land. The 38th section of the land law provided for two classes of cases; the first, cases in which the person going to the land office for a grant, had, by his own neglect to return his survey in due time, or by getting a survey made contrary to the provisions of the statute, lost his right to demand a grant, whether any other person had a right of any kind to the land, or not; the second, cases in which, though the person seeking the grant had pursued the regular course, some other person had by law better right. The caveat, in the present case, belonged to the latter class. The statute gave the remedy, in express terms, to persons having by law a better right to the land. The elder grantee having a better right, indeed the best and the only right to the land, was entitled to the caveat by the plain letter of the statute. It was a remedy which might be highly beneficial though not absolutely necessary, to him; and, moreover, public policy dictated the propriety of giving it to him. The elder grantee, might, indeed, assert or defend his rights against the junior
382 *grantee, on the strength of his elder patent; but, in order to prevent the junior claimant from vexing him with an action (as his adversary possession would

not prevent the operation of the commonwealth's grant) it was necessary to prevent him from getting a grant. And it behooved the legislature to provide means (it was much to be lamented it had not provided more effectual means) by which the evil of issuing several grants for the same land, might be prevented; for the junior grant, though it might not serve to give the grantee any land, would give him a colourable title, which he might sell in the market. The most liberal construction ought to be given to the 38th section of the land law, in order to advance and extend the remedy. It was true, the provisions of the 42nd, 43rd and 47th sections of the statute, were applicable only to the case of a caveator seeking a grant; but there were many such cases included in the provision of the 38th section, and for which of course it was necessary to provide in the subsequent sections; and the provisions made to enable a successful caveator who had no grant, to procure one, afforded no inference, that a person, who already had a grant, was to be deprived of the remedy by caveat plainly given him by the words of the 38th section.

CARR, J. The first objection taken by the appellant's counsel is, that there was here no such affidavit as is required by the 43rd section of the land law, as the foundation of the proceeding by caveat. The obvious intention of that provision, was to prevent fraudulent combinations and collusion. It does not, in terms, require the oath of the caveator: it requires that the person entering the caveat, shall file an affidavit, that the caveat is made with intention to procure the land for the person in whose name such caveat is entered. Here is a citizen of New York, perhaps never in Virginia, who in 1806, bought of Means, the original grantee, a large tract of land, lying in the extreme western part of the state. It was natural, that he should
383 *employ some one in the part of the country where the land lay, to look after it; this was Arnold. Many years after Boardman's purchase of Means, Hardman enters and surveys the land; and this agent and attorney in fact enters the caveat, and makes oath that it was entered bona fide, and not in trust for the caveatee. Does not this affidavit give to the mind, as strong an assurance that this is in truth a real adversary proceeding, as if the caveator living in New York had made the oath? I confess it does to me; and I think this in principle, very much like the case of *Kyles v. Connelly*, under the statute authorizing the issuing of attachments on affidavits. It is questionable with me, indeed, whether the party, never having urged this objection before, can be heard, for the first time in the court of last resort; but if he can, he may, at least, be fairly judged by the facts disclosed to us here. Can any body look at this record, and doubt that this is really and truly an adversary proceeding? Would the caveator claiming to hold under a patent, collude with one who had a mere entry and survey? If this was mere collusion, would the caveatee have taken this appeal? I cannot understand the

motives which, in a case of collusion, would have dictated such a course.

The other objection strikes at the foundation of the caveat. It is, that a man cannot by caveat, prevent another from obtaining a grant for land, which he himself claims to hold by a perfect legal title. This, I confess had been my impression. Without ever having had my attention particularly drawn to the subject, I had taken it for granted, that the caveat law was meant solely to try imperfect titles. The provision of the statute, however, is very broad. It divides caveats into two classes: 1. If a party fails to return his plat and certificate within twelve months, or if the breadth be not one-third of its length, any person may enter a caveat; this is the first class, in which no right is claimed for the caveator, but he relies wholly on some imperfection in the works of the caveatee: 2. Or "if any person shall obtain a survey of land,

to which another hath by law a better
384 *right, the person having such better right, may, in like manner, enter a caveat to prevent his obtaining a grant, until the title can be determined." The better right here spoken of, is in no manner defined. He has a better right, who holds by patent, than he who has only his entry and survey. The case, therefore, must be admitted to fall within the letter of the statute. We must admit too, that it could never have been the intention of the legislature, to suffer two patents for the same land, to issue to different persons. However ineffectual the guards against this abuse may have proved (and they have been deplorably so) it is very clear, that the legislature meant, in good faith, to sell to adventurers, none but waste and unappropriated land. I can well imagine also, more than one reason, which should make it desirable to the holder of land, to prevent other patents issuing for it, though he might believe that his own was valid and covered it. But yet if this were *res integra*, I should feel some doubt which construction was the true one. But I do consider the case as so far adjudicated, that I am by no means willing to disturb it. In *Preston v. Harvey*, 3 Call 427, the caveator stood expressly upon the ground of his patent; that was the better right, on which he entered his caveat; and the court expressly so stated it. Thus judge Roane says "The object [of the caveat] is to protect the appellee's title to 187 acres of land, which he claimed by patent" &c. In the second case of *Preston v. Harvey*, the caveator, in like manner, stated his better title to be a patent; and the court came to the same conclusion, on the same ground. So in *Archer v. Sadler*, the caveator rested wholly upon his deeds, and the long possession under them, which, he insisted, authorized the presumption of a patent; and the judges all argue that point, and come to the conclusion, that he must be considered as holding under a patent. It was said, that the point was never raised in these cases: true, but why? The counsel were very able, and the cases were argued with great zeal, talent and learning; the judges seem to have examined the subject
385 with great care: why was it, *that

this point occurred to not one of them? Nay more, that in the last case, they laboured with all their might to prove that the caveator should be presumed to have a patent, which, according to the doctrine now contended for, would have sufficed to turn him out of court? All this could only have been upon the ground, that they considered the law too clear, on this point, to suggest a doubt. I am, therefore, for affirming the judgment.

CABELL, J., concurred.

TUCKER, P. I do not think there is any thing in the objection, that the affidavit that the caveat was bona fide, was made by the agent instead of the party himself. But I am of opinion, that the caveat ought to have been dismissed, as the caveator had a patent for the land in controversy.

This case brings into discussion, for the first time, the question, whether a person who has already obtained his patent, can sustain a caveat against any other person, who is proceeding regularly to obtain a grant for the same land, on the ground of better right. I say it is the first time; for though it was fairly presented, and might very well have been brought into discussion, in *Preston v. Harvey* and *Archer v. Sadler*, yet it was not so discussed. The objection seems to have occurred to no one, and it is readily admitted to have been taken for granted, that such a proceeding was regular. Our experience, however, admonishes us, that little confidence is to be placed in opinions thus loosely taken up; and this very case is a striking illustration of the truth. For, of those who have come into the discussion, and of those to whom the argument has been addressed, the greater part have always been under the contrary impression. For my own part, though I have been aware of the cases which have been cited, I never did hear—in the course of the discharge of my official duties in the western part of this state, where this

subject is as familiarly understood as
386 *the alphabet—I never did hear the caveat considered in any other light, than as a proceeding invented by the statute, for bringing before a competent tribunal, a comparison of equities: I never did hear it spoken of as a proper remedy for a patentee, who having covered himself already with the title of the commonwealth, certainly needed no assistance from this summary remedy. It is much to be regretted, that our books furnish us so few cases on the subject, and that we have not access to the Kentucky reports, in which we could trace back the interpretation of this law, almost to the time when it began first to be put into operation. We are driven therefore to our own resources. We must look to the statute itself; its motives, its design, its plan and its provisions.

Until the revolution, the lands west of the Alleghany were locked up from the adventurer. The large quantities of waste and unappropriated lands in that part of the state, induced the legislature in 1779, to pass the statute of that year for the granting of those lands, with a view to encourage emigration, promote population, increase the revenue, and create a fund for

discharging the public debt. A land office was accordingly opened; and, as its provisions were calculated to flood the western country with adventurers, each of whom had a right to pick and choose for himself out of this immense wilderness, it was easy to foresee that innumerable litigations and conflicts of title would be the consequence. Against this the legislature, which certainly had more foresight of evil than prudence in guarding against it, anxiously provided. The anticipation of what was to happen appears from the preamble to one of the provisions of the statute; which was introduced with these words—"and for preventing hasty and surreptitious grants and avoiding controversies and expensive law suits, be it enacted" &c. It was, precisely, with the object of providing a mode of settling the innumerable controversies, which were obviously to arise between the innumerable competitors in this race for patents, that the caveat law was enacted.

387 *It was not enacted with a view to provide for the trial of legal titles completed by patent; for the ordinary provisions of the common law in relation to these, had never been found deficient. It was enacted—the caveat tribunal was created—for the purpose of comparing the equities of persons who were both in pursuit of grants for the same piece of land, and of deciding which had the better right. This very expression carries much meaning to my mind. The words right and better right, in connexion with the progress of the adventurer in pursuit of lands, have, I think, always had something of a technical signification. In our land law, I understand right and better right, as contradistinguished from, instead of comprehending, title by patent. As early as 1705, we hear of importation rights and settlement rights; and the laws provided, in case of not seating and planting, that the party should not only forfeit his grant, but also the rights on which it was founded; here using the terms in opposite senses. And in the acts of 1779, we hear of importation rights, settlement rights, military rights, treasury rights: we find the word used, in a thousand instances, to designate merely that equitable interest which the claimant had to the lands for which he desired to procure a patent. The statute of May 1779, ch. 4, is full of the use of the term in this technical sense; so also is the statute of May 1779, ch. 5, establishing the land office; both of these statutes, indeed, forming obviously but one act.

It was for the settlement of controversies respecting these rights that the caveat law was made; it was for the speedy determination of the question, whose unpatented right was the better right, that this summary proceeding was instituted; for, until the decision of that question, the register could not know to which party to issue the patent, and until the patent was issued, no taxes were paid, and the resources of the state were consequently impaired. How far this consideration mingled, in our legislation, with paternal care for the interest of the adventurers in the land lottery, will appear from the preamble to the 4th

388 section of the statute of May *1783,

ch. 29, 2 Rev. Code, p. 401, which recites the existence of the practice of fraudulent and collusive caveats, "whereby much lands are covered from taxation."

That the object of the legislature was merely to settle conflicting entries, I think is strongly indicated by a passage in the opinion of the venerable president of this court, in the case of Johnson v. Brown, 3 Call 267. "It was foreseen, says he, by the legislature, that there would be interfering entries and surveys; and the caveat was the remedy for settling all those disputes prior to the patent, to avoid the inconvenience of that solemn instrument being involved in contests of that kind." It was a remedy not wanted by the patentee; for the patent was a shield to him against every thing but a bill in equity. His case could not, therefore, have been in the eye of the legislature, as he needed no such aid; and if he was not to have aid from the proceedings, there was no conceivable motive for comprehending his case within the provision. The provision, indeed, had its root in the ante-revolutionary course of proceeding, for some recollections of which we are indebted to the industry of Mr. Leigh, in the compilation of laws prepared under his care. In 2 Rev. Code, p. 340, § 8, he refers to the act of 1732, ch. 11, § 10, 12, which recites, that controversies frequently arose concerning priority of entries for lands, and the rights to patents for them, which were properly cognizable before the governor and council, and makes certain provisions for witnesses &c. with a proviso, that the act should not be construed to give the council board power to hold plea of any matter properly cognizable before the courts of law; "plainly shewing," as he truly says, "that the proceeding by way of caveat (though, in its nature, strictly judicial) was had before the council sitting as an executive body, and not as judges sitting in the general court;" and plainly shewing, I will add, that this prototype of the caveat law, altogether excluded the idea of that board holding cognizance of any dispute between patentees, or a patentee on one hand and the holder of an entry on the other.

389 *From this seedling our caveat law sprung; and unless the contrary clearly appears, we must take it that the stock is of the same character with that from which it has been derived. The caveat law is an invasion of the ordinary course of common law proceedings. Upon familiar principles, it will be extended no farther than the legislative enactments will clearly justify. And as, anterior to the enactment of it, the analogous tribunal was tied down to disputes about priority of entries and the rights to patents, we cannot, without strong language, attribute to the caveat court, the power of deciding upon cases where patent rights are involved; and thus encounter "the inconvenience of having those solemn instruments involved in contests of that kind," and decided by a proceeding as summary and informal as those of a pie poudre court.

Let us then see, what there is in the provisions of the law, to justify the proposition, that a patentee may caveat upon the

ground of better right than the caveatee. I say, upon the ground of better right; because there are four causes stated in the land law, which authorize the entering of a caveat: 1. failing to return the plat and certificate of survey in due time; 2. disproportion between the length and breadth of survey; 3. a better right on the part of the caveator; and 4. the failure to deliver a copy of the judgment in a caveat cause to the register in due time. Of the two first and fourth causes, it has been supposed any person may take advantage, whether he has interest in the matter or not. The third, with which we have concern, rests upon the ground of better right. As to this, it is provided, that "if any person shall obtain a survey of lands to which another hath by law a better right, the person having such better right may in like manner enter a caveat." This term better right, I have already said, I understand in reference to and in connexion with the various species of rights, before mentioned in the statute, not yet carried into grant. It seems to me to be the natural understanding. Our legislature was not in the habit of using that word right

390 to signify *complete title by patent; while, on the other hand, the examples are infinite, of the use of that term to designate rights not perfected by patent. Nor do I think it reasonable to suppose, that they designedly used one term to comprehend two different if not opposite things; namely, complete and incomplete rights—in other words, patents, and surveys not carried into grant; especially, if the legislature really designed so great an innovation upon the ante-revolutionary statute, which expressly inhibited that solemn instrument, a patent, from being involved in a contest of this summary character. Had such been the design of the legislature, it would have distinctly provided, that if any person should obtain a survey of lands, for which another hath a patent, or a better right by law, the person having such better right, might enter a caveat &c. But, instead of such an enactment, we have the phrase better right alone, which according to the construction contended for is to serve a double purpose; to cover two kinds of interests intirely distinct; thus introducing, obviously, the greatest confusion in the residue of the provisions in relation to the caveat. For, in another section of the statute, it is provided, that if the judgment is in favor of the plaintiff, upon producing a copy of it and also producing a certificate of new rights on his own account, he shall be entitled to a grant thereof. Now, this is altogether intelligible when applied to a candidate for a patent. The certificate of new rights, which he must produce, is a certificate of survey in his own behalf, founded upon prior entry and warrant; and upon producing these, he is entitled to a grant. But how can the patent caveator be intended here? How can he have new rights?—a new survey upon a new entry and warrant on the land, which he already holds securely by patent? How is he to be entitled to a grant thereof, when he has a grant already? To avoid these difficulties, it was said, that this part of the statute re-

spects those only whose better right has not been carried into grant. And, thus, though the first part of the clause is construed to be general, the latter part

391 is restricted to *one particular class of cases, while no sort of provision is made for that class, which particularly required provision, if indeed it was comprehended. To understand this, let us see the operation, or rather the want of operation, of this litigation upon the rights of the parties: let us see how completely both will retire from the forensic battle, with their labour for their pains. Each will have spent his money in the pursuit of the phantom of justice, and the victor and the vanquished will find themselves pretty much where they were. Take, first, the caveator: suppose he succeeds, the judgment will only be that he hath the better right, and the utmost that can flow from this judgment, is, that he will arrest the emanation of the patent to the caveatee. How is he benefited by this? The emanation of the patent could do him no harm; for if it should emanate, it would be junior to his, and would therefore give way to him in a court of law. He has no reason to fear such an adversary except in equity. There, indeed, the junior patentee may file a bill, alleging that his entry and survey were prior, and demanding the conveyance of the legal title from the patentee. Will the judgment upon the caveat be a bar to any such demand in equity? I see no reason to suppose it; for if so, then we must take it for granted, that notwithstanding the caveator goes into the caveat court upon his grant, yet the parties are to go behind the grant, and compare the equities. Can this be so? Can it have been designed that this solemn instrument should have been involved in a contest in this summary proceeding, in which its foundations were to be examined, and the proceedings which led to it sifted and scrutinized, and this without any intimation from his adversary by pleading, caveat, or otherwise, of the rotten part of his case? Better a great deal have permitted any person who wished to take up land to caveat a patentee (absurd as it would be in itself) for then he would at least have notice where he was to be attacked. But again; if, notwithstanding the patent, the equities are to be compared, why is it that a caveat, however well begun, must be dismissed, if the

392 caveatee *gets a patent? Hunter v. Hall, 1 Call 206; Guerrant v. Bagby, 6 Munf. 160. Why not permit the parties to go on to sift the equities? The answer is, because the object of the caveat is frustrated. But why did not the legislature provide a power in the caveat court to vacate a patent, thus surreptitiously obtained, by its judgment? The only reason that can be given, is that it did not design to vest this important power in a tribunal acting so summarily. Further, if, as we are now supposing, the equities are to be compared, and the patent is not to be conclusive, why is it that after comparing the equities, and after establishing the superiority of his own entry, the junior claimant, the caveatee, cannot have the effect of his victory? All the judgment he can have,

is a judgment to vacate the caveat, not to vacate the patent also. And by the vacation of the caveat, all the advantage he gets, is to take out his patent, which, being junior, must, in all courts of law, be held inferior to that of his adversary, and he must at last be driven into equity, to prove a second time the superiority of his equitable title. No—if patentees may be caveators, I have no hesitation in saying, that the caveatee should not be permitted to go behind the patent in the caveat court. And if the equities are not compared;—if the legal title is to predominate; then, of course, the judgment in favor of the caveator is no bar to the assertion of the caveatee's claim in equity. Thus, we are brought back to the position, that though the caveator succeeds in his caveat, his judgment will only prevent the emanation of a patent which he cannot fear, and still leave him exposed to an equity, which he well may dread. Then, as to the caveatee, I have already anticipated his condition after his victory. If the legal title is to prevail, whatever may be the state of the comparative equities, then it is obvious, that he must fail in the caveat, and be driven into equity. But, even if the practice under this novel construction of the law should prevail, of allowing the caveatee to go behind the patent of the caveator; yet, if he succeeds, he can have no judgment, to vacate the patent; and after

393 *a vexatious law suit, he finds himself at the beginning of the race. He must now go into equity to establish his title again. I cannot, I acknowledge, perceive any reason, upon such scanty grounds, to recognize a proceeding, which ascertains nothing, decides nothing.

I will only add a concluding remark upon the subject of the phrase better right. If it stood alone, there might be more ground for the pretension, that it is broad enough to comprehend patents as well as other rights. But when the statute speaks of a survey of land being obtained, "to which another hath by law a better right," is not this expression demonstrative, that the legislature was looking to those unperfected rights, which the party held by law, instead of that perfect, complete, and indisputable title, which he held by patent?

Upon the whole, I am of opinion, that the judgment should be reversed, and the caveat dismissed; but the opinion of the court is, that the judgment be affirmed.

394 *Arthur v. Crenshaw's Adm'r.

April, 1833.

(Absent BROOKE, J.)

Debt on Injunction Bond—Evidence*—Admissibility of Record of the Injunction Cause.—In debt on an injunction bond, the declaration in assigning breach, alleges that the injunction was dissolved by the superior court of chancery; plea, conditions performed; a trial, plaintiff offers the record of the injunction cause in evidence, whereby it appears the injunction was awarded by the county court in August 1814, dissolved in July 1820, and bill dismissed in September 1820; and in November 1820, leave was given to the plaintiff in equity to rein-

state the injunction, and amend the bill, and the amended bill was filed and answered; afterwards, the cause is removed by certiorari to the superior court of chancery, which dissolved the injunction awarded by the county court in August 1814, not that awarded in November 1820—and an objection being taken to the record as evidence, on the ground that the injunction awarded in August 1814, had been finally and conclusively dissolved by the county court, and so was not and could not be dissolved by the superior court, and, therefore, that there was a variance between the record offered in evidence, and the allegation, of the breach in the declaration, the objection was overruled, and the record admitted in evidence: *HOLD*, the record was properly admitted in evidence.

Debt on bond with collateral condition, in the county court of Campbell, brought by Crenshaw's administrator against Arthur surviving obligor of one Calloway and himself.

The declaration,—after demanding the penalty of the bond, and alleging the execution thereof on the 17th November 1814, by Calloway and Arthur to Crenshaw (assignee of M. Anthony) in his lifetime,—set out the condition in *hac verba*, as follows: "The condition of the above obligation is such, that whereas the said Calloway has obtained an injunction to stay proceedings on a judgment recovered against him in the county court of Campbell by the said Crenshaw assignee as aforesaid, amounting to 445 dollars, but to be discharged by the payment of 222 dollars with interest &c.—if, therefore, the said Calloway and Arthur, their heirs, executors or administrators, shall well and truly pay the said Crenshaw assignee as aforesaid, his executors &c. the amount of the judgment &c. and all costs and damages which shall be awarded against them in case the

395 *injunction aforesaid should be dissolved, then the obligation to be void" &c. And then the declaration assigned as a breach of the condition, that the injunction was, on the — day of —, dissolved by the superior court of chancery of Lynchburg, to which the cause had been removed by certiorari from the county court of Campbell which awarded the injunction; yet neither Calloway in his lifetime, nor Arthur at any time, ever paid Crenshaw, the amount of the judgment at law, and the costs and damages awarded him on the dissolution of the injunction, or any part thereof, but failed and refused to pay the same. Arthur put in the plea of conditions performed, on which an issue was made up.

At the trial the plaintiff offered in evidence a copy of the record of the suit in chancery, in which the injunction was awarded to Calloway, to stay proceedings on Crenshaw's judgment against him; from which it appeared, that the injunction in the condition of the bond mentioned, was awarded by the county court of Campbell, on the 9th August 1814, upon a bill exhibited by Calloway, alleging matters of equity against Anthony, the assignor of the bond to Crenshaw, on which the judgment at law had been recovered; that Anthony having put in an answer, in which the allegations of the bill were denied, the county court at July term 1820, dissolved the injunction, and, afterwards, at September term in the same year, on a hearing,

*The principal case is cited in *Taylor v. Bank of Alexandria*, 5 Leigh 476. See monographic note on "Evidence" appended to *Lee v. Tapscott*, 2 Wash. 276.

dismissed the bill with costs: that afterwards, at November term in the same year, the county court on the motion of Calloway, "gave him leave to reinstate the injunction dismissed at September term." and to amend his bill: that amended bill was immediately exhibited, alleging other matters of equity against Anthony; and indeed, it was upon those new matters, first stated in the form of an affidavit, that the county court made the order giving Calloway leave to reinstate his injunction: that Anthony answered the amended bill; and many documents and depositions were filed; and then the cause remained, for some time, wholly neglected in the county court: that,

at length, upon the application of
396 Anthony (who having "paid the amount of the debt to his assignee, was now entitled to the benefit of the judgment at law) the cause was removed by certiorari to the superiour court of chancery of Lynchburg; and that court, on motion, dissolved "the injunction awarded to Calloway by the county court of Campbell on the 9th August 1814." Whereupon, Arthur's counsel objected to the introduction of this record as evidence; but, the court overruled the objection and permitted the record to go in evidence to the jury; to which opinion he excepted.

There was a verdict and judgment for Crenshaw's administrator; from which Arthur appealed to the circuit court of Campbell, which affirmed the judgment; and then he appealed to this court.

Leigh, for the appellant, argued, that the injunction referred to in the condition of the bond, was the injunction awarded, by the county court of Campbell on the 9th August 1814; that that injunction was dissolved by the county court at July term 1820, and the bill on which it was awarded, was dismissed at September term following; so that the injunction referred to in the condition of the bond, was, in truth, dissolved by the county court of Campbell, and not by the superiour court of chancery of Lynchburg: that, therefore, as the declaration alleged, that the injunction had been dissolved by the superiour court of chancery, and the record adduced to prove the breach, shewed that it was dissolved by the county court, there was such a variance between the evidence adduced to prove the breach of the condition of the injunction bond, and the allegation of the breach in the declaration, as rendered the evidence inadmissible. It was true, the county court, at November term 1820, gave Calloway leave to reinstate the injunction before awarded to him, and dismissed at the preceding September term; but that, in fact, was an award of a new and distinct injunction, on new matter alleged, to which the injunction bond

had not, and could not have, any relation. The county court could "not, at November term, reinstate the former injunction awarded on the original bill, which had been dismissed at September term. The injunction which remained to be disposed of, was the new injunction awarded at November term 1820; and the order of the superiour court of chancery, overlooking the injunction of November

1820, and dissolving the injunction of August 1814, which had already been dissolved, and the bill on which it was awarded dismissed, by the county court, was wholly nugatory.

Johnson, for the appellee, said, it was now quite immaterial, whether or no the county court could properly reinstate the original injunction, after the bill on which it was awarded had been dismissed at a previous term; for the county court, in fact, did reinstate, and intended to reinstate, the original injunction; and this at the instance of Calloway. But however that might be, there was no material variance between the record adduced to prove the breach, and the allegation of the breach, in the declaration. The declaration alleged, that the injunction referred to in the condition of the bond (namely, the injunction awarded by the county court on the 9th August 1814) was dissolved by the superiour court of chancery; and the record shewed an order of the superiour court, dissolving the injunction awarded by the county court on the 9th August 1814. The argument, that that injunction had been previously dissolved by the county court, was founded on a nice criticism: the record stated, exactly what the declaration alleged, that the injunction was dissolved by the superiour court. If the decree of the superiour court was wrong, it could not be thus impugned. Besides, the substantial part of the allegation was that the injunction had been dissolved; and it could not be material whether the plaintiff's history of the injunction cause was exactly accurate or not.

CARR, J. I have seen few cases that, in my apprehension, present less difficulty than this. The only question is, whether the record was admissible evidence.

398 The appellee "brings his action on an injunction bond, against the surety; and in his declaration describes the bond and sets out the condition with perfect accuracy, and, in assigning the breach of the condition, alleges that the injunction, which had been awarded by the county court of Campbell, was dissolved by the superiour court of chancery of Lynchburg. The defendant pleads conditions performed; and the issue is made up on that plea. The plaintiff to prove the breach laid in the declaration, offers in evidence the record of the injunction suit; and this record shews the whole proceedings in the county court, and the removal of the cause, by certiorari, to the superiour court; and states, in so many words, the decree of the superiour court, that the injunction awarded to Calloway by the said county court, on the 9th August 1814, be dissolved; which is the very injunction, on granting which the injunction bond, now sued on, was given. Could the court say that this evidence was not pertinent to the issue? not admissible under the pleadings? Unquestionably not. Here was the decree of a competent court dissolving the very injunction, the dissolution of which was the fact in issue. Whether that order of dissolution was a correct decree or not, was a question, surely, that could not be adjudged in this side way, on a question as to the admissibility of the

record in evidence; the decree itself remaining in full force nowise impeached, and no appeal taken from it. I think the judgment must be affirmed.

CABELL, J., concurred.

TUCKER, P. In *Mowry v. Miller*, 3 Leigh 561, which was an action for a malicious prosecution, the declaration set forth an examination and acquittal on the 7th October, and on the trial the plaintiff produced in evidence the record of an acquittal on the 7th November. The introduction of the record was objected to because of the variance. This court took a distinction between the case as it appeared, and that of a misrecital. We considered the 399 declaration as merely *alleging the fact of acquittal, and not as undertaking to recite the record; and (upon the authority of *Purcell v. Macnamara*, 9 East 157, overruling *Pope v. Foster*, 4 T. R. 590, and sustained by *Philips v. Shaw*, 4 Barn. & Ald. 435,) affirmed the judgment. These cases establish, that where the time of the trial of a particular fact is not material, a variance from the date, in alleging the trial and the result, will not be material, although it is to be proved by a record, provided the time be not alleged as descriptive of the record by means of a prout patet per recordum or otherwise. Although these cases are not ad idem with the case before us, the principle is, I think, altogether applicable. Here, the substance of the allegation in the declaration, is, that the injunction was dissolved. There is no attempt to recite the order of dissolution, nor is there any mention of its date. But instead of alleging, as was the fact, that the injunction was dissolved in the county court, it is erroneously stated, that it was dissolved by the superiour court of chancery:—I say erroneously, because, I do not think it necessary to go into the inquiry, how far the defendant Anthony was, on the one hand, bound to respect the order of the county court reinstating the injunction, or, on the other, how far he was at liberty to disregard it, because irregularly made. If he was bound to respect it; if it was in fact a restraint upon him, which he had no right to set at defiance, until it was removed by the same court or a superiour tribunal; and if, as I think, the reinstatement is to be considered as the old injunction, though most irregularly revived, then, the declaration strictly conforms to the fact. The injunction was dissolved by the superiour court of chancery of Lynchburg. But if Anthony was at liberty to disregard this irregular reinstatement, or if it is to be considered as a new order of injunction, it is certain that the declaration erroneously describes the court, at which the dissolution took place. This, however, was not the point of the allegation. The substance of it was the fact of dissolution, which was to entitle the plaintiff to his action, and the date of the dissolution to 400 ascertain *the extent of his demand.

It is not improbable, that the declaration would have been considered faulty on special demurrer in this latter respect, as the day of dissolution is blank. But that defect cannot affect the judgment now. The only point in question is, the mistake

as to the court in which the injunction was dissolved, which I have already said I do not consider as forming a material part of the allegation.

The case of *Busby v. Watson*, 2 W. Black. 1050, is not inapplicable to shew, that the mistake of the court is as immaterial as the mistake of the date. There, in case for malicious prosecution, the declaration alleged that the defendant procured the plaintiff to be indicted at the general quarter sessions of the peace for Middlesex; and a record was introduced, proving indeed the fact of indictment, but that it was at the general sessions, instead of the general quarter sessions. These courts are different, for the general quarter sessions, have more extensive jurisdiction than the general sessions. The evidence was rejected at nisi prius for this variance; but the court of common pleas thought otherwise; and ordered a new trial.

Judgment affirmed.

401

**Daniels v. Conrad.*

April, 1833.

(Absent BROOKE, J.)

Contract to Transfer and Deliver Title Bond*—Acceptance of Order on Third Person to Deliver Bond—Effect.—Defendant agrees to assign, transfer and deliver a title bond to plaintiff; defendant gives an order on third persons requiring them to deliver the bond to plaintiff, and containing an assignment thereof to him; and this order is given by defendant, and accepted by plaintiff, in lieu of an actual delivery of the bond: HELD, the delivery of the order was tantamount to a delivery of the bond, and a full performance of the contract on defendant's part, whether plaintiff obtained the bond or not.

Same—Witnesses—Examination as to Value.—The agreement to transfer the title bond, was part of the consideration given by defendant for land bought of plaintiff: HELD, the value of this land is a proper subject of inquiry at the trial; and a witness, who had owned the land, having been examined by both parties as to its value, evidence offered to prove the price at which the witness had himself offered it for sale, is proper and competent.

Assumpsit for breach of contract, by Daniels against Conrad, in the circuit court of Pendleton.—There were two counts in the declaration.—The first alleged, that one Rogers contracted to sell to Conrad a parcel of land lying in the county of Nicholas, for 663 dollars, which sum Conrad paid to Rogers, and Rogers with one Skidmore his surety, thereupon, gave him a bond with condition that Rogers should within a specified time, make him a good title in fee simple, or refund the purchase money; and it being afterwards ascertained, that Rogers had no title to the land, and that it belonged of right to Daniels, Daniels sold the title, and caused it to be conveyed to Conrad, in consideration of 100 dollars paid him by Conrad, and of a promise and agreement on his part, to assign, transfer and deliver to Daniels, the title bond which had been executed by Rogers to Conrad, Rogers and his surety being at the time perfectly solvent and able to pay the amount which the bond bound them to refund; and the breach of Conrad's promise and agreement complained of, was, that he

*Contracts.—See monographic note on "Contracts" appended to Enders v. The Board of Public Works, 1 Gratt. 364.

did not, and would not, assign, transfer and deliver, the title bond to Daniels, or cause it to be done.—The second count,

after stating the contract between 402 Daniels and Conrad in the *same words as in the first count, stated the breach of Conrad's promise and agreement to assign the title bond, thus—that Conrad executed and delivered to Daniels an order (to which he put his seal) on O. Phelps and A. Earle, requesting them to deliver the title bond to Daniels, and thereby also assigning the title bond itself to Daniels; and this order was presented to Phelps and Earle, but neither of them did or would deliver the title bond to Daniels, and in fact neither of them had possession of the same; of which Conrad had notice, and was requested to deliver the title bond, or cause it to be delivered, to Daniels; and if the bond had been delivered to Daniels, he could have recovered the money due thereon from Rogers and his surety; but Conrad did not, and would not, deliver the title bond to Daniels, or cause it to be done. Conrad pleaded non assumpsit, and the statute of limitations. At the trial of the issues, the plaintiff filed two bills of exceptions to opinions of the court.

1. From the first of them, it appeared that it was proved, that the land sold by Daniels to Conrad, had originally belonged to the father of Daniels, who in truth had made the arrangement with Conrad for the sale of it to him, but before the bargain was executed, had given and transferred the benefit thereof (as an advancement) to his son the plaintiff, between whom and Conrad the bargain was finally completed; and the father having been introduced by the plaintiff as a witness on his behalf, to prove the circumstances and manner of the transaction, was examined, both by the plaintiff's and the defendant's counsel, as to the real value of the land which was the subject of the contract, at the time of the sale to Conrad; and in the cross examination, he was asked by the defendant's counsel, whether he had not, before the sale of the land to the defendant, offered to sell it to one Crouch for less than 400 dollars? to which he answered, that he had not as well as he remembered, but that if he had, it was for very little less than 400 dollars. Afterwards, in the progress of the trial, the defendant's counsel called Crouch 403 as a witness, and asked him, whether *the first witness (the plaintiff's father) had not offered to sell the land to him before the sale made to Conrad, and if so, at what price? The plaintiff's counsel objected to the inquiry, that it related to collateral matter, which had been brought into the cause by the defendant's counsel himself in his cross examination of the first witness, and that it was not competent to the defendant to controvert it. But the court, thinking that the answer to the inquiry might be proper testimony to be weighed by the jury, in estimating the degree of credit that ought to be given to the testimony of the first witness, overruled the objection, and directed the witness Crouch to answer the question; to which opinion the plaintiff's counsel excepted.

2. It appeared, that upon the contract be-

tween Daniels and Conrad being concluded, Conrad gave Daniels an order on Phelps and Earle for the title bond, dated March 6, 1820, and signed and sealed by Conrad in these words—"To O. Phelps and A. Earle—You will please deliver to J. Daniels [the plaintiff] the title bond I hold of C. Rogers and A. Skidmore, for I hereby assign the same to Daniels for value received (N. B. without recourse)." On this order there was this indorsement—"There is no such bond in my hands; (signed) A. Earle." And the court, on the motion of the defendant's counsel, instructed the jury, that if they should find from the testimony, that the above order was executed and delivered by Conrad to Daniels, and accepted by Daniels, in place of the actual delivery into his hands of the title bond therein mentioned, they must find a verdict for the defendant; to which opinion of the court the plaintiff's counsel excepted.

There was a verdict and judgment for the defendant; from which the plaintiff appealed to this court.

Johnson, for the appellant, argued, 1st, That the whole inquiry as to the value of the land, and much more the special inquiry propounded by the defendant's counsel on his cross examination of the plain- 404 tiff's witness, were collateral *to the issue: that it was obvious, the inquiry as to the value of the land could only have been gone into, to ascertain the measure of damages; but, in that view, the value of the title bond which Conrad undertook to assign to Daniels for the land, not the estimated value of the land, was the point in issue: that the inquiry propounded to the witness, as to the price for which he had offered to sell the land, was collateral again to the inquiry as to the value of the land, which was itself collateral to the issue; and the question was only intended to lay a foundation for impeaching the credit of the witness. Now, he said, it was a settled rule, that a witness is not to be cross examined as to a distinct collateral fact, for the purpose of afterwards impeaching his credit; and if a witness answers such a question, evidence cannot afterwards be admitted to contradict his testimony on such collateral matter. Stark. Law Ev. part 2, § 22, vol. 1, p. 134.* 1 Phil. Law Ev. ch. 8, p. [227.]† 2ndly, He said the instruction given by the court to the jury was erroneous. Here was no demurrer to the evidence, and no statement of the evidence, from which the whole case could be ascertained. The court directed the jury, that if they should find a single fact, namely, that Conrad's order on Phelps and Earle for the title bond, had been given by him, and accepted by Daniels, in place of the actual delivery of the bond,—they must find for the defendant. To justify such an instruction, it must appear from the pleadings, that that fact was conclusive of the point in issue; but there was no issue made up on the point. For aught that appeared, it might have been in proof, that Conrad when he gave the order on Phelps and Earle, knew that neither had possession of

*Ingraham's ed. Boston 1828.

†American ed. New York 1820.

it; nay, that he had it in his own possession; that he had afterwards assigned it away, and delivered it to another person: in such case, it could hardly be contended, that his fraudulent imposition of a nugatory order for the bond on Daniels, in place of the actual delivery thereof to *him, would exempt him from the duty to assign, transfer and deliver the bond.

Daniel, for the appellee, said, the conduct of both parties at the trial, shewed that the value of the land was material to the issue; for the plaintiff and defendant both, had gone into that inquiry: and then the defendant asked a question, the object of which was to ascertain at what price the land had been offered for sale; an inquiry of all others, the best calculated to ascertain its real value; so that if a false answer was given by the witness to this question, it was strictly proper to offer evidence to contradict him, and thus to impeach his credit. As to the other point, he said, the precise point in issue was, whether Conrad had, according to his promise, assigned, transferred and delivered the title bond to Daniels. The order drawn by Conrad on Phelps and Earle, was an absolute deed of assignment of the title bond to Daniels; and the instruction was no more than this, that the delivery and acceptance of the order for the bond, was tantamount to the actual delivery of the bond itself, if both parties agreed and intended that it should be so. Daniels, it appeared, presented the order to Earle, who said he had no such bond in his possession; but it did not appear that he ever applied to Phelps, or that if application had been made to him, the order would have been ineffectual to procure the bond.

TUCKER, P. Without impugning the principles laid down by Starkie and Philips, in the passages cited by the appellants' counsel, I am of opinion, that there was no error in the admission of the testimony set forth in the first bill of exceptions. The value of the land was certainly material to the issue. The evidence of the witness as to the value, was, of course, directly applicable to the issue, and every fact going to disprove his valuation was, in like manner, material or applicable. For what goes to disprove evidence that is directly applicable, must be itself directly applicable. It cannot be deemed collateral only. Thus, it cannot be

406 *denied, that if, in detinue, a witness swears that the value of a horse is 100 dollars, evidence would be admissible to prove that he had sworn, upon a formal trial, that he was worth only 50 dollars. And if such evidence as this would be within the issue, and not collateral but direct, evidence of his declarations not on oath, though less strong, would certainly not be less direct. In like manner, though evidence that he had offered the same horse for the price of 50 dollars, might not be as strong as the evidence of his declarations, because he might be asking a lower price than he really thought the property worth, yet certainly it cannot be fairly affirmed to be less direct. I think, therefore it was proper to permit evidence to

contradict the testimony of the witness as to the price at which he had offered the land.

The question presented by the second bill of exceptions is more difficult. The first count in the declaration goes distinctly enough for the failure to deliver the bond according to contract. Now, I think, there can be no question, that as to this count, the evidence was conclusive against the plaintiff. For, certainly, if the defendant did draw and deliver the order to the plaintiff, and the plaintiff did accept the same in the place of actual delivery into his hands, of the title bond itself, it was a sufficient fulfilment of the contract to deliver, and a discharge of the defendant in this action. The original contract to deliver was satisfied and at an end, whatever other rights might have become vested in the plaintiff by the act done in satisfaction.

What then was the effect of that act? what rights did it confer on the plaintiff?

1. By the delivery of the order, and its acceptance in the place of the actual delivery of the bond, the title to the bond absolutely passed. *Pleasants v. Pendleton*, 6 Rand. 473. If it had been afterwards burnt, lost or destroyed, the loss would have been Daniels's, not Conrad's. 2. By that delivery and passing of title, the property in the bond itself so passed, that if Phelps or Earle had it in their possession, trover or detinue would have lain for it, whether they accepted the order or not. And if

407 they *had it not, those actions might have been sustained by the plaintiff against any person in whose possession it might happen to be, even the defendant himself. And if it was found not to be in Phelps's or Earle's hands, whose concern was it to search for it, after the plaintiff had received the order as an actual delivery into his hands of the bond itself? It was, surely, the plaintiff's concern. The defendant was not only not bound to search or sue for it, as he had discharged himself from all further connexion with it, but he had no right to sue for it. He could neither have brought trover nor detinue, nor even a bill of discovery against Phelps or Earle, or any other person. The delivery had passed away the property, and left him powerless over the subject. 3. The right of property in the subject, would have enabled Daniels to sue the obligors at law or in equity on the lost bond, and establish it by the evidence of the defendant himself. Or he might have sued Phelps and Earle, and called upon the defendant to prove their possession; or he might have brought them all into equity, on the ground that the money was due to him, and demanded, that the obligors should pay it to him accordingly; that Phelps and Earle should give it up, or account for it; or that the defendant, should surrender it if he had it, or pay him the amount of it, if there had been in fact no such bond as he represented. And 4. In like manner, he might at law have sued the defendant in detinue or trover, if the defendant had the bond, or he might sue him in an action for deceit, or even in assumpsit, if he had pretended to sell him a bond, which had no existence. These

remedies are still open to him if he is injured. But I do not think he could sue him in assumpsit, after receiving this order as a full compliance with the contract to deliver the bond; and therefore the proof of that fact was a complete bar of his action.

I am therefore of opinion, that there is no error in the judgment.

The other judges concurred. Judgment affirmed.

408 *Melson v. Doe on Demise of Cooper.

April, 1833.

(Absent BROOKE, J.)

Wills—Devise of Land with Absolute Power to Sell—Limitation Over—Effect.—Testator devises land to his son William and his heirs, and if he should die without a son and not sell the land, then to testator's son George: *HOLD*, the devise gave William absolute power to sell the fee simple; and therefore, whether he sold it or not, he took a fee simple, and the devise over to George was void.

Upon the trial of an ejectment, brought by George Cooper against Edmund Melson, in the circuit court of Elizabeth City, for a message and parcel of land in that county, the jury found a special verdict, from which it appeared that the case was thus:

John Cooper died in 1813, seized of the message and land in controversy, having by his last will duly made and published, devised, inter alia, as follows—"I give to my son William Cooper the plantation I live on, to him and his heirs forever. In case he should die without a son and not sell the land, I give the land to my son George; and if he should die under age, then the land to be sold by John Herbert, and divide the money among all my children then alive or their children that may be alive at that time." The plantation on which the testator lived, was the land now in controversy. George Cooper, the lessor of the plaintiff, was the testator's son George, mentioned in the devise, who claimed the land under the limitation over to him therein contained. The testator's son William, to whom the land was devised in the first instance, attained to full age, married, and died leaving issue one daughter, but without leaving or ever having had a son, and without having sold the land. Melson, the defendant, claimed under William Cooper. The question referred to the court, was, Whether, upon this state of facts, George Cooper, the lessor of the plaintiff, was entitled to the land?

The circuit court held that he was, and gave him judgment accordingly; from which Melson appealed to this court.

409 *Johnson, for the appellant, insisted, 1. that, even throwing out of view the unlimited right clearly given to William the first taker, to sell the land, the devise to him and his heirs, and if he

should die without a son, then over, would have given him an estate tail, which the statute for abolishing entails would have converted into a fee simple, and barred the contingent remainder to George: he cited Robinson v. Robinson, 1 Burr. 38, 3 Bro. P. C. (Tomlin's ed.) 180, S. C. and Robinson v. Miller, 1 Rolls's Abr. 837, pl. 12. But 2. he said, here was a manifest intent to give William, the first taker, an unlimited and absolute right to sell the land, when, how, and to whom he pleased; he might have sold the fee simple; and, therefore, he took the fee simple by the devise, and though he did not sell, he died seized of the fee simple. Upon this point, he cited Riddick v. Cohoon, 4 Rand. 547.

Leigh, for the appellee, admitted that the case of Riddick v. Cohoon was in point and conclusive, unless a distinction could be made between a bequest of personal property with a general power to sell it at pleasure, which was the case there, and a devise of real estate, with a general power to the devisee to sell it, which was the present case; and he confessed he could see no ground on which he could maintain such a distinction.

CARR and CABELL, J., founding their judgment on the last point (as the reporter understood) that a general absolute unlimited power to sell the land, was plainly given to William Cooper by the devise, held, that he took a fee simple, and therefore that the judgment was erroneous.

TUCKER, P., doubted on both points, and, upon the whole, inclined to the opinion, that the judgment of the circuit court was right.

Judgment reversed, and judgment entered for the appellant.

410 *Godwin's Adm'r v. Godwin's Adm'x &c.

April, 1833.

(Absent BROOKE, J.)

Executors and Administrators—Sale of Slaves When Not Necessary to Pay Debts—Right of Widow in Proceeds—Bond.—An administrator makes sale of slaves of his intestate, to raise funds for payment of debts, but it turns out that the funds are not wanted to pay debts: and upon a question, what

***Executors and Administrators—Sale of Slaves—Adjustment of Rights of Widow in Proceeds.**—In *Hickerson v. Helm*, 2 Rob. 663, upon the question of the adjustment of the interest of the widow in the sale of slaves belonging to her husband, the rule laid down in the principal case, that such interest should be an annual sum from the death of her husband until her death, equal to the amount of one-third of the gross amount of the sales or the value of the slaves, was followed. *BALDWIN*, J., however, was of opinion that the widow was entitled to credit for one-third annually of the estimated hires, and he said at page 663 that his view of the case was not in conflict with the rule laid down in *Godwin v. Godwin*, 4 Leigh 410.

***Same—Life Tenant—Security for Return of Property.**—In *Houser v. Ruffner*, 18 W. Va. 251, *PATTON*, J., said: "I know of no law, which requires a life-tenant to give security for the return of money or other property upon the termination of the life-estate, unless those in remainder or reversion show such special circumstances, as call for the intervention of a court of equity by bill of *quia timet*. *Chisholm v. Starke*, 3 Call 25; *Holliday v. Coleman*, 2 Munf. 162; *Mortimer v. Moffatt*, 4 Hen. & M. 503; *Frazer v. Beville*, 11 Gratt. 9; *Dunbar v. Woodcock*, 10 Leigh 628; *Weeks v. Weeks*, 5 N. H. 326; *Scott v. Price*, 2 Serg. & R. 59. *Godwin v. Godwin*, 4 Leigh 410, would seem to lay down a different doctrine. In that case an administrator sold certain slaves under the apprehension, that the proceeds would be

***Wills—Devise of Land with Power to Dispose of—Limitation Over.**—On this question, the principal case is cited in *foot-note* to *May v. Joyner*, 20 Gratt. 692; *foot-note* to *Madden v. Madden*, 2 Leigh 377; *foot-note* to *Missionary Society v. Calvert*, 32 Gratt. 357; *Elcan v. Lancasterian School*, 2 Pat. & H. 68, and *note*; *Randolph v. Wright*, 81 Va. 617; *Johns v. Johns*, 86 Va. 336, 10 S. E. Rep. 2; *Hall v. Palmer*, 87 Va. 358, 12 S. E. Rep. 618; *Farish v. Wayman*, 91 Va. 435, 21 S. E. Rep. 810; *Mihollen v. Rice*, 13 W. Va. 520; *Howard v. Carusi*, 3 Sup. Ct. Rep. 579, 109 U. S. 725; *note* to *Farish v. Wayman*, 1 Va. Law Reg. 230. See monographic *note* on "Wills."

interest the intestate's widow is entitled to in the proceeds of the slaves so sold: HELD, that, as the widow was entitled to only a life interest in one-third of the slaves, the best general practical rule is, to give her one-third of the proceeds of sale thereof for her life, requiring bond with surety of her, that the principal, at her death, shall be paid to the persons entitled in remainder.

This was an appeal from a decree of the superiour court of chancery of Williamsburg, in a suit between J. A. Chandler administrator of Joseph Godwin deceased, who had been administrator of Edmond Godwin deceased, and Martha Godwin widow of Edmond, and administratrix de bonis non of his estate, and others his distributees; which involved a settlement of Joseph Godwin's accounts of administration of the estate of Edmond Godwin, and a distribution of any balance found due thereon.

Upon the settlement of the accounts before the commissioner, it appeared, that there was a balance due from the estate of

Joseph Godwin to that of Edmond Godwin; but this balance consisted intirely of the proceeds of slave property of Edmond's estate, which had been sold by Joseph, under an apprehension that the sale was necessary to raise funds to pay debts of Edmond's estate, though it turned out that the sale was not necessary, or that more slaves were sold than necessary, to meet the debts. And in distributing this balance, the commissioner allowed the widow one-third of it in absolute property. To this an exception was taken, on the ground, that as the widow was entitled by law only to a life estate in one-third of the slave property of her husband, so she was only entitled to the value of a life interest in one-third of the proceeds of the slaves
411 that had *been sold. The chancellor, in his decree, overruled the exception, approved the report, and decreed accordingly.

An appeal was taken by Chandler, from the decree generally; and there were many questions arising on the details of the accounts; but the only question of law was that presented by the above mentioned exception to the commissioner's report.

Leigh, for the appellant.

Johnson, for the appellees.

necessary to pay debts. It turned out otherwise, and the question was, what interest the widow took in the proceeds. If the slaves had not been sold, she would have been entitled by statute to one-third of them for life. TUCKER, Judge, in delivering the opinion of the court held, that she took a life-estate in one third of the purchase-money. He uses this language: 'The use of the purchase money for life is therefore the most proper measure; and whenever her portion of purchase money is so paid over to a widow for life, bond with security should be required of her for paying it over at her death to the persons entitled in remainder.' JUDGE TUCKER cites no authority in support of his position, that the widow should be required to give security, draws no distinction between a life-tenant of money and other personal chattels, so as to take the case out of the general rule, gives no reason why security should be required, and does not discuss the question at all.

'There is this difference between the cases I have referred to and *Godwin v. Godwin*. In all of those cases the life-tenant took under the provisions of a will; in that case the life-tenant took by force of the law. Whatever importance may be attributed to that difference, and I must confess I can see no difference in principle, upon the ground that in the case of a will the testator had it in his power to require security, and his failure to do it was evidence of a personal trust and confidence, and in the case of a life-tenant by force of the law there is no personal trust and confidence. It does not affect the question I am considering. If the effect of JUDGE TUCKER's decision in *Godwin v. Godwin* is to hold that a life-tenant of money or other personal chattel is not entitled to the possession of such money or other chattel until bond with security is given for the return of the money or property upon the termination of the life-estate, then I am compelled to dissent from such decision, as contrary both to principle and authority.

'I know of no case where it has been held, that a life-tenant can be required to give security for the return of the property, unless some special reasons are assigned, as in *Chisholm v. Starke*, 3 Call 25, and *Frazier v. Bevell*, 11 Gratt. 2. On the contrary, in *Holliday v. Coleman*, 2 Munf. 162, and *Mortimer v. Moffatt*, 4 Hen. & M. 508, the court refused to require security, saying in the latter case: 'Yet the court will not rule the tenant for life to give security to have the property forthcoming at his death, unless there appear some danger of its being wasted or put out of the way.'

'There is no difference between money and any other personal chattel. *Weeks v. Weeks*, 5 N. H. 326; *Scott v. Price*, 2 Serg. & R. 59; *Dunbar v. Woodcock*, 10 Leigh 628. The fact, that in *Godwin v. Godwin*, money was to be paid to the widow instead of other personal property could not have been the ground of the decision of JUDGE TUCKER. In that case the widow was entitled to the slaves. They were converted into money without her assent and under a misapprehension upon the part of the administrator; she should not have been placed in a worse position with regard to the proceeds, than she was with regard to the thing sold.'

See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

TUCKER, P. The court is of opinion, that the widow is improperly allowed one-third of the balance found due from the administrator, in absolute property. That balance is, in effect, the proceeds of the sales of slaves, to one-third of which she had title indeed, but only for life. What her proportion of the price ought to be, can be estimated by no certain rule that the court knows of. It is a complicated question presenting a triple ratio; the probable life of the widow, the probable life of the slaves, and the difference between the hires of the slaves in her portion, and the interest of her portion of their price. For, if the slaves had not been sold, their hires would have been of more value to her than the interest of the money; and, therefore, the mere interest of the money for life would seem, at first view, not a fair compensation; yet as this is certain, and the hires uncertain, since the slaves may die, perhaps there is no better rule, in such cases, than to allow her one-third of the money for life. No other course can approximate to what is right. For it is possible the slaves, or the widow, may die, the day after allotment; and so her interest may be worth little or nothing. But it is also possible, that the slaves may live many years, and yet die before her, and then she would have had the whole value. And it is also possible, she might live until they were superannuated; so that if they survived her, they would be a charge and not a profit. The use of the
412 *purchase money for life, is, therefore, the most proper measure; and wherever her portion of purchase money is so paid over to a widow for life, bond with security should be required of her, for paying it over at her death, to the persons entitled in remainder.

Decree reversed, and cause remanded.

Bargamin v. Poitiaux Ex'or &c.

April, 1833.

(Absent BROOKE, J.)

Replevin—Avowry—Nonappearance of Plaintiff—Non-Suit.—In replevin, defendant makes avowry for rent due him from plaintiff, and then plaintiff failing to appear and plead, is non-suit: *Held*,

Same—Same—Same—Writ of Enquiry—Statute.—It is proper, in such case, to award a writ of inquiry to ascertain avowant's damages, under the 23rd section of the general statute of rents. 1 Rev. Code, ch. 118.

Same—Same—Insufficient—Effect.—In such case, too, the avowry is to be considered as only a suggestion, and though it be faulty as an avowry, in not shewing the landlord's title, yet as a suggestion, it is good and sufficient.

Same—Same—Same—Jeoffails.—In such case, moreover, the statute of jeoffails would be applicable to cure all defects in the avowry.

Judgment by Default—When Statute of Jeoffails Applicable.—In general, the statute of jeoffails is not applicable in case of a judgment by default for want of appearance; but if the party has once appeared, though he makes default afterwards, and then there is judgment against him by such default, the statute of jeoffails is applicable.

Poitiaux executor of Wercq having distrained the goods of Bargamin, for 120 dollars rent claimed of him, Bargamin, sued out of the circuit court of Henrico, a writ of replevin of the goods, and gave bond with surety to perform the judgment of the court in case he should be cast, according to the statute 1 Rev. Code, ch. 113, § 23, p. 451. The declaration was in the usual form, alleging the unjust taking and detention of the goods against sureties and pledges.

The suit was commenced as long ago as January 1820. But from October 1820, 413 when the cause was, by order of *the court, transferred from the rules to the court docket, until March term 1826, it seemed to have been neglected by both parties, and was only continued by force of the provisions of the statute to prevent discontinuances. At March term 1826, Poitiaux filed his avowry, in these words:

"And the said Poitiaux executor of L. Wercq deceased, by H. C. his attorney, comes and defends the wrong and injury, when &c. and well avows the taking of the goods and chattels in the declaration mentioned in the said dwelling house in which &c. and justly &c. because he says, that he the said Poitiaux executor as aforesaid, for a long time to wit, for all the time during which the rent hereinafter mentioned was accruing due, and from thence until and at the said time when &c. was landlord to the said Bargamin of the said dwelling house in which &c. and the said Bargamin for a long time, to wit, for the space of two quarters of a year ending on &c. and from thence until and at the same time when &c. held and enjoyed the said dwelling house in which &c. with the appurtenances as tenant thereof to the said Poitiaux executor as aforesaid, under a certain demise thereof theretofore made, at and under a certain yearly rent, to wit, the yearly rent of 400 dollars, payable quarterly, on the first days of January, April, July and October, in every year, by even and equal portions; and because the sum of

120 dollars of the rent aforesaid for two quarters ending on the said 1st day of January 1820, and from thence until and at the same time when &c. was due and in arrear from the said A. Bargamin to the said Poitiaux executor as aforesaid, he well avows the taking of the said goods and chattels in the said dwelling house in which &c. and justly &c. as for and in the name of a distress for the said rent so due and in arrear to the said Poitiaux executor as aforesaid, in manner aforesaid, and which still remains due and unpaid. And this he is ready to verify &c. Wherefore, he prays judgment, and a return of the said goods and chattels, together with his damages &c. according to the form of the statute in such case made and provided, to be adjudged to him &c."

414 *To this avowry no plea was put in. And, at a subsequent term, the avowant appearing by his attorney, and the plaintiff being called and not appearing, on the motion of the avowant, it was adjudged, that the plaintiff be nonsuited, and that the avowant go thereof without day; and on the further motion of the avowant, it was ordered, that a jury should inquire how much of the rent in the avowry mentioned was in arrear and unpaid at the time of the taking of the goods and chattels in the declaration mentioned: whereupon a jury was impaneled to make the inquiry, who found, that there was at the time of the distress made, 120 dollars of the rent in the avowry mentioned in arrear and unpaid: therefore, with the assent of the avowant, it was adjudged by the court, that the avowant should recover against the plaintiff, the sum of 120 dollars with interest after the rate of six per centum per annum from the 1st January 1820 till payment and his costs &c. and that the said avowant have execution thereof &c.*

*In order to understand the disputed points of practice in this case, it is proper to mention, that none of the english statutes on the subject were in force in Virginia at the time this action was commenced. The statute of 7 Hen. 8. ch. 4. and 21 Hen. 8. ch. 19. providing that the avowant, in replevin, for rent, if the plaintiff be barred, shall recover damages and costs, had been repealed; and neither the statute of 17 Car. 2. ch. 7. directing the proceedings and judgment in replevin, in case the plaintiff be nonsuit, or judgment be given for the avowant on demurrer, nor the statute of 11 Geo. 2. ch. 19. simplifying the form of the avowry or consurance in replevin, were ever in force in Virginia: nor had we any similar statutory provisions. The only statute, varying the proceedings and judgments in replevin, from the course of the common law, was the provision in the statute of rents, 1 Rev. Code, ch. 118, § 23, p. 451, requiring bond and surety of the plaintiff, before suing out the writ, to perform and satisfy the judgment of the court. In case he shall be cast: it is provided, that "if upon the trial of the suit, it shall be found that the rent distrained for was justly due, the party injured or delayed by suing forth the writ, shall recover, against the party suing forth and prosecuting the same, double the value of the rent in arrear and distrained for, with full costs of suit." But after this suit was brought, namely in February 1823, a statute was enacted, whereby it was provided, that in all cases where property distrained or attached for rent, shall be claimed by any other person or persons than the tenant or tenants, it shall be lawful for the said person or persons to sue out his or their writ of replevin, directed to the sheriff: and upon the execution of a bond by the person or persons suing out the writ, with one or more sufficient securities, in double the amount of the value of the said property, to be ascertained by two disinterested freeholders, to be sworn before some justice of the peace, and conditioned to perform and sat-

*Replevin.—The principal case is cited in foot-note to Maxwell v. Light, 1 Call 117. See monographic note on "Detinue and Replevin" appended to Hunt v. Martin, 8 Gratt. 578.

Judgments.—See monographic note on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

415 *Upon the petition of Bargamin to this court, a supersedeas to the judgment was allowed him.

Leigh, for the plaintiff in error, said the avowry was clearly naught; that it was framed upon the precedent in 2 Chit. Plead. 512, of an avowry under the statute of 11 Geo. 2, ch. 19, § 22, but there was no similar provision in the statute law of Virginia, and the avowry must be judged of by the common law rules of pleading; Southall v. Garner, 2 Leigh 372. He took the question to be, whether the defects of the avowry were cured by the statute of jeofails, 1 Rev. Code, ch. 128, § 103, p. 512, which after very strong provisions for curing defects after verdict (provisions which, he admitted, would cure the defects of the avowry here, if they were applicable to the case) provided, that "neither shall any judgment, entered by nil dicit or non sum informatus be reversed, nor a judgment after inquiry of damages be stayed or reversed, for any omission or fault, which would not have been a good cause to stay or reverse the judgment if there had

416 been a verdict." Now, "a judgment by nil dicit was, where a party appears, but does not plead; and a judgment by non sum informatus was, where a party appears by his attorney, but the attorney says he is not informed of any answer; but here the plaintiff in replevin, after filing his declaration, and after avowry by the defendant, made default and was nonsuit. It had often been decided by this court, that the statute of jeofails did not apply to cases of judgment by default; and in *Roe v. Baker*, in which the defendant appeared and obtained two continuances, without putting in a plea, and the cause was tried between the parties, both appearing, as if there had been a plea, and verdict and judgment rendered for the plaintiff, the court held, that this was a judgment by default, and that, therefore, the statute of jeofails had no application to the case, and reversed the judgment for defects in the declaration.† And as to the circumstance of the judgment

isfy the judgment of the court in such suit, in case he or they shall be cast therein, such sheriff shall proceed to execute and return such writ, as heretofore; and the jury that shall try the issue in such cause, shall also inquire of the value of the property, and of the damages sustained by the avowant, by occasion of the suing out the said writ, which in no case shall be less than the value of ten per centum upon such value; and judgment shall be accordingly rendered, if the plaintiff be barred, for the value so ascertained, with interest from the date of the writ, and the damages and costs. And if the plaintiff be nonsuit before issue joined, the court, upon the suggestion of the defendant, in the nature of an avowry, shall award a writ to inquire of the value and damages as aforesaid, which shall be ascertained by the jury, and judgment shall be given accordingly."—"And that so much of the twenty-fourth section of the aforesaid act, to which this is an amendment, as subjects the party suing out the writ of replevin to the penalty of double the value of the rent in arrear, and distrained for, if he shall be cast in the suit, shall be, and the same is hereby repealed." Sess. Acts of 1822-3, ch. 29; Supp. to Rev. Code, ch. 193, § 4, 5, pp. 254, 5.—Note in Original Edition.

**Roe v. Baker*, was argued by Stanard for the plaintiff in error, and by Leigh for the defendant, and decided in December 1826—it has never been reported. It was a suit brought by Baker against Roe upon an award. The declaration was, in many respects, fatally defective and faulty: this was admitted on all hands, and indeed was too apparent to be denied; and the only question was, whether the defects were cured by the statute of

in the present case being a judgment after inquiry of damages, he said, the directing that inquiry was itself a palpable error. The english statutes, respecting the course of proceeding and the judgment in case the plaintiff in replevin be nonsuit, not being in force here, and there being no similar

statutory provisions of our own in 417 existence *when this suit was brought, the proceedings and judgment should have been according to the course of the common law; and according to the common law, the only judgment that could have been given, was a judgment awarding a return of the goods distrained to the defendant, to be irreplevisable in future. 1 Esp. Ni. Pri. 376; 6 Bac. Abr. Replevin and Avowry, L. pp. 83, 4; 1 Wms. Saund. 195a, note 3; 2 Id. 286, note 5. The avowry in this case, therefore, very properly, only demanded judgment for a return of the goods to the avowant. It was very obvious, that the proceedings after the nonsuit of the plaintiff, the award of the writ of inquiry, and the judgment of the court, were moulded upon the statute of February 1823; but that statute could give no warrant for such proceedings, because, 1. the statute was enacted after this suit was commenced; and 2. the statute applies only to actions of replevin brought by a person other than the tenant, to recover his own goods improperly distrained for rent due from the tenant.

Scott, for the defendant in error, argued, that the statute of February 1823, though it was enacted after the action was brought, was properly resorted to by the court, as a rule for its proceedings, and well warranted the writ of inquiry and the judgment, both of which were subsequent to the enactment; and if not, yet, that the statute of jeofails was applicable to the case, and cured all defects in the avowry.

TUCKER, P. At common law, in the action of replevin, after issue joined, both parties are plaintiffs, and therefore the plaintiff cannot suffer a nonsuit. *Eggleton v. Smart*, 1 W. Blacks. 375; *Jones v. Concanon*, 3 T. R. 661; *Hodgkinson v. Snibson*, 3 Bos. & Pull. 603. But, before issue joined, he is the only plaintiff; and he might therefore have suffered a nonsuit, and terminated the whole process. But when he did so, the judgment was not merely that he take nothing by his bill, as in other cases of nonsuit: for having, by his replevin, got what he principally wanted, that is, his goods, and then abandoned the process instituted to es-

jeofails? The defendant had appeared at one term, moved for, and obtained a continuance; appeared again at the next term, and obtained another continuance; and then at the third term, both parties appeared and went to trial, exactly as if the defendant had pleaded, and an issue had been regularly made up, though, in fact, he had never put in any plea; and there was a verdict for the plaintiff, on which the court gave him judgment. This court held that this was not a judgment by nil dicit, or non sum informatus, or an inquiry of damages, but a judgment by default, to which the statute of jeofails was not applicable, and, therefore, reversed the judgment for the defects of the declaration: dissentient GREEN, J. who (as the reporter well remembers) held, that the statute of jeofails was applicable in cases of judgments by default; a proposition which the counsel for the defendant in error had earnestly endeavoured to maintain.—Note in Original Edition.

418 tablish *his right to them, it was right he should be compelled to return them. Hence, the judgment, in case of nonsuit in replevin, went on to award that the defendant should have a return of the goods and chattels; Tidd's Pract. Forms, p. 599. And this was equally the case whether the nonsuit was before or after avowry, as where it was for want of a declaration; Id. 586. If then the case at bar stood unaffected by any statute, the court ought to have given a mere judgment for a return of the goods, when the plaintiff suffered a nonsuit; and whether there was a good or bad avowry filed, or whether an avowry was filed or not, the judgment must have been the same.

In England, however, the common law has been modified by several statutes. Those passed in the reign of Henry 8, gave to the avowant damages for the vexatious replevin, either in case of judgment against the plaintiff upon demurrer on a nonsuit, or in case the jury found for the avowant; in which last case, the same jury might assess the damages; but if they failed to do so, a writ of inquiry might be awarded; and, in the first two cases, the avowant was always entitled to his writ of inquiry. 1 Wms. Saund. 195, c. in note. An extract from the statutes is to be found in the same note. They are, I presume, not in force at this time in Virginia. Next came the statute 17 Car. 2, the provisions of which may be found in the same note. But this statute never was in force with us, nor was the statute 11 Geo. 2, ch. 19, § 22, dispensing with the necessity of regularly setting out in the avowry the title of the lessor or landlord; 2 Id. 284, c. But though the statute of 17 Car. 2, was never in force, yet, we have long had a provision in our statute book making a great innovation in the common law: it will be found in the statute of 1769, ch. 4, 8 Hen. Stat. at Large 382, 3, and in the Old Rev. Code, Pleasants's edi. ch. 89, § 15, and 1 Rev. Code, ch. 113, § 23, p. 451, and it was the law of the land at the time of the commencement of this suit. By this statute it is provided, that "if upon the trial of the suit, it be found that the rent distrained for was

419 justly due, the *party injured or delayed by suing for the writ of replevin, shall recover against the party suing forth and prosecuting the same, double the value of the rent distrained for, and full costs." Yet, though this statute devolves upon the landlord a right to double rent, it makes no particular provisions for the mode in which the party is to proceed. It leaves the courts to mould the remedy to the right, or, what is much better, to follow the established course of proceeding in analogous cases at common law, or cases under analogous english statutes. It is to be wished, I think, that this court had pursued the latter course in *Maxwell v. Light*, 1 Call 117, instead of the practice established in that case, which seems to me both anomalous and inconvenient. Be this as it may, that case respected a trial where an issue had been made up between the parties: our concern is with the case of a nonsuit after avowry.

That the right of the landlord to a judg-

ment for double rent, was confined to the case of an issue made-up and trial thereof between the parties, and did not extend to a judgment in case of nonsuit or upon demurrer, does not seem to be a reasonable construction. The double damages were given as a satisfaction for the delay and injury of suing forth the writ, and the wrong is enhanced where the proceeding has been so frivolous, that the plaintiff himself has abandoned his pretensions. Upon nonsuit, therefore, or upon demurrer, I think the avowant is entitled to double rent if it shall appear that the rent distrained for was justly due. But how is that fact to be ascertained? I answer by a writ of inquiry. And how is the inquiry to be presented to the jury, where the plaintiff has suffered a nonsuit before the pleadings are made up? I answer, by filing a suggestion in the nature of an avowry. Now, this is precisely the course which was pursued under the statutes of Hen. 8. Those statutes gave the landlord a right to damages, but they said not a word as to the mode in which the party was to get at them. The courts therefore decided, that these damages were to be ascertained by writ of inquiry;

420 1 Wms. Saund. *195, c. in note; 6 Bac. Abr. Replevin and Avowry, L. pp. 84, 6; 14 Petersd. Abr. 280. Lord Hardwicke seems, indeed, to have laid down a very broad and proper principle, that in every case where it may be necessary for the purpose of doing complete justice, a writ of inquiry may be granted; with the exception of the case of a jury failing to inquire of the rent in arrear under the statute of Charles, which in strong language, seems to tie up the inquiry to the jury impaneled to try the issue. But the courts also decided, under the same statutes, although they contain not a syllable about a suggestion, that if the landlord would, in the case of nonsuit, entitle himself to damages within the statutes, he must make a cognizance or avowry, or a suggestion *pro retorno habendo*; 1 Wms. Saund. 195, e.

From these analogies, I am of opinion, that where the landlord chooses to avail himself of the statute, he must in case of nonsuit before issue joined, file a suggestion in the nature of an avowry, and thereupon a writ of inquiry must be awarded to inquire of the value of the rent in arrear. He may, however, waive the statute, and take the common law judgment *de retorno habendo*, since the statute only adds to his remedy. 1 Wms. Saund. 195, c; Rees v. Morgan, 3 T. R. 349.

In this case, the parties have been supposed to have proceeded under the statute of February 1823. That statute cannot apply to an action brought before its commencement. For though, at first view, it may seem to affect the remedy only, it in fact most materially acts upon the rights of the parties. When the lessee brought this suit, the landlord under the statute then existing, immediately became entitled to recover double rent, if the distress was found rightful. The statute of 1823 takes away the double rent, and gives in lieu of it, damages not less than ten per cent. It goes then to the right, and not

merely to the remedy, and is obviously not binding upon the rights of the landlord. But if not in force as to the landlord, it cannot be in force as to the tenant. If it is law for one, it is law for the other.

421 I consider *it therefore as not applying to this case. But I am not satisfied, that the proceeding is not perfectly reconcilable with the previous statute. By it, a writ of inquiry is rendered necessary for ascertaining whether the rent distrained for was justly due and in arrear. Now, that is the inquiry directed here, in effect; and the jury have found 120 dollars of rent in arrear, which is the amount avowed for. Upon this verdict, the landlord might have demanded judgment for double rent; but by his consent, judgment was entered for the rent in arrear with interest at six per centum only: thus waiving the heavy penalty which the law entitled him to insist on.

It is contended, however, that the avowry is bad, according to the decision of *Southall v. Garner*, 2 Leigh 372, in which it is declared that as the statute of 11 Geo. 2, ch. 19, § 22, is not in force in Virginia, the old common law strictness, as to setting forth the avowant's title in the avowry, must be adhered to. Admitting this doctrine in its fullest extent, in its application to an avowry upon which an issue in fact or in law is made up, I do not think it can apply to a mere suggestion after a nonsuit, of which character the avowry in this case must be considered, as the plaintiff neither demurred nor pleaded to it. Where the parties go to issue upon the right of distress, there is more reason to demand that the title out of which the right grows, should be distinctly stated. But, in the case of a nonsuit, the plaintiff waives the contest, and acknowledges the right; and the writ of inquiry is only to ascertain the quantum of the demand. This is the general character of a writ of inquiry. See the cases collected 10 Peterad. Abr. 654, & seq. The suggestion, therefore, in this case, would seem sufficient. Why insert the title in detail, when the tenant cannot contest or traverse it in this stage of the proceeding. The landlord, indeed, must prove the lease, and the rent due; and the tenant is at liberty to controvert its being in arrear, by proving payments; but I apprehend he can no more plead in this case to the sug-

422 gestion, than he could plead to *the suggestion of breaches after a judgment by default in debt on bond with collateral condition. See *Bullythorpe v. Turner*, Willes 435; *Foot's case*, 1 Salk. 93; 14 Peterad. 268, in note; 1 Wms. Saund. 58, note 1. Upon looking into the forms of these suggestions, I incline to think, they were much more general than avowries, even before the statute of 11 Geo. 2, ch. 19. See *Tidd's Pract. Forms* 586, which I take to be under the statute of Charles 2, and not of George 2. That is quite general.

Upon the whole, I am therefore for affirming the judgment, without thinking it necessary to resort to the statute of jeofails to sustain the avowry or suggestion.

CABELL, J. The statute of jeofails declares, that no judgment entered by nil dicit, or non sum informatus, shall be re-

versed, nor shall a judgment after inquiry of damages be stayed or reversed, for any omission or fault which would not have been a good cause to stay or reverse the judgment, if there had been a verdict. I have never considered this statute as embracing any case of judgments by default for want of appearance; whether those judgments be final, as in case of office judgments confirmed in actions on bonds, bills or notes; or merely interlocutory, and afterwards completed by writ of inquiry of damages, as in actions on the case. That it does not extend to the former class of cases, is manifest from *Nadenbush v. Lane*, 4 Rand. 413. If this were not so, the plaintiff might bring his action on a bond for 100 dollars, which the defendant, knowing it to be just, might fail to defend, in the full confidence that no judgment could be rendered, which the bond would not justify; and then the plaintiff might file his declaration on a bond, forged or paid, for ten times the amount, and recover a judgment which would be irreversible. I think it equally clear, that the statute does not apply to cases of judgments after writs of inquiry, where the writs of inquiry have been awarded on default for want of appearance. The principle is precisely the same in both cases, and it applies

423 more forcibly *to the latter than to the former; for in the latter, the plaintiff may, in his declaration, not only enlarge the amount claimed in his writ, but he may change the form of action altogether. He may bring his action on an uncontested account, and may then file his declaration, and go before the jury, for slander or assault and battery. But the statute expressly embraces judgments by nil dicit and non sum informatus; which judgments, we know, are never rendered except where the party has previously appeared: and the party having once appeared, it is his own folly not to see that every thing is correct, or to abandon the case before it is ended. The statute also embraces, in terms, judgments after inquiry of damages. But although these words are general, I do not think they were intended to have a universal application. I think they were intended to apply only to those cases, where, as in the cases of judgments by nil dicit and non sum informatus, there has been a previous appearance by the party. But even this restricted application of the statute is sufficient to embrace the case before us; for here the party had appeared. Therefore, I am of opinion to affirm the judgment.

CARR, J. I am of opinion that this judgment should be affirmed. I concur in the opinion of the president generally. There is one point, however, taken by him, which I have not so carefully examined, as to justify a decided opinion upon it; such examination not being necessary to a decision of the case, in my view of it. That point is, whether the statute of February 1823 embraces the case? There is another point, too, on which the president has not given an opinion, which I must think a strong one in support of the judgment; that is, the statute of jeofails. This, it must be observed, is not a case where there has

been no appearance, and where the defendant may be considered wholly ignorant of the proceeding; on the contrary, he was the original actor; he sued out the writ of replevin, and thereby got possession of the goods distrained, and put the

424 *landlord to his avowry. After this, he can by no means (I think) claim the exemption extended to one supposed to be wholly uninformed of the action. He comes within the meaning, as well as the letter of the statute. But it was said, unless you apply the statute of February 1823 to this case, there should have been no writ of inquiry, and then the case would not have been within the statute of jeofails. The reasons given by the president answer this objection, and shew to my mind, that without the aid of the statute of 1823, the writ of inquiry was proper. It was said, that it was the settled law of this court, that the statute of jeofails does not extend to a case like this. I have considered the court as saying (in perhaps more than one case) that where there has been no appearance at all by the defendant, the statute does not embrace the case. *Roe v. Baker* was cited; and the record does certainly shew, though there had been no regular appearance, the defendant had in fact been in court so far as to obtain one or more continuances. I have no recollection of the argument, of the conferences, or the particular opinions of the court; I cannot therefore think that it was a case much argued or examined, by the bar or bench; or that we meant to settle the practice by it. I have looked in vain among my papers for a note of the argument, or my own remarks. It is, therefore, a naked decision, which, however I may have then decided, I must confess seems to me now to have been directly within the statute of jeofails. I have always thought, that (however we, in our private judgment, might suppose the legislature had covered too much ground by that statute) we were bound, nevertheless, to administer it, according to the spirit in which it was passed, and extend its provisions to every case, within the view of the law makers.

TUCKER, P., then said, he concurred with the other judges, that the case was within the provisions of the statute of jeofails.

Judgment affirmed.

425 **Rogers & Brothers v. Marshall and Others.*

April, 1833.

(Absent BROOKE, J.)

Judgments—Ca. Sa.—Execution of Mortgages between Judgment and Service of Ca. Sa.—Priority.—A. recovers a judgment against B. at August term, and sues out a ca. sa. thereon in October, under which B. is taken in execution, and in November takes the oath of insolvency, and is discharged, under

***Judgments—Execution of Ca. Sa.—Effect.**—In *Leake v. Ferguson*, 2 Gratt. 432. it is said, the creditor here resorted to the ca. sa., and after taking out the ca. sa. and having it executed he can no longer stand on the lien of the judgment, citing *Rogers v. Marshall*, 4 Leigh 425. This is certainly true, under the decisions of this court so far as respects the creditor, and with respect to debtor on whom the ca. sa. is executed. Yet the services of the ca. sa. is not an actual discharge of the judgment.

Also, in *Werdenbaugh v. Reid*, 20 W. Va. 592, it is

the statute for the relief of insolvent debtors: in the interval between the date of A.'s judgment and the service of his ca. sa. on B. sundry mortgages are executed by B. and duly recorded, to secure sundry debts to other creditors: HELD, that by the actual service of A.'s ca. sa. on B. the lien of A.'s judgment was destroyed, and A. could then stand only on the lien given to the ca. sa. executed by the statute of executions, 1 Rev. Code, ch. 184, § 10, and that, therefore, the mortgagees are entitled to the benefit of their mortgages.

Rogers & brothers recovered a judgment against Lane, for 745 dollars with interest and costs, in the county court of Frederick, at August term 1823, and sued out a capias ad satisfaciendum thereon, in October, returnable December, following. Lane, being already in custody of the sheriff under other writs of ca. sa. sued out by other creditors, was charged in execution under the ca. sa. of Rogers & brothers also; and on the 4th November 1823, he took the oath of insolvency; and was discharged, in all the cases, under the act for relief of insolvent debtors.

After the date of the judgment recovered by Rogers & brothers against Lane, and before their execution, or any of the other executions sued out against his body, had been served upon him, several deeds executed by Lane conveying property for the security, satisfaction and indemnification of other creditors, were duly recorded: namely, 1. three deeds of trust, one dated the 18th April, and the other two the 9th August, and all recorded on the 12th August, 1823, conveying sundry real estate to Thomas Marshall, trustee, in trust to secure debts amounting to 1372 dollars due to A. C. Cazenove and A. C. Cazenove & Co. 2. A deed of trust, dated the 22nd August and recorded the 15th September 1823, conveying other real estate to the same Thomas 426 *Marshall, in trust to indemnify William Vanmetre and James Wray against suretyships and other responsibilities they had incurred for Lane.

There was another deed alleged to have been executed by Lane, on the day when Rogers & brothers recovered their judgment, conveying sundry personal property to W. Robertson, in trust for the security and indemnification of Vanmetre; but this deed not being in the record, the date of the execution and of the registry thereof, did not appear. And there were two deeds of assignment to Vanmetre, of sundry debts due to Lane, dated the 22nd August 1823.

In the schedule of his effects made by Lane, on taking the oath of insolvency, was included his equity of redemption of the mortgaged subject comprised in all the foregoing deeds, and sundry other property likewise under prior incumbrances.

Rogers & brothers exhibited their bill in

said, the writ of ca. sa. was by statute expressly made a lien on all the real and personal estate of the debtor from the time it was levied. But this lien, while express, conferred upon the creditor an inchoate right until the debtor took the oath of insolvency; if he died in jail the security of the creditor was lost. Citing *Stuart v. Hamilton*, 8 Leigh 507; *Rogers v. Marshall*, 4 Leigh 425. The principal case is also cited on this subject in *Foot-note* to Jackson v. Helskell, 1 Leigh 267; *Foot-note* to Foreman v. Loyd, 2 Leigh 284.

See monographic notes on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425, and "Mortgages" appended to Forkner v. Stuart, 6 Gratt. 197.

the superior court of chancery of Winchester, against Lane, the trustees, and the cestuis que trust, setting forth the facts above stated, insisting that as their judgment against Lane was recovered before the deeds executed by him for the benefit of Cazenove, Cazenove & Co., Vanmetre and Wray, and Vanmetre, were recorded, and indeed before all but one of them were executed, they had, by force of the judgment, a prior lien on the real estate of Lane mortgaged and conveyed by the deeds; and were entitled to have satisfaction of their judgment out of the trust subject, in preference to the cestuis que trust; alleging also, that the deeds executed for the benefit of Vanmetre, were executed to delay and hinder Lane's creditors in the recovery of their just claims, and were fraudulent in fact; and praying that all the deeds might be set aside, and the property thereby mortgaged sold for the satisfaction of their judgment; and general relief.

The defendants, in their answers, insisted, that Rogers & brothers, by the suing out and levying of their ca. sa. against Lane, had lost the lien of their judgment, and thenceforth were only entitled to the lien of their ca. sa.

427 *executed, under the provision of the statute (1 Rev. Code, ch. 134, § 10, p. 528); and as that statute made the ca. sa. executed a lien on the real estate of the debtor, only from the time the execution was served, and the deeds under which the defendants claimed having been all recorded before the ca. sa. sued out by Rogers & brothers was served on Lane, therefore the cestuis que trust, claiming under those deeds, were entitled to the full benefit of them. And Vanmetre denied the allegations of fraud imputed to the transactions in which he was concerned.

The chancellor dismissed the bill as to Marshall, the trustee, A. C. Cazenove, and Cazenove & Co. as to whom the controversy turned wholly on the question of law presented by the pleadings; and Rogers & brothers appealed from the decree to this court.

The cause was argued here, by Johnson for the appellants, and Leigh for the appellees.

I. Johnson premised, that the judgment recovered by Rogers & brothers against Lane, gave them a lien on all the real estate then held by the debtor; and that, therefore, at the time when the deeds were executed, under which Cazenove and Cazenove & Co. claimed, the real estate thereby mortgaged by Lane to them, was subject to the lien of the judgment, and the deeds only passed the title to the trustee subject to that incumbrance. And then he contended, that the subsequent suing out of the ca. sa. by Rogers & brothers, and the service thereof on Lane, did not destroy the lien of the judgment. For, he argued, that though the effect of the suing out and service of the ca. sa. at common law, might have been to deprive the judgment creditors of their right to sue out an elegit on their judgment, and so to destroy the lien of the judgment on the debtor's lands, yet the law was altered, in this respect, by the provision in the statute of

executions, 1 Rev. Code, ch. 134, § 10, whereby the ca. sa. executed was made a lien on the whole of the lands of the debtor from the time of levying the writ.

428 *The judgment was a lien on a moiety of the debtor's lands, which continued in full force till the ca. sa. was served on the debtor; and then, this provision of the statute made the ca. sa. executed a lien on the whole of them. That which gave a lien on the whole, could not justly be construed to take away the previous lien on the moiety. This statute, he insisted, was intended to give the creditor suing out the ca. sa. a more beneficial lien on the debtor's lands, than his judgment gave him; not to destroy the lien of the judgment on the moiety, but to preserve and include it in the lien of the ca. sa. executed on the whole. And he referred to the case of Fox v. Rootes, as an authority in point. In that case, he said, certain creditors had obtained a decree against Rootes; after which Rootes executed a deed of trust, conveying real estate for the benefit of other creditors, of whom Fox was one: the creditors claiming under the decree, sometime after the execution of the deed of trust, sued out a ca. sa. upon their decree against Rootes, which was executed on him, and he discharged from custody under the act for the relief of insolvent debtors: and this court held, that the creditors claiming under the decree, were entitled, notwithstanding their ca. sa. executed on Rootes, to have satisfaction of their decree out of the lands which had been mortgaged in the meantime by Rootes's deed of trust, in preference to Fox, whose debt was secured by the deed.

Leigh, for the appellees, said it was clear law, that the lien of a judgment on the lands of the debtor, was only the consequence of the capacity of the creditor to sue out an elegit on his judgment, and extend the lands to satisfy the debt; and that if a ca. sa. be sued out on a judgment, and the debtor be actually taken and charged in execution under that process, the creditor can never afterwards have an elegit on his judgment. The 10th section of the statute of executions made a ca. sa. executed a lien on the whole of the debtor's lands, from the time of the service of that process; but this lien was wholly distinct from, and indeed incompatible with, the lien of the judgment. And

429 *In Jackson v. Heiskell, 1 Leigh 257, 270, 278, it was agreed by the counsel, and it was the opinion of the judges, that a judgment creditor who sues out an execution against the body of his debtor, and levies it, surrenders the lien of his judgment by having elected this process of execution; that the lien of the judgment can never be revived but by the death of the debtor in execution, or his escape or rescue; that in lieu of the lien of the judgment, so surrendered, he obtains the statutory lien of the execution, commencing at the date of its levy; and that this lien has no relation back, so as to affect any prior right of creditor or purchaser, but every fair purchaser and creditor, whose rights are prior in time, have preference by law. As to Fox v. Rootes, he said, it was heard before a court of three judges, and there was

such a remarkable diversity of opinion among them on the several points involved in the case, that the judges themselves, sensible that the adjudication could settle no principle, desired that it should not be reported. It was manifest from the decree, that the opinion, in that case, on the point mentioned by the appellants' counsel, was founded on the very peculiar circumstances of the case.*

430 *II. Johnson said, that supposing the principle of the decree right, yet the bill ought not to have been dismissed as to the appellees: they should have been retained in court, in order that the chancellor might compel the execution of the trust for the benefit of the cestuis que trust and of the judgment creditors, and appropriate the surplus, if any, to the satisfaction of the judgment.

Leigh said, this was a matter of very little importance. It was plain enough there could be little or no surplus; and whatever there might be, would vest in the sheriff for the benefit of the ca. sa. creditors, at whose suit Lane was in custody when he took the oath of insolvency; and some of them, who are not parties

431 to this suit, had priority over *Rogers & brothers. Besides, the object of the bill was to set aside the deeds; and it was only in case they should be set aside, that a sale of the subject was prayed.

CARR, J. The principal argument relied on by the counsel for the appellants, was, that when the deeds of trust were executed, the property was subject to the lien of the judgment recovered by Rogers & brothers against Lane, and passed, thus incumbered, to the trustee, Marshall; and that the subsequent issuing of the ca. sa. upon the judgment, and the service thereof upon Lane, did not affect the lien of the judgment: for, though it was admitted that the issuing of the ca. sa. and taking the body of the debtor in

432 *execution, would, at common law, have destroyed the lien of the judgment, which springs from the capacity of the creditor to take out an elegit, it was contended, that the provisions of our law of executions changed all this, by making a ca. sa. when levied, a lien on the whole estate of the debtor, real and personal. The judgment, it was said, bound half of the land to the moment of levying the

*The case of Fox's adm'r v. Rootes and others was an appeal from a decree of the superior court of chancery of Fredericksburg, which was decided in December 1828. There were only three judges present at the hearing—CABELL, COALTER and CARR. The following is a copy of the decree:

A majority of the court is of opinion, that the plaintiffs claiming under the deed from Rootes senior to Fox, dated the 1st March 1821, are purchasers for valuable consideration, and as such, within the protection of that part of our statute of frauds, which is substantially taken from 27 Eliz. ch. 4. They have, therefore, an undoubted right to apply to a court of equity for the purpose of removing out of their way, any obstruction to the fair and just enforcement of their incumbrance. With respect to the deed executed by Thomas Rootes senior to his son Thomas Rootes, bearing date the 18th February 1813, purporting to convey to his son the Gouldhill tract of land in the proceedings mentioned, and which deed it is the object of the bill to set aside, it appears, to a majority of the court, 1. that this was a voluntary deed; 2. that it was not recorded until eight years after its date; 3. that, during all the intervening time, the existence of the deed was carefully concealed from the world; the grantor remained in full possession of the land from the year 1817, and exercised over it every act of ownership, with the knowledge and assent of the grantee. A majority of the court is, therefore, of opinion, that as to the purchasers under the deed to Fox, and the decree creditors, also parties to this suit, the said deed of 1813, is fraudulent and void. With respect to the priorities between the purchasers under Fox's deed, and the decree creditors, the court is of opinion, that all these creditors take precedence of the purchasers: Baylor's creditors, 1. on the ground of actual notice; and 2. because at the date of the deed to Fox, the lien of their decrees was in full force; Dunlop, because though it does not appear, that he had taken out execution within the year, yet as his decree is stated in Fox's deed as an existing debt, and provision therein made for its payment, those claiming under that deed are purchasers with full notice of the decree, and cannot be received, especially in equity, to contest its priority of lien. As to the decree creditors before the court, it appears that they are, 1st. Dunlop, who obtained a decree in 1818; and 2ndly, Baylor's creditors, namely Martin's ex'ors, Graves, Hoomes, Guy, Jones's ex'ors, Talliaferro, Chiles's adm'r, Pemberton and Tenant (these nine being represented by Battalle), also Catlett, Davis, Grinnun, Green and Patton, all of whom obtained decrees in the same suit in 1820. A majority of the court is of opinion, that as between these two classes of creditors, Dunlop has priority; though it has been decided, that a judg-

ment creditor, who has suffered the year to elapse without taking out execution, cannot afterwards overreach in equity, a bona fide purchaser of the debtor's land (such purchase being made after the year), yet this applies, neither in terms nor in principle, to a subsequent judgment creditor, who has not laid out his money on the land, nor trusted the debtor on that fund, but on his general credit; and the same majority considers it a settled rule, that when, in equity, the question is as to the priority of judgment creditors, they are ranked according to the date of their judgments, without inquiring, as between them, whether such judgments have been kept alive by process: the capacity to renew by scire facias being, in such case, considered in that forum as sufficient proof of the lien; provided it appears, that these judgments are still due. Under this rule, the majority of the court think, that Dunlop must be first satisfied; next Baylor's creditors, *pari passu*. It appears, that most of these creditors have issued writs of ca. sa. on one of their instalments, which have been served on Rootes, and under which he has taken the benefit of the insolvent debtor's oath. It is the opinion of a majority of the court, that this proceeding cannot, as a court of equity, postpone these creditors, as to that instalment, to the purchasers under Fox's deed, because that deed being made for the security both of the purchasers and those creditors, whatever effort the latter made to procure from another source, satisfaction of their decrees, was an effort to assist and benefit the purchasers, by lessening the amount for which their security was liable. As it does not appear with certainty, what has been made under the executions of Baylor's creditors, and what are the balances due them, the chancellor very properly referred this matter to a commissioner, and also correctly ordered, that in the meantime Gouldhill should be sold, and the proceeds held subject to the future disposition of the court. It is the opinion of a majority of the court, that whatever of this fund shall remain after satisfying the decree creditors aforesaid, shall be applied in the order directed by Fox's deed, to the payment of the purchasers under that deed; and should there still be a surplus, it is not the intention of the court, by any thing in this opinion or decree, to affect the disposition thereof. The court says nothing in this opinion and decree, on the subject of the deed of 1813, conveying the slaves from Rootes senior to Rootes junior, or as to the disposition of said slaves, because it does not consider that subject to be before it; nor is it intended by this decree, to decide at all to as the validity or character of the deeds, from Rootes senior to Prosser. Therefore, it is decreed and ordered, that so much of the decree aforesaid as conflicts with the foregoing opinion, be reversed and annulled, and the residue thereof affirmed &c. And it is ordered, that the cause be remanded to the said court of chancery to be further proceeded in according to the principles of this decree.—Note in Original Edition.

*In the following cases Fox v. Rootes is cited: Counts v. Walker, 2 Leigh 283; Claiborne v. Gross, 7 Leigh 345; Stuart v. Hamilton, 8 Leigh 508, 509; Taylor v. Spindle, 2 Gratt. 68, 70; foot-note to McClung v. Belrne, 10 Leigh 304.

ca. sa.; and how, it was asked, could that destroy the lien on the half, which gave to the same party a lien on the whole? It is, certainly, the rule of the common law, that if the debtor's body be taken on a ca. sa. it is a satisfaction of the debt, and the creditor can have no other execution, and especially he cannot have an elegit. The few exceptions to this rule, as was justly said by counsel in the argument of *Jackson v. Heiskell*, "are founded on after circumstances, which defeat the effect of the process, and disappoint the creditor of that satisfaction, which the law supposes such process to afford; as rescue, escape, or death of the debtor in execution." The authorities for this doctrine are cited in that case. In that case, too, the judges who were inclined to give the ca. sa. lien the greatest extent (and whose opinions for going so far, have been since overruled, *Foreman v. Loyd*, 2 Leigh 284,) admitted, that no creditor, after taking out a ca. sa. and getting it executed, could stand upon the lien of the judgment.

The appellants' counsel relied upon the decision in the case of *Fox v. Rootes*; on that point in the case, where the court, in comparing the liens of the creditors under the decree, and the purchasers under the deed of trust, did not consider the deed as destroying the lien of the decree creditors, though they had sued out writs of ca. sa. on their decree, on which, the debtor's body had been taken in execution, and he was discharged on taking the oath of insolvency under the act for the relief of insolvent debtors. It might be a sufficient answer to that case, to say that, according to the rule of this court, it is not authority;

being the decision of a majority only
433 of a court of three judges: but, *in justice to my brethren, with whom I sat and from whom I differed as to that point, I must observe, that they by no means intended to lay down this as general doctrine, but simply as the result of the peculiar circumstances of that case. This is apparent from the language of the decree, which is as follows: "It appears, that most of these creditors [the creditors by decree] have issued writs of ca. sa. on one of their instalments, which have been served on Rootes, and under which he has taken the benefit of the insolvent debtor's act. It is the opinion of a majority of the court, that this proceeding cannot, in a court of equity, postpone these creditors as to that instalment, to the purchasers under Fox's deed; because that deed being made for the security both of the purchasers and these creditors, whatever effort the latter made to procure from another source, satisfaction of their decree, was an effort to assist and benefit the purchasers, by lessening the amount for which their security was liable."

Another objection to the decree was, that it dismissed the bill of the plaintiffs as to the appellees, instead of keeping those parties in court, and superintending the sale of the mortgaged subject, and distribution of the proceeds, so that, in case of any surplus, it might have been applied to the judgment of these plaintiffs. The answer is, that the

bill had no such object; it was brought simply to remove these deeds out of the plaintiffs' way as fraudulent. It is too, apparent enough, that the fund was utterly inadequate to the satisfaction of the prior liens; and the knowledge of this, was probably the reason, why the plaintiffs preferred to take an appeal from the decree immediately, instead of asking the court to take management of the fund, and give them any surplus which might remain.

I think the decree must be affirmed.

CABELL, J. I have been always surprised to hear the case of *Fox v. Rootes* referred to as authority; at least, as to those points which received the sanction
434 of two only of *the three judges who sat in the case. This court consists of five judges; and although three of them, being a majority, constitute a court competent to decide any case which may be brought before it, yet a point decided on the opinion of two only of the three judges so constituting a court, is never regarded as authority; such opinion decides the case as between the parties, but does not settle the law of the land. In consequence of this well established principle, the case of *Fox v. Rootes*, though most elaborately and ably argued at the bar, and most gravely considered by the court, was directed not to be reported; and such was the diversity of opinion among the judges, the majority consisting on some points of one set of judges and on others of another, that they determined not even to deliver their opinions in court, but simply to embody in the decree, the points, on which the court, or a majority, were found to agree.

That case has been referred to in the argument of this, as establishing the general principle, that a person obtaining a judgment, and having a ca. sa. levied on the body of his debtor, who is duly discharged under the insolvent law, still has the benefit of the lien of his judgment, so as to overreach an incumbrance created by the debtor between the date of the judgment and the levy of the execution. I sat in *Fox v. Rootes*, and was one of "the majority of the court, who thought that, under the circumstances of the case, the creditor by decree, who had resorted to the ca. sa. and had pursued his debtor to insolvency, did not lose the lien of his prior decree;" and I will remember, that I came to that opinion, not as the result of any general principle, but as the result of the particular circumstances of the case. Indeed, this is manifest from the language of the decree itself, as has been shewn by my brother Carr. Whether the circumstances relied on by the majority of the court, justified their opinion on that point, it is not material to inquire, there being no such circumstances in the case now before us. We have now nothing to decide but the general principle; and I am

clearly of opinion, as I was when I
435 decided **Fox v. Rootes*, that, in the absence of particular circumstances, a creditor who resorts to his ca. sa. and pursues his debtor until he is discharged under the insolvent act, loses the lien of his decree or judgment; that particular lien being merged in the superiour lien of the ca. sa. executed, and being forever dis-

charged by the ca. sa. having had its full effect.

I, therefore, think the decree before us was right, as to the main point in the cause. And I concur with judge Carr, for the reasons given by him, as to the propriety of the dismissal of the bill. If there is really any probability that a surplus will remain after the satisfaction of the creditors under the deeds of trust, the appellants will be at liberty, notwithstanding the dismissal of this bill, to institute a new suit for the purpose of reaching it. I am for affirming the decree.

TUCKER, P. I concur with my brethren on the main point; but I am of opinion that the decree is erroneous in dismissing the bill as to the appellees; because, though they have preference, yet this being, in effect, a bill by a judgment creditor to redeem prior incumbrances, they should be a party to the decree. To sell an equity of redemption at public auction, subject to a deed of trust, the amount due upon which cannot be known, as the original debt may have been reduced by payments, is inadmissible. Whoever purchases must purchase at hazard, and of course the sale must always be a sacrifice; ruinous to the mortgagor, or perhaps to other creditors. In such cases, it is therefore always proper that the junior incumbrancer should convene all the prior incumbrancers before the court. Gilm. 133. There is a further reason, I think: as a general rule, sales ought not to be made where the legal title does not pass by the sale. Purchasers of equities always purchase at risque, and sales at risque always tend to sacrifices. To decree a sale at risque would seem, indeed, at variance with the principles of the court.

though I will not say no case can occur in which it would be permitted. My opinion is that the decree should be reversed, with the intimation however of the opinion of this court, that the cestui que trust creditors have a preferable right to payment.

Decree affirmed.

Lee v. Patillo.

April, 1833.

(Absent BROOKE, J.)

Awards—Misbehavior of Arbitrators—Effect.—Award of arbitrators set aside, on the ground of circumstances in their conduct, amounting to misbehavior, though not to corruption, and resulting in injustice to one of the parties.

Patillo exhibited a bill in the county court of Charlotte in chancery, at November term 1820, alleging, that he had employed Lee, a carpenter, to build him a house

***Awards—Misbehavior of Arbitrators—Effect.**—For the proposition that an award of arbitrators will be set aside on the ground of circumstances in their conduct, amounting to misbehavior, though not to corruption, resulting in injustice to one of the parties, the principal case is cited and followed in *Shipman v. Fletcher*, 82 Va. 600. To the same effect, the principal case is cited in *Dickinson v. Railroad Co.*, 7 W. Va. 430. Also, on the question as to when an award of arbitrators will be set aside, the principal case is cited in *Fluharty v. Beatty*, 22 W. Va. 706; *foot-note* to *McCormick v. Blackford*, 4 Gratt. 133; *foot-note* to *Portsmouth v. Norfolk County*, 31 Gratt. 727.

See monographic note on "Arbitration and Award" appended to *Bassett v. Cunningham*, 9 Gratt. 684.

of particular dimensions, and to do some other carpenter's work for him: that after the work was completed, Patillo, thinking Lee's bills unreasonably high, refused to pay them, but agreed with him to submit the prices of the work to Degraffenreidt and Tisdale, or in case of disagreement their umpire: that the arbitrators did not ascertain the quantity of timber used in the work, nor measure the work, but confined themselves altogether to the prices that ought to be charged for such work; that the work charged in Lee's bills, at the prices fixed by the arbitrators amounted to 2633 dollars: that when the award was presented to Patillo, he told Lee he believed he had charged in his bills more work than he had done; upon which Lee promised to have an accurate calculation made of the work and materials, and that, in this respect, the award should not be considered conclusive: that on this promise, Patillo gave his bond to Lee for 720 dollars, the

balance due him, according to the estimate of the arbitrators, *after deducting previous payments made by Patillo: that by an estimate, which Patillo had since had made by a skilful carpenter, the quantity of timber in the work (for hewing and sawing of which the arbitrators allowed Lee, 8s. 6d. per hundred) was less by more than a third than the quantity charged in Lee's bills, and he doubted not there were other errors in the bills: that Patillo had since applied to Lee, to unite with him in appointing two persons to measure the work, and ascertain the quantity of timber used therein; but Lee refused to do so; sometimes denying his promise at the time Patillo gave his bond, to correct errors of this kind, and alleging that this matter had been settled by the arbitrators; and sometimes alleging, that it was impossible for any persons now to ascertain the quantity of timber used and of work done: that Patillo had made sundry payments in part discharge of his bond to Lee; and that Lee had brought suit on the bond, and recovered judgment for the balance due thereon. Therefore, the bill prayed an injunction to restrain Lee from further proceedings on his judgment at law; and that the quantity of timber used and work done by Lee should be ascertained, and credit allowed Patillo for any overcharge in Lee's bills; and general relief.

Lee's bills for the work done, with the prices extended by the arbitrators, and the award of the arbitrators at the foot thereof, were exhibited with the bill. The award was in these words: "We T. Degraffenreidt, W. Tisdale and W. Parrotte, as arbitrators upon the bills and vouchers produced, have settled it up agreeably to our judgments this 15th August 1818,"—signed by the arbitrators.

Lee, in his answer, stated, that the work done by him for Patillo, and the particulars thereof, appeared in his bills for the same, now exhibited by Patillo: that it was not true that the submission to arbitration was confined to the prices; it was made for the purpose of settling the whole matter in dispute relative to the work, and the arbitrators did actually settle the whole matter;

Degraffenreidt and Tisdale went 438 *to the house, viewed the work, compared it with Lee's bills, and chose Parrotte as their umpire; and these three made the award: that Patillo did not execute his bond to Lee, on the terms mentioned in the bill; on the contrary, Patillo proposed to give his bond, about which Lee was indifferent, as he held the bills for the work and the arbitration; but, at Patillo's request, he received the bond, as a full and complete settlement, and gave up the bills and the award, which he would not have done if he had considered the matter still unsettled: that after the bond was executed, Patillo said, jestingly, that he would be glad for his own satisfaction, to have the work accurately measured, to which Lee answered that he might for his own satisfaction get it done if he could; but Lee never promised to do it himself, nor did he intimate, before or after the execution of the bond, that he would unsettle the award or bond again: that Patillo, sometime afterwards applied to Lee to have a remeasurement of the work and timber, to which Lee answered he would never refuse any thing that was right; and the same request to have the work remeasured, being repeated by Patillo, he told him, he had often declined, and then positively refused, to do so: that he considered himself no wise bound to measure the work now: and he insisted, that the award, and the bond given by Patillo was a complete settlement; but, he averred, his bills for the timber and work were accurate as to the quantity, and went into the particulars to shew that they were so.

The affidavits of several witnesses were taken and filed by the parties, to the following effect:

1. Thomas Lee deposed (in two affidavits) that he was present at a conversation between the parties in the summer of 1820 [after Lee had brought suit on Patillo's bond] in which Lee agreed, that when Patillo gave him the bond, he required that the calculations of the quantities of materials and work should still be made, to which Lee answered he was willing to any thing that was right; but though Lee admitted that this conversation had passed, he 439 added, that *he did not think, then or now, that it was right to remeasure the work.

2. Two carpenters, Hannah and Perry, deposed, that they had carefully examined and measured the work which was shewn them by Patillo (Lee not being present) and ascertained the quantity of timber in the whole work to be 25,922 feet. (Lee's bills on which the award was founded, stated the quantity to be 33,194 feet.)

3. Degraffenreidt, one of the arbitrators deposed, that he and Tisdale, after undertaking the arbitration, separately viewed the work, in order to see the manner in which it was executed: that they afterwards met to make the arbitration and named Parrotte for their umpire (Lee being present, Patillo not): that they took the bills of the work done by Lee, as furnished by him, and extended the prices, without entering into any calculations of the quantity of work or materials, Degraffenreidt

and Tisdale not having seen it together, and Parrotte the umpire having never seen it at all: that Patillo had requested that a calculation should be made of the quantity of materials and work, expressing his opinion that there were considerable errors in this respect; but as Degraffenreidt declined this service, and understood that Tisdale had done so likewise, he considered that the prices alone were submitted to arbitration, and the arbitrators acted only on the prices: that Degraffenreidt's own price for hewing and sawing was six shillings per hundred, and he had done some at 5 dollars per thousand. (In the arbitration, Lee was allowed 8s. 6d. per hundred.)

4. The arbitrator Tisdale deposed, that Lee's work was done in a workmanlike manner: that he and the other arbitrator were called upon to settle the prices; but he considered, that the arbitration was to be a final settlement between the parties, and that a calculation as to the quantity of materials used in the work was part of the business of the arbitration, because Lee furnished them with a bill of the work, which bill was not disputed by Patillo: and he deposed that his price for hewing and sawing was 7s. 6d. per hundred.

440 *5. There were two depositions of P. Endaly, taken to prove and overcharge in Lee's bills as to the quantity of wagonage in halling the timber. His statements were very confused, and somewhat contradictory.

6. There were depositions, as to the usual mode of measuring such work in that part of the country; and

7. Depositions, taken to prove that timbers cannot be accurately measured after they are worked up in a house.

In this state of the evidence the cause was set down for hearing in the county court, February 1822; but it was not heard till June term 1824, when on Patillo's motion, the county court gave him leave to file

An amended bill, in which Patillo charged the arbitrators and the umpire, or a majority of them with partiality and corruption, and founded the charge upon their depositions: for that, 1st, the arbitrators took Lee's wills as to the quantity of work and materials, without any calculation of their own or measurement: 2ndly, that, though they had set lower prices on some of the smaller items than Lee had charged, they had allowed on the heaviest items higher prices than he claimed; and on the heaviest item of all (the charge for hewing and sawing 33,194 feet of timber) they had allowed Lee 8s. 6d. per hundred, when according to Degraffenreidt's deposition, his own highest charge for such work was only 6s. and according to Tisdale's, his rate of charge was but 7s. 6d. and when even Lee's charge was but 7s. 6d. in a bill rendered to Patillo, which he had handed to the arbitrators: 3rdly, that Lee, in a lumping charge for certain parts of the work, had charged 200 dollars, but the arbitrators had allowed him 380 dollars; and they had moreover made him an allowance of 30 dollars "for work not mentioned in Lee's bills."

Lee put in his answer to the amended bill at the same term, stating that the arbitra-

tors did measure the work, and insisting that their conduct in fixing the prices, was impartial, fair and just.

441 *And on the same day on which he put in his answer, he moved the court to dissolve the injunction; which motion the court overruled, because the answer to the amended bill had not been filed till that day. Whereupon Lee presented a petition to the superiour court of chancery, praying an appeal from the order of the county court overruling the motion to dissolve the injunction; which was allowed.

In the superiour court of chancery, in October 1825, the motion to dissolve the injunction was renewed; but the chancellor overruled it, and ordered the injunction to stand till the hearing; and, at the same time, by the consent of the parties, he appointed three persons to measure the work done by Lee for Patillo, to fix the prices thereof, and to settle all other matters in relation thereto, and make report of the same to the court.

The commissioners made a long report of their proceedings in execution of the order; shewing the manner in which they had measured and ascertained the quantities of timber and of work done, and settled the prices, with all the details. It appeared by their measurement, that the quantity of timber hewed and sawed by Lee, was 26,497 feet, instead of 33,194 feet charged in Lee's bills on which the arbitrators acted, and that there were several other overcharges in those bills. And the result was, that Patillo had, already, as early as the 7th December 1819, paid Lee the sum of 300 dollars, over and above the just amount to which he was entitled.

Lee filed several exceptions to the report; but they were all the same, in substance; viz. that the commissioners had, without reason or justice, disregarded the accounts as settled by the arbitrators, both as to the quantity of work, and the prices.

The depositions of the arbitrators were taken anew, and filed.

1. Tisdale deposed, that, at the request of the parties, he went with Lee to Patillo's, to view and arbitrate the carpenter's work done for him by Lee: that Patillo told him

442 *Degraffenreidt was to be the other arbitrator, but he was not present; that he, Tisdale, viewed the work: that he asked Patillo, whether he disputed the quantity or quality of the work; and he said he did not; that he called on them merely because he was not a judge himself; that Tisdale might view the work then, and Degraffenreidt might view it at another time, and when they met, if they should disagree, they might call in a third person. The arbitrators appointed Parrotte their umpire, and the three met and settled the work.

2. Degraffenreidt deposed, that he examined the work in the presence of the parties, the other arbitrator Tisdale being absent: that it was then agreed by the parties, that Tisdale and he should settle the work, and, if they should disagree, call in a third person: that they did disagree, and called in Parrotte, and the three settled the work: that Patillo observed to him, Degraffenreidt, that he thought Lee's bill very high, and especially, the hewing and sawing appeared to him enormous; and he expressed a wish that the arbitrators should make some calculation to

see whether the bill for hewing and sawing was correct or not; but, not doubting the correctness of Lee, they did not enter into a calculation of any part of the work done: that the deponent saw Lee's bills for the hewing and sawing, and supposed them to be correct from the view he had of the work.

Upon the final hearing, the chancellor overruled Lee's exceptions to the report of the commissioners, and approved the same; perpetuated the injunction awarded by the county court to Lee's judgment at law against Patillo; and moreover decreed, that Lee should pay Patillo, the sum of 300 dollars with interest from the 7th December 1819 (that being the sum appearing by the report to have been then overpaid by him to Lee on account of the work by him done). From this decree, Lee appealed to this court.

The cause was argued here, by Johnson for the appellant, and Leigh for the appellee. The argument consisted, 443 *chiefly, in a critical examination of the pleadings and the proofs, and of the same matters of details, which are discussed in the opinions of the judges.

CARR, J. The principles which govern awards, have been so often, and so solemnly settled by this court, that it would be an idle waste of time to state them again, or to cite the authorities on which they rest. If there be any thing settled in the law, it seems to be this, that to set aside an award, you must shew either a mistake apparent upon its face, or misbehaviour in the arbitrators. The court may be fully satisfied that the award has operated injustice, yet if the mistake be not upon its face, and there be no proof of partiality or corruption, it will not touch it. Whether these rules are wise or not, whether this domestic forum is to be cherished or discouraged, will hardly (I presume) at this day, be considered open questions.

That there is no mistake apparent upon the face of the award, seemed to be admitted, and must, I think, be taken as a clear point.

The first bill states, that Patillo employed Lee to do some carpenter's work; and after the work was finished, considering his bills unreasonably high, he refused to pay them; whereupon, they agreed to submit the prices of the work to the decision of Degraffenreidt and Tisdale, or their umpire: that the arbitrators confined themselves to price, taking Lee's bills for amount of work: that when Patillo received the award, he told Lee he believed he had charged more work than was done; that Lee promised to have an accurate calculation of the work and materials made, and that, in this respect, the award was not to be considered binding and conclusive; and that, upon this agreement, he executed his bond to Lee for 720 dollars, the balance due according to the award: that Lee afterwards, refused all measurement or correction, sued him on the bond, and obtained judgment. If Patillo could have established, either by the answer or by other proof, the agreement, on which 444 *he states that his bond was executed, he would have taken the case off the ground of the award, so far as regarded the amount of work and materials, and would clearly have had a right to the remeasure-

ment and calculation agreed on. But in this respect, he has failed. The answer is certainly no admission: Lee there says that the bond was not executed upon the terms mentioned in the bill; but on the contrary Patillo proposed to give his bond, about which he felt indifferent, as he had his bills and the arbitration, but at the request of Patillo, he received a bond, as a full and complete settlement, and gave up all his bills and the award; which he would not have given up, if he had considered the matter as still unsettled. He adds, that after the bond was executed, Patillo said, jestingly, that he would be glad, for his own satisfaction, to have the work accurately measured; and Lee replied he might do so, if he could; but he never promised to do it himself, nor did he intimate, before or after the execution of the bond, that he would unsettle the award or bond again. I think this a positive denial, and being responsive, must be disproved. Is there any evidence that disproves it? Clearly not, in my mind. No witness is produced who was present at the execution of the bond, when Patillo says the agreement to remeasure was made; yet there is a witness to the bond,—a female. If Patillo really disputed the correctness of Lee's bill as to amount of work, is it not strange, that he should, in the first place, have permitted the arbitrators to take it as the basis of their award, and then when he found the award made, and the sum ascertained upon that basis, should have executed his bond for the balance, without one scrip of writing, or any witness to prove a verbal understanding, that he was still to have a right to unsettle every thing that was done? to destroy the very foundation of the award? The only witness who gives evidence touching this point at all, is Thomas Lee: he speaks of a conversation between the parties after the suit at law was brought; and taking his two affidavits together (if I do not misunderstand them, for, the last especially is very ambiguously expressed) they only amount to this, that he heard a conversation between the parties, in which Patillo claimed, that he had required a remeasurement when he executed his bond, and that Lee had said he was willing to do what was right, but did not think a remeasurement right. This, if it were proved by more than one witness, would not amount to any thing like an agreement; but being a single witness against the bond, executed unconditionally, and Lee's positive answer, is of no weight.

The ground, then, upon which the first bill was filed, was wholly unsupported; and the injunction ought to have been dissolved, on the motion made in the county court, and the bill dismissed; but the court being divided, the motion was overruled. This was in June 1821. The case then stood upon an order to take depositions till February 1822, when it was set for hearing by the plaintiff. So it remained till June 1824, when upon the plaintiff's motion, leave was given him to file an amended bill: a permission, which in my judgment, ought never to have been granted under the circumstances of the case, and after the great lapse of time which had taken place.

The new bill charges the arbitrators and

their umpire with corruption. The grounds of this charge, as they may be collected from the bill are, 1. that the arbitrators took the bills of Lee as to the amount of work and materials, without examining these points themselves; and 2. that they allowed 8s. 6d. per hundred for hewing and sawing, although their own prices for the same work, were only 6s. and 7s. 6d. These, I believe, are the material points. No evidence is gone into, to prove from the words or the temper of the arbitrators, partiality or corruption; it is rested on their acts as stated above. We must recollect that mere mistake cannot be established by evidence. Do the acts complained of, amount to partiality or corruption?

1. As to taking Lee's bill Degraffenreidt says, that when he met first on the business, Patillo expressed a wish that the bills should be examined as to quantity of materials and *work; but as he declined doing so, and understood that Tisdale also had declined such examinations, he considered the prices alone submitted to their arbitration, and accordingly they acted on the prices only. Tisdale, in his first affidavit, says he viewed the work at the request of both parties; that he did consider the calculation of the work and materials as a part of their business; but that Lee furnished a bill, which was not disputed by Patillo. In his second affidavit, he says, he asked Patillo, whether he disputed the quality or quantity of the work; he said he did not, but that he merely called on them; because he was not a judge; that he might view the work then, and Degraffenreidt might view it at another time; and when they met, if they disagreed, they might call on a third person. Now, when he said that he did not dispute the quantity or quality of the work, but called on them because he was not a judge, what was it he called on them for? Let his original bill sworn to in open court, answer: that states, that believing Lee's bills unreasonably high, he refused to pay them, and he and Lee agreed to submit the prices of the work, to Degraffenreidt and Tisdale. But what ever might have been his original wish, it is clear, that he knew the arbitrators were about to make their award without any measurement or calculation of quantity, and to take Lee's bills as their basis, and that he acquiesced in this proceeding. Degraffenreidt expressly declined such examination; Tisdale considered Lee's bill admitted: Patillo knew these things, and then was his time, to have insisted on the measurement and calculation, if he continued to think them material; but so far from this, it is evident, that in his conversation with Tisdale, he counted on the award being made without them; for he tells him, he might view (not measure and calculate) the work then, and Degraffenreidt might view it at another time, and when they met, if they disagreed, they might call in an umpire. The arbitrators considered their award a final settlement; which could only be upon the ground, that the bill of Lee was admitted; since a subsequent measurement and calculation must remove the *very basis of their work, and throw every thing again up into the wind. But more than all this, when the award was

made, and presented to Patillo, he went into a settlement upon it, received a credit for all his payments, executed his bond unconditionally for the balance, and it is not till upwards of two years after, when pressed by a judgment on the bond, that he calls in question by his bill any part of the transaction. Under these circumstances, it surely cannot be imputed to the arbitrators as proof of partiality or corruption, that they took Lee's bills as to quantity of work and materials.

2. The other charge of misbehaviour is, that although the price of Degraffenreidt for hewing and sawing was 6s. per hundred, and that of Tisdale 7s. 6d., yet these arbitrators allowed Lee 8s. 6d.; and if this award had been made by these two men, this would have been, to say the least of it, a strange and suspicious fact. But we are told, on all hands, that if they differed, they were to choose an umpire; they did disagree, and then called on Parrotte. I need not say, that when arbitrators disagree and call in an umpire, the award is in law his, though they may sign it with him. Nor is he, in his decision on any point, bound to agree with either of the arbitrators, or to split the difference between them: he must be guided by his own judgment, free of all control; and, in the absence of all testimony, we must suppose he was so, in fixing this price for hewing and sawing. This then is no ground for fastening upon the arbitrators or the umpire, the charge of corruption.

But it was said, if these arbitrators had no agency in settling the amount of work and materials, it is no part of their award, and has nothing of the sanctity belonging to awards. I consider Lee's bills as the statement of the subject matter, on which the arbitrators were to act; as if the parties had said, here are bills of certain work done and materials found; we cannot agree as to the prices; you must judge between us in fixing them. The bills become thus the very foundation of the award.

448 *But suppose there were no award here at all; suppose that when Lee presented his bills to Patillo, he had examined them for himself, or got some friend better acquainted with the subject, to do it; and that, after such examination, he had settled with Lee, got all his credits, and executed his bond for the balance; and after a judgment on the bond, had attempted to open the whole account from its foundation, and had shewn such a case as is now before us: I, for one, would have refused to open the transaction. Look at the nature of it: no previous bargain is made settling any of the terms: the carpenter goes to work, finds all and does all; the work is finished; and the bill presented, containing a hundred different items,—timbers, wagonage, hewing and sawing, finding, measurement, prices, &c. &c. All is settled, the bills given up, and bond taken; and some six or eight years afterwards, all this is to be ripped up! How can you settle it then? The carpenters tell us, that there is no such thing as ascertaining with any thing like accuracy, the quantity of timbers which have been used in a building. Look at the measurement made by Hannah and Perry, at the instance of Patillo, and without notice to Lee. The

persons who made that, tell us, that if they had measured side and edge, there would have been no material difference between their bill and Lee's; and many witnesses tell us, that this was the usual mode at the time the work was done.

It was relied on, that the commissioners who acted under the order of the superior court of chancery, were appointed by consent of the parties by their counsel. I do not consider this as going, in the slightest degree, to shew the assent of Lee to open the transaction, or abandon the ground he occupied under the award. He moved to dissolve the injunction; this motion was overruled; and all done afterwards, was in invitum. Before these commissioners, he protested against their proceeding, and claimed to hold to the award. Look at the testimony as to the wagonage on which the commissioners seem to have rested their report, as to this matter: can

any one read the depositions of Endaly, 449 *and give them much credit? Will they not see, that when asked the same questions, by the different parties, he answers them differently?

Upon the whole, I must believe, that to open such a transaction as this, on such ground, will be contrary to the whole current of authority, and fraught with very mischievous consequences. Look at the monstrous result here. The party who had a judgment at law on the bond of the other for 720 dollars with interest and costs, is called into equity, to injoin his judgment; the bill seeks nothing more; yet by this process of resettlement, a balance is produced against him, and a decree entered, not merely to injoin his judgment perpetually, but, in addition, that he pay to the man for whom he built the houses, 300 dollars with interest and costs. I cannot agree to this. I think the decree should be reversed, the injunction dissolved, and the bill dismissed.

CABELL, J. It is manifest that great injustice was done Patillo by the award of the arbitrators; and I think, this injustice may be remedied without the violation of any established principle. I do not say, that these arbitrators were corrupt; but they have reposed a confidence in the unproved representations and statements of one of the parties to the submission, which, to say the least of it, amounts to misbehaviour, if not to partiality.

The language of the bill is so defective in precision, that if we were to look to that alone, we might, perhaps, be somewhat in doubt as to the extent of the submission; whether it embraced the quantity, as well as the prices, of the work. But when we look to the conduct of the parties, and to the evidence in the cause, there can be no doubt, but that the whole subject of the work was referred; quantity, quality and prices. Lee expressly swears it in his answers; for he says, that it was not true that the reference was confined to the prices, but it was for the purpose of settling the whole matter in dispute relative to the said work &c Tisdale, one of the arbitrators, says that 450 at the first meeting of *the parties (the other arbitrators not being present) he asked Patillo, whether he disputed the

quality or quantity of the work; he said he did not, but that he merely called on them because he was not a judge of it himself. Surely this did not mean, that he acquiesced in Lee's bill in these respects. If that were the case, why call on them at all? Not knowing whether the bills were right or wrong, he could not, as an honest man, dispute it; but left it for them to decide. Degraffenreidt, the other arbitrator, says, that when he first met the parties, Patillo requested, that the calculation of the quantity of materials and work should be made, and expressed his opinion that considerable error existed in this respect. Now, let us see what was the conduct of the arbitrators. It is admitted, that they made no inquiry into, nor any estimate of, the quantity of materials or of work, but were guided intirely by Lee's bills. Tisdale says, he did not make any calculation, because Patillo did not dispute the bills in these respects. I have shewn already that he did not admit them. It was, consequently, the duty of the arbitrators to make the necessary inquiries to satisfy themselves of their justice. Degraffenreidt repeats in his second deposition, what he had said in the first, as to Patillo's anxiety on this subject; that he observed, that he thought Lee's bills were very high, and especially the hewing and sawing appeared to him to be enormous; and that he expressed a wish that the arbitrators should make some calculation to see whether it was correct in these respects. It is worthy of remark, that these objections, made in the presence of the arbitrators, related only to quantities of work and materials; for Lee's bills as submitted to them contained no prices; yet the arbitrators made no estimate of quantities whatever. I have given the reason assigned by one of them for this omission. Then let us hear the other: Degraffenreidt, after relating Patillo's anxiety for them to make the calculation, says, that not doubting the correctness of Lee, they did not enter into a calculation of any part of the work done for Patillo. And as to the umpire, he never saw the work at all. I cannot sanction an award thus made.

451 *Nor do I think the bond given by Patillo precludes him from seeking redress in equity. He says in his bill, that at the time the bond was given, there was an agreement that there should be a remeasurement of the work. Lee professes to deny this; but I do not believe him. His answer appears to me to be an equivocation. In another part of his answer, he has stated what is certainly false; for he says that the arbitrators went to the house, viewed the work and compared it with his bill; in which last particular, he is contradicted by both of them. Besides, the proposition to remeasure the work, was under the existing circumstances so reasonable, that no fair and just man could have objected to it. But even if there was no agreement at the time of entering into the bond, yet, on general principles, as the bond was founded on the award, and as the award itself was liable to be set aside for misconduct of the arbitrators, and is in many respects contrary to justice, the bond itself ought to be no more respected

than the award. I am for affirming the decree.

TUCKER, P., concurring in this opinion, the decree was affirmed.

452 *Coiner v. Hansbarger.

April, 1833.

(Absent BROOKE, J.)

Bonds—Assignment—Insolvency of Obligor—Necessity for Bringing Suit against.—C. assigns to H. a bond of W. payable on demand; if the obligor is insolvent at the time of the assignment, it is not necessary that the assignee should bring suit on the bond against him, in order to entitle himself to recourse against the assignor.

Same—Same—Same—Liability.—In such case, the assignor is immediately liable to the assignee upon the contract of assignment.

Same—Same—Same—Agreement by Assignee Not to Bring Suit against Obligor—Waiver of Objection by Assignor.—A bond payable on demand is assigned by the holder to a third person: the obligor is insolvent at the time of the assignment, and so continues: the assignee forbears to bring suit against the obligor, and makes an arrangement with him, whereby he agrees to receive payment at a future day: the assignor being informed of the fact, though ignorant of the legal effect thereof to discharge him from liability, sanctions the arrangement, and promises payment of the debt to the assignee: HELD, the assignor is bound by such his promise to pay.

Assumpsit, by Hansbarger against Coiner, in the county court of Augusta. The declaration contained a special count, stating, that Coiner, being the holder of two bonds for 150 dollars each, payable on demand, executed by one White to a third person, by whom they had been assigned to Coiner, assigned the same bonds to Hansbarger for a valuable consideration, and that White had not paid the contents of the bonds to Hansbarger, but that on the contrary, he was, at the time of the assignment to Hansbarger, and yet, insolvent and unable to pay the same, so that suits against him on the bonds would not only have been unavailing, but by the direction of Coiner himself were not brought against him; by reason of which Coiner became liable to pay Hansbarger the said two sums of 150 dollars each, and being so liable assumed to pay the same to him &c. There were also two money counts; one, for money paid, laid out and expended; and the other, for money had and received. Coiner pleaded the general issue.

At the trial, the court, on the motion of Coiner's counsel, instructed the jury, that, if they should find from the evidence, that Hansbarger, without authority from 453 or consent *of Coiner, had made an arrangement with White, the obligor in the assigned bonds, whereby the payment of the money due thereon was postponed, as to part for two months, and as to the residue for four months, and that White actually paid the part he agreed to pay at the end of

***Bonds—Assignment—Due Diligence—Waiver.**—The use of due diligence by suit or otherwise, may be waived by the assignor, and the consideration paid by the assignee is a sufficient consideration to support the assignor's promise to pay, either express or implied. Walker v. Henry, 36 W. Va. 106, 14 S. E. Rep. 442, citing *Coiner v. Hansbarger*, 4 Leigh 452. The principal case is also cited in *Foot-note* to *Barksdale v. Fenwick*, 4 Call 492, on the question of due diligence.

See monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801, and monographic note on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 409.

the two months, in such case, Coiner was discharged from his liability to Hansbarger, as assignor of the bonds; but the court left it to the jury to decide, upon the evidence, whether a direction given by Coiner to Hansbarger not to bring suit on the bonds till required by him, or any other circumstances proved in the cause, amounted to an authority or consent, on Coiner's part, to the arrangement made by Hansbarger with White.

And then, the court, on the motion of Hansbarger's counsel, instructed the jury, 1. That if they should find, that at the time of Coiner's assignment of the bonds to Hansbarger, White the obligor was insolvent, and that nothing could have been got from him by suit, in such case, Hansbarger, the assignee, was not bound to bring a suit against the obligor, but had a right to recouse against Coiner, the assignor. 2. That if the jury should find, that White the obligor was insolvent at the date of Coiner's assignment to Hansbarger, and continued insolvent till the commencement of this action, in such case, Coiner became immediately liable upon the assignment to Hansbarger; and a subsequent arrangement, made by Hansbarger with White, whereby Hansbarger agreed that upon the payment of half the debt within two months, he would give White four months time for the balance, with which agreement White failed to comply,—did not impair Hansbarger's right to recover against Coiner, the assignor, in this action. And Coiner's counsel, thereupon, moved the court to instruct the jury, that unless they should find that the money could not have been obtained from White, either with or without suit, at the time the arrangement was made between Hansbarger and him, then that arrangement did discharge Coiner from his liability as assignor; but the court refused to give this instruction.

3. The court instructed the jury, that if they should find, that, after the arrangement made by Hansbarger with White, whereby time was given him for the payment of the debt due on his bonds, Coiner was informed of that arrangement, and sanctioned it, and promised payment of the debt to Hansbarger, in such case, though Coiner was ignorant of the legal consequences of such arrangement between the assignee and obligor, his promise of payment to Hansbarger was binding on him. To these instructions of the court, Coiner's counsel filed exceptions.

There was a verdict and judgment for Hansbarger. Coiner appealed to the circuit court, which affirmed the judgment; and then he appealed to this court.

Johnson, for the appellant. The second instruction given by the county court to the jury was wrong. There is a plain analogy between the situation of an assignor of a bond, who is bound to make good the debt to the assignee, if it cannot be collected from the obligor, and the responsibility of a surety for his principal. It is not material, in the case of the assignor, that the obligor with whom the assignee makes a new contract, giving him time for the payment of the debt, is insolvent, any more than it is material, in the case of a surety, whether the principal, to whom the creditor by a new contract gives

further time, is solvent or insolvent. In the first case, the assignor ought to be held to be absolutely discharged, by the new contract made by the assignee with the obligor, upon the same principle, that the surety is held to be discharged by the new contract made by the creditor with the principal. *Norris v. Crummev*, 2 Rand. 228; *Hunter v. Jett*, 4 Id. 104; *M'Kenny v. Waller*, 1 Leigh 434; *M'Lemore v. Powell*, 12 Wheat. 554. The third instruction of the court to the jury, was also erroneous. If, by reason of the new contract of the assignee with the obligor, giving him indulgence for the debt, without the consent of the assignor, the assignor was discharged from liability on his contract of assignment, then his promise to pay the debt himself, was a promise without any consideration to support it, and therefore not binding on him.

In the case of mercantile paper, indeed, where the holder has not used due diligence, the promise of the drawer or indorser to pay the money to the holder, made with full knowledge of the fact of negligence, has been held to preclude him from relying on such negligence, in his defence against an action on the bill or note. *Goodall v. Dolley*, 1 T. R. 712; *Hopes v. Alder*, 6 East 16, in notes; *Lundie v. Robertson*, 7 East 231; *Stephens v. Lynch*, 12 East 38; *Potter v. Rayworth*, 13 East 417. This, however, is not because the promise is considered binding per se, but because it is considered as an acknowledgment that due diligence has been used (such as giving due notice of dishonor) which dispenses with proof of such diligence; or as an admission, that the defendant is, in all events, the proper person to pay the debt. So, in *Potter v. Rayworth*, lord Ellenborough said, that the defendant's promise to pay, was evidence that he was conscious of his liability to pay the note, which must be because he had due notice of dishonor; and *Bailey, J.*, considered the promise, either as an acknowledgment that he had due notice of the dishonor, or that without such notice, he was the proper person to pay the note, as the party for whose use it was drawn. The truth is, a very rigid measure of diligence is required of the holder of mercantile paper; and negligence, in many particulars, often not at all affecting the substantial justice of the claim, is fatal. Hence, the promise of the defendant has been taken, not as binding per se, but as a waiver of objection to negligence, or as equivalent with proof of diligence, or as dispensing with such proof. But, in the case of assignor and assignee of a bond, where no such rigid rules are prescribed for the conduct of the assignee, and where the measure of diligence required varies according to circumstances, the subsequent promise of the assignor to pay, after the assignee has by his negligence lost his recourse against him, must be held binding per se, or not at all; and binding per se it cannot be, unless it is founded on some

consideration; on some legal or moral duty to pay the debt. Here, there was no consideration whatever to support the promise.

Leigh, for the appellee. The only diligence required of the assignee of a bond, in order to entitle him to recouse against the

assignor, is, that he shall promptly bring and prosecute suit against the obligor; and if the obligor be insolvent at the time of the assignment, so that a suit against him would be wholly unavailing, it is unnecessary for him to bring the suit. *Brown v. Ross*, 6 Munf. 391. In the present case, then, immediately upon Coiner's assignment to Hansbarger of the bonds of White, who was at the time insolvent, Hansbarger's right of action against Coiner accrued. Any effort that he made afterwards, to get the money of White, without a suit, was a voluntary effort made for Coiner's benefit, which, certainly, could not exonerate him from his liability, already complete and absolute, to make good the debt. These considerations alone suffice to shew the propriety of the first and second instructions. The appellant's counsel regards the third instruction, as wholly independent of the second, and indeed, as proceeding on the supposition that the second was erroneous. Take it so. The instruction was, that if Coiner was informed of the arrangement made by Hansbarger with White, giving him indulgence for the debt, and sanctioned it, and promised payment, the promise was binding. His express sanction of the arrangement shewed, that he knew it was beneficial to himself; that it was the best, perhaps the only, method of getting any thing from the obligor, and so of preventing the necessity of recourse to him. His sanction of the arrangement made it his own; such sanction was equivalent with the giving of previous authority to Hansbarger to make it. His promise to pay the debt, was an acknowledgment, that he was conscious of his liability for it; an acknowledgment, that what had been done by Hansbarger, had been rightly done; so done as to preserve Hansbarger's recourse against him. There is, therefore, no question about the consideration to support the promise. The principle of the cases,

457 in *which the holder of a bill of exchange or note, has omitted what due diligence required, and yet a subsequent promise of the drawer or indorser to pay it, he being aware of the negligence, has been held binding on him for the debt, seems applicable, a fortiori, to the case at bar: the cases on the subject are all collected in 4 Petersd. Abr. Bills and Notes, p. 480. The only question upon the last instruction was, in truth, whether Coiner's ignorance of the legal effect of Hansbarger's proceedings (supposing the legal effect would have been to discharge him from liability as assignor) destroys the effect of his sanction of those proceedings, and of his promise to pay the debt. But this is no longer a questionable point. *Bilbie v. Lumley*, 2 East 469; *Stevens v. Lynch*, 12 East 38; *Brisbane v. Dacres*, 5 Taunt. 144; 1 Eng. C. L. Rep. 43; *Stuart v. Lee*, 2 Leigh 77; *Taylor v. Chowning*, 3 Leigh 654.

PER CURIAM. There is no error in the instructions of the county court to the jury. Judgment affirmed.

458 *Waddy's Ex'ors v. Hawkins's Adm'r.
April, 1838.

(Absent CABELL, J.)

Administrator d. b. n.—Capacity to Sue*—Case at Bar.

*Administrators d. b. n.—Capacity to Sue.—See mon-

—The sureties of an executrix require counter security from her under the statute of wills of 1792, ch. 92, § 25, and she failing to give counter security, the court orders her to deliver the testator's estate then in her hands, consisting of slaves, to her sureties: she delivers the estate to them, and they receive the profits for several years; then the executrix dies, and there is an administrator de bonis non with the will annexed of the testator: the sureties having never settled any account of their transactions while the estate was in their hands, a suit in chancery is brought by the administrator de bonis non against the sureties for an account of the profits to which the legatees of the testator are not parties. HELD, the suit well brought, the administrator, not the legatees, being entitled to demand the account of profits and the balance due thereon. **Executors—Compensation—Amount**—Testator directs, that his executors shall be handsomely paid out of his estate, for the trouble they shall be at in discharging that trust: it appears, that there is no extraordinary trouble in the administration: HELD, nothing shall be allowed beyond the usual commission of five per cent.

The last will and testament of John Hawkins deceased, proved and recorded in the county court of Hanover, in the year 1779, after appointing his executors, "desired that they might be handsomely paid out of his estate for the trouble they should be at in discharging that trust." His widow Mary Hawkins qualified as executrix, and William Waddy and George Dabney were her sureties in her executorial bond. At the May term of the county court 1794, the executrix having received due notice of an application to be then made to the court, by her sureties for counter security, and failing to appear, an order was made by the court, that she should deliver the estate of her testator in her hands, to the sureties, Waddy and Dabney. And, accordingly, she delivered to them, all the estate that remained unadministered,

consisting of a few debts due or 459 claimed to be due to the estate and yet to be collected, and about twenty slaves; and thenceforth till December 1801, Waddy had the possession and management of the whole property, taking steps to collect the debts claimed for the estate, and receiving the profits of the slaves. His co-surety Dabney, took no part in the business. At the end of the year 1801, Mrs. Hawkins the executrix being dead, and Joseph Hawkins having taken administration de bonis non with the will annexed of the testator John Hawkins's estate, Waddy delivered him all the slaves belonging to the estate, but he rendered no account of his transactions while the estate was in his hands. Application was made to Waddy to render this account in 1809: when he admitted his duty to render it,

ographic note on "Executors and Administrators" appended to Rosser v. Deprist, 5 Gratt. 6.

*Executors—Compensation—Amount.—See principal case cited in *Claycomb v. Claycomb*, 10 Gratt. 591; *Gregory v. Parker*, 87 Va. 454, 12 S. E. Rep. 801.

For further information, see foot-note to *Claycomb v. Claycomb*, 10 Gratt. 599; monographic note on "Executors and Administrators" appended to Rosser v. Deprist, 5 Gratt. 6.

*This order was made under the provision of the revised statute of wills of 1792 (1 Old Rev. Code, ch. 92, § 25; Pleasants's ed. p. 165), which was in these words: "When sureties for executors or administrators conceive themselves in danger of suffering thereby, and petition the court for relief, the court shall summon the executor or administrator, and make such order or decree thereupon, to relieve and secure the petitioners, by counter security or otherwise, as to them shall seem just and equitable." There was, at that time, no other statutory provision on the subject. The order of the county court, in the present instance, was in conformity with the usual practice of the courts under the provision above quoted.—Note in Original Edition.

but owing (it appeared) to ill health, he made no settlement; and shortly afterwards, he died.

In 1813, Joseph Hawkins, the administrator de bonis non with the will annexed of the testator John Hawkins, exhibited his bill, in the superiour court of chancery of Richmond, against Dabney and John Waddy executor of William Waddy, praying an account of the administration of the estate by Dabney and Waddy, while it was in their hands under the order of the county court of May 1794, and a decree for the balance that should be found due thereon. And the defendants having put in their answers, by which it appears that Waddy had had the sole management of the estate, and was alone accountable for the same, the court ordered the executor of Waddy to render an account of Waddy's administration of Hawkins's estate while it was in his hands.

The commissioner reported two statements. The first, after allowing Waddy the usual commission of five per cent., shewed a balance due from his estate to that of Hawkins, of 1671 dollars, with long arrears of 460 interest; which balance *consisted, almost intirely, of the profits of the slaves while they were in Waddy's hands, from 1794 to 1801. The second statement shewed a balance of only 288 dollars; the balance being reduced to this sum, by crediting Waddy with 200 dollars, yearly, for the seven years of his agency, for his trouble in managing the estate. It appeared clearly, from the face of the accounts, that he had incurred no extraordinary trouble at all; and, in the first statement, all his expenses were credited to him, over and above the five per cent. commission therein allowed. The claim for the extraordinary compensation of 200 dollars a year, during the seven years, was founded wholly on the provision in the will of the testator Hawkins, that his executors "should be handsomely paid out of his estate for the trouble they should be at in discharging their trust."

Much delay was produced in the progress of the cause, by the deaths of all the parties, the necessity of reviving it from time to time, and the delays in the qualifications of other representatives of the deceased parties; and many years elapsed before the suit was revived between the proper parties, and brought to hearing. At the final hearing, the cause stood revived between Liddal Bowles administrator de bonis non of the testator John Hawkins, and Anthony Waddy the surviving executor of William Waddy (the surety) and Edmund Goodwin administrator of John Waddy, who alone had first qualified as the executor of William.

The chancellor, being of opinion that there was no ground for the claim of the extraordinary compensation of 200 dollars per annum to Waddy, for his trouble in managing the estate, and that the usual commission of five per cent. was an ample compensation, decreed, that the surviving executor of Waddy should pay to Bowles the administrator de bonis non &c. of Hawkins, the balance of 1671 dollars, with interest &c. appearing to be due by the first statement of the commissioner's report. From this decree, the defendant applied by petition to this court for an appeal; which was allowed.

461 *Daniel and Johnson, for the appellant, insisted, 1. that Waddy, who had in effect administered the estate of Hawkins from 1794 to 1801, was entitled, by the express provision of Hawkins's will to be "handsomely paid for his trouble;" which, they said, certainly meant that he should be allowed something more than the usual compensation of five per cent. commission. And 2. that the administrator de bonis non of Hawkins, could not maintain a suit against Waddy, to recover the balance due from him to Hawkins's estate, any more than he could have maintained a bill against Mrs. Hawkins, the executrix, to recover a like balance due from her, if the estate had remained in her hands, since Waddy must be considered as acting merely as her agent; and that the claim could only be prosecuted by the creditors or the legatees of Hawkins: and as to this point, they relied on Wernick's adm'r v. M'Murdo, 5 Rand. 51.

J. M'C. Wickham and Leigh, for the appellee, answered, that there was not the least pretext for the claim of extraordinary compensation for Waddy's services; for it was plain, from the accounts, that if there had been any extraordinary trouble in the administration of Hawkins's estate, that trouble had been incurred by Mrs. Hawkins, the executrix, before the estate was taken out of her hands; that Waddy, certainly, had incurred no trouble for which the commission of five per cent. was not a "handsome" compensation. As to the other point, they said, that Waddy was not an executor or administrator of Hawkins's estate, nor an agent of the executrix, but only a receiver appointed by the court; per Green, J., in Wernick v. M'Murdo, 5 Rand. 87. But supposing he was to be regarded as the agent of Mrs. Hawkins, the executrix; then, as the moneys he had received had never been accounted for and paid to her, she neither had, in fact, nor could have, administered them, or converted them to her own use; so that the balance due from Waddy was assets of Hawkins's estate remaining unadministered, and unconverted, which, according to the 462 *principles of the case of Wernick's adm'r v. M'Murdo, belonged to the administrator de bonis non of Hawkins; Id. pp. 72, 73.

PER CURIAM. The decree is to be affirmed.

Cloud v. Catlett's Ex'or.

April, 1833.

(Absent BROOKE, J.)

Detinue*—Special Bail—Recognizance—By recognizance of special bail in detinue, taken by a justice in the country, the bail is made to undertake, that in case the principal shall be cast, he shall restore the chattels sued for, or the alternative value thereof (without adding "as the court shall adjudge"), or pay and satisfy the condemnation of the court, or render his body in execution &c. or that the bail will do it for him: HELD, this is a good recognizance of special bail, according to the statute 1 Rev. Code, ch. 128, § 53.

Same—Same—Same—Scire Facias Thereon—What It Must Show.—In scire facias upon a recognizance of

*Detinue.—On this subject, see monographic note on "Detinue and Replevin" appended to Hunt v. Martin, 8 Gratt. 573.

†Same—Special Bail—Recognizance—Scire Facias Thereon—What It Must Show.—In Catlett v. Russell,

special bail in detinue. It is not necessary that the scire facias should shew, that the execution against the principal had been superseded for the specific thing and given for the alternative value, according to the statute 1 Rev. Code, ch. 134, § 46, and a scire facias omitting to state such matter, is good on general demurrer.

Same—Same—What Necessary to Charge.—It is necessary to charge the special bail in detinue, that the execution against the principal should be superseded as to the specific thing and given for the alternative value, and that a ca. sa. should be sued out against the principal, without effect; but if these proceedings be omitted, it is matter of defence for the bail, of which he can avail himself only by plea; dissentiente TUCKER, P.

This was a scire facias, sued out by Cloud against the executor of Catlett, upon a recognizance of special bail entered into by Catlett in his lifetime, for one Lelew, in an action of detinue brought by Cloud against Lelew in the circuit court of Shenandoah.

The scire facias—reciting that D. Cloud, at a circuit court held for the county of Shenandoah on the 27th April 1826, by the judgments of the court, had recovered against S. Lelew certain chattels [specifying them] of the aggregate 463 *value of 750 dollars, if they might be had, if not, then the value of them aforesaid, and 14 dollars for his costs &c. whereof the said Lelew was convicted as appeared of record, execution of which judgment still remained to be made; and that, before M. E. a justice of the peace of Shenandoah, J. Catlett "personally appeared, and undertook for the said S. Lelew. that in case he should be cast in the said suit, he the said S. Lelew would restore the aforesaid property or the alternative value thereof, or pay and satisfy the condemnation of the court, or render his body in prison in execution for the same, or that he the said J. Catlett would do it for him," as appeared by the recognizance filed in the said suit; and that the said Lelew had not restored the chattels aforesaid to the said Cloud, nor paid him the aforesaid value and costs, nor rendered his body to prison, nor the said J. Catlett for him; and that the said J. Catlett, since entering into the recognizance, had died, and A. Catlett was his executor—therefore, commanded the sheriff to make known to the executor, that he should be at the clerk's office of the said circuit court, at the rules there to be held, on &c. to shew

cause why Cloud should not have execution against the estate of the bail in the hands of his executor, of the said judgment, according to the form and effect of the recognizance &c.

The defendant appeared and craved oyer of the recognizance in the scire facias mentioned; which being read to him, he demurred, and the plaintiff joined in the demurrer; the entry of the demurrer, and joinder in the record, being in these words—"And the said defendant demurs generally, in which the plaintiff joins."

The recognizance set out on oyer was as follows: "Memorandum, that upon the 17th May 1824, J. Catlett, of the county &c. personally appeared before me M. E. a justice of the peace &c. and undertook for S. Lelew, at the suit of D. Cloud, in an action of detinue now depending in the circuit court of Shenandoah for certain chattels [specifying them] of the [aggregate] value of 1300 464 dollars, that, in *case the said S. Lelew shall be cast in the said suit, he the said S. Lelew will restore the aforesaid property or the alternative value thereof, or pay and satisfy the condemnation of the court, or render his body in prison in execution for the same, or that he the said J. Catlett will do it for him" &c.

The circuit court held, that the law upon the demurrer was for the defendant, and gave judgment for him; to which this court, on the petition of the plaintiff, allowed a supersedeas.

Johnson, for the plaintiff in error. The demurrer, as here pleaded, is so loose and vague, that it is impossible to understand from it the issue of law it was intended to present; the circuit court ought not to have admitted it; and this court ought not to tolerate such an irregular practice. The appellee's counsel will, doubtless, state the grounds, on which the judgment of the circuit court, that the plaintiff was not entitled to judgment upon his scire facias, is to be vindicated.

Leigh, for the defendant in error. A general demurrer, in the most technical form, would have given precisely the same information as to the point of law, as this informal pleading gave, and no more: it would merely have denied that the plaintiff was entitled, upon his own shewing, to recover; and this was denied by this informal demurrer. The plaintiff joined in it, and his objection to it, now, in this court, for want of form, comes too late. The points of law presented by the demurrer, are obvious. The statute requires, that the recognizance of special bail in detinue, shall be so changed from the form of the recognizance in other actions, "as to subject the bail to the restitution of the thing sued for, whether animate or inanimate, or the alternative value, as the court shall adjudge; 1 Rev. Code, ch. 128, § 53, 105, pp. 501, 512. The recognizance here is faulty; because after stating the alternatives which the bail undertook his principal should perform, or render his body in prison, it omitted to refer 465 the duty of the bail to the judgment *of the court, as the statute requires.

The recognizance is so framed as to bind the bail for the alternatives specified in the recognizance, not "as the court

6 Leigh 355. CARR, J., said: "I wish it distinctly understood, that I do not mean by anything said here, to detract from the case of *Cloud v. Catlett's Ex'or*, in the slightest degree. My best judgment approves that decision, as sound and clear law. That was a scire facias against bail, liable by his undertaking in the original action, and I think, that the scire facias was sufficiently full, and gave sufficient notice, that the *distingas* had been superseded, and the *ca. sa.* issued. I consider the case before us, essentially different."

And, in the same case, CABELL, J., said: "The omission to state, even in a scire facias at common law, what is essential to the plaintiff's recovery, is no cause of demurrer. Thus, in a scire facias against the executor of one who had been special bail in an action of detinue, to show cause why the plaintiff should not have execution of the judgment, against the estate of the bail in the hands of the executor, it was not stated, either that the *distingas* for the specific thing had been superseded, or that a ca. sa. against the principal had been returned *non est inventus*. Nobody doubted that these things were essential to the plaintiff's right to recover. But the court held, that the absence of them was not to be taken advantage of by demurrer, but must be shown by plea. (*Cloud v. Catlett's Ex'or*, 4 Leigh 462.)"

In this case (Catlett v. Russell), JUDGE TUCKER referred (p. 875) with approval to his opinion in the principal case.

should adjudge," but whether the court should adjudge or not. In the form of the recognizance of special bail in detinue, given in Henning's Justice, p. 137, the undertaking of the bail is, that the principal shall restore the thing, or the alternative value thereof, "as the court shall adjudge, or that the bail shall do it for him." (It ought to be, that the principal shall restore the thing, or the alternative value, as the court shall adjudge, or render his body in execution for the same, or that the bail shall do it for him.) This judgment of the court is essential to ascertain the responsibility of the bail; as is apparent from the 46th section of the statute of executions, 1 Rev. Code, ch. 134, p. 541, which provides, that "if a distringas issue in detinue, the court, for good cause shewn, may direct it to be superseded so far as relates to the specific thing, and to be executed for the alternative price or value only, if fixed in the judgment, or if the same shall afterwards be fixed by writ of inquiry." In truth, the body of the principal cannot be touched on a distringas; it is not till that is superseded, and the judgment is thus made one for the alternative value, that a ca. sa. may be sued out upon it; and until that is done, therefore, the principal cannot render his body in execution, or the bail do it for him; because the principal cannot, at his own pleasure, discharge himself of the duty of restoring the specific chattel recovered, nor is it in the power of the bail to exempt him from it. To fix the liability of the bail in detinue, then, it is essential the court should adjudge, that the distringas be superseded for the specific thing, and thus make the judgment a mere judgment for the alternative value, like any other debt; a judgment on which a ca. sa. may be sued out; and then the ca. sa. must be sued out against the principal without effect, before a scire facias can be maintained against the bail. Special bail can never be charged, in any case, till a ca. sa. against the principal has been returned non est inventus; 1 Bac

466 *Abr. Bail in civil causes, D. 341, for the bail is not bound to render the principal, until he knows by the plaintiff's suing out the writ of ca. sa. that he means to proceed against the person of defendant; 2 Wms. Saund. 72 a, in notes. Therefore, even supposing that the objection to the form of the recognizance, in this case, can be got over, the scire facias is fatally defective; for it does not shew (what it is essential to the plaintiff's right to recover, it should shew) that the distringas had been superseded for the specific thing, and the judgment made a mere judgment for the alternative value, so as to give the plaintiff a right to sue out a ca. sa. without which the bail cannot surrender the body of the principal in discharge of his undertaking. The bail rightly demurred to the scire facias, because it did not shew any right in the plaintiff to proceed against him, much more any title to recover. It was not necessary to allege by plea, the omission of proceedings necessary to fix his liability, when the plaintiff did not allege that such proceedings had been had.

It behooved the plaintiff to shew in his pleadings, a title to recover.

Johnson, in reply. When the statute requires, that the recognizance of special bail in detinue, shall be so changed as to subject the bail to the restitution of the thing sued for, or the alternative value, as the court shall adjudge, it is obvious, that the judgment of the court intended by the provision, is the judgment for the specific thing or the value, in the alternative, not the subsequent order superseding the distringas for the specific thing. The bail must, therefore, discharge himself, if the principal do not discharge him, by restoring the specific thing, or the alternative value ascertained by the judgment. But, admitting it to be necessary, that the court should supersede the distringas for the specific thing, and that a ca. sa. should be sued out against the principal without effect, in order to fix the liability of the bail, yet it is not necessary, that the scire facias against the bail should allege that such proceedings have been had. In cases of judgments for

467 debt, the plaintiff *must sue out a ca. sa. against the principal, and that must be returned non est inventus, before he can maintain a scire facias against the bail; and yet the scire facias never alleges that such proceedings have been had. If they have not been had, the bail must plead that matter in bar. He cannot demur to the scire facias, for the omission to allege the preliminary proceedings against the principal.

CARR, J. This demurrer is so loosely pleaded, that I feel some unwillingness to tolerate it. It is, simply, that the defendant demurred generally, without saying whether to the scire facias or the recognizance of bail. It may be presumed that it is to the recognizance; for, if the purpose were not to object to it, there could have been no reason for demanding oyer of it. Accordingly, the counsel in support of the demurrer, made his first attack upon the recognizance; though he did also take the position, that the scire facias was defective in not stating that the distringas had been superseded for the specific thing, and the ca. sa. issued.

With respect to the recognizance, I cannot see any substantial defect in it. I have examined the subject with my best care, and looked into the scanty materials which the books furnish us on the subject of detinue, and the proceedings in it; but they give me no light. Our statutes must guide us, together with the reason of the case, and the analogies of the law. In actions of debt &c. where bail is required, the undertaking of bail is, that if the principal be cast, the principal will pay and satisfy the condemnation of the court, or render his body to prison in execution for the same, or that the bail will do it for him. Upon this undertaking, the bail is never considered as fixed for the debt, unless the debtor has failed both to pay and to render his body; and to prove that he has failed, there must be a ca. sa. issued without effect, before the scire facias can issue against the bail. In actions of detinue, the statute directs that the recognizance shall be so changed, as to subject the bail, to the

468 *restitution of the thing, or the alter-

native value, as the court may adjudge. With respect to these words, as the court may adjudge, it seems to me that they refer to the alternative value; meaning, that the bail shall be subjected to the restitution of the specific thing, or the alternative value, as fixed in the judgment of the court. This idea is founded, in some degree, on a clause of the execution law, which being in *pari materia*, may be taken as a part of the same statute: "if a *distringas* issue in *detinue*, the court, for good cause shewn, may direct it to be superseded, so far as it relates to the specific thing, and to be executed for the alternative price or value only, if fixed in the judgment, or if the same shall afterwards be fixed by a writ of inquiry." It strikes me, that the judgment of the court, in these two passages, relates to the same thing. By the words as the court may adjudge, the law cannot mean, that the bail shall restore the thing, or pay the value, as the court may adjudge that he shall do the one or the other; for we know that the court has no such power. I do not, however, consider these words as having much bearing on the questions involved. The bail, in *detinue*, undertakes that the defendant shall restore the specific thing, or pay the condemnation of the court, or render his body to prison in execution for the same, or that he will do it for him. If the principal does either of these things, the bail is discharged; if he does neither, the bail is liable. Now, I think, that a careful examination of this recognizance will satisfy any one, that the bail is substantially bound, according to the requisitions of the law; that the doing of either of these three things by the principal, will release him, and that he can only be rendered liable by his doing none of the three. Neither the alternative value, nor the render of the body, can be demanded till the *distringas* is superseded; nor can there be a failure in the render, till a *ca. sa.* (as in all other cases) has issued ineffectually.

With some of my brethren, the chief difficulty in the case, seems to be the failure in the *scire facias* to allege,
469 *that the court had superseded the *distringas*, and awarded the *ca. sa.* I cannot think this was necessary. To my mind the *scire facias* sets out the record of the judgment with sufficient fullness; and if the fact were, that there had been no supersedeas of the *distringas*, and award of other executions, this should have been shewn by plea.

Examine the *scire facias*:—after stating the judgment with all its particulars, and undertaking of the bail, the writ states, that Lehw, the principal, had not restored the chattels to Cloud, the plaintiff, nor paid the alternative values thereof and the costs, nor surrendered his body to prison, nor Catlett for him. Are not these allegations, in this judicial writ, founded upon the express ground, that the supersedeas and *ca. sa.* have been awarded? How could the principal be said to have failed to pay the condemnation, or deliver his body in execution, if there had been no *ca. sa.*? and how could the bail be said to have forfeited his recognizance by not doing it for him, until a *ca. sa.*? And when he is called on to

shew cause why Cloud should not have execution against him of the judgment aforesaid according to the form and effect of the recognizance, can he fail to understand, that this takes for granted the superseding the *distringas*, and issuing the *ca. sa.*? Is it not a fair call on him to plead the want of these prerequisites to charge him, if the fact would support him? What is this superseding order of court? Is it a judgment? surely not: such an idea supposes two judgments for the same thing in the same cause. For, in the original proceeding, the verdict was for the chattels if to be had, if not then their alternative value; and the judgment of the court followed it exactly. The order, then, was no judgment; there was nothing to be adjudged; but the court, upon the motion of the plaintiff, without notice even, being informed, that their process of *distringas* was ineffectual, superseded it, and opened to the plaintiff the common law process of execution. Was this ever denied?

is it not a motion of course? Look at
470 *the effect of the *distringas*: it commands the sheriff to distrain the defendant by his goods and chattels, lands and tenements, so that neither he nor any persons by his authority, may lay hands on them; and the sheriff takes house, lands, and goods, and receives the issues and profits, until the defendant produce the specific thing of the value of so much, or the value if the thing is not to be had; and when the defendant in contempt, stands out against the severe and rigorous process, and frustrates the judgment of the court, and the justice of the case, can it be supposed, that the court would hesitate, at the motion of the plaintiff, whose sole concern it is, to award him the other executions, which issue in the commonest cases? Assuredly, not. As far as my experience goes, the plaintiff in such case has only to shew, that the *distringas* has been ineffectual, and that he wishes it superseded; it is done of course. And why need this be stated in the *scire facias*, more than any other motion made in a cause? Why more than to state in every *scire facias* against bail, that a *ca. sa.* has issued? In no case, can you come upon the bail by *scire facias*, unless you have issued a *ca. sa.* without effect, by which the bail has had notice, that the body is demanded. And if you omit this, the bail may defeat the *scire facias*, but not by demurrer. Thus in *Williams v. Vaughan*, Cro. Jac. 97, Moor 775, Williams brought *scire facias* against Vaughan, who was bail for Gouch, in debt; and set forth the judgment, and that Gouch had not rendered his body, nor paid the condemnation; Vaughan demurred, because it was not alleged that a *ca. sa.* issued first against the principal; sed non allocatur. And I rather think, that, since that time, it has not been attempted, at least I have met with no later attempt.

I think the *scire facias* good, and am for reversing the judgment, and awarding execution for the alternative value.

CABELL, J., concurred.

471 *TUCKER, P. I do not think there is any defect in the recognizance; but I am of opinion that the *scire facias* is defective.

It seems to be agreed, on all hands, that

the bail is only to be responsible upon the failure of the principal to perform the whole of the alternatives mentioned in the recognizance. One of them is to render his body to prison in execution for the alternative value, not for the specific thing, for that is only to be obtained by distringas. The failure to perform this requisition, can only be ascertained by the return of a ca. sa. non est inventus, as some of the books say; or, as it is said in others, the issue and return is necessary to notify the bail that the plaintiff designs to proceed against him; but all agree that the ca. sa. is essential to sustain the scire facias.

In setting forth his right of action in the scire facias, the plaintiff must, as in every other case, shew his title to a judgment. It is true, that in the scire facias it is not necessary to set forth the issue and return of the ca. sa. for the want of it is a matter that must come out in the defendant's plea. Yet the scire facias must, in every case, shew a title to the thing for which the plaintiff demands judgment, even supposing a ca. sa. has properly issued. In the action of debt, he shews a judgment for a sum certain, and he demands a judgment against the bail for that sum, which the bail was bound to pay him. But in detinue, the judgment is for the property, not for the price. From an examination of the old books of entries, I find, that the judgment, when by default or on demurrer, was formerly entered in the first instance, for the specific thing; and upon the return that it could not be had, but not till then, a writ of inquiry of the value was awarded, and a second judgment was entered for the alternative value. Coke's Entries 169b; 3 Blacks. Com. 413. This may possibly have given rise to the phrase in our statute, "as the court shall adjudge," so much commented on at the bar. But where an issue is made

up between the parties, the jury who
472 try the issue, find *the value, and judgment is entered for the specific thing or for the alternative value if it cannot be had. Upon this judgment a distringas issues, and upon that distringas, the sheriff is only entitled to receive the specific thing. He cannot receive the alternative value though tendered by the defendant, without a previous direction of the court that the distringas shall be superseded for the specific thing. Nor can the plaintiff direct him to levy for the alternative value, without a like direction. Neither party, therefore, can change the character of the judgment without the order or judgment of the court. This order, superseding the distringas for the specific thing, and directing it to be executed for the alternative value, is in strict analogy to the second judgment I have mentioned. And the provision requiring an order of the court for the conversion of the judgment for the specific thing into a judgment for the value—in other words, converting the action, in effect, from detinue to trover—is most wisely given. For the propriety of superseding the distringas for the specific thing, may depend upon various circumstances. One effect of the order is

to change the property; to vest the specific thing in the defendant, and a right to its value in the plaintiff. Now, if the property is eloiigned, or has been sold by the defendant, the order is most proper. But, if the slave be dead since the judgment, there would seem to be little reason in compelling the defendant to pay the value: certain it is, this court has been divided on the question on whom the loss would fall, in case of death of the slave before verdict; Austin's ex'or v. Jones, Gilm. 341. Be this as it may, it would certainly be inconsistent with every received principle to permit the defendant to keep the property against the will of the plaintiff, if the value found by the jury was inadequate, or to permit the plaintiff to waive the claim to the property itself, and take the alternative value, if that value was enhanced. Until such an order of court can be shewn, the plaintiff should not have, and certainly has not, any money demand against the defendant.

473 *Now, it seems to me, that as the scire facias calls upon the bail to shew cause why judgment shall not be rendered against him, which judgment can only be for money, it should appear on the face of the process itself, that an order had been made superseding the distringas for the specific thing, and directing it to be executed for the alternative value only. For how, in case of default, can the court see a justification for a judgment for the value? Or how, if this demurrer were overruled, can this court see that the plaintiff is entitled to judgment for it? It may be said, that as there is no defence, it will be implied, in like manner, as the issue and return of the ca. sa. will, in such case, be implied. But to this the answer is obvious; that though the court may well imply an act of the party, namely, the issuing of the ca. sa. it cannot properly imply an act of the court. It could not, for instance, imply the original judgment of the court. The party must shew that judgment, as the foundation of his demand. But the order to supersede the distringas, is itself a judgment. It is the decision of the court upon a judicial question submitted to it, which, as has been shewn, completely changes the rights of the parties. Again; though the court, upon default of the defendant, may imply, and does imply, the act of issuing a ca. sa. yet I do not think the right to issue it can be left to implication. The scire facias must shew a right to take the body, before the bail can be charged for an omission to render it in execution: for, although the undertaking is that the defendant shall do some one or other of several things, yet, after all, the bail cannot be responsible until there has been a failure in all, and the last of them is the surrender of the body.

I have diligently searched the books of entries for the forms of scire facias against bail in detinue, but in vain. I have not been fortunate enough to find even a recognizance of bail in that action. I have been, therefore, compelled to examine the question upon the reason of the thing and the analogies of the law; and upon
474 this examination I am satisfied, *that

the scire facias is defective, and that the judgment should be affirmed.*

Judgment reversed, and judgment entered for the appellant.

Rice v. White.

April, 1838.

Deceit—Statute of Limitations—When It Begins to Run.—In an action for deceit in a sale of a chattel, there is a plea of the statute of limitations, a general replication thereto, and issue thereon joined: HELD, the cause of action accrued at the time of the deceit practised, and the limitation begins to run immediately.

Same—Same—Same—Quære—Special Replication.—It seems, that if the fraud was not discovered till some time after it was practised and within the time of limitation, this would suffice to take the case out of the statute: but to enable the plaintiff to avail himself of such matter, he must plead it specially in his replication.

Same—Measure of Damages.—**Quære**, in an action for deceit in the sale of a slave, by vendee against vendor, what is the proper measure of damages? the purchase money with interest, or the value at the time the property was recovered from the vendee for defect in the vendor's title?

*Note by the president. I think, that after the recital of the original judgment, concluding thus, "whereof the said S. Lebew was convict as appears of record," the scire facias should have proceeded to recite something after this form—"And whereas afterwards, to wit, on the — day of —, at a circuit court continued and held for the said county, it was by the judgment of the said court, on the motion of the said D. Cloud, ordered that the distringas be superseded as to the specific thing recovered by the said judgment, and that the same be executed for the alternative price or value; and whereas, afterwards, to wit, on the — day of —, at a circuit court continued and held for the said county, it appearing to the court, that the distringas theretofore awarded the plaintiff was unavailing, upon the motion of the plaintiff, it was ordered, that he have execution against the said S. Lebew, as well for the alternative value of the said property as for his damages and costs adjudged to him as aforesaid."

Deceit—Statute of Limitations—When It Begins to Run.—To the point that the right of action for deceit occurs at the time the deceit is practiced, and the statute of limitations begins to run at once, the principal case is cited in Merchants' National Bank v. Spates, 41 W. Va. 32, 23 S. E. Rep. 682; Fant v. Fant, 17 Gratt. 14.

In Thompson v. Whitaker Iron Co., 41 W. Va. 574, 23 S. E. Rep. 795, it was held that where a cause of action arises out of fraud the statute of limitations runs from its perpetration; but that this rule did not apply to fraudulent transfers. In delivering the opinion of the court, BRANNON, J., said: "Callis v. Waddy, 2 Munf. 511. *Rice v. White*, 4 Leigh 474. Cook v. Darby, 4 Munf. 444. and Fant v. Fant, 17 Gratt. 14, say that statute runs from the act of fraud."

In Rowe v. Bentley, 29 Gratt. 700, it is said: "In the cases of fraud the authorities are conflicting, as to whether at law the statute begins to run from the commission of the fraud, or from its discovery. Angell on Lim. § 183 to § 189; Callis v. Waddy, 2 Munf. 511; *Rice v. White*, 4 Leigh 474; 1 Rob. Prac. (Old Ed.) pp. 82, 87, 110. In equity, however, it would seem to be well settled that the statute begins to run only from the discovery of the fraud. Shields, Adm'r, etc., of Waller & others v. Anderson, Adm'r of Byrd, etc., 3 Leigh 729; 2 Rob. Prac. (Old Ed.) 261, 252."

See the principal case also cited in Scates v. Wilson, 9 Leigh 477; Huston v. Cantrell, 11 Leigh 160; Thornburg v. Bowen, 37 W. Va. 548, 16 S. E. Rep. 828.

See further, monographic note on "Limitation of Actions" appended to Herrington v. Harkins, 1 Rob. 591.

Statute of Limitations—Exception—Special Replication.—If there is anything that takes a case out of the statute of limitations, it can only be availed of by stating it in a replication to the plea of the statute. To th's effect, the principal case is cited in Merchants' National Bank v. Spates, 41 W. Va. 33, 23 S. E. Rep. 683; Davis v. McMullen, 86 Va. 267, 9 S. E. Rep. 1095; Vanbibber v. Beirne, 8 W. Va. 178. See Boyle v. Conway, 3 Call 1, and foot-note.

Same—Measure of Damages.—In case for deceit there is, perhaps, no fixed rule for the assessment of damages: they are not limited, however, as in an action on the warranty: if so, they may go beyond those recoverable in an action on the warranty. Boyles v. Overby, 11 Gratt. 205, citing the principal case and Brown v. Shields, 41 Ark 446.

This was an action on the case for deceit in the sale of a slave, brought by White against Rice, in April 1826, in the circuit court of Halifax. The declaration contained several counts: those on which the

475 plaintiff relied at the trial, *alleged, in substance, that Rice, professing to act as the agent of one Ann Foster, and by authority from her, in making sale of a female slave, and knowing that Mrs. Foster had only a life interest in the slave, and that the reversion after her death belonged to the executor of one Matthew Rice deceased, falsely and fraudulently represented and warranted to White, that Mrs. Foster, was entitled to the absolute property in the slave, and by means of that deceit, sold the same to White, at a full price for the absolute property; and the executor of M. Rice, afterwards in an action against one Lewellen, to whom White had sold the slave, recovered the same; and so by means of the deceit practised on him by the defendant Rice, whereby he was induced to give a full price for the absolute property of the slave, White not only lost the property, but was compelled to incur great expense in defending the title &c.

The defendant pleaded two pleas in bar, the entry whereof in the record, and of the issues thereon, was in these words: "And the defendant by his attorney, comes and defends the wrong and injury, when &c. and for plea saith, that he is not guilty in manner and form as the plaintiff against him hath complained; and the defendant for further plea, pleads the statute of limitations; and of this he puts himself upon the country; and the plaintiff likewise.

At the trial of the issues, several bills of exceptions were filed by the defendant's counsel to opinions of the court; but it is not necessary to state them, as none of the points thereby presented were noticed in the argument here, or touched by the court, in its decision of the cause.

The jury found a verdict for the plaintiff on both issues, and assessed his damages to 459 dollars.

Whereupon the defendant moved the court to set aside the verdict, and direct a new trial, 1. because the verdict was not warranted by the evidence; 2. because the jury had given excessive damages; and 3. because the action in point of law could not be maintained against the defendant. The judge, at his instance, certified, that the following facts were proved at the trial, viz:

476 *That Rice, the defendant, in the year 1811, as the agent of his mother, Ann Foster, sold the slave in question to the plaintiff, White, for 220 dollars; and part of the purchase money was applied to the discharge of a debt then due by Mrs. Foster, and the balance to a debt due by the defendant himself, to the plaintiff; that, at the time of this sale, the defendant knew that Mrs. Foster had only a life interest in the slave, and that the reversion belonged to the executor of M. Rice deceased, Mrs. Foster's first husband and the defendant's father; and he did not disclose these facts to the plaintiff: that Mrs. Foster died in 1817; and then the executor

of M. Rice brought an action of detinue against Mary Lewellen, to whom the plaintiff had in the meantime sold the slave, and recovered judgment against her for the slave or the alternative value thereof, and damages for the detention; which value was ascertained by the jury to be —, and the damages for the detention were assessed at —: that Mrs. Lewellen then brought suit against the plaintiff, to recover of him retribution, of what had been recovered of her by Rice's executor; and in that action recovered a judgment, and sued out execution for the damages and costs adjudged to her, amounting to the sum of 459 dollars [which was the amount of damages assessed to White, by the verdict of the jury in this suit]; but the defendant insisted, that, if the plaintiff was entitled to recover in this action at all, the measure of damages should be the purchase money paid by the plaintiff for the slave, with interest thereon from the time the right of action for her accrued to M. Rice's executor.* Upon this state of facts, the defendant's counsel moved for a new trial, on the grounds above mentioned. The court overruled the motion, and the defendant excepted.

Judgment was then given for the plaintiff, for the damages assessed by the jury and costs; from which the defendant appealed to this court.

The cause was argued here, by Johnson for the appellant, and Leigh for the appellee.

I. Johnson insisted, that the proper measure of damages was the purchase money, with interest from the time when the action of Rice's executor for the slave sold to White accrued. And Leigh, earnestly contended, that the actual amount of damages, which the purchaser sustained by reason of the defect of the title, and the deceit practised upon him in regard thereto, was the just measure of retribution due to him, which was ascertained, in this case, by Mrs. Lewellen's recovery against him. Otherwise, he said, no one could ever safely purchase a female slave; for, if she should have increase, she would herself be of little profit to her owner, and the children would be a charge during their childhood; and then, the mother and all her increase might be recovered of the vendee, and he, after being at the charge of rearing the children, would only get back the purchase money he had paid for the mother. But this point, though very fully debated at the bar, was not noticed by the judges, in their opinions.

II. Johnson maintained, that upon the state of facts proved at the trial, as certified by the judge, the verdict ought to have

been for the defendant upon the issue joined on the plea of the statute of limitations. He said, the deceit practised by Rice in the sale of the slave to White, was the only cause of action, which White could have against Rice; and the action for the deceit accrued immediately upon the sale, which was in 1811; but this action was not brought till April 1826. He cited *Batley v. Faulkner*, 3 Barn. & Ald. 288; *Short v. M'Carthy*, Id. 626; 5 Eng. C. L. R. 478 288, 403; **Granger v. George*, 5 Barn. & Cress. 149; *Howell v. Young*, Id. 259; 11 Eng. C. L. R. 185, 219; *Bank of Utica v. Childs*, 6 Cowan 238; *Miller v. Adams*, 16 Mass. Rep. 456; *Wilcox v. Plummer*, 4 Peters 172.

Leigh said, that the fraud was sufficient to take the case out of the statute of limitations; *Bree v. Holbech*, 2 Doug. 656. That, in this action for deceit, the cause of action accrued when the deceit was discovered; for the effect of the deceit was not only to defraud the party injured, but to conceal the fraud from him; and to give the wrongdoer the benefit of the statute of limitations, during the time the injured party was lulled into security by the very deceit practised upon him, was, in effect, to allow him to derive from his own wrong, all the advantage he could have derived from perfect fairness in the transaction; it would exempt him from responsibility for the deceit, unless, by chance, it should be discovered before the time of limitation should expire. *Clarke v. Hougham*, 2 Barn. & Cress. 149; 9 Eng. C. L. R. 47; *Brown v. Howard*, 2 Brod. & Bing. 73; 6 Eng. C. L. R. 25; *The first Massachusetts Turnpike v. Field*, 3 Mass. Rep. 201; *Sherwood v. Sutton*, 5 Mason 143. It might be said, that, if the action for the deceit accrued when it was discovered, yet the fact of the deceit being discovered within the time of limitation, ought to be put in issue by a replication in avoidance of the plea of the statute; and this, as a general proposition, might be true: but, in this case, the statute of limitations was not formally pleaded, and the same regularity of pleading on the plaintiff's part, ought not to be required of him, as if the defendant's pleading had been regular. It was the design of both parties to dispense with form, and to put in issue the whole merits of the defence founded on the statute of limitations. The defendant pleaded "the statute of limitations," without saying how the statute operated as a bar, and tendered an issue; and the plaintiff, without saying how his action was within the time, accepted the issue. The pleadings left both parties (and were intended to leave them both) at large, to shew when the action accrued.

479 *Johnson replied, that the defendant's plea of "the statute of limitations," though irregular, was as good after issue taken upon it, as if it had been ever so formal and technical; and the authorities cited for the appellee shew that the matter of avoidance now relied on in argument, ought to have been pleaded in a replication, in order that it might have been put in issue, or demurred to. But it was questionable, to say the least, whether

*This bill of exceptions did not state the date of the institution of the suit of Rice's executor against Mrs. Lewellen, nor the date of his judgment against her, nor the alternative value of the slave ascertained by that judgment, nor the damages assessed for the detention; and these facts appear no where in the record. Neither did this bill of exceptions state the date of the institution of Mrs. Lewellen's suit, or of her judgment against White: but it appeared from the record of that suit, set out in another bill of exceptions filed at the trial, that it was commenced in February 1826, and the judgment recovered in November following. This suit of White v. Rice was commenced in April 1826.—Note in Original Edition.

the fact of the deceit having come to the knowledge of the plaintiff within the time of limitation, would have sufficed to avoid the operation of the statute; *Callis v. Waddy*, 2 Munf. 511; *Troup v. Smith*, 2 Johns. Rep. 33; *Leonard v. Pitney*, 5 Wend. 30.

CARR, J. The counsel for the appellant, in the argument, confined himself to the bill of exceptions taken to the refusal of the court to grant a new trial, which contains a statement of the facts proved at the trial, certified by the judge.

The suit was brought in 1826. The declaration charged fraud and deceit practised by the defendant on the plaintiff, in the sale of a female slave in 1811. The pleas were not guilty, and "the statute of limitations;" on both which issue was directly taken.

It was contended, by the appellant's counsel, that the evidence shewed a case, which, on the plea of the statute, proved the verdict to be against both law and evidence; and, consequently, that the court erred in not granting a new trial. I was exceedingly struck with the argument of the appellee's counsel in reply, and was strongly inclined to believe with him, that the statute could not run in such a case till the fraud was discovered. But an examination of the cases has compelled me to think, that, in the actual state of the pleadings, the decision refusing the new trial was wrong. The statute says, "the action shall be brought within five years next after the cause of such action or suit and not after." The question then is, when did the action accrue? It seems to me,

480 when *the fraud in the sale was perpetrated. Suppose, that in a month after he had received the slave, and paid his purchase money, the plaintiff had discovered the cheat; could he not instantly have brought suit for it? What should prevent him? Could the defendant ward off the action by pleading that the plaintiff had received no injury, and possibly never might? surely, not: the injury was in the fraud; in selling him a slave out and out, to which he knew his mother had no title longer than her life. This doctrine is held, explicitly, in many cases cited at the bar. I do not undertake to decide, how the question would have been, if to the plea of the statute, the plaintiff had replied, that the defendant had fraudulently and deceitfully concealed from him the cheat he had practised upon him; and that the suit was brought within five years after the discovery. In that case, there must have been either a demurrer, which would confess the fact, and put the case upon the law; or an issue, and then the fact would be directly in issue. But here, the issue is different; it is taken directly upon the statute; that is, upon the question, whether the suit was brought within five years after the cause of action arose. I think the judgment should be reversed, and the cause sent back for a new trial, when the plaintiff may move to amend his pleadings, if he shall be so advised.

CABELL and BROOKE, J., concurred.

TUCKER, P. Our first attention, in

this case, must be turned to the state of the pleadings. (He stated them.) Upon the trial of the issues a verdict was rendered for the plaintiff upon which the defendant moved for a new trial.

If the plea of the defendant be an immaterial plea, it is obvious, that no new trial ought to be granted; for it would be vain and futile to award a new trial for an immaterial matter; of a matter which, even if found for the defendant, could not entitle him to a judgment. But here, the plea of "the statute of limitations," only

481 seems to be an informal, *and not an immaterial plea. If pleaded formally, it would be a bar; and, accordingly, we find it was so considered in *Cook v. Darby*, 4 Munf. 444. That was trespass on the case against a common carrier for embezzlement; pleas, not guilty and "the act of limitations" in those words only, and issue: the plaintiff's evidence proved embezzlement fifteen years before the action: the defendant moved the court to instruct the jury, that the statute of limitations barred the action; but the court instructed the jury, that the statute did not apply: exceptions were taken, and a supersedeas allowed by this court. The appellee's counsel contended, that the statute did not apply to the case, as the declaration charged a fraud: but the court, nemine dissentiente, reversed the judgment, on the express ground that the statute well applied to the case. Now, this could not have been, if the court had not considered the plea, as pleaded, a material and substantial plea, however informal. It was expressly assailed as being defective, and was likened to the plea of "justification," which it is admitted is not good; *Kirtley v. Deck*, 3 Hen. & Munf. 388. But the objection did not prevail; the distinction, indeed, being evident, between the plea of "the statute of limitations," which offers a distinct and specific ground of defence, without anything more, and the plea of "justification," which unless carried out, is utterly nugatory. The first gives the plaintiff fair and full notice of the defence set up; whereas the second subverts no purpose of pleading, as it does not give notice of the character of the "justification," on which the defendant will rely. *Kerr v. Dixon*, 2 Call 319. It is true, that in the case of *Henderson v. Foote's ex'ors*, 3 Call 248, the court seemed to think, that the plea of non assumpsit within five years, referred to the time of the plea, according to the decision of *Smith v. Walker*, 1 Wash. 135, and that it was, therefore, an immaterial plea; but as, in every case, it is now held to be the settled rule that "actio non" goes to the commencement of the action, the plea ought certainly not to have been gratuitously considered as violat-

482 ing this *rule. If the short minute of the plea is to be considered as sufficient after verdict, it is because the court will intend it to be carried out into proper form. It certainly would not intend it to be extended into an improper form, unless its terms required it. This case, therefore, must yield to the case of *Cook v. Darby*; and the rather, as it does not seem to have been much considered, nor was the point essential to be decided.

Taking the plea as substantially good, there is no doubt that it was fully sustained by the evidence. For, in an action of deceit in the sale of property, the cause of action arises at the instant; and the plaintiff might, in this case, have sued the next day after the perpetration of the fraud, and have recovered his damages to the value of the purchase money paid. The numerous authorities cited at the bar to this point, are satisfactory and conclusive: I shall only mention, particularly, *Battle v. Faulkner*, *Short v. M'Carthy*, and *Howell v. Young*. In this last case *Holroyd, J.*, says, "whether the plaintiff elects to sue in one form of action or another [either for a breach of promise, or for a breach of duty] the cause of action, which in either form is substantially the same, accrued at the same moment of time: and the breach of promise, or of duty, took place as soon as the defendant took insufficient security." In the case before us, therefore, the plaintiff might have brought his action the day after the sale, and recovered damages, if he had then known of the defect of title and the fraud practised on him.

But it is said, he did not know it; that it does not appear that the fraud was discovered more than five years before the suit brought; and that, therefore, the bar of the statute does not apply. Had the plaintiff replied that matter, I should have been unwilling to disturb the verdict on the ground of the statute. But he has not done so. He has joined issue on the plea, instead of replying the matter which would have avoided it. He cannot, therefore, avail himself of this matter in avoidance of the statute. He ought to

483 *have replied it, that the defendant might have taken issue on the fact of discovery. Non constat but that the defendant might, if he had been called upon to do so by such a replication, have proved the knowledge on the part of the plaintiff, of the defect of title, on the next day after the sale. On general principles, it is as necessary that the defendant should be informed by the replication of the particular avoidance of the statute, in order that he may rebut it, as that the plaintiff should be informed of the ground of defence by plea, that he may be prepared to meet it. Nothing is more clear than that exceptions to the statute must always be replied, or any other matter which avoids its influence. *Bogle v. Conway's ex'ors*, 3 Call 1. In *Clark v. Hougham*, 2 Barn. & Cress. 149, the plea was non assumpsit within six years; replication, that the defendant did assume within six years. *Bailey, J.*, said, in reference to certain evidence given in the case, "The question how far fraud may prevent the operation of the statute of limitations, does not properly arise in this case. On the form of the replication adopted, the only question is, when did the cause of action accrue? In order to take advantage of the fraud, there should have been a special replication." And of the same opinion were the other judges.

I am therefore of opinion, that the statute was a good bar to the action, and was sustained by the evidence. The verdict

being, then, against the evidence, should be set aside, and a new trial awarded. When the verdict is set aside, the plaintiff may have leave to withdraw his informal replication, and reply that the fraud was discovered within five years before the commencement of the action, which would be, I think, a sufficient answer to the plea. *Bree v. Holbech*, 2 Doug. 632; *Booth v. Earl of Warrington*, 4 Bro. P. C.; *Tomlin's* edi. 163.

Judgment reversed.*

484

**Briggs v. Hall.*

May, 1833.

Landlord and Tenant—Eviction by Landlord from Part of Demised Premises—Effect.—In assumpsit for the use and occupation of a farm for a year, it appears, that the landlord entered on a meadow parcel of the premises, within the year, and mowed and carried away the hay, without the consent and against the will of the tenant: who, nevertheless, continued to occupy the farm during the residue of the year: HELD, the landlord by such disturbance of the tenant, lost the benefit of the entire contract, and is not entitled to recover any part of the rent.

Assumpsit for use and occupation of land, brought by Briggs against Hall, in the county court of Fauquier. There were two

*This case, as the reporter is informed, had been compromised between the parties, before the hearing of it in this court.—Note in Original Edition.

Landlord and Tenant—Eviction of Tenant—Effect.—"The quiet enjoyment of the premises, without any molestation on the part of the landlord, is an implied condition, on which the tenant is bound to pay rent." "If, therefore, the tenant be at any time deprived of the premises by the landlord's agency, the obligation to pay rent ceases, because his obligation has force only from the consideration which is the enjoyment of the premises. From this principle it also follows, that if the land be recovered by a third person, by a title superior to that of the lessor, the tenant is discharged from the payment of rent, after eviction by such recovery. If part only of the land is recovered, such an eviction is a discharge of so much of the rent as is in proportion to the value of the land evicted. But if the lessor himself wrongfully deprives the tenant of the whole or any part of the premises, the tenant is discharged from the payment of the whole rent until the possession is restored. And the reason why there should be no apportionment of the rent in the latter case is, that it is done by the wrongful act of the landlord himself, and no man should be encouraged to disturb a tenant in the possession of that which, by the policy of the feudal law, he ought to protect and defend." In *Tunis v. Grandy*, 22 Gratt. 150, *MONCURE, P.*, who delivered the opinion of the court, quotes the above principles of law in regard to the eviction of a tenant from the demised premises or a part thereof, from *Taylor's Landlord and Tenant*, § 378, and continues by saying: "These principles, which seem to have had their origin, in part at least, in the feudal law, are well settled, not only in England, but in many, if not most of the states of this Union, and have certainly received the emphatic sanction of this court in *Briggs v. Hall*, 4 Leigh 483. See also, monographic note on "Landlord and Tenant" appended to *Mason v. Movers*, 2 Rob. 606.

Same.—Actual Eviction—What Constitutes.—An actual eviction is an actual expulsion of the tenant out of all or some part of the demised premises,—and physical ouster or dispossession from the very thing granted, or some substantial part thereof. To this point the principal case was cited in *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. Rep. 901.

Appellate Practice—Demurrer to Evidence—Motion for New Trial.—In *N. & W. R. Co. v. Dunnaway*, 93 Va. 33, 24 S. E. Rep. 698, the principal case was cited as a case in which the appellate court reviewed a judgment on a demurrer to evidence, though no motion for a new trial was made in the court below.

For further information on this subject, see monographic note on "New Trials" appended to *Boswell v. Jones*, 1 Wash. 322; monographic note on "Demurrer to the Evidence" appended to *Tutt v. Slaughter*, 5 Gratt. 864.

As reaffirming the decision in *Humphreys v. West*, 3 Rand. 516, the principal case is cited in *Newberry v. Williams*, 89 Va. 300, 15 S. E. Rep. 865.

counts in the declaration; namely, general indebitatus assumpsit for the use and occupation, and quantum meruit for the same. Plea, non assumpsit.

At the trial, there was a demurrer to evidence, from which it appeared, that the plaintiff adduced evidence, proving that he had let the premises, being a messuage and farm, to the defendant for a year, at a rent of 70 dollars, and that the defendant had occupied the same, accordingly, for the whole year. Then the defendant, on his part, adduced evidence, proving that there were four acres of meadow parcel of the farm let by the plaintiff to him, and that the plaintiff, during the year, entered upon the premises, and mowed the hay growing on the meadow, and carried the same away, the defendant objecting and forbidding him to do so; and this was the only interruption or disturbance given by the landlord to the tenant, who did not, thereupon, quit the premises, but continued, notwithstanding such interruption, to occupy the farm for the year. And such being the evidence on both sides, the plaintiff demurred and said that the evidence was sufficient to maintain the issue on his part, and not sufficient to maintain the same on the defendant's part; and the defendant joined in the demurrer.

The jury found a verdict for the plaintiff for 70 dollars with interest &c. subject to the opinion of the court on the demurrer to evidence. The court held that the law on

the demurrer was for the defendant, 485 and gave him judgment; *and upon a supersedeas awarded to the plaintiff, the judgment was affirmed by the circuit court; and then, on the petition of the plaintiff, a supersedeas was allowed him by this court.

Stanard and Briggs, for the plaintiff in error.

Harrison for the defendant.

CARR, J. In adjudging that the evidence was sufficient in law to maintain the defendant's plea of non assumpsit, the court, no doubt, went upon the ground, that the entry and mowing and carrying away the hay crop, was an eviction as to the meadow, and that an eviction of part of the rented premises by the landlord, was an extinguishment of the whole rent. I was doubtful at first, whether, on the issue, this evidence as to taking away the meadow crop, was admissible; but examination has removed that doubt. I find it laid down in many books, that, in debt for rent, the defendant may, under the plea of nil debet give in evidence an entry and expulsion by the landlord; and the doctrine, I think, applies a fortiori here.

Is this evidence such as would have authorized a jury to find an eviction? The principal enjoyment and possession of meadow, consists in the taking and using the hay: the man who does this, is to every rational purpose, the possessor. Therefore, the wrongful entry of the landlord into the meadow, and his forcible cutting and carrying away of the hay, might, I think, well have authorized a jury to find an eviction as to the meadow land; and the court on the demurrer must do the same.

But does this eviction of part suspend the whole rent? In the old books of the highest authority, this is explicitly laid down as settled law. Roll, Coke, Bacon, and many others, are express to this point; and they give, what seems to me, a sound reason for it. Thus Gilbert in his law of evidence, p. 283, says, "If the lessor enter into part, the whole rent is suspended, for the lessor cannot apportion it

486 *by an act of his own; for, if the party himself, by his own wrong, doth hinder himself from the benefit of his own intire contract, the jury ought not to decide it in his favour, for possibly the lessee would not have contracted for one part without the other. If a stranger evict the lessee of part of the land, the rent must be apportioned, for though part be taken away, since also some part remains, there is a part of the consideration money remaining due to the lessor, for otherwise the act of the law, in the stranger's recovery, would do wrong to the lessor." In 6 Bac. Abr. Rent, M. p. 49, it is said, "Where the lessor takes a lease of part of the land, or enters wrongfully into part, there are variety of opinions whether the intire rent shall not be suspended, during the continuance of such lease, or tortious entry; and in the last case, it seems to be the better opinion, and the settled law at this day, that the tenant is discharged from the payment of the whole rent, till he be restored to the whole possession, that no man may be encouraged to injure or disturb his tenant in his possession, whom by the policy of the feudal law, he is bound to protect." These are the old books: but

Starkie, a late writer of high authority, states the law in the same way: speaking of the lessee's defence under the plea of nil debet, he says—"So the lessee may shew an entry, or an expulsion from the premises by the lessor, or any suspension of rent by him, under this issue; for since the lessor by his own wrongful act deprives the party of the benefit of the intire contract, no apportionment can be made in his favour." Stark. Law Ev. part 4, vol. 2, p. 465. Chancellor Kent too, in his Commentaries (vol. 3, p. 376,) says, "If the landlord enters upon part of the demised premises by wrong, the better opinion is, that it suspends the payment of the whole rent, until the tenant be restored to the whole possession, for the lessor ought not to be able so to apportion his own wrong, as to oblige the tenant to pay any thing for the residue." In Cibell v. Hills, 18 Vin. Abr. Rent. I, a. pl. 2, p. 513, citing Leo. 110,

the court held the continuing in possession of the landlord, was *not material, for if he does any thing amounting to an entry, though he depart presently, yet the possession is in him, sufficient to suspend the rent, and he shall be said extra tenere the defendant" &c. In Roll's Abr. 940, it is said, "If a man lease a rectory, for years, reserving rent, and upon part of the glebe, there is a sheep cot, and the lessor enter and pull it down, and the lessee reenter, and then the rent is in arrear; the rent is suspended, notwithstanding the reentry of the lessee, for part of the profits of the thing leased is taken from

the lessee, to wit, his house, and that by the act of the lessor." So, in the case before us, part of the profits of the thing leased, the hay crop, was taken from the lessee, and that by the act of the lessor. These authorities prove clearly to me, that there was such an expulsion here, as justified the court in its judgment.

It was contended at the bar, that this, though admitted to be the ancient law, has been changed by the modern english decision; and that the rule now established there, is, that if the landlord evict the tenant from parcel of the premises, the tenant, if he quit the residue, is discharged from the whole rent; but if he continue in possession of the remainder, he is liable pro tanto: and for this Stark. Law Ev. part 4, vol. 3, p. 1520, and the cases there cited, are referred to. Starkie certainly lays down the rule, as stated, and cites in support of it *Smith v. Raleigh*, 3 Campb. 513, and *Stokes v. Cooper*, Id. 514, in a note. The first of these cases was assumpsit for use and occupation of a house and garden; plea, the general issue; it appeared, that after the defendant had agreed to take the premises, at an intire rent, and possession had been delivered to him, the plaintiff railed off a part of the garden, and built a privy upon it, for the use of a number of his other tenants, and the defendant thereupon returned the keys to him: lord Ellenborough ruled, that this amounted to an eviction from part of the demised premises; which, the taking being single, and the rent intire, he considered a complete answer to the action; and he nonsuited the plaintiff.

488 Surely, this case does not *furnish authority for the position, that the tenant continuing to hold the part from which he is not evicted, is liable pro tanto; for no such point was before the court, nor did the judge say a word about it: he simply held, that, in the case before him, the tenant was discharged. In his note to this case, the reporter says, "This case was recognized by Dallas, J., in *Stokes v. Cooper*, in which the rule was laid down, that after eviction from part, the landlord cannot recover upon the original contract, and the tenant by giving up possession of the residue, is intirely discharged; but that if the tenant, after the eviction, continues in possession of the residue, he may be liable upon a quantum meruit." This is a brief and loose note of a decision made on the circuit, and gives us a mere skeleton of the case. I take it that the case before the court was, like that before lord Ellenborough, and that the point adjudged was, that after eviction from part, the landlord cannot recover upon the original contract: if so, what is said about the quantum meruit was extrajudicial. And that it was so, seems the clearer from the case cited in support of the judgment; which is *Dalston v. Reeve*, 1 Ld. Raym. 77, where in covenant upon indenture for nonpayment of rent, the defendant pleaded eviction; the plaintiff demurred; and judgment was given for the defendant because it is rent, and the eviction is a suspension of it, and therefore a good plea. Now, I consider these cases as rather confirming, than going to overrule or change, the doctrine, that an eviction of

part of the rented premises by the landlord, is a suspension of the whole rent: In the first, lord Ellenborough expressly says, that "an eviction from part of the demised premises, is a complete answer to the action." In the other, Mr. justice Dallas says, "that after eviction from part, the landlord cannot recover upon the original contract." In the case before us, the suit was brought upon the original contract; the plaintiff demurred to the defendant's evidence; that evidence shews an eviction of part of the premises, by the landlord; and the question of law raised by this demurrer is, whether, in law, this evidence

489 supports *the defendant's plea of non assumpsit? or in lord Ellenborough's language, whether "eviction of part is a complete answer to the action?" If indeed, these cases could be considered as meant to change the old and well established rule, I should reject their authority: they are, at best, but nisi prius decisions of a single judge; and I should say that the old rule is wise, humane and just, and the new one the contrary. How can the landlord complain of the law which says to him, "be just, and abide by your contract; if you take from your tenant a part of the premises, you shall receive no rent?" But look at the other side: a man rents a tract of land; it is of a size which suits his capital and his views; he would not rent a part of it; it would be too small; but after he has settled upon it, and made all his arrangements for a crop, his landlord comes and takes forcible possession of his best fields: he must either at an inclement or inconvenient season, turn himself out of house and home; or if he remains, you make him pay to this oppressive landlord, a portion of the rent. It is not consistent either with the policy or humanity of the law, thus to arm the strong against the weak.

But how can we, in the existing posture of the case, come at the question, whether the rent should be apportioned? The jury has found a verdict for the whole rent, the 70 dollars. No objection was made to this by the defendant; no motion was made to the court, to set aside the verdict for excessive damages: on the contrary the parties put themselves intirely upon the law of the case. The plaintiff demurs to the defendant's evidence, saying it is not sufficient in law, to maintain the issue on his part; the defendant says that the evidence is sufficient. Thus an issue in law is made up, and this is the sole point to be tried by the court. This, which is so clear in itself, has also the sanction of this court. In *Humphreys v. West*, 3 Rand. 518, judge Coalter said, "The court is of opinion, that the only question for their consideration, on a demurrer to evidence, is, whether the evidence supports the issue or not.

490 After the demurrer is *joined, the jury may either be discharged, and (if the judgment be that the evidence does support the issue) a writ of inquiry is awarded; or the jury then impeached, may go on to assess conditional damages. But, in either case, the question is with the jury, not the court, as to the question of damages; subject, as in all other cases to

the superintending control of the court, to grant a new trial in case the damages are excessive. That however rests with the court before whom the trial was had; and that too, upon a motion to that court for a new trial; there being no case in which that court is bound, *ex mero motu*, and without motion, to grant a new trial, and subject the defendant, without his consent, to greater damages. The appellate court cannot grant such new trial; for that, would be to reverse the judgment of an inferior court, on a motion for a new trial here, which was not made to that court, and of course, on a matter in which that court committed no error." This was the unanimous judgment of a full court, and has never since (that I have heard of) been questioned. I am for affirming the judgment.

CABELL and BROOKE, J., concurred.

TUCKER, P. After having very much revolved this case, with which I have been perplexed, not only by the cases upon the subject of suspension of rent, and of use and occupation, but by the extremely awkward and unsatisfactory manner in which the demurrer is presented, I am inclined to think, that the whole question depends upon the fact, whether there was, in this case, any regular demise or lease? If there was a regular demise or lease, then it seems clear from the whole current of authorities, from the time of Roll to the passing of the statute of 11 Geo. 2, ch. 19, that general *indebitatus assumpsit* for use and occupation will not lie, unless upon a collateral promise, or where, as it is said, the promise is to pay a sum in gross. Wherever there was a regular demise, the landlord was supposed to have his remedy
491 *upon the contract itself. Thus, we are told in 1 Roll's Abr. 7, 8, that if a man leases for years reserving rent, *assumpsit* will not lie, either during the lease or after, because it savours of the realty. And this is perfectly consonant with general principles. For, in no case, can a man who has made an express contract abandon that, and recover under a contract implied or raised by law. He may have contracted for terms less favorable than the law would imply, and he must be bound by such contract. He cannot be permitted to abandon it, and recover more than he stipulated for, or on other terms than those stipulated.

Questions, however, often arose, in these cases, whether the engagement was to pay rent, or was a promise to pay a sum in gross? Whether an express promise to pay the rent reserved, was or was not collateral, or upon a new consideration? and whether there was a regular demise or not? For, if there was an express promise to pay a sum in gross, the action was maintainable; as where the declaration set forth, that in consideration that the plaintiff promised to make a lease for two years and to repair during the term, the defendant promised to pay twenty shillings per quarter; this was held to be a promise to pay a sum in gross, and therefore recoverable in *assumpsit*; 1 Roll's Abr. 7 O. case 3. And where there was any new consideration (such as forbearance to sue) and a promise to pay after the rent became due,

the action was held to be maintainable; 1 Brownl. 14. So also where there was no regular demise, and the defendant nevertheless entered and enjoyed, by permission of the owner, the landlord might maintain an action for use and occupation; since, otherwise, he would have been without remedy. But where there was no such ground of exception to the general rule, that rule prevailed, that in case of an actual lease *assumpsit* would not lie. *Green v. Harrington*, 1 Brownl. 14; *Mantel v. Brett*, Hob. 397.

In consequence of these principles, nothing was more frequent at common law, in actions for use and occupation, than the nonsuit of the plaintiff by evidence
492 on the trial of *a regular demise. It was to remedy this inconvenience, that the stat. 11 Geo. 2, ch. 19, was enacted. See 4 Hen. & Munf. 168. The statute provides, that where the demise is not by deed, the landlord may bring the action for use and occupation, and if on the trial any parol demise or agreement (not being by deed) whereon rent is reserved, shall appear in evidence, the plaintiff shall not therefore be nonsuited, but may use it as evidence of the quantum of damages. This statute never was in force with us, nor have we any similar provision. We stand, therefore, upon the old common law, which permits a recovery in *indebitatus assumpsit* for use and occupation, either upon an express or implied promise where there has been no regular demise, but denies it where there has been such demise, unless in cases of collateral promises, or promises upon new consideration, or a promise to pay a sum in gross. That the action is sustainable upon an express or implied promise under such circumstances, is clearly established by the case of *Eppes v. Cole*, 4 Hen. & Munf. 161, and by the cases there cited. The apparent collision between some of these cases and others to be found in the books, may be explained by an attention to the distinctions above mentioned. See Chambers's Landlord and Tenant 687.

In this view, then, it is essential to determine, whether there was or was not a regular demise in this case; and from a careful examination of the demurrer, I am of opinion there was not. [Here, the judge entered into an examination of the evidence set out in the demurrer, to shew the justness of this conclusion.] If there was no regular demise, then the action for use and occupation will lie; and, in that action, the question of eviction does not arise, but the plaintiff is entitled to recover for that part actually enjoyed, but for that part only. *Tomlinson v. Day*, 3 Brod. & Bing. 680, 6 Eng. C. L. R. 315. Now, it seems, that, in this case, the promise to pay the 70 dollars was for the whole land including the meadow; and as the meadow was not enjoyed, the rent should be apportioned.

493 Or, (to consider *it in another light) the tenant having enjoyed the land, without the meadow, should only be compelled to pay for the part enjoyed.

The verdict, however, has found the whole 70 dollars, subject to the opinion of the court on the demurrer. Shall the plaintiff then recover the whole sum, because the

court is of opinion the evidence does support an action? By no means. I am of opinion, that the evidence maintains the action, indeed, but only for part of the sum. The verdict, therefore, has not so found the damages as to enable the court to pronounce judgment. Upon the case presented, the jury ought either to have been discharged without inquiring of damages, or they ought to have found the damages with a double aspect; namely, so much if the plaintiff was entitled to the whole rent, and so much if he was not entitled to rent for the meadow. This not being done, the verdict, I think, should be set aside, and a writ of inquiry awarded. But the other judges being of opinion that there is no error in the judgment, it must be affirmed.

Pierce v. Massenburg.

May, 1833.

[26 Am. Dec. 333.]

Infants—Apprenticeship—Infant Necessary Party.—A father cannot bind his infant child apprentice by indentures to which the child is not a party; and indentures of apprenticeship executed by the father, without the child's concurrence, are not voidable only, but void.

This was an action on the case, in the circuit court of Norfolk, brought by Massenburg against Pierce, for enticing away and keeping and detaining in his Pierce's service, two apprentices and servants of Massenburg, named Minson and Face. Plea, the general issue. Verdict for the plaintiff for 650 dollars, subject to the opinion of the court on a case stated, which was thus:

494 *There were two indentures of apprenticeship executed, the one between Minson's father and Massenburg, and the other between Face's father and Massenburg, whereby the fathers, respectively, bound their sons, then infants, to Massenburg, a pilot, till they should attain to full age, to learn the art and mystery of a pilot for Chesapeake bay and James river; but the indentures were not signed by the infant sons, respectively, nor were they in any way parties to them. And the question referred to the court, was, whether these indentures could be received in evidence, to prove the apprenticeship, or any legal contract of service, such as would entitle the plaintiff to maintain this action?

The circuit court held that the law was for the plaintiff, and gave him judgment for the damages assessed by the verdict; to which this court, on the petition of Pierce allowed a supersedeas.

Leigh, for the plaintiff in error, said, that it was now well settled, that a father cannot bind his infant son as an apprentice or servant, without his assent; The King v. Cromford, 8 East 25; The King v. Ripon, 9 East. 295; The King v. Arnesby, 3 Barn. & Ald. 583.

The attorney general, for the defendant in error, said, that whatever might be the common law on the point (as to which there had been some contrariety of opinion) the

right of a father to bind his infant child apprentice, was plainly recognized by the statute law of Virginia; which provides, that any apprentice bound by his father, may, with the approbation of the county or corporation court, after he shall be sixteen years of age, agree to serve until he shall be twenty-four, or any shorter time; 1 Rev. Code, ch. 108, § 27, p. 411. Besides, he said, this was an action for a tort, and the defendant stood convicted of the wrong by the verdict. Such a wrongdoer could not avail himself of any defect in the contract of apprenticeship of the plaintiff's apprentices, whom he had seduced from the service of their master, though the apprentices themselves might not have
495 *been bound to fulfil the indentures executed by their parents; Keane v. Boycott, 2 H. Blacks. 511.

CARR, J. I consider the question submitted to the court, to have been substantially this, whether a father can bind his infant son apprentice by deed without the assent of the son? If he could, then Massenburg had a right of action against Pierce, for enticing his apprentices from his service; if not, then he had no such right. This subject, I consider as untouched by any provision of our own statute law. When the attorney general quoted the statute providing that any apprentice bound by his father, may with the approbation of the court, after he shall be sixteen years of age, agree to serve till he shall be twenty-four or any shorter time, it struck me that the words bound by his father, seemed to acknowledge an unqualified power in the father to bind the son; but further examination has changed this impression. I find by the doctrines of the common law, long and well established, that a father cannot bind his infant son apprentice, without the assent of his son, and such assent proved by his signature to the indenture; but that, in this manner, he may bind him. This being the common law doctrine, well known to our law makers, when they speak of an apprentice bound by his father, they mean, I conclude, bound in that way in which a father may bind his son; that is, with his assent, shewn by his joining in the deed. If the statute had intended to abrogate the common law, and to confer on the father a new power, it would have used words expressive of such intent: but those employed clearly speak of an existing power, without meaning to add to or detract from it. As to the common law on the point, the authorities cited for the appellant, are decisive. I think the judgment must be reversed, and judgment entered for the appellant.

CABELL and BROOKE, J., concurred.
496 *TUCKER, P. The authority of a father to bind his son apprentice without his consent, is distinctly denied by various authorities; as appears in the case of The King v. Arnesby, cited at the bar. The passage in Com. Dig. Justice of peace, B. 55, which was quoted in that case, to sustain the power of the father, is truly declared to be unsupported by authority. In like manner, in The King v. Cromford, the indenture was held invalid because the infant had not executed it.

*For the proposition laid down in the syllabus, the principal case was cited in State v. Reuff, 29 W. Va. 757, 3 S. E. Rep. 804. See also, monographic note on "Infants" appended to Caperton v. Gregory, 11 Gratt. 505.

Lewin on Settlements 251, 2. If the case was of the first impression, I should be of the same opinion. It is going very far to establish a rule by which every father would have the right to bind his child without his consent, whatever be his age or his circumstances, or the service, or the terms of that service. It would vest the power over a child on the borders of maturity, in a father perhaps his inferior in discretion, and for the profit of the father, at the expense of the degradation of the child. Such a power cannot readily be conceded, and is, as we have seen, without authority to sustain it.

Respectable authorities, indeed, have asserted a right in the child to bind himself without his father's concurrence; *The King v. Mountsorrel*, 3 M. & S. 497; *The King v. Great Wigston*, 3 Barn. & Cress. 484; *The King v. Chillesford*, 4 Id. 94; 10 Eng. C. L. R. 161, 279; *Lewin* 247. If such right really exists, it is obviously incompatible with the asserted right of the father. But as it is unnecessary to decide that question here; as the English cases on these questions, intermingle principles of the common law very frequently with statutory provisions, which it would require some pains to separate; and as the question of the emancipation of the child from parental authority is one of great delicacy, I shall not now venture to give an opinion upon it. See as to emancipation, 5 Barn. & Ald. 525; 1 Barn. & Cress. 348; *Lewin* 80, 81.

It was very strongly argued, that the wrongdoer cannot avail himself of the defect of the contract of apprenticeship; and *Keane v. Boycott* was cited. There 497 is no doubt, that *where there is a contract of service, though it may be voidable between the parties, the wrongdoer cannot set up that as a defence. But the reason is, not merely that it is no concern of his, but that the contract being only avoidable, it may be avoided or affirmed at the pleasure of the party. Thus, in the case of the negro boy who bound himself when a slave and under age, and who was seduced from his master's service, it was decided, that the defendant could not make the objections of infancy and duress. The privilege was personal to the infant, who might waive it and conform to the contract, even if it was avoidable (which by the way, it is not admitted to be, in all the cases; 6 T. R. 557; 3 Barn. & Cress. 487; *Lewin* 299). So, in *Westerdell v. Dale*, 7 T. R. 310, it is said, that an indenture for a shorter period than that required by the statute of Elizabeth, is not void but only voidable, and that at the election of the parties themselves; and that a third person cannot set up the objection. But these are cases in which there is a contract, though a voidable contract. But here is a case of no contract at all. In those cases, the contract might have been affirmed: in this, there is none to affirm. The infant's assent by act in pais, by any act short of joining in the indenture would not suffice to bind him; 3 Barn. & Ald. 584. The defendant may therefore well object, that there was no contract of service. Thus, in *The King v. Cromford*, where the

indentures are considered void, it was strongly asked, how an action could be maintained by the supposed master against any person who should seduce the apprentice from his service.

This point is yet more clear if the child can bind himself without his father's concurrence. For, if the father cannot bind the child, and the child can bind himself, then he who contracts for the service of the child with the child himself, must of course be protected by that contract, and have a right to rely on it. Otherwise, the child must yield to the unauthorized act of the father, or be an outcast incapable of getting into service. This cannot be.

498 *I am of opinion, upon the whole, that the indentures in this case, were not admissible "to prove the apprenticeship or a legal contract of service such as to enable the plaintiff to maintain his action." And the jury having found their verdict subject to the opinion of the court upon the point thus reserved, I think the judgment should have been for the defendant.

Judgment reversed, and judgment entered for the appellant.

Tod v. Baylor.

May, 1833.

Deeds—Married Women—Privy Examination—Certificate—Sufficiency.—A certificate of a privy examination of a feme covert to a conveyance of real estate by husband and wife, before commissioners in the country, under the statute of conveyances of 1793, states, that the feme made her acknowledgment of the conveyance of the land contained in the conveyance thereto annexed, freely and voluntarily, and that she was willing the same should be recorded, without stating that the feme declared that she had willingly signed and sealed the deed, and without stating that it was shewn and explained to her by the commissioners: **Held**, if the feme had in fact signed the deed, such certificate of privy examination is substantially a compliance with the requisitions of the statute, and good, and the feme is bound by the deed; but if the feme had not signed the deed, such acknowledgment, so certified, is not sufficient to make the deed binding on her, within the requisitions of the statute.

Dower—Lands Alienated by Husband—Time of Valuation.—Upon a bill in equity by a widow against the

***Acknowledgments—Married Women—Certificate—Compliance with Statute.**—The certificate of acknowledgment of a married woman to a conveyance of real estate need not show a literal compliance with the statute: where there has been a substantial compliance therewith, it is sufficient. To this effect, the principal case is cited with approval in *Hockman v. McClanahan*, 87 Va. 37, 12 S. E. Rep. 230; *Virginia, etc., Co. v. Robertson*, 88 Va. 118, 13 S. E. Rep. 350; *foot-note* to *McClanahan v. Siter*, 2 Gratt. 280; *Hurst v. Leckie*, 97 Va. 563, 34 S. E. Rep. 464; *Grove v. Zumbro*, 14 Gratt. 501, 514, and *foot-note*; *Hairston v. Randolphs*, 12 Leigh 450; *Leftwich v. Neal*, 7 W. Va. 578; *Blair v. Sayre*, 29 W. Va. 610, 2 S. E. Rep. 100. See the principal case also cited in *Hairston v. Randolphs*, 12 Leigh 462, 463.

In *Hairston v. Randolphs*, 12 Leigh 445, 461, and *foot-note*, the principal case was distinguished from the case at bar on the ground that two cases were governed by different statutes, and that the statute governing the principal case did not require that the certificate should show that the "deed was explained to the wife." To the point that the law, as it stood when the principal case was decided did not require that it should appear from the certificate that the deed was shown and explained to the wife at the time of her privy examination, the principal case was cited also in *Groves v. Zumbro*, 14 Gratt. 516; *Watson v. Michael*, 21 W. Va. 573; *Laidley v. Central Land Co.*, 30 W. Va. 512, 613, 4 S. E. Rep. 709.

For further information on this subject, see monographic note on "Acknowledgments" appended to *Tallaferro v. Pryor*, 12 Gratt. 277.

†**Dower—Lands Alienated by Husband—Time of Val.**

allenee of her husband, for dower of lands aliened by the husband in his lifetime, the widow is dowerable of the lands, as of the value thereof at the time of alienation, not at the time of assignment of dower: she is entitled to no advantage from enhancement of the value, either by improvements made by the alienee, or from general rise in value, or from any cause whatever.

Same-Same-Account of Profits.—Upon a bill in equity by a widow against an allenee of the husband for dower of lands sold, she is not entitled to an account of profits from the death of the husband, but only from the date of the subpoena in the cause: otherwise, upon a bill against the heir.

John Baylor deceased, by deed, in his lifetime, dated the 25th November 1801, in consideration of 2550 dollars, 499 *conveyed to George Tod, in fee simple, a parcel of land (300 acres) in Caroline. This deed purported, in the body of it, to be the deed of Baylor and of Anne his wife; but the husband only signed and sealed it; and though there was another seal to it, put there for the wife, she did not sign the deed.

And by another deed, dated the 12th October 1803, purporting to be the deed of Baylor and wife, and signed and sealed by them both, in consideration of 2624 dollars, they conveyed to Tod, another parcel of land (320 acres) in the same county.

Commissions for the privy examination of the wife as to both the deeds, were issued from the county court of Caroline, and directed to two justices of the peace for the county. The commission as to the first deed of November 1801, recited that the deed had been executed by the husband and Anne the wife, and that the wife could not conveniently travel to the county court to make acknowledgment thereof; and empowered the commissioners to receive the acknowledgment, which the wife should be willing to make before them, of the conveyance contained in the deed, which was annexed to the commission; and then proceeded in these words—"And we do, therefore, command you that you, do personally go to the said Anne, and receive her acknowledgment of the same, and examine her privily and apart from the said John Baylor her husband, whether she doth the same freely and voluntarily, without his persuasions or threats, and whether she is willing that the same shall be recorded in our said county court: and when you have received her acknowledgment and examined her as aforesaid, that you distinctly certify us thereof in our said court, sending then there the said indenture and this writ." And the form of the commission as to the last deed of October 1803, was exactly the same, *mutatis mutandis*.

The certificate of the justices who executed the commission as to the first deed, returned under their hands and 500 *seals, indorsed on the commission, was in these words: "Agreeably to the power to us granted by the within com-

uation.—The principal case was cited in *Verlander v. Harvey*, 36 W. Va. 377, 15 S. E. Rep. 55, as establishing the principle that, where land is aliened by a husband in his lifetime, the value of the dower of his widow, when commuted, should be estimated at the time of the alienation or sale, and not at the time of the death of the husband.

***Same-Same-Right of Widow to Mesne Profits.**—See the principal case cited in *Thomas v. Gammel*, 6 Leigh 13, 14, and *foot-note*: and distinguished in *Macaulay v. Dismal Swamp Land Co.*, 2 Rob. 580, 584. See further on this subject, *monographic note* on "Dower" appended to *Davis v. Davis*, 25 Gratt. 567.

mission, we have this 10th August 1802, personally gone to Mrs. Anne Baylor, and examined her privily and apart from her said husband,—who makes to us her acknowledgment of the conveyance of 300 acres of land contained in the indenture hereto annexed, freely and voluntarily, without the threats or persuasions of her husband, and that she is willing the same shall be recorded in the county court of Caroline." And the certificate of the justices who executed the commission as to the last deed, was the same, *mutatis mutandis*.

Both the deeds, with the commissions for the privy examination of the feme covert, and the certificates of privy examination, were duly recorded.

John Baylor, the husband, died in September 1824. And in 1827, his widow, Mrs. Baylor, exhibited her bill in the superior court of chancery of Fredericksburg, against George Tod, the purchaser of the two parcels of land in the deeds conveyed; alleging, that neither of the deeds was so executed by her according to the provisions of the statute then in force,* as to make the same binding on her; and praying, therefore, that dower might be assigned her of both parcels of land; and an account of the rents and profits from the death of her husband.

Tod, in his answer, admitted the facts, but insisted, that the deeds were both duly executed by Mrs. Baylor, and that she had thereby relinquished her right of dower in the lands.

The chancellor, by an interlocutory decree, appointed and directed commissioners in the country, with the assistance of the surveyor of Caroline, to lay off and assign to Mrs. Baylor, one equal third part of both the parcels of land in question, respectively, having regard to quantity 501 and *quality, to be held by her for her dower in the lands: and he ordered a commissioner of the court to take and report an account of the profits from the death of John Baylor, the husband, to the time when the dower should be assigned to the widow, and also an account of all the permanent improvements made by Tod on the lands.

The commissioners in the country, reported that they had proceeded, in pursuance of the decree, "to assign to Mrs. Baylor, 140 acres of land, by metes and bounds, as laid down in the plot [returned with the report], being, in their estimation, one third of the parcel of 300 acres of land conveyed by John Baylor to the defendant, by the deed of November 1801, having regard to quantity and quality"—and also "to assign to her 110 acres of land, by metes and bounds as laid down in the plot, being, in their estimation, one third, according to quantity and quality, of the parcel of land conveyed by Baylor to the defendant, by the deed of October 1803," which parcel was found to contain 328 acres.

The commissioner of the court reported

*The statute of 1792, 1 Old Rev. Code, ch. 90, § 6, Pleasants's ed. pp. 157, 8. A copy of it is given in a note in the report of Langhorne v. Hobson, ante 225. —Note in Original Edition.

an account of the profits, and an account of the value of the permanent improvements that had been made by Tod. He stated the annual value of the whole of the lands, to be 280 dollars; and that the aggregate profits of the whole, at that rate, for the time from the death of Baylor to the assignment of dower to his widow, was 1068 dollars. And he stated the value of the permanent improvements made by Tod, to be 1270 dollars. But it did not appear from the report, whether in his estimate of the profits, he stated the yearly value of the land without reference to Tod's improvements, or the yearly value as enhanced by those improvements.

No exceptions being taken to either report, the chancellor, on the final hearing, approved and confirmed them; and decreed, according to the first report, that Tod should surrender to the widow, the two parcels of land laid off for her dower, and should pay her 356 dollars, being one third of the amount of profits of the whole 502 of the lands, as stated in *the second report. From this decree, Tod appealed to this court.

The cause was argued here, by Stanard for the appellant, and Leigh for the appellee.

I. Stanard insisted, that the court of chancery ought not to have entertained jurisdiction of the case; for the foundation of the jurisdiction of the court, in matters of dower, was the necessity of its aid for a discovery of title papers, and for removing impediments to her rendering her legal title available at law; and whenever, on a bill in equity for dower, doubts have arisen as to the legal title to dower, the constant practice had been to put her to bring her writ of dower. 1 Fonb. Eq. 19, in notes; 1 Rop. on Prop. Husband and Wife, 445, 6; Curtis v. Curtis, 2 Bro. C. C. 620. In the present case, the only question was a mere point of law; namely, whether the wife had so joined in the conveyances of her husband to Tod, as to make them her own, and so to preclude her from demanding dower? She ought to have been sent to a court of law, to try that question and establish her right.

Leigh answered, that however narrow were the grounds on which the court of chancery originally assumed jurisdiction in matters of dower, the jurisdiction was now established on principles that embraced all cases of dower without exception; and this, he said, appeared from the authorities cited for the appellant. It was true, that the practice of the court of chancery in England, when doubts arose as to the legal title of the widow to dower, was to put her to bring her action at law to establish her title, retaining her bill, however, in order to give her relief if she should establish her right at law; a practice that might be proper enough there, but there was no reason for such a practice in our courts, and none such was known here.

II. Stanard contended, that the appellee was a party to both the deeds of her husband conveying the lands in question to Tod; and thereby relinquished her 503 possibility of *dower. That she in-

tended to join in the deeds, there could be no doubt; the only question was, whether she had so executed her purpose, as to make the deeds binding on her, according to the provisions of the statute of conveyances of 1792? She actually signed, sealed and delivered the second deed of October 1803. As to the first deed, that of November 1801, she did not, indeed, sign it; but her husband signed, sealed and delivered it, and there was another seal put to it, which was intended to be hers, and which she recognized as hers in the acknowledgment of the deed made by her to the commissioners; and the very act of acknowledging it and consenting that it should be recorded, was a delivery of it. Therefore, this deed also must be taken to have been sealed and delivered by her, according to the provisions of the statute. Then, with regard to the commissions for her privy examination, and the certificates of the privy examination returned by the commissioners, which were precisely alike in respect to both deeds, he maintained, that, if they did not comply in words with the requisitions of the statute, yet they conformed with them in substance; Langhorne v. Hobson, ante 224; Harvey v. Borden, 2 Wash. 156; Ware v. Cary, 2 Call 263. And he argued, that the statute prescribed the duty to be performed by the commissioners in the privy examination of a feme covert, but did not require that they should state, in their certificate, all the particulars of such privy examination; and there being not the least reason here, to suspect unfairness in the transaction, it ought to be intended; that the commissioners performed their duty in the manner required by law. The extreme nicety and rigor, which would avoid the privy examinations in this case, would be alike applicable, doubtless, to very numerous cases, and would shake most of the land titles in the country derived from femes covert.

Leigh said, it was clear that the appellee had not executed the first deed of November 1801, within the meaning of the statute of 1792; for the statute provided for the privy examination of a feme covert only 504 in respect to deeds sealed *and delivered by husband and wife; and if the sealing and delivery by the wife might properly be inferred from her acknowledgment of the deed on privy examination, the provision that she should have sealed and delivered the deed, was nugatory and idle; since her acknowledgment of the instrument was required in every case, in order to make it binding on her; and if that were tantamount to sealing and delivery by her, it had been enough to require the acknowledgment. But the statute expressly required, that the feme covert should declare that she had willingly signed and sealed the deed: the signing, then was certainly necessary. As to the commissions for the privy examination of the feme covert in this case, he had thought that such commissions, under the statute of 1792, ought to prescribe to the commissioners the essential particulars of the duty which the statute required them to perform, and that if the commission omitted any of them, i

was fatally defective: but the judgment in *Langhorne v. Hobson* obviated all his objections to these commissions; these being in the same form with the commission in that case, and the objections to the commission there having been disregarded, though very strenuously urged. But, certainly, the commissioners were bound to perform the duty required of them by the statute, in all essential particulars, and to certify the execution of the commission to the court. The manner and particulars of the execution of it, could only appear by the certificate thereof: that was to be recorded, in order that it might thereby appear, whether or no the feme covert had been duly examined, and had duly acknowledged the instrument. Now, the statute required that the feme covert, being privily examined by the commissioners, should "declare that she willingly signed and sealed the writing, to be then shewn and explained to her." It was plainly intended that the deed should be shewn to the wife, in order to identify it; that she should be examined as to the identical writing; and that she should acknowledge her signing and sealing of that: but here, the commissioners only certified, that the wife 505 acknowledged "her conveyance of the lands contained in the deeds," not these identical conveyances thereof, nor that she had signed and sealed any conveyance; and though they added that the deeds were annexed to their certificates, such annexations might have been and (for aught that appeared) were made, after the privy examinations were completed. The statute required, not only that the instrument should be shewn to the feme covert, but that it should be explained to her; that the commissioners should inform her of its contents and effect: it constituted them the judicial advisers of the feme covert as to her rights, in order to guard her against a surrender of them through ignorance or weakness: it intended to substitute them when the privy examination was made in pais, in place of the judges when it was made in open court. In *Langhorne v. Hobson*, the commissioners certified that they read the deed to the feme covert. In the present case, they did not certify that the deeds were read to the feme covert, or that they were in any way explained to her, or even that they were shewn to her that she might get a knowledge of their contents for herself; and, for aught that appeared, the acknowledgment which they said she made before them, might have been made in perfect ignorance of the contents, purpose or effects of the deeds. If such privy examinations as these were good and effectual, it would be hard to imagine any that would be faulty and unoperative.

III. Stanard insisted, 1. that if the appellee was entitled to dower of the lands in question, she was not entitled to be endowed thereof as of the increased value produced by the permanent improvements made by the purchaser, Tod; and 2. that she ought to have been endowed of the lands as of the value at the time of the alienation, not as of the increased value, produced by the appreciation of the property from any cause what-

ever, at the time the dower was assigned. He cited *Harg. Co. Litt. 32a*, note 8, from *Hale's MSS. 1 Rep. on Prop. 347*; 4 *Kent's Comm.* 64.

Leigh answered, 1. that it did not appear, that, in the assignment of dower to the appellee, the commissioners had 506 *given her any benefit from the permanent improvements made by Tod; and it was plain enough that they did not: for the attention of the parties had been drawn to the subject of Tod's improvements, since the court had ordered an account of them, and yet no exception was taken to the report of the assignment of dower on this or indeed any other ground. 2. He admitted, that the widow was not entitled to take any advantage of any increase of value produced by improvements made by the purchaser; but he contended, that she was entitled to the advantage of any increased value of the land produced by general causes, unconnected with the improvements made by the purchaser. This was chancellor Kent's opinion, upon a review of the authorities on the point, in his commentaries, vol. 4, pp. 65, 6, 7, and in a note there, he explained that that was the extent to which he intended to go in *Hale v. James*, 6 *Johns. Rep.* 258. The point was most fully and learnedly discussed by Tilghman, C. J., in *Thompson v. Morrow*, 5 *Serg. & Raw.* 289, and by Story, J., in *Powell v. M. & B. Man. Co.*, 3 *Mason* 347. And they held, that the widow was indeed to take no advantage of any increase of value produced by improvements made by the purchaser, but throwing those out of the estimate, she was to be endowed according to the value at the time of the assignment of dower; and, moreover, that there was never any rule of the common law to the contrary. It were strange if there had been. The widow must sustain the loss in case of depreciation of the lands; yet the doctrine contended for denied her any advantage from the rise in value. Besides, the right of dower was a right to one third of the land in kind, of which the husband was seized at any time during the coverture; and it was admitted, that the husband could not by his alienation, bar her of that right: but, according to this doctrine, he might fix conclusively the price of her right of dower, which yet he could not sell, and bind her to take land to the value of one third of the price for which he thought proper to sell.

507 *IV. Stanard objected, that the decree gave the widow profits from the death of her husband; which, he said, she certainly was not entitled to demand against Tod, a purchaser from the husband in his lifetime. The common law gave the widow no damages. The statute of Virginia, 1 *Rev. Code*, ch. 107, § 4, p. 403, taken from the statute of Merton, 20 *Hen.* 3, ch. 1, gave the widow damages only when she was deforced of her dower of lands whereof her husband died seized; and equity, following the law, could give her the profits only in that case.

Leigh said, the courts of chancery went further than the courts of law in respect to the profits of dower lands. *Curtis v. Curtis*, 2 *Bro. C. C.* 620; *Mundy v. Mundy*, 4

Id. 294; *Oliver v. Richardson*, 9 Ves. 222. In *Curtis v. Curtis*, a widow filed a bill against the heir for dower; she and the heir both died pending the suit; and it was admitted that damages were not recoverable at law against a party who was dead; yet the court decreed the profits to the widow's representative; and it was expressly said, that in decrees for doweresses, courts of equity give a remedy beyond what courts of law can give; 2 Bro. C. C. 628. He also cited 1 Rop. on Prop. 447, 8, 9, where it is said, that it is the course of the courts of equity to assign the widow her dower, and universally to give her an account of profits from the death of her husband; and that her right to an account of them in equity, may be inferred against heir or alienee, or their representatives.

CARR, J. The directions of the statute of 1792, as to the privy examination of femes covert by commissioners in the country, touching their acknowledgments of deeds, seem to me clear and explicit. The commissioners are commanded, 1. to examine the wife privily and apart from her husband; 2. to take her declaration that she willingly signed and sealed the deed, which they are then to shew and explain to her; 3. that she consents that it may be recorded. And the commissioners

are to return with their commission, 508 *a certificate, 1. of such privy examination; 2. of such declaration made; and 3. of such consent yielded. It was contended strongly, that the certificate must state also, that the deed was shewn and explained to the feme; but this seems to me to be adding to the requisitions of the law. It is clear, that the commissioners are directed to shew and explain the deed to her, on her privy examination; but this need not be certified; for the law expressly limits the certificate to the privy examination, the declaration, and the consent. Words could not make this plainer, as it seems to me. The certificates are alike in the two deeds before us. They are to the following effect: "We have this day gone to Mrs. Baylor, and examined her privily and apart from her husband" (here is the first requisite of the law, the privy examination, clearly stated) "who makes to us her acknowledgment of the conveyance of the 320 acres of land contained in the indenture hereunto annexed, freely and voluntarily;" that is, as I understand it, who makes to us her acknowledgment, or declaration, that she freely and voluntarily conveyed the 320 acres contained in the indenture thereto annexed; which, to my mind, is a perfectly substantial compliance with the second requisite of the law, namely, a declaration that she willingly signed and sealed the said writing. The certificate proceeds, "and that she is willing the same shall be recorded in the county court of Caroline:" here is the third requisite. My opinion is, then, that to every reasonable and substantial purpose of the law, this is a good and sufficient certificate.

Upon an examination of the deed of 1801, it appears, that though it purports to be the deed of the wife, and she has thus acknowledged the execution of it, yet she has

never in fact signed it. Upon the general doctrine, that sealing and delivery constitute the deed with the persons sui juris, and that, with a feme covert, the privy examination is the vital principle, I was strongly inclined to consider this deed binding on the widow. But the statute of 1792, by requiring the wife to declare 509 on her examination, *that she willingly signed and sealed the deed, raises some doubt, whether the legislature did not contemplate her signing as necessary; and two of my brethren think the deed, for want of this, not binding on her. I therefore yield the inclination of my mind on that point.

The next objection taken to the decree is, that it directs the dower to be allotted according to the present value of the land with all its present improvements, instead of the value at the time of alienation. I consider it the clear rule of the common law; that where a husband aliens during coverture, and the widow claims dower in those lands after his death, she shall not be entitled to dower according to the improved value of the land, but must take her dower according to the value at the time of alienation. Fitz. Abr. tit. Dower, § 192; Perk. tit. Dower, § 328; Harg. Co. Litt. 32a, n. 8, citing Hale's MSS. 1 Rop. on Prop. 346; 4 Kent's Comm. 64; *Humphrey v. Phinney*, 2 Johns. Rep. 484; *Hale v. James*, 6 Johns. Ch. Rep. 258. This doctrine seems to rest on ground similar to that of the recovery of a vendee of land against the vendor, on eviction; which, on great consideration, we have fixed at the purchase money with interest, in *Stout v. Jackson*, 2 Rand. 132, and *Threlkeld v. Fitzhugh*, 2 Leigh 451.

Another objection taken to the decree, is, that the chancellor has given rents and profits from the death of the husband. I think, in a case of alienation by the husband, this was wrong. At law such profits could be given only as to land of which the husband died seized; and I think equity, which takes jurisdiction, in these cases, only from the superiour convenience of its proceeding, ought in this point to follow the law. But for a fuller view of this subject, I refer to the reasons and authorities which will be stated by the president.

CABELL, J., concurred.

510 *BROOKE, J. The statute of conveyances of 1792, requiring that a feme covert shall declare to the commissioners for her privy examination, that she willingly signed and sealed the deed, leaves no ground for a construction that would dispense with that part of the execution of the deed by the feme covert. Although the sealing and delivery of the deed is, by the common law, the essence of its execution, and though when the privy examination is before the court of record, that is all that is required by the statute; yet we cannot intend, that sealing and delivery is all the statute requires, when the privy examination is had before commissioners in the country, against the express letter of the statute. It would be doing great violence to the language of the law, to dispense with signing by the feme

covert. Since seals, except by mere scrolls, have gone out of use, signing is better evidence of the execution of a deed than sealing with a scroll, which may be at all times forged without the probability of detection. When the privy examination of a feme covert is had before a court of record, the signing by her seems not to be required; yet when it is had before commissioners in the country, the signing may have been required as an indispensable guard against fraud. I think, therefore, that the first deed was not duly executed by Mrs. Baylor, according to the statute of 1792.

As to the second deed, which was signed by her, I think the certificate of her privy examination by the commissioners in the country, substantially good and sufficient; and that she has no claim to dower in the land conveyed by that deed. But as to the deed which she did not sign, though the certificate of the commissioners of her privy examination as to it, would also have been sufficient if she had signed it, she is not barred of her dower as to the lands thereby conveyed by her husband by that deed.

Whether she is entitled to be endowed, according to the value of the land at the time of the alienation by her husband, or at the time of the assignment of her dower, is another question. The 4th section of our statute of dower *certainly does not embrace the case before us.

It is, substantially, taken from the statute of Merton, which only provided for the case in which dower is claimed by a feme covert, of lands of which her husband died seized. And this provision was an exception to the rule of the common law in all droitual actions, in which no damages were recovered; and cannot be extended beyond the provision, on any ground of policy or supposed hardship. In truth, in the case before us, it is more than probable, as the value of lands has generally fallen, that the value of the land was much greater at the date of the deed of alienation, than at this time; so that the rule of the common law is a better rule for the feme covert than the rule under the statute. And the rule of the common law is more consonant with the rule established by this court, in the cases of *Stout v. Jackson* and *Threlkeld v. Fitzhugh*; namely, that the value of the land at the date of the warranty, and not at the time of eviction, is the true measure of damages. It would be very hard on the alienee, to subject him to greater damages than he could recover upon the warranty of the husband against the heir, according to the decisions just mentioned. For the rule of the common law in regard to such cases as that now before us, I refer to the authorities cited by judge Carr.

On these grounds, I think the decree of the chancellor must be reversed, and the cause remanded for farther proceedings; in which dower is to be assigned to the appellee, of the lands conveyed by the first deed which she did not sign, according to the value at the date of the alienation by her husband, with the rents and profits

from the suing out the subpoena in this cause.

TUCKER, P. The first question in this case, arises on the construction of the statute of conveyances of 1792. Disencumbering that section of the statute, of those words which are not immediately necessary in deciding this question, it provides that "when husband and wife shall have sealed and delivered a writing purporting to be a conveyance *of any estate or interest, if, before two justices who may be empowered by commission to examine her privily and take her acknowledgment, the wife, being examined privily and apart from her husband, shall declare that she willingly signed and sealed the said writing, to be then shewn and explained to her by them, and consenteth that it may be recorded, and the said commissioners shall return with the said commission, and thereunto annexed, a certificate under their hands and seals of such privy examination and declaration, and consent yielded by her," then the deed shall be binding on the wife.

According to this statute, the commission ought to recite, that the husband and wife had sealed and delivered a conveyance purporting to be a conveyance [here setting forth succinctly of what, or otherwise referring to the writing so as to describe it] and should empower the justice to examine her privily and take her acknowledgment of the said writing; and such commission, without more saying, would be good; for it is in the words of the law. And even if not literally in those words, yet if it be substantially so, it will suffice, or many titles in the country would be shaken. Thus, in the present case, though it is not stated, in terms, that the parties had sealed and delivered a conveyance, it is stated that "by indenture (which is a writing sealed and delivered) dated the 12th October 1803, they had sold and conveyed" an estate &c. This is a substantial compliance, and therefore good.

Now as to the certificate. The law is not content with the justices merely echoing the commission, by certifying that they had privily examined the wife, and she had acknowledged the writing; but it goes on to prescribe what shall be certified by them. The wife, being examined privily and apart from her husband, must declare that she willingly signed and sealed the writing, to be then shewn and explained to her; and must consent that it be recorded. The justices are then to certify such privy examination (that is, that she was examined privily and apart from her husband) and such *declaration made (that is, that she willingly signed and sealed the writing) and such consent yielded by her (that is, that it be recorded). Nothing can be more clear than the construction of this clause, except as to the words "to be then shewn and explained to her:" they do not seem, by a literal construction, to require the fact of shewing and explaining the deed to be expressly certified; for they stand out, as it were, from the rest of the clause, and seem merely directory. Yet, as in acts in pais,

those presumptions are not usually made, that every thing has been rightly done unless the contrary appears, which are made by law in relation to the transactions of a court, it has been always my impression that, in strictness, this matter also must be certified or must in some form appear. If the question was now of the first impression, I should be for construing the statute with very great strictness. It prescribes the mode in which a person may convey, whose power of conveying was before circumscribed to the forms known to the common law. It is an innovation upon that law; it prescribes a form of conveyance unknown to it. It ought, therefore, to have been required to be strictly complied with: a literal compliance would not indeed have been demanded, but a substantial compliance in every thing material. I fear, however, that the practice of the country, ever since the introduction of the commission, has been very far from conforming to the requisitions of the law, with any thing like strictness. The alternative is therefore presented, of abating somewhat of this rigor, or of running the risk of shaking land titles. If the case of dower was alone in question, it would be less important, but conveyances of the maiden land of femes covert would also be involved. Our predecessors, accordingly, seem to have been cautious in their decisions upon the laws which were the originals of this statute. In *Harvey v. Borden*, 2 Wash. 156, it did not appear from any part of the record, that the commissioners were justices of the peace, as was required by the statute of 1748; they were not so styled in the commission: yet

514 the court overruled "the objection, judge Roane saying, 'the law requires the clerk to direct it to such persons, and he ought not to be presumed to have done wrong;'" and judge Fleming said, "I do not think that we carry the doctrine of presumption beyond its accustomed limits, when we say, that to support this deed we will intend that the law has been obeyed unless the contrary appear." In *Ware v. Cary*, 2 Call 263, the names of the justices were omitted; the commission was directed to — gentlemen justices; it was executed by two persons, who certified "that they acted by virtue of the commission thereto annexed," but they did not say "directed to us," nor did they certify that they were justices of the peace: yet the objection was overruled. Influenced by like considerations in the recent case of *Langhorne v. Hobson*, this court overruled the objections to the commission and privy examination, and ratified the title of the purchaser.

What, then, let it be asked, is essential in the certificate? The answer is, that it should ascertain satisfactorily, in some form or other, those facts which the law deems essential to the transfer of the title of the feme. Those facts are, 1. her privy examination apart from her husband; 2. her knowledge of the nature of the act done; 3. her acknowledgment of the conveyance; 4. her declaration, that that acknowledgment is free and voluntary; and 5. and last, her consent that

it may be recorded. If these facts substantially appear, the certificate is good; and though not certified in so many words, if they satisfactorily appear, it will suffice. Now in this case, it is expressly certified, 1. that the feme was privily examined apart from her husband; and 2. that she acknowledged the conveyance of the 320 acres of land contained in the indenture thereto annexed. 3. Her knowledge of the nature of the act she was doing, appears from the certificate that she acknowledged the conveyance of the 320 acres contained in the deed; for how could they certify that fact, unless she knew that that deed did convey that 320 acres? 4. This acknowledgment was made freely and voluntarily; and lastly, she consented it should be recorded.

515 "If this certificate be not sufficient, I fear there are few that are so in the commonwealth. I have examined the records of the circuit and hustings courts here. The following form is that which seems to have prevailed previous to 1819. It was printed at the foot of the printed commission. "Pursuant to the within commission, we did this day examine the within named A. B. privily and apart from her husband, and made known to her the contents of the annexed indenture, when she acknowledged the same to be her act and deed, declaring to us that she did the same freely and voluntarily, without the persuasions or threats of her said husband, and was willing the said deed should be recorded." Here, there is no direct allegation that the deed was shewn to the feme, or that she acknowledged that she signed the same.

I am, then, of opinion, that the deed of October 1803, was duly executed to bar the widow's claim of dower.

I am however of a very different opinion as to the other deed, that of November 1801. For, though the certificate is the same, the fact is not according to the declaration and acknowledgment. When it is certified, that the feme acknowledged the deed, we may safely imply that she acknowledged that she had signed and sealed it, if upon the face of the deed, she appears to have signed and sealed it. But if the writing be in fact signed, without being sealed, her acknowledgment would not prove it to be sealed; and e converso, if it be sealed without being signed, the acknowledgment cannot justify the inference that it was signed, contrary to the express fact. And although we do not require the certificate to be in the express language of the law, neither do we dispense with any part of the law. We only consider the language used, as if it was the very language of the law. The purchaser's case can certainly be no better for its variance from that express language. Now, if the commissioners had followed the law literally, they would not have certified that the wife declared she had willingly signed and sealed, because she had not signed. Or

take it to have been so certified; then 516 it is certified that she had *signed, when in fact she had not; so that the certificate or declaration is falsified. It was said, indeed, that this word signing has been here introduced inadvertently.

But of this we are not entitled to judge: *ita lex scripta est*. It is more probable, that the legislature considered signing a necessary concomitant of every deed or conveyance. I am not prepared to dive into its motives, but if it be true at this day, that deeds are in general to be considered good though not signed, I think it is at least fortunate that in relation to *femes covert*, an exception to the rule may be inferred. It only remains on this part of the subject, to say, that I do not think the acknowledgment of the seal can be an acknowledgment of a signing, or that the insertion of the name of the *feme* in the body of the deed, can help the case.

The widow is, I think, clearly entitled to dower in the 300 acre tract, conveyed by the deed of November 1801.

In this view of the case the decree must of course be reversed; and, therefore, an examination whether it did nor did not exclude the improvements in the order to lay off the dower, is unnecessary. On that point, I shall only say, that I think the law very clear, that, in laying off the dower, the improvements made by the purchaser, should be excluded from the estimate, except that improvement in the productive character of the soil which arises from the course of husbandry. In like manner, I am of opinion, that the accession of value arising merely from the progress of society, and the general progressive increase in the value of lands consequent upon increasing wealth and population, cannot be thrown into the scale of the purchaser, or diminish the quantity of land to which the widow will be entitled. But on this point my brethren differ from me.

As to the profits: I have always thought, that, as the alienee is not liable at law for rents and profits, because the statute of Merton copied in the 4th section of our statute of dower, only gave damages where the widow was deforced of lands whereof the husband died seized, so neither ought she to recover them in equity. It

517 seems to me an absurdity, *that in matters of concurrent jurisdiction, there should be different measures of redress in the two courts. It is yet more strange, that when, with a view to affording facilities to the dowress, jurisdiction is entertained of her case, instead of leaving her to her legal remedy against a party claiming a legal title, her remedies should be so vastly enlarged by this assumption of jurisdiction: and it is most of all strange, when the statute limits the damages to one class of cases, and excludes them from another, that a court of equity should repeal or add to the act of the legislature. I do not think there is an adjudged case to justify it, in the case of the alienee. *Curtis v. Curtis* was cited to prove that equity will go farther than the law in giving a remedy to the dowress: for although at law, the action against the heir as a deforcer, dies with him in respect to the damages, because it is in the nature of a tort, yet in that case, the demand for profits was sustained though the heir died before the decree. But it is to be observed, that the court proceeded mainly on the idea that the dowress brought her suit in

the lifetime of the heir, and waived the trespass by bringing her bill in equity; and I am aware of no case in which the bill lies for *mesne profits*, unless filed before the death of the heir. That cases have been decided in New York, on this point, favorably to the widow, cannot be denied; *Swaine v. Perine*, 5 Johns. Ch. Rep. 492; *Hale v. James*, 6 Id. 258. But these cases are not authority for us, where they are neither sustained by the current of decisions of those tribunals from which we have drawn our law, nor are consistent with its acknowledged principles. There is no such current of authorities in favour of the widow's right to profits against the alienee. In *Dormer v. Fortescue*, 3 Atk. 124, 131, lord Hardwicke, in deciding another point, incidentally mentions the case of a widow, and states that in some cases she will be decreed profits from the time her title accrued; but, even in this incidental remark, he takes a distinction: where the widow cannot proceed at law be-

cause of a term that is in her way, 518 the court will give her *profits from the time her title accrued; but where the term is out of her way, and she has no need to come into this court, it would have been otherwise. That is, in effect, the court of equity alone having jurisdiction in the first case, administers relief at its pleasure; but having only concurrent jurisdiction in the latter, it follows the law, and gives profits only as the law would give them. It is proper to add also, that lord Hardwicke does not advert particularly to the case of the alienee. The case of *Curtis v. Curtis* was a case against the heir as was also the case of *Mundy v. Mundy*, 2 Ves. jr. 122, and so, I think, we must take *Oliver v. Richardson*, 9 Ves. 222. There being, then, no direct controlling authority, and the two jurisdictions being concurrent as to this matter, I think the court of equity should follow the law, and give no damages in dower against the alienee, except from the date of the decree.

With these views, I am of opinion to reverse the decree and send the cause back for further proceedings.

Decree reversed, and the cause remanded to the court of chancery for further proceedings, in which dower should be assigned to the appellee of the land conveyed by the deed of her husband which she did not sign, (that of November 1801) according to the value of the land at the date of the deed; and an account should be taken of the profits, from the suing out of the subpoena in the cause.

519

*Butcher v. Hixton.

May, 1838.

Debt on Note—Statute of Limitations—Subsequent Acknowledgment.—In debt upon a promissory note against H. and B.—H. being the principal debtor and B. the surety, and the declaration counting on the note alone.—B. pleads severally, the statute of limitations, the plaintiff replies generally, and issues: **Held**, that proof of an acknowledgment of the debt by H. the principal, within five years next before the action brought, does not sustain this issue on the plaintiff's part. **Same—Same—Same—Declaration.***—If in any case of

*Debt on Note—Statute of Limitations—Subsequent Acknowledgment—Declaration.—To the point that

an action of debt on simple contract, the plaintiff would rely on a subsequent acknowledgment to take the case out of the statute of limitations, it seems, he must count on such subsequent acknowledgment in his declaration; otherwise, in an action of assumpsit.

Debt on a promissory note of one Hart and the appellant Butcher to Hixton, brought in May 1826, by Hixton against the makers, in the county court of Randolph. The declaration was in the usual form, alleging the execution of the note by the defendants, and the failure and refusal of both and each to pay the money. The defendants pleaded payment, jointly; and Butcher, severally, pleaded the statute of limitations. The plaintiff replied generally to both pleas, and thereupon issues were made up.

The evidence at the trial, was, 1. the promissory note on which the action was founded; which was a note of Hart and Butcher to Hixton, dated the 26th October 1819, for 126 dollars payable the 15th September 1820, with credit indorsed on it for four dollars paid on the 22nd August 1822; and 2. proof that Hart, within the five years next before the action brought, acknowledged that the debt mentioned in the note was unpaid and justly due; that Hart, however, was now insolvent, though he was solvent at the time the note fell due; and that Hart was the principal debtor, and Butcher was only his surety. And this being all the evidence, Butcher demurred thereto, as not sufficient to maintain the

action against him; and the plaintiff joined in the demurrer.

There was a verdict for the plaintiff, subject to the opinion of the court on the demurrer to evidence. The county court held that the law on the demurrer was for the plaintiff, and gave him judgment against both defendants. Butcher
520 *appealed to the circuit court, which affirmed the judgment; and then he appealed to this court.

Johnson, for the appellant.

Robinson, for the appellee.

CARR, J. The question is whether the evidence supports the replication of the plaintiff to the plea of the statute of limitations? To my understanding it is clear, that it does not; and this, whether we look at the point in issue upon the pleadings, or the plain words and clear meaning of the statute. This is not an action of assumpsit, but debt; there are no money counts in the declaration; no count of insimul computassent. The single point is, whether the cause of action accrued within five years; and the single cause of action counted on, is the note. Now, how is this point supported by the evidence demurred to? First, there is the promissory note; which, so far from proving that the cause of action accrued within the five years next before the commencement of the suit, proves exactly the reverse. The next evidence is the indorsement on the note. I do not mean to say that this, standing alone, is proof of

in an action of debt on a promissory note, the case will not be taken out of the statute of limitations by proof of the new promise unless there is a general *indebitatus* count in the declaration, the principal case is cited in *Bell v. Crawford*, 8 Gratt. 123; *Farmers Bank v. Clarke*, 4 Leigh 609. In this last case, TUCKER, P., said that the principal case was not conceived to go farther than to establish the necessity of bringing *assumpsit*, or adding a count on *indebitatus assumpsit* to the declaration in debt, where reliance is to be placed upon an acknowledgment or promise to avoid the bar of the statute of limitations.

BROOKS, J., in *Farmers Bank v. Clarke*, 4 Leigh 608, 609, said that he concurred in the opinions of the president and JUDGE CARR in the principal case, solely on the ground, that the acknowledgment of Hart, the principal in the note, could not be considered as a waiver of the statute of limitations by Butcher, the surety, and that he did not think it material to decide any other point made in the argument; that the acknowledgment in the principal case, being defective in two respects, as a waiver of the statute, it was unnecessary to decide the question, whether it was within the issue in that case.

JUDGE CARR, in his opinion in *Farmers Bank v. Clarke*, 4 Leigh 607, said: "It is not necessary to examine the more general proposition discussed in the argument, whether in debt on a promissory note, any subsequent acknowledgment can be resorted to, to take the case out of the statute. However, as the case of *Butcher v. Hixton* (ante, 519), in which that point was decided, has excited some remark, I shall barely say, that the case was very ably argued; that for myself, I examined it very laboriously; and that on a re-examination, I continue to think the opinion there given correct, whether we take it upon the pleadings, upon the plain meaning of the statutes, upon principle, or upon authority."

See monographic note on "Limitation of Actions" appended to *Herrington v. Harkins*, 1 Rob. 501.

Statute of Limitations.—Subsequent Acknowledgment.—Sufficiency.—The subsequent promise or acknowledgment, to take a case out of the statute of limitations, ought to be such a one as if declared upon would support an action of itself; that is, it must be an express promise to pay, or such an acknowledgment of a balance then due, unaccompanied by reservations or conditions, as that a jury ought to infer from it a promise to pay. As recognizing this doctrine, cases of *Butcher v. Hixton*, 4 Leigh 519, and *Farmers Bank v. Clarke*, 4 Leigh 603, were

cited in *Aylett v. Robinson*, 9 Leigh 45. See also, *foot-note* to this case.

And in *Dingild v. Schoolfield*, 32 Gratt. 808, JUDGE BURKS, who delivered the opinion of the court, said: "If an acknowledgment is relied on, says JUDGE PARKER, it ought to be a direct and unqualified admission of a present subsisting debt, from which a promise to pay would naturally and irresistibly be implied. *Sutton v. Burruss*, 9 Leigh 381. If there be an unequivocal admission that the debt is still due and unpaid, unaccompanied by any expression, declaration or qualification indicative of an intention not to pay, the state of facts out of which the law implies a promise is then present, and the party is bound by it. *JOHNSON, J.*, in *Young v. Monpoe*, 2 Bailey (So. Car.) 278. It is needless to multiply authorities for the proposition stated, but the following may be consulted: *Bangs v. Hall*, 2 Pick. R. 368; *Bally v. Crare*, 21 Pick. R. 323; *Russell v. Copp*, 5 N. Hamp. R. 154; *Head's Ex'x v. Warner's Adm'rs*, 5 J. J. Marshall R. 255; *Peoples v. Mason*, 2 Dev. R. 387; *Aylett's Ex'or v. Robinson*, 9 Leigh 45; *Sutton v. Burruss*, 9 Leigh 381; *Butcher v. Hixton*, 4 Leigh 519; opinion of MONCURE, J., in *Bell v. Crawford*, 8 Gratt. 110."

For further information, see *foot-note* to *Sutton v. Burruss*, 9 Leigh 381, and other notes there cited; monographic note on "Limitation of Actions" appended to *Herrington v. Harkins*, 1 Rob. 501.

Same.—Same.—Action on Old Contract.—In *Bowles v. Elmore*, 7 Gratt. 391, JUDGE MONCURE, delivering the opinion of the court, said that it had long been a vexed question, whether, where a new promise is made to pay a debt barred by the act of limitations, the action might be brought on the old contract. The judge then cites the principal case, and *Farmers Bank v. Clarke*, 4 Leigh 603, and says that two of the judges in these cases contended that the action should be brought on the new contract; but that the question was not decided in these cases and had never been decided in Virginia. In this case, JUDGE MONCURE left the question till unsettled as it did not affect the case at bar. See the principal case also cited on this point in *Bell v. Crawford*, 8 Gratt. 123; *Horne v. Speed*, 2 Pat. & H. 621. In the first of these two cases, it was said that the proviso in the statute of limitations of April 1838, was produced by the opinions expressed by some of the judges in the principal case and *Farmers Bank v. Clarke*, 4 Leigh 603.

For further information, see monographic note on "Limitation of Actions" appended to *Herrington v. Harkins*, 1 Rob. 501.

any thing; but taking it as proof of a partial payment, it is relied on to shew an admission, that, at its date, the note was unpaid; and this it does shew; and the plaintiff has also expressly proved, that the defendant Hart, within the five years, admitted that the debt was just and unpaid. But does this support the issue? does it shew that the cause of action accrued within the five years? Assuredly not, unless we can say, that this acknowledgment of the debt does not operate as a new promise, but draws down the original promise to the time of the acknowledgment; and this it is impossible to say, in this action of debt, founded on the promissory note alone. Indeed, there are many cases, in the english books, to shew, that in actions of assumpsit, the subsequent acknowledgment must be taken as a new substantive promise; and this (when I come to cite these

521 cases more particularly) *will shew the distinction in this respect between debt and assumpsit. What says the statute of limitations on this subject? All actions upon the case (other than slander) and all actions of debt grounded on any lending or contract without specialty, shall be commenced and sued within five years next after the cause of such action, or suit, and not after. This statute is taken from that of the 21 Jac. 1, ch. 16, only substituting five years for six. It would seem to me difficult for the legislature to have selected terms more clear and unambiguous, than those used in this law; and yet we shall see, that by the course of judicial legislation pursued by the english courts, they have made them to mean, sometimes one thing, sometimes another, and sometimes nothing at all. Happily, the more recent decisions, are bringing the subject back to the plain common sense of the statute; at least, the judges seem disposed to come as near to it, as the trammels of inveterate practice and precedent, will permit them. With us, there are no such trammels; for I believe this is the first time, that the point now in discussion, has come directly before this court.

I do not know, that I can so well state the course of decision on this subject, as by quotations from some of the able judges who have presided in the english courts, within the last fifteen or twenty years. In *A'Court v. Cross*, 3 Bing. 329, 11 Eng. C. L. R. 124, chief justice Best says, "I am sorry to be obliged to admit, that the courts of justice, have been deservedly censured for their vacillating decisions on the 21 Jac. 1, ch. 16. When by distinctions and refinements, which, as lord Mansfield says, the common sense of mankind cannot keep pace with, any branch of the law is brought into a state of uncertainty, the evil is only to be remedied by going back to the statute; or if it be in the common law, settling it on some broad and intelligible principle.—The statute says, that actions on the case, account, trespass, debt, detinue, and replevin, shall be brought within six years after the cause of action, and not after. These actions, it will be observed, are mentioned in the same

must be brought, is the same in all of them. In all of these except assumpsit, the six years commences from the moment there is a cause of action, and that time cannot be enlarged by any acknowledgment. But in assumpsit, it has been holden, that although six years have elapsed since the debt was contracted, if the debtor promises to pay it within six years, he cannot avail himself of this statute, because this promise, founded on a moral consideration, is a new cause of action. It seems to me, the plaintiff should have been required to declare specially, on this new promise, and ought not to have been permitted to revive his original cause of action, for which the statute expressly declares no action shall be brought. By the present practice, the defendant has not such distinct information as, I think, he is entitled to, that the plaintiff means to avail himself of some promise, to recover a stale demand. The real cause of action is kept intirely out of view, and one that cannot be supported is brought forward. This is inconsistent with what is said to be the intent of special pleadings. The courts however have not stopt here; they have said, acknowledgment of a debt is sufficient, without any promise to pay it, to take the case out of the statute. I cannot reconcile this doctrine either with the words of the statute, or the language of the pleadings. The replication to the plea of non assumpsit *infra sex annos*, is, that the defendant did undertake and promise within six years. The mere acknowledgment is not a promise to pay it. It has been supposed, that the legislature only meant to protect persons who had paid their debts, but from length of time had lost or destroyed the proofs of payment. From the title of the act to the last section, every word of it shews, that it was not passed on this narrow ground. It is, as I have often heard it called by great judges, an act of peace. Long dormant claims, have often more of cruelty than of justice in them. The legislature thought, that if a demand was not attempted to be en-

forced within six years, some good
523 excuse for the non-payment *might be presumed, and took away the legal power of recovering it." Again, in *Scales v. Jacob*, 3 Bing. 638, 13 Eng. C. L. R. 85, the same distinguished judge makes the following sound and excellent remarks: "The two best statutes in our books are, the statute of frauds and the statute of limitations; but, unfortunately, the judges in Westminster hall, have taken a different view of the subject; and, until recently, a struggle seems to have been made to avoid the effect of those statutes. It is curious to observe the progress of opinion on this subject. At first, it seems, the judges were with the statute, and in *Dixon v. Thompson*, 2 Show. 126, *Scroggs, J.*, and the bar on both sides were agreed, that there must be an express promise to take the case out of it. The same point was ruled, in *Bass v. Smith*, 12 Vin. Abr. 229, and in *Lacon v. Briggs*, 3 Atk. 105, it was still held, there must be a promise, although the court considered it somewhat hard. Then, in *Hyleing v. Hastings* [1 Ld. Raym.

389; Com. Rep. 54], by the opinions of ten judges, after much consultation, it was determined that an acknowledgment of the debt, was at the utmost only evidence from which a promise to pay might be inferred by a jury; but that if a jury found only the bare acknowledgment, it would not be sufficient. After this, equity lawyers came into the courts of common law. Lord Mansfield brought with him into those courts, equitable notions of the statute of limitations; and held that a bare acknowledgment of the debt, even after action brought, would be sufficient to support the action, although not commenced till after the expiration of six years. Lord Loughborough entertained the same opinion. The court of king's bench adhered to it, till ultimately the principle was carried to such a degree of absurdity, that a declaration of a defendant that he would not pay (*Dowthwaite v. Tibbut*, 5 Mau. & Sel. 75), was holden a sufficient acknowledgment to take the case out of the statute." The judge then states the case of *Hellings v. Shaw*, 5 Taunt. 608, where the court of common pleas (*Gibbs, C. J.*) came to a different 524 decision; and refers to, "and approves of all he had himself said in *A'Court v. Cross*. He then says, "Having disposed of the cases, I come next to the statute. If the language of that is clear, we are especially bound to adhere to it, where there is a conflict among the decisions; and the language of this statute is so clear, that if it were not for the decisions, a doubt would hardly be raised upon it. It has been argued, that the object of the statute was to protect those who had lost the evidences of their payments. This I deny. The title of the act is proof to the contrary; An act, for limitation of actions, and for avoiding suits in law, and the preamble is, For quieting men's estates, and avoiding suits." (See 3 Hen. Stat. at Large 381, our statute of 1705, 4th year of Queen Anne, with a like title, An act for limitation of actions, and avoiding of suits, and the preamble, For avoiding of law suits. And in the revival of 1748, there is the same title and preamble, 5 Id. 513.) The judge proceeds: "After appointing various periods of limitations for other actions, the act provides, that all actions on the case, other than for slander, shall be commenced and sued within six years next after the cause of such actions, and not after. But it has been argued, that by an acknowledgment after the six years, a new cause of action is created, from which a promise may be implied. Yet in ejectments and the other forms of action, besides assumpsit, enumerated in the statute, no acknowledgment after the allotted time will create a new cause of action, although the statute was passed on the same principles with respect to those actions as with respect to assumpsit. It is not a statute to protect parties against loss of evidence, to quiet claims."

There are many cases going to shew, that the old doctrine, that the acknowledgment of a debt was a continuation of the original promise, is exploded. *Hurst v. Parker*, 1 Barn. & Ald. 92; *Green v. Crane*, 2 Ld. Raym. 1101; *Sarell v. Wine*, 3 East

409; *Ward v. Hunter*, 6 Taunt. 210; 1 Eng. C. L. R. 359; *Pittam v. Foster*, 1 Barn. & Cress. 248; 8 Eng. C. L. R. 67. In 525 this last case, chief justice Abbott said, "The question is, whether an acknowledgment within six years operates as a new substantive promise, or draws down the original promise to the time when the acknowledgment is made? In *Hurst v. Parker*, lord Ellenborough says, that in assumpsit, an acknowledgment of the debt is evidence of a fresh promise. If that be not so, but on the contrary the acknowledgment is to have the effect of drawing down the original promise, then in an action by an executor, upon promises made to the testator, evidence of a promise made to the executor would support the issue; but the reverse was decided in *Green v. Crane*." And he added, that *Ward v. Hunter* (to the same effect) "was determined at a time when lord chief justice Gibbs presided in the common pleas, than whom, no judge was ever more perfectly acquainted with the rules of pleading."

In *Bell v. Morrison*, 1 Peters 371, judge Story delivering the opinion of the court, and speaking of the power of a partner, after dissolution, to bind the firm by the acknowledgment of a prior debt, says, "We think the proper resolution of this point, depends upon another, that is whether the acknowledgment or promise is to be deemed a mere continuation of the original promise, or a new contract springing out of and supported by the original consideration? And we think it is the latter, both upon principle and authority."

I must add one more to this list of cases: *Tanner v. Smart*, 6 Barn. & Cress. 603, 13 Eng. C. L. R. 273, decided by the court of king's bench in 1826. The opinion is delivered by lord Tenterden, and I shall continue to quote his words, because I think it the fairest and most impressive manner of stating the authority. He says, "The action was in assumpsit. Issue was joined upon the statute, and the acknowledgment proved was, I cannot pay the debt at present, but I will pay it as soon as I can. The point, therefore is, whether this is such an acknowledgment as, without proof of any ability on the part of the defendant, takes the case out of the statute?"

526 There are, undoubtedly, "authorities that the statute is founded on the presumption of payment; that whatever repels that presumption, is an answer to the statute, and that any acknowledgment which repels the presumption is, in legal effect, a promise to pay the debt; and that though such acknowledgment is accompanied with only a conditional promise, or even a refusal to pay, the law considers the condition or refusal void, and considers the acknowledgment of itself an unconditional answer to the statute." And after referring to the cases touching this doctrine, he proceeds: "But if there are conflicting authorities upon the point, if the principles, upon which the authorities I have mentioned are founded, appear to be doubtful, and the opposite authorities more consonant to legal rules, we ought to grant a new trial." He then quotes the words of

the statute, and proceeds," though this statute puts all these actions upon the same footing, it is only in actions of assumpsit, that an acknowledgment has been held an answer; and when in the case of *Hurst v. Parker*, it was decided to be inapplicable to actions of trespass, lord Ellenborough gave what appears to be the true reason, that in assumpsit an acknowledgment of the debt is a fresh promise, and that promise is considered as one of the promises laid in the declaration, and one of the causes of action which the declaration states. If an acknowledgment, had the effect, which the cases in the plaintiff's favor attribute to it, one should have expected that the replication to a plea of the statute would have pleaded the acknowledgment in terms, and relied upon it as a bar to the statute; whereas the constant replication, ever since the statute, to let in evidence of an acknowledgment, is, that the causes of action accrued (or the defendant made the promise in the declaration) within six years; and the only principle upon which it can be held to be an answer to the statute, is this, that an acknowledgment is evidence of a new promise, and as such constitutes a new cause of action, and supports and establishes the promises which the declaration states. Upon this principle, whenever the acknowledgment

527 supports any of the *promises in the declaration, the plaintiff succeeds; when it does not support them, (though it may shew clearly, that the debt never has been paid, but is still a subsisting debt) the plaintiff fails." The chief justice then cites and comments on all those cases shewing that an acknowledgment is a new promise; and concludes this point thus: "All these cases proceed upon the principle, that under the ordinary issue on the statute of limitations, an acknowledgment is only evidence of a promise to pay; and unless it is conformable to and maintains the promises in the declaration, though it may shew to demonstration that the debt has never been paid, and is still subsisting, it has no effect."

Therefore, upon the pleadings in the case before us, upon the plain words and meaning of the statute, upon principle, and upon authority, I am clearly of opinion, that the evidence demurred to does not support the issue on the plaintiff's part; and that the judgment ought to be reversed and judgment entered for the appellant.

CABELL and BROOKE, J., concurred in the opinion, that there was nothing to take the case out of the statute of limitations, and that the law on the demurrer to evidence was for the appellant.

TUCKER, P. The question on this demurrer to evidence, which I think it material to consider, is, whether the action of debt on the note can be sustained by evidence of an acknowledgment that it was due, the day of payment of the note, being more than five years before the commencement of the action?

It is laid down, as a general rule, that the statute of limitations must be pleaded, and cannot be given in evidence on the general issue; 4 Bac. Abr. Limitation of actions, F. p. 484; 2 Wm. Saund. 63, a, b. To this

rule we have an admitted exception in the action of detinue; and at an early day lord Holt was of opinion, that the action of debt formed another exception, for he thought the statute was proper evidence *under the plea of nil debet.

Draper v. Glassop, Salk. 278. This opinion does not seem to have been universally acquiesced in: 1 Wms. Saund. 283, n, 2; *Lindo v. Gardner*, 1 Cranch 343; Id. append. 465; *Pearsal v. Dwight*, 2 Mass. Rep. 87. And it would, perhaps, have been as well that it never had obtained. The importance of requiring the statute to be specially pleaded, is obvious from the surprise to which both plaintiff and defendant are exposed by the contrary course. The plaintiff is met at the trial by the defence of the statute; and the defendant on his part, who makes the defence, is utterly in the dark as to which of the various exceptions to it, the plaintiff may rely upon; whereas if the statute be specially pleaded, the exception must be specially replied; *Bogle v. Conway*, 3 Call 1. It must be admitted, however, that in *Murdock v. Herndon's ex'ors*, 4 Hen. & Munf. 200, and in *Beattie v. Tabb's adm'rs*, 2 Munf. 254, the opinion of lord Holt is strongly countenanced; and in the former judge Roane goes so far as to intimate, that under the plea of nil debet, the effect of the statute might be rebutted by proof of recent acknowledgments. The question not having been debated, and the court not being full, I shall not venture to controvert the principle thus recognized by this court. I shall consider the matter in both aspects, though the defendant in this case has chosen to plead specially; which he ought not to have done if the matter was proper evidence under the general issue; 5 Bac. Abr. Pleas and Pleadings, G. 3, p. 370; *Boot v. Wilson*, 8 East 311.

First, then, upon the supposition that the statute of limitations must be specially pleaded, it seems to me to be obvious, that a subsequent acknowledgment or promise cannot support the action. Thus, the plea in this case is, that the action did not accrue within five years: what action? the action on the note. Now, if the action on the note did, as is manifest, accrue more than five years before the suit, how can the jury find this issue for the plaintiff, upon the proof that the defendant had subsequently acknowledged the debt

529 *to be due? That subsequent acknowledgment might, indeed, give a new cause of action, and be the foundation of an action of assumpsit; and with or without an express promise to pay, it might be the foundation of another action of debt. But certainly it does not sustain this action of debt. This action of debt rests for its support upon a note, of a certain date and payable at a future time. The proof is of an oral promise at another date, to pay at a different time, for the original day of payment was past. Do the allegata and probata correspond? If a written note, varying from that described in the declaration, in a single cent, or in the day of payment, had been offered in evidence, it must have been rejected as not supporting the action; and though it is

admitted that assumpsit on an oral contract may be sustained by an agreement in writing to the same effect, *M'Williams v. Willis*, 1 Wash. 199, 202, yet it cannot be pretended, that an action of debt on a promissory note, could be sustained by evidence of an oral acknowledgment of debt, or by any express promise by words, to pay the sum demanded in the declaration. I am, therefore, of opinion, that upon this issue, the evidence is not sufficient to sustain the plaintiff's action.

Would the case be materially altered, if we view it, secondly, upon the supposition that the plea had been *nil debet*? I think not. In that aspect also, the same difficulties would present themselves. The evidence introduced shews the cause of action set forth in the declaration to be barred, and that which is offered to avoid the bar, is an acknowledgment of debt which does not fit or support the declaration. If there had been the most express promise, it would not have sustained it, because the contract therein set forth is not the same, but another. The *allegata* and *probata* do not correspond.

It is said, however, that this objection has been made in the english courts, in the action of assumpsit, and overruled; *Leaper v. Tatton*, 16 East 420. It was well answered, that even in the action of assumpsit the inveterate practice
530 *alone has prevented the court from requiring the plaintiff to declare on the special promise; *A'Court v. Cross*, 3 Bing. 329; 11 Eng. C. L. R. 126; *Upton v. Else*, 12 Moore 303; 22 Eng. C. L. R. 451. Besides, there is confessedly a looseness in the action of assumpsit, which, is unknown to the action of debt, and where there are money counts in the declaration, there could be no difficulty in sustaining the action by proof of a subsequent promise, whether it was looked upon a new promise, or as drawing down the original cause of action to the date of the subsequent acknowledgment.

It may perhaps be supposed, that the effect of the subsequent acknowledgment or promise, is not to create a new cause of action, but to revive the old, and to draw it down to the subsequent date. I do not think so. It is obvious, that, in this regard, there is no difference between an acknowledgment of a preexisting debt, and an express promise to pay it. For an acknowledgment of debt as much constitutes a right of action as any promise however express. I shall, therefore, in the following remarks, make no difference between them.

The various and conflicting opinions upon the statute of limitations, form a topic of frequent remark in courts of justice. The attempt to reconcile them would be vain and futile, since they are on all hands conceded to be contradictory. No sooner had the statute passed, than ingenuity began to exert itself, in order to elude its operation. The first attempts were resisted, and an express promise was held necessary. 2 Show. 126; 12 Vin. Abr. Evidence, T. b. 63, pl. 4, p. 229; *Hyleing v. Hastings*, 1 Ld. Raym. 389. But subsequent decisions seem to have operated, in effect, a repeal of the statute. It had provided, that the actions enumer-

ated should be brought within five years next after the cause of action or suit, and not after: yet the courts decided, that though the action was barred by the statute, it was revived by a new promise; and it must be confessed, that instead of considering the new promise as a new cause

531 *of action, they considered it as reviving the old promise or original cause of action. So far indeed, was the notion carried, that, in the time of lord Mansfield, it was decided, that an acknowledgment of the debt after the commencement of the action, would take it out of the statute; *Yea v. Fouraker*, 2 Burr. 1099. This leaves no doubt, that the old promise was considered as revived, and the operation of the statute as put out of the way by the acknowledgment. And even to this day, there are many who take this view of the subject. Thus, in *Scales v. Jacob*, 3 Bing. 638; 13 Eng. C. L. R. 85, 90, *Burrough, J.*, says, that the acknowledgment within six years keeps the debt alive, though he admits that a new promise after six years, creates a new obligation. See also the case of *Upton v. Else*, before cited. And in *Leaper v. Tatton* (where the promise was after six years), lord Ellenborough says, "it is the common practice to declare on the original contract, and the only question is, whether the defence given by it has been waived." Moreover, in *Dowthwaite v. Tibbut*, 5 M. & S. 75, where the defendant acknowledged the debt but refused to pay, the acknowledgment was held sufficient; and must therefore have had the effect of reviving the original debt, since the refusal to pay was certainly no new promise. The same principle is found in *Bryan v. Horseman*, 4 East 599. And in *Jones v. Moore*, 5 Binney 582, *Brackenridge, J.*, combats the idea of a new promise being implied, instead of the old cause of action being revived. It cannot be necessary to go into any argument to shew, that these opinions are in the teeth of the statute. The statute declares the action shall not be sustained more than five years after the cause of action accrued; the courts say it shall, provided there be an acknowledgment to take the case out of the statute.

This way of considering the question is not necessary to effectuate the ends of justice; it is in conflict with the forms of the pleadings, which are the best evidences of the law; it jars with acknowledged
532 principles, and is rejected by the *more modern opinions of the courts, which are going back to the doctrines in the time of Shower and lord Raymond.

1. It was unnecessary to violate the statute, by considering the original cause of action as revived. For the subsequent acknowledgment or promise, whether before or after the expiration of five years, was a sufficient ground on which to sustain a new action. Debt or assumpsit might have been sustained; for even the acknowledgment of debt without a promise, is sufficient to support an action of debt, or to sustain an implied promise of payment. And in the action of assumpsit, though the suit may have been brought on the original promise, for instance, on a promissory note, yet the new promise, implied from

the acknowledgment of debt, might always be given in evidence under the general counts.

2. The form of the pleading corresponds with this view of the subject. The replication to the plea of the statute is, not that the defendant acknowledged the preexisting debt within five years, which would certainly not be a good plea under the statute, but that he promised within five years; and this averment may be established either by proof of express promise, or by proof of an acknowledgment of debt from which the law implies a promise.

3. The idea of the acknowledgment reviving the original debt, instead of amounting to a new and substantive cause of action, not affected by the statute, jars with indisputable principles. Thus, in assumption against an executor, upon the promise of his testator, evidence of an acknowledgment of the debt by the executor, will not support the action; that is to say, it does not revive the original promise of the testator, but the action can only be sustained upon the executor's promise. *Green v. Crane*, 2 *Ld. Raym.* 1101; *Ward v. Hunter*, 6 *Taunt.* 210, 11 *Eng. C. L. R.* 359; *Atkins v. Tredgold*, 2 *Barn. & Cress.* 23, 9 *Eng. C. L. R.* 12; *Hickman's ex'ors v. Walker, Willes* 27; *Sarell v. Wine*, 3 *East* 409; *Kinder v. Paris*, 2 *H. Blacks.* 561.

So, where an action was brought against A. and B. and C. *the wife of B. upon a joint note of A. and C. made before her marriage; an acknowledgment of the note by A. after six years, and after the marriage, was not evidence to support the issue; *Pittam v. Foster*, 1 *Barn. & Cress.* 248, 8 *Eng. C. L. R.* 67. Had it revived the original action, it must have been sufficient, but being a new promise, it did not bind C. who was then covert; and, of course, it did not bind B. her husband.

4. The notion of the original cause of action being revived, is negatived by the greater part of the more recent and most respectable authorities. Thus in the last cited case of *Pittam v. Foster*, chief justice Abbott states the question to be "whether an acknowledgment made within six years, operates as a new substantive promise, or draws down the original promise to the time when the acknowledgment is made." He cites *Hurst v. Parker*, 1 *Barn. & Ald.* 93, where lord Ellenborough says, "that in actions of assumption an acknowledgment of the debt is evidence of a fresh promise;" and his own opinion and those of the rest of the court are sustained by that position. In the case of *A'Court v. Cross*, there was an acknowledgment of debt with an express declaration, "I will never pay it:" the court seems to have been strongly impressed with the embarrassment and difficulties produced by conflicting decisions, and to have desired to settle some principles in that case, which should not be departed from. The chief justice states, that where the debtor promises to pay, he cannot avail himself of the statute, because this promise founded on a moral consideration, is a new cause of action. In *Scales v. Jacob*, the defendant said, he was not able to pay, but would

pay when he could. There was a divided court: but Gazelee, J., and Best, C. J., sustain the position I am contending for; and Burrough, J., admitted it, where the acknowledgment is after six years, but denied it in that case where it was before the bar was complete. "The cases shew," says Gazelee, "that a promise made under such circumstances as the present case, is a new promise, and not a revival of the old one." And the chief justice says, "It is clear that after the six years, the plaintiff has no cause of action, except on the new promise; and that being conditional, the condition attached to it must be observed. The new promise does not bring down the old cause of action, but creates a new one: the form of the pleadings sufficiently indicates this &c." And in *Tanner v. Smart*, 6 *Barn. & Cress.* 603, 13 *Eng. C. L. R.* 273, lord Tenterden, delivering the judgment of the whole court, declares that an acknowledgment is no answer to the statute, except in actions of assumption; and moreover, that it does not revive the old promise but is evidence of a fresh promise.

The same opinions are well sustained by chief justice Tilghman in *Jones v. Moore*, 5 *Binney* 576. See also *Roosevelt v. Marks*, 6 *Johns. Ch. Rep.* 266, 290, citing *Danforth v. Culver*, 11 *Johns. Rep.* 146; *Laurence v. Hopkins*, 13 *Id.* 288; *Sands v. Gelston*, 15 *Id.* 511.

I am, upon the whole, clearly of opinion, that the acknowledgment has the effect of creating a new promise, and does not revive the old one; and if so, it seems obvious that an action of debt upon the old contract, which is barred, cannot be sustained by proof of the new promise. Indeed, it is very clearly stated in two of the cases cited, that the doctrine of taking a debt out of the statute by subsequent acknowledgment only applies to cases of assumption; 13 *Eng. C. L. R.* 93, 375, 11 *Eng. C. L. R.* 126.

The other points in the case it is not necessary to discuss as this is fatal to the plaintiff's demand.

Judgment reversed, and judgment entered for the appellant.

535 **Sydnor v. Gee, Sheriff &c.*
May, 1883.

Sale of Chattels—Redelivery to Vendor upon Bailment

—**Effect.**—An absolute bill of sale of slaves is executed by B. to C. for valuable consideration, and the slaves are delivered by vendor to vendee: and then vendee hires the slaves to vendor, for their victuals and clothes, taxes and levies, till the end of the ensuing year: the sale, and the hiring are both bona fide transactions: at the end of the year, vendee takes possession of the slaves, holds them for several years, and then dies: a creditor of vendor recovers judgment against him, after vendee has taken possession of the slaves, and levies his execution on the slaves in the hands of vendee's executor: **Held**, in a controversy between such creditor of the vendor and the executor of the vendee, that the slaves are the property of the vendee's estate, and not subject to execution at the suit of such creditor of the vendor. **Same—Same—Same—Fraud Per Se.**—It seems, that,

***Sale of Chattels—Retention of Possession by Vendor—Fraud Per Se.**—In *foot-note* to *Davis v. Turner*, 4 *Gratt.* 423, it is shown that, while the doctrine of fraud *per se* as laid down in *Edwards v. Harben*, 3 *T. Rep.* 587, was approved by many early Virginia decisions, later cases introduced various excep-

in the case of an absolute sale and delivery of chattels, and an immediate redelivery thereof by vendee to vendor, upon bailment, for a limited time, on valuable consideration, both transactions being in fact fair, such bailment of vendee to vendor is not inconsistent with the sale, so as to make the sale fraudulent per se, within the rule of *Edwards v. Harben*, 2 T. R. 587.

Same—Immediate Possession by Vendee Unnecessary.†

—If an absolute sale of chattels, fair in itself, be not accompanied and followed by immediate possession, but possession is taken by the vendee before the rights of any creditor of the vendor attaches, the sale is good against the vendor's creditors.

Sydnor sued out a writ of fieri facias on a judgment of the county court of Mecklenburg, against Baptist, and delivered it to Gee, the sheriff of the county, who levied it on three slaves, named John, Rachel and Nancy, as the property of Baptist; but a doubt arising whether the slaves were the property of Baptist, or of the estate of A. Clausell deceased, and Clausell's executor forbidding the sale, the sheriff required of Sydnor, and he gave, an indemnifying bond, with one Cunningham his surety, according to the statute, 1 Rev. Code, ch. 134, § 25, 6, 7, pp. 533, 4, and thereupon two of the slaves were sold to satisfy Sydnor's execution.

And then an action of debt, on the indemnifying bond, founded on the statute, was brought by Gee, the sheriff, at the relation and for the benefit of Clausell's executor, against Sydnor and Cunningham, in the circuit court of Mecklenburg. The declaration set out the condition of the 536 the *bond, and alleged as the breach thereof, that the three slaves taken and sold to satisfy Sydnor's execution against Baptist, were the property, not of Baptist, but of the relator. Plea, conditions performed; and issue. At the trial, the defendants demurred to the evidence, and the plaintiff joined in the demurrer. The evidence set out in the demurrer was as follows:

1. Sydnor's fi. fa. against Baptist (by the return upon which, it appeared, that it was levied upon the three slaves before mentioned, and that two of them John and Nancy were sold to satisfy the execution) and the indemnifying bond on which the action was founded.

2. An absolute bill of sale, executed by Baptist to A. Clausell, in his lifetime, dated the 9th November 1821, and recorded

tions, and modifications, and finally, in *Davis v. Turner*, the whole doctrine was repudiated. The principal case has been cited by several later cases as a modification of, or exception to, the doctrine of *Edwards v. Harben*. Several subsequent cases, in discussing this doctrine, review with approval the decision in the principal case. See *Lewis v. Adams*, 6 Leigh 327, 332, 339; *Mason v. Bond*, 9 Leigh 185; *Tavenner v. Robinson*, 2 Rob. 286; *Davis v. Turner*, 4 Gratt. 422, 455, 456; *Bindley v. Martin*, 28 W. Va. 798. In his dissenting opinion in *Lewis v. Adams*, 6 Leigh 336, 337, *CABELL, J.*, distinguishes the principal case from the case at bar; and discusses the question as to grounds on which the decision in the principal case turned—whether on the resumption of possession by the vendee before the rights of creditors attached; or on the manifest fairness of the original transaction, which was attended with delivery.

*Same—Immediate Possession by Vendee Unnecessary.—Under a *bona fide* sale of chattels, though there is no delivery of possession at the time of sale, yet if the vendee gets possession before the rights of any creditor attaches, the sale is good against the vendor's creditors. *Poling v. Flanagan*, 41 W. Va. 200, 23 S. E. Rep. 689, citing the principal case and *McKinley v. Ensell*, 2 Gratt. 333.

in the county court of Mecklenburg on the 30th October 1822, whereby Baptist, in consideration of 850 dollars, conveyed to Clausell, a female slave and her children, among which were the three slaves, on which Sydnor's execution was levied; on which bill of sale the following writing was indorsed—"This day the within named M. Baptist gave and delivered to the within named A. Clausell, the within mentioned slaves [naming them] in the presence of us, as witness our hands, the 7th December 1821. (signed) M. Baptist, [the vendor]—J. Clausell and M. Brand," [the witnesses]. And it was proved by two of the subscribing witnesses to the bill of sale, that the above writing indorsed thereon was, in fact, executed on the same day on which the bill of sale was executed, though the dates appeared to differ.

3. Evidence, that Baptist, before the execution of the bill of sale was indebted by bond to Clausell in the sum of 1280 dollars; and that the slaves in the bill of sale mentioned were sold by Baptist to Clausell, at a fair valuation by indifferent persons, for 850 dollars, in part satisfaction of that debt; and a credit for that sum was indorsed by Clausell, on the bond; this credit being of the same date as the bill of sale.

537 *4. Articles of agreement under seal, between Clausell and Baptist, of even date with the bill of sale (namely, the 9th November 1821), and attested by the same subscribing witnesses; whereby it was witnessed, that Clausell hired all the slaves in the bill of sale mentioned to Baptist, from that date till the 1st of January 1823; in consideration of which Baptist obliged himself to find them victuals and clothes during the term, and to pay all taxes and levies upon them.

5. The evidence of witnesses (who were the witnesses to the bill of sale) that Baptist, immediately on the execution of the bill of sale at Baptist's house, the slaves being then present, said to Clausell, "Here are the negroes; they are your property;" that the witnesses of the transaction then went away, leaving Baptist and Clausell together, and the slaves also there, and did not know whether Clausell removed the slaves at that time or not; that Clausell lived during the year 1822 at Baptist's house, Baptist's wife being Clausell's sister: that about Christmas 1822, Clausell removed all the slaves to his own land in the neighbourhood: that Clausell held possession of them all, from that time till his death in December 1826, except one which he sold, and another which he hired to Baptist in the year 1825, as a nurse for his child: that Clausell, from the date of the bill of sale, listed the slaves on the books of the commissioner of the revenue, as his property: that during the years 1823, '24 and '25, Baptist having dissipated his property, lived on Clausell's land, as his overseer; and the slaves mentioned in the bill of sale worked there under Baptist as the overseer, until 1825, during which year he was dismissed; and the slaves, thenceforth, remained in the exclusive possession of Clausell; and after his death in December 1826, all of them, except the one which

he had sold, remained in possession of his executor until they were taken by the sheriff under Sydnor's execution against Baptist.

6. The will of A. Clausell, whereby he bequeathed the slaves to a legatee.

538 *7. The defendant then adduced evidence, that Baptist was, at the time of the execution of the bill of sale to Clausell, indebted beyond what he was worth, and all the other slaves he then held in his possession, being only three, were mortgaged for debt; and that the debt due by him to Sydnor, for which the judgment was recovered on which Sydnor's execution was sued out, was contracted before the bill of sale to Clausell was executed.

There was a verdict for the plaintiff for 550 dollars with interest &c. The circuit court held, that the law on the demurrer to evidence was for the relator, and gave the plaintiff judgment, for his benefit; from which Sydnor appealed to this court.

Leigh, for the appellant.

Johnson, for the appellee.

CARR, J. No question has been raised, in the argument at the bar, and none could have been raised, as to the fairness, in point of fact, of the transaction as between Baptist and Clausell; nor was it denied, that the sale of the slaves by the former to the latter, was an actual sale, and, as between the parties, valid and effectual. But it was contended for the appellant, that possession did not accompany and follow the deed of Baptist to Clausell; that the sale was, therefore, fraudulent in law, as to the creditors of Baptist, according to the rule of *Edwards v. Harben*, 2 T. R. 587, and that Sydnor, as a creditor, had a clear right to levy his execution on the property. On the other hand, it was contended for the appellee, that as the sale from Baptist to Clausell was in itself a real and fair transaction, so the possession was at no time inconsistent with the bill of sale; but if it was so at any time, that the taking of possession by the vendee, and holding the property more than four years, had removed all ground for imputing fraud to the sale, before Sydnor was in a situation to assert any claim against Baptist. Let

539 us then, inquire, 1. Whether the possession of Baptist under *the hiring, was so inconsistent with the deed as to bring the case within the rule of *Edwards v. Harben*? 2. Does this rule comprehend a case where the possession, though not taken immediately, was taken and held under the deed, for years before any creditor obtained a lien by judgment?

I have heretofore expressed my view of the rule of *Edwards v. Harben*. and have no idea of going over that ground again. It must be recollected, that this is a demurrer to evidence, where the court must make all such inferences in favor of the party, whose case is taken from the jury, as the jury might fairly have made. It is admitted by all the cases, that possession remaining with the vendor, is but evidence of fraud which may be explained away. Now, suppose this case had gone to the jury upon this evidence; might not the jury have concluded from the evidence, that the bill of sale was executed upon an actual

sale for a valuable consideration? that there was a real delivery of the slaves, and a true and actual hiring of them for twelve months to the vendor; that the woman being a breeder, and the children small, were, really and bona fide, worth no more than their victuals, clothes, taxes and levies; that at the end of the year, the vendee resumed possession of the slaves, carried them to his own farm, and kept and used them as his own, till the day of his death, without a single claim from the vendor, or the assertion of any claim by any creditor of the vendor; and that he bequeathed them by his will, as his own property, never dreaming that any creditor of his vendor would set up a claim to take them: might not, nay, must not the jury, I ask, have drawn these conclusions from the evidence in the record? I really think so, and feel that as taking their place, I ought to do the same. And viewing the case in this light, it seems to me, that the possession continuing with the vendor, is explained, and shewn to be consistent with the deed; to be, in truth, the possession of the vendee; for, if the vendee had fairly bought and paid for the slaves, and they had been delivered, they were to all intents and purposes his own; he might sell them, 540 hire them, *send them to Africa; you cannot restrict him in exercising the rights of ownership; you cannot say, he might hire to others, but not to his vendor. The hiring was just as open and public here as the purchase.

Then, as to the second point, Can we say that this case is within the rule? that the transaction was calculated to defraud, hinder or delay, the creditors of Baptist? As between the parties, many cases decide that the bill of sale is good, if for valuable consideration, though not accompanied by possession; *Steel v. Brown*, 1 Taunt. 380; *Kidd v. Rawlinson*, 2 Bos. & Pull. 59; *Robinson v. M'Donnell*, 2 Barn. & Ald. 134; *Thomas v. Soper*, 5 Munf. 28. And where was the creditor, who, at the date of the bill of sale, could question any sale which Baptist might choose to make of his property? Not the appellants, for they were then and for a long time after creditors at large. Suppose at the time of this sale, Baptist had sold every slave he owned to traders for the southern market, who were about to take them directly out of the state, could these appellants have stopped them? If the cases are examined, it will be found, that, in not one of them, has a creditor been heard to contest a conveyance, whose right did not attach while the property remained with the vendor. In *Steel v. Brown*, Steel sold Cockburne the lease and fixtures of a public house, received £200. in part, took his notes for the balance, and put the house and goods into his possession, taking a bill of sale of the fixtures and goods for his security: after about nine months, Cockburne becoming embarrassed in his affairs, Steel took possession of the goods: Brown had lent Cockburne the £200. which he paid to Steel in part for the purchase, and had taken an assignment of the lease, and a judgment acknowledged by Cockburne: after Steel took the goods into possession, Brown had his execution levied

on them as the property of Cockburne, and immediately apprised Steel of what he had done, and Steel brought trover against him: at the trial, the defendant failed in proving his judgment, and the plaintiff
541 obtained a judgment: Vaughan, *sergeant, moved for a new trial, on the ground that inasmuch as Cockburne had remained in possession of the goods for a considerable time after executing the bill of sale, the plaintiff had no title to them, nor any legal possession, under that instrument; and he cited *Edwards v. Harben*. The court were clearly against the new trial. One ground was, that the defendant had notice of the plaintiff's lien, as was proved by his giving him notice of his levy on the goods. But Mansfield, C. J., further remarks, "No case has decided, that a bill of sale unaccompanied by possession, may not under certain circumstances be fair and valid. If one executes even a colorable bill of sale for a valuable consideration, though the vendor remains some time in possession, it is a good bill as between the parties. All that has been said about the transaction relates to third persons: but in the present case, if the defendants had proved themselves to be creditors, which they failed to do, it is very doubtful, whether they could have been in a better situation than they now are, on account of the communication, which appears to have been made, at the time of the transfer of the lease." Lawrence, J., said, "I am of the same opinion. A bill of sale is good as between the parties to it, though no possession is taken at the time when it is executed. The case of *Edwards v. Harben* is good law, but not applicable here; that was the case of creditors." Here we find, that though it made a part of the case stated, that the defendants lent Cockburn £200. yet, because they failed to shew themselves judgment creditors, they were denied the right to contest the fairness of the bill of sale, under the rule of *Edwards v. Harben*; and very correctly, it seems to me; for how could the sale be in fraud of those, who had no right to object to any sale the owner might choose to make? So in the case before us: Suppose during the year that Baptist held the slaves on hire, he had sold and delivered them to a stranger; could these appellants have objected? or after they obtained their judgment, could they have taken the slaves in execution? And if Baptist might
542 by this *fraud upon his vendee Clausell, have extinguished all claim of the appellants upon the slaves, must not the effect be the same, when at the end of the year, he delivered them up to Clausell? thereby putting his seal anew to the bill of sale. Suppose the bill of sale thrown out of view, and that Clausell had, at its date, bought the slaves and paid the money, and at the close of the year 1822, Baptist had, in consideration thereof, delivered up the slaves to Clausell; surely, this would have been good against all creditors whose rights were not then so perfected as to enable them to object to a sale out and out. The case of *Bartlett v. Williams*, 1 Pick. 288, is directly in point: it was argued with great research, and the opinion is, I think, a very sensible one. The judge observes, "It

is certainly a general rule, that possession must follow and accompany the deed; and that the possession of the vendor after the bill of sale, unexplained, would render the conveyance void, as against creditors. But such a possession may be explained, as in the case of *Kidd v. Rawlinson*, and be perfectly consistent with justice. Such possession may also be consistent with the terms of the deed. The doctrine in the case &c. of *Edwards v. Harben* is unquestionably sound. But there, the vendee did not obtain possession under the bill of sale, before the right of the creditors of the vendor accrued." The judge also cites the case of *Robinson v. M'Donnell*, as bearing on the question, and I cannot but think that it has a pretty strong bearing; for though it was a case of bankruptcy, and came more immediately within the statute of the 21 Jac. 1, yet the two statutes are nearly related, being *in pari materia*, both for the protection of creditors; and it is natural when the one is under discussion, for the mind to advert to the other. In that case, Bayley, J., says, "Where there is a deed executed, under which it is competent for a party to take possession immediately, and he does not do so in six months, I am not aware of any case, which decides that such omission would be fraudulent, so as to make the deed void, under the statute of Elizabeth. If indeed the right of any third persons had intervened, it might be void as against them."

543 *The case of *Williamson v. Farley*, Gilm. 15, was relied on. I consider it materially different from this. There, the lien of the third person attached, while the possession of the vendor continued: there too, the vendee, though he had taken a bond, purporting that the slaves were hired for a year, and were to be delivered at the end of it, took possession of them in less than a month, thereby disaffirming the contract of hire. I am for affirming the judgment.

CABELL, J. I am for affirming the judgment, upon the ground that the vendee, Clausell, took possession of the property before the rights of the creditor attached. But for this, I should be for reversing it; for if there had been no such resumption of possession, I should have been clearly of opinion, that the case would come within the rule of *Edwards v. Harben*.

BROOKE, J. I also am of opinion, that the judgment should be affirmed.

TUCKER, P. The demurrer to evidence, filed by the defendant (the appellant here), presents, as is supposed, the single question, whether possession accompanied and followed the deed from Baptist to Clausell? If it did, within the meaning of the principle established by the case of *Edwards v. Harben*, and the numerous other cases of the same class, the judgment of the circuit court must be affirmed.

In the examination of this case, I shall assume, that the transaction was in point of fact fair and bona fide; that Clausell was a fair creditor, Baptist a real debtor, and the transaction honestly designed for the payment of a just debt, in property at a fair valuation. I shall also assume, that the delivery was with no actual covinous

intent, but that it was bona fide, and that the hiring from Clausell to Baptist was also a bona fide transaction. The facts set forth in the demurrer sustain this view of the case; but if they were more doubtful, we should be bound to infer them, because the *jury might fairly have done so; and the defendant having withdrawn these inquiries, from the appropriate tribunal, cannot complain of the most favorable inferences being made by the court, in behalf of his adversary.

The defence, indeed, is, that, however fair the transaction may have been in point of fact, and however good and valuable the consideration, the deed is void, because it was unaccompanied by delivery of the possession. This defence must rest upon one of two grounds; either that there was no delivery when the deed was made, or that the delivery which was made, followed by the redelivery to Baptist on hire, was not a valid delivery.

There is some difficulty as to the date at which the deed was acknowledged. Take it, as was suggested at the bar, that the deeds were prepared on the 9th November, but were not executed until the 7th December following. The indorsement of that date, and the testimony, establish its execution then; and the witness further proves that, immediately thereupon, Baptist said to Clausell, the slaves being then present, "here are the negroes; they are your property." The witnesses then went away and left the slaves and Clausell there, and did not know that they were removed at that time. They were not removed, in fact; but a more express delivery cannot be established, unless it be rendered nugatory by the failure to remove them, or by the subsequent hiring. Whether, under the circumstances of the conflicting dates, and the relationship between the parties, the defendant might have successfully assailed the transaction before the jury, is not the question. That the transaction was bona fide, might very fairly have been inferred by the jury, from the consideration given, and the other circumstances proved, and we must accordingly infer it.

But it is contended, that the slaves were left in Baptist's possession for more than a year. If the case turned upon this, it would have been a sufficient answer to this objection, that Clausell also lived with Baptist during the same time. It was

enough that they staid where their master staid. *It would be a forced inference, that my slave, who lives where I live, is in the possession of my landlord, and not in my possession. This court has, in a very strong case, considered otherwise. In *Braxton v. Gaines*, 4 Hen. & Munf. 151, Braxton having received £100. for his daughter, gave her in lieu of it a negro woman; she and her slave continued to reside in her father's family, and her father even included the slave in a mortgage to certain creditors: yet her rights were sustained against them. But, in this case, there was an express hiring, immediately after the delivery to Clausell under the bill of sale. It was a hiring by deed executed on the same day. Now, this hiring must, upon the demurrer to evidence,

be taken to be bona fide. It presents, then, this question: is the sale of a slave fraudulent per se, because the vendee at the time of the purchase and delivery of possession, hires the slave to the vendor, even though that hiring be in fact bona fide and for a fair consideration? I apprehend not. The transaction may, indeed, as between friends and relations, suggest a suspicion of unfairness; but if it be a real and not a covinous transaction, the delivery would exempt it from the legal inference of fraud.

While I accede without difficulty to the doctrines, as I understand them, on this subject, I cannot but remark, that, however salutary they may be, I see no propriety in the exercise of our astuteness in applying them for the purpose of avoiding a fair transaction. It is better to follow the suggestion of lord Mansfield, that "the statute of frauds ought not to be construed to make innocent parties sufferers;" *Cadogan v. Kennett*, 2 Cowp. 432.

Where, indeed, possession does not accompany and follow the deed, where the vendor's possession and enjoyment is uninterrupted, or where the delivery, though ostensible, appears to have been only colourable, the transaction, according to all the cases, is fraudulent per se. But, if there be such delivery as the nature of the transaction admits, and if that delivery be

real and not colourable, then the case is not within the influence of

Edwards v. Harben. Thus, where the situation of the property is such as to preclude the actual delivery; where it is not so in the power of the vendor as that he can give, or so in reach of the vendee as that he can receive, the possession; the want of delivery does not constitute fraud, provided the vendee takes possession as soon as it can be had. Such is the case of a ship at sea; such the case of the sale of a runaway slave; or of the purchase of goods in a warehouse, and receiving the key; or of the purchase of coals in bulk, or lumber in quantity, lying on the bank of a canal, or of the purchase of a sick slave; 5 Rand. 216, or of a horse in the country which I am to send for tomorrow; *Ibid*. All these are cases which do not come within the principle; because such possession is delivered as the transaction admits of. It is not that the rule is impaired; it is that the case does not come within it.

Admitting the rule, then, in its most unqualified terms, as establishing the law, there is always a previous question to be settled; the question of fact, whether there was such delivery as the nature of the case admitted of, and was that delivery real and bona fide? *Hardaway v. Manson*, 2 Munf. 230. If there was, then is the transaction good; if not, then it is bad. But this question of fact cannot be settled by any fixed and determinate rule. It depends upon the nature of each transaction, and must vary accordingly.

I have said, that in the inquiry as to the fact of delivery, it is essential it should appear, that it was real and bona fide. For if a delivery is only colourable, it is void. And whether colourable or not, is also a question of fact. In like manner, where a delivery is proved, and the property

is redelivered to the vendor, upon whatever terms, the question presented, is a question of fact; was the delivery to the vendee real and bona fide, or only colourable and collusive? If the latter, it is fraud per se; if the former, it is valid and effectual. For, though there be an immediate redelivery upon a new contract (for instance, a contract for hire) yet *this does not avoid the delivery by the vendor, I conceive, provided the redelivery on hire, be a real and bona fide transaction. If, indeed, it be covinous and collusive, then the delivery itself is infected; it is naught; it is void; and the case falls directly within the influence of the rule of fraud per se.

Innumerable instances might be presented of delivery and redelivery, which the common sense of every man must admit to be unassailable. I buy a horse from a countryman, and the seller immediately borrows him to save himself the fatigue of going home afoot. I buy a slave in midsummer, which I shall not want till Christmas, while the vendor wishes to keep him to finish his crop, and I hire him for the residue of the year to my vendor for a fair price. I invest my money in a lease for 99 years of a house, not for residence, but for the purpose of renting; and I immediately redemise it to my assignor for a year. I invest 10,000 dollars in slaves, not to till my land, but to be let to hire: I make purchases, and on the completion of each purchase, I hire the slave to his former master. Can it be, that in these various transactions, so common in the concerns of life, that the purchaser is affected with constructive fraud, and must lose the benefit of his purchase? I think not. The mischiefs of the rule would be greater than the frauds at which it is aimed, if it be permitted to insinuate itself into such transactions as those. While the rule is admitted to be inflexible, the question whether there has been a bona fide delivery, must depend in every case upon its own peculiar circumstances.

The case of *Williamson v. Farley*, Gilm. 15, cannot, perhaps, be reconciled with these principles, unless upon the ground that the taking possession of the slaves by Farley, within the year for which they were hired, was evidence that the hiring was only colourable and collusive. That is certainly a strong feature in the case; but even with this, it seems to me to have gone very far. No reasons were given, however, for the opinion of the court, nor does it appear whether the case was argued or not.

548 *The case of *Edwards v. Harben* was not the case of a sale and a subsequent bailment. The deed was an absolute sale on its face, but was intended as a security only, according to which character, possession would have been held by the debtor. The creditor refused to accept it, unless he was permitted to take possession in fourteen days. This is an express negative of his right before, and shewed the inconsistency of the real transaction with the deed.

It was contended, however, very strongly, that to recognize an immediate redelivery

upon hire, is to provide a legal method of effectuating such a fraud; and that if there be such immediate hiring, it ought to appear upon the deed as part of the transaction. There might be yet more force in this argument, if fraud would be defeated by the avoidance of the contract of hire when contemporary with the deed. The objection could certainly not avail, if there was an actual interruption of the vendor's possession for a month, a week, or even a day. And yet a redelivery upon hire within a short period, would be as much calculated to deceive the creditor, as if it were immediate. It would be indeed vain, to attempt so to arrange the possession of personal property, as altogether to prevent frauds upon purchasers and creditors. Some circumspection and vigilance must be demanded of them. Caveat emptor is the rule which applies to them. If I lend a man a horse to ride to Kentucky, and he sells him on the journey, it is the buyer's loss. If I lend my slave to my son for any period less than five years, and he sells him, it is the buyer's loss. If I hire a slave to a man at a distance and he sells him, it is the buyer's loss. On either side, there is an evil to be avoided; and the most common transactions of life, and the ordinary sales of personal estate, will be trammelled and embarrassed, if our sole care is directed to the protection of creditors and purchasers, who ought to protect themselves.

Nor would the case be altered by making the contract of hire part of the instrument of sale. That instrument is never recorded.

It is in the pocket of the vendee, and 549 *never seen by the creditor. It cannot, therefore, give him any notice of the real character of the transaction. If the witnesses to the sale are witnesses also of the hiring, as in this case, the same evidence is afforded to the creditor of both acts.

Applying these principles to the case, and taking the transaction to be bona fide in all its parts, I am clearly of opinion, that there was a valid delivery, and that the effect of it was not destroyed by the immediate redelivery to Baptist on a new contract of hire. After the termination of that contract, they were taken into Clausell's own possession, and so continued until they were taken by execution; which confirms the fairness of the whole transaction, and proves that it was a real and not a colourable sale.

According to the view I have taken of the case, it is unnecessary to examine the interesting question, which has been so ably argued, as to the effect of the subsequent acquirement of possession by the vendee upon intervening rights of third persons. This question has been touched by one of the judges of this court in *Clayton v. Anthony*, 6 Rand. 305, and by another in *Batton v. Glasscock*, Id. 78, and is mentioned and waived, in the recent case of *Shields v. Anderson*, 3 Leigh 735, 7. But it may not be amiss to say, that it is strongly my impression, that the failure to deliver possession, where there is no real fraud intended, does not attach fraud to the transaction forever; and that a subsequent

delivery will make it valid and effectual against all creditors, whose debts are contracted, and all purchasers whose bargains are made after such subsequent delivery. The taking possession will at least make it the same thing as if the deed was then made; see the remarks of Bayley, J., in *Jones v. Dwyer*, 15 East 27, 8. Farther than this I am not disposed at this time to go; but shall be free to reexamine the question in other aspects, whenever it shall again arise.

Judgment affirmed.

550.

***Roanes v. Archer.**

May, 1838.

Husband and Wife—Settlement for Use of—Liability for Husband's Debts.—Real and personal estate settled by deed, to the use and benefit of R. and E. his wife, during their joint lives, and if R. should survive E. his wife, then to his use during his life, and after his death to the children of R. by E. his wife: HELD, the joint interest of husband and wife during their joint lives, is not subject to the husband's debts; but his contingent interest in case he should survive his wife, is subject to his debts.

Deed—Acknowledgment after Lapse of Statutory Period—Effect—Re-execution.—A deed dated in April 1804, and the execution thereon attested by witnesses, is not recorded within eight months from its date; but, in April 1806, the grantor acknowledges the deed in open court, and upon such acknowledgment it is ordered to be recorded: HELD, upon the construction of the statute of conveyances of 1792, 1 Old Rev. Code, ch. 90 § 1, 4, such acknowledgment of the deed in court is to be taken as a re-delivery and re-execution of the deed, so as to make it a deed as of the date of such acknowledgment, and so the deed is well recorded within eight months from the time of the execution, and is valid as against the grantor's creditors.

By indenture, dated the 6th April 1804, between William Royall of the first part, James Roane of the second part, and John Archer and John Royall, trustees of the third part,—reciting that Roane was indebted to William Royall in the sum of £2000. by bond dated in September 1787, and William Royall was desirous of bestowing this money on the children of Roane by Elizabeth his wife, who was the nearest relation of Royall, and had agreed to give up the bond to Roane to be cancelled, in consideration that Roane would settle certain lands and slaves, in the manner after mentioned, on his children by his said wife,—therefore, Roane conveyed to the trustees, and the survivor of them, and the heirs &c. of the survivor, a parcel of land in Charles City, and twenty four slaves; upon trust, 1. for the use and benefit of Roane and Elizabeth his wife, during their joint lives; 2. if Roane should survive his wife, then to his use during his life; and 3. after his death, to the use of his present and any future children by his said wife; with power to Roane to appoint the subject to and among or to such of his children, as he should think proper—And

Royall, on his part, released to Roane the debt due him by the bond of 1787.

551 *This deed was executed by Roane and his wife and the two trustees, and there were five subscribing witnesses to their execution of it; it was not executed by William Royall. It was not recorded within eight months after its date, according to the provisions of the statute of conveyances of 1792.* But it was admitted to record by the county court of Charles City, at its April term 1805, by an order in these words: "The aforewritten indenture, in trust, between James Roane and Elizabeth his wife, John Archer and John Royall, was this day, in open court, acknowledged by James Roane, and as to him ordered to be recorded, and continued as to the rest."

William Archer, the appellee, having recovered a judgment against James Roane for 600 dollars, sued out a fieri facias thereon, which was levied on some of the slaves mentioned in the deed of trust, then in Roane's possession.

Whereupon, Elizabeth the wife of Roane, by her next friend, and their children, exhibited a bill against William Archer, the creditor, in his own right and as administrator of John Archer the surviving trustee, and James Roane; setting forth, the deed of trust of April 1804; and setting forth also, that James Roane was, in fact, as recited in the deed, justly indebted to their kinsman William Royall in the sum of £2000. by the bond of September 1787,

552 and *that it being his design to give Mrs. Roane and her children the benefit of the money, Roane on his part, in consideration that he would release the debt to him, agreed to settle the property in the deed mentioned as therein provided, so that this was the real consideration of the deed; insisting, that the slaves settled by the deed, were not liable to be taken in execution and sold for James Roane's debts; and praying an injunction to inhibit the sheriff from proceeding to sell the slaves he had taken to satisfy Archer's fieri facias.

The injunction was awarded.

William Archer, answering in his own right, said, he knew nothing of the deed of trust mentioned in the bill, but from the recital of its provisions therein contained; and he insisted, that James Roane, his debtor, held by the deed a life estate in the slaves thereby settled which was justly subject to execution for his debts.

*1 Old Rev. Code, ch. 90, § 1, 4. Pleasants's ed. p. 157.

The 1st section provides, "that no estate of inheritance &c. in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing sealed and delivered; nor shall such conveyance be good against a purchaser for valuable consideration, not having notice thereof, or any creditor, unless the same writing be acknowledged by the party or parties who shall have sealed and delivered it, or be proved by three witnesses to be his, her, or their act, before the general court, or court of the district, county or corporation, in which the land or some part thereof lieth, or in the manner herein after directed, within eight months from the time of selling and delivering, and be lodged with the clerk of such court to be there recorded."

And the 4th section provides, that "all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, shall be void as to all creditors and subsequent purchasers, unless they shall be acknowledged or proved, according to the directions of this act"—Note in Original Edition.

***Husband and Wife—Settlement for Use of—Liability for Husband's Debts.**—See, citing the principal case on this subject, Nickell v. Handly, 10 Gratt. 338, 341, and foot-note: Johnston v. Zane, 11 Gratt. 571; foot-note to Perkins v. Dickinson, 3 Gratt. 335, containing extract from Johnston v. Zane, 11 Gratt. 570; Armstrong v. Pitts, 13 Gratt. 243; French v. Waterman, 79 Va. 628.

***Acknowledgments.**—On this subject, see *Eppe v. Randolph*, 2 Call 126; monographic note on "Acknowledgments" appended to *Tallaferro v. Pryor*, 12 Gratt. 277.

shall shew it by some extracts from the arguments at the bar, and the opinion of the court. Mr. Call and Mr. Marshall both argued, most elaborately, to prove that there may be a redelivery of the same deed; but observe the particular ground, on which they place this reexecution, as to the facts—Mr. Call says, "But it will be said, this was not a new deed, but a mere re-acknowledgment of the old one, which, according to the chancellor's reasoning, can mean nothing more than an acknowledgment, that it was delivered the day of its first date. This position is never true; because when it is reacknowledged, the grantor repeats the ceremony, and says in the presence of the witnesses, that he acknowledges it to be his seal, and delivers it as his act and deed. So that it is in fact, always, an act of the day of its reacknowledgment. But, however true the position may be in general, it is certainly not so, in this particular case: because the grantor here, has actually caused the real date of the reacknowledgment to be noted by the witnesses, thereby manifesting his design that it should be considered an act of that day." Now, I ask, do the facts here stated, and the arguments drawn from them, apply in the slightest degree, to a simple acknowledgment in court in order to have the deed recorded? Assuredly not. See, then, a few remarks of Mr. Marshall: "It is said, however, that the reacknowledgment was no delivery. But for what purpose was it made then? Certainly, the intention

559 was to deliver; *and here the evidence is express, that it was delivered on the date of the last acknowledgment." Here, again, is a case stated wholly different from the one at bar. Let us turn now to the opinion of the court; and here, I must admit, that the criticism of the counsel on my construction of the judge's opinion (as given in *Rootes v. Holliday*, 6 Munf. 258,) is just; I did mistake his meaning, when I supposed that he considered an acknowledgment in court, a reexecution: he does not put the case on that ground; and, in truth, he had no reason for doing so, for there was in that case no acknowledgment in court. He says, "The term reacknowledgment seems to have produced in the mind of the chancellor, mistaken ideas." He understands it as meaning no more, than that Richard the father, on the 21st March, acknowledged that he had on the 20th September before, sealed and delivered that deed: a mistake, which information from our clerk would correct. It would be, that when a man comes into court to acknowledge a deed, the question put to him is, not whether he delivered the deed at the date, but whether he then acknowledges the indenture to be his act and deed? So the oath of the witnesses is, that they saw the bargainor seal and deliver the paper as his act and deed. Such was the oath administered to Curry and the other witnesses to this deed. When did they see it sealed and delivered? Not on the 20th September 1785 (for then they were not present, and other witnesses attested that delivery) but on 21st March, when they subscribed it, noting upon the paper, the day of the delivery which they attested." Is it not seen

at a glance, how vastly different a case this is, as stated by the court, from a mere acknowledgment of the deed by the bargainor, in court? Observe some further remarks of the judge: he says, "It is admitted by the chancellor, that if this deed had been cancelled, and a new one made, it would have been good. This the counsel also admit; but pursuing the chancellor's idea, they have produced a number of cases, some stating that between the date and the recording, the estate is in the bargainor; others, that it *is in the bargainee; and others still, that it is in suspense. Leaving it to others to reconcile this clashing jargon, we consider what would be the opinion of a plain man on the occasion. It would be, that the estate was in the bargainee, while he held the deed, which was the evidence of it; but when he surrendered that deed to the bargainor, his legal title ceased, and the other was at liberty to convey it to him or any other; and if to him, might either destroy that deed, and make a new one, or by a reexecution of the same paper, give it force as a new deed from that period." Here we see the court considers, that by the bargainee's surrendering the deed to the bargainor, in that case he divested himself of his title, and the other was at liberty to convey to him or another. If our case is like that, and an acknowledgment in court is equal to a reexecution before witnesses, whenever a grantor takes the deed, to make his acknowledgment before the court, he revests himself with the legal title, and may grant to another. Would not this notion, once countenanced by this tribunal, make wild work in the country? The court thought such the effect, where both grantee and grantor (as in *Eppe v. Randolph*) concurred in the reexecution of the deed; but would that enlightened tribunal have given the same effect to the every day occurrence of the grantor's acknowledging the deed in court? Assuredly not. It must, therefore, have thought with me, that the case before them was very different from the present, and gave no countenance to the attempt now made.

The case of *Colquhoun v. Atkinsons*, 6 Munf. 550, was also relied on; but, besides that the reexecution there, was also in the country, and the recording subsequent to it, the question was never raised; and not only so, but could not have been raised, for the bill instead of impeaching this deed, claimed in subordination to it.

The case of *Moore v. The Auditor*, 3 Hen. & Munf. 232, was a case of recording upon the acknowledgment of the grantor; and yet the court decided, that the deed was not recorded within eight months.

561 *Upon the whole, I am most strongly opposed to the decision which will be made in this case, and cannot but consider that it will be very mischievous. I am for affirming the decree.

TUCKER, P. The argument of the main question in this case, having turned very much upon the effect of the second acknowledgment of the deed, it is proper first to ascertain what are the received doctrines of the law as to a second delivery.

The old common law writers tell us, that

"a deed cannot have and take effect, at every delivery, as a deed; for if the first delivery take effect, the second delivery is void." Perkins § 154, Cowp. 203. So far as this principle applies to the cases put of an infant or a man in prison, it may be admitted to be both reasonable and unquestionable. But it would be unreasonable to extend it to a case, where at the time of the second delivery, there were rights in the grantor to any intent, which had not been passed out of him by the first delivery. Thus, if A. bargain and sell to B. in fee, A. having only an estate for life, this estate only passes. But if the fee afterwards comes to A. by descent or purchase, a second acknowledgment of the deed would operate upon the inheritable portion of the estate, which had not been passed by the first delivery. And so, in the case of *Eppes v. Randolph*, it was argued, in relation to the second delivery of a deed in order to have it recorded, that the estate, until recording, remained in the grantor, as to creditors and purchasers, and therefore, the second delivery did operate; and that, if nothing passed against creditors and purchasers by the first delivery, then there was an interest to pass by the reacknowledgment; namely, that portion of the estate which remained in him for the benefit of creditors and purchasers; 2 Call 151. These, and various other able arguments upon this difficult subject, were duly considered in that case, and resulted in the decision, that the second delivery was valid and effectual, to the

562 intent *of making it the point of time from which the eight months were to be computed, within which the deed was to be admitted to record. The deed, there, was dated the 20th September 1785. At that date, it had been sealed and delivered before one set of witnesses. It was reacknowledged before another set of witnesses on the 21st March 1786, and was recorded the 3d July 1786, nearly ten months after the first delivery, but less than four months from the last delivery. If the last delivery was void, then the record of the deed was too late. If the last delivery was valid, then the record of the deed was in good time. The court decided, that the deed was duly recorded, distinctly affirming that the second delivery was effectual. "Upon the whole" said president Pendleton, "we are of opinion, that the deed is to be considered, to every intent and purpose, as a deed of the 21st March 1786, and not before; that it was therefore recorded in due time;" 2 Call 185.

It would be difficult to conceive otherwise of the design of the legislature in the statute of conveyances, than as the court seems in this case to have considered it. The statute contemplated a variety of steps in the completion of a conveyance under its provisions. It required it to be executed before witnesses and proved by them within a given time, or to be acknowledged by the party in court. Until this was done the effect of the conveyance was imperfect. It bound the grantor, indeed, to some intents, but, unless recorded, it left in him almost as much power over the estate as he had before. His conveyance to a subsequent purchaser, without notice, would pass even

the legal title to him; *Newman v. Chapman*, 2 Rand. 93, and a judgment in favor of a precedent or subsequent creditor, with or without notice, would deprive the vendee of the estate; *Guerrant v. Anderson*, 2 Rand. 208. Did the statute design, that, if by accidental sickness or removal of witnesses, and the death or faithlessness of the vendor, the deed should not be admitted to record in time, the case should be 563 without *remedy? Did it design, that the original vice of the omission to record the deed, should be so inherent that nothing should purge it? If it did not, what is the remedy? There is none more obvious, more simple, and more consistent with the law, than that which the court has sanctioned in *Eppes v. Randolph*; the redelivery of the deed for passing out of the grantor the dangerous power left in him, of conveying away the legal title to a third person, or of subjecting it to the debts which he might contract or had contracted. A surrender of the conveyance by the grantee to the grantor, would not reveal the title in the grantor so that he might make a new deed; for since the statute of frauds (I speak of the English statute, herein nearly equivalent to our statute of conveyances) has required all conveyances of freehold estates to be by deed, nothing seems to be better settled, than that cancelling or delivering back the deed to the grantor, does not reveal the title; 4 Cruise 497; *Doe v. Bingham*, 4 Barn. & Ald. 672; 6 Eng. C. L. R. 560; *Roe v. Archbishop of York*, 6 East 86; *Bolton v. Bishop of Carlisle*, 2 H. Blacks. 263. So that a conveyance would have nothing to operate upon, except that latent power in the grantor of which I have spoken. And even if the grantee reconveyed to the grantor, of purpose, in that way, to take back a second conveyance, still the original vice would infect the chain of title. It would subject the estate to the claims of creditors anterior to the first deed, and, perhaps, also to subsequent purchasers without notice. Surely, the legislature could not have intended that the omission should be without remedy; and if there be a remedy, that which has been adopted, and which has proceeded upon the principle of the second delivery being valid, is the best that can be devised, and as little liable to technical objection as any other.

It is obvious, indeed, that unless we construe the statute as requiring all the witnesses to be present together, and to witness the same act of delivery, there must of necessity be several deliveries; and yet each of these deliveries is necessary 564 *to make a complete deed, which may be recorded and divest the grantor of all power over the estate. We must, therefore, take it, that the strict technical doctrine, which pronounces a second delivery to be ineffectual, can have no application to this question.

We are relieved, however, from the responsibility of settling this matter by the case of *Eppes v. Randolph*, which settled it more than thirty-three years ago. No case has come down to us with stronger sanctions than this celebrated case. It has been reported with a degree of care and

labour, by one of the able counsel in the cause, and under the eye of his adversaries and the court, which forbids a doubt of its fidelity. It was argued with distinguished ability and zeal, by the most learned and sagacious counsel who ever aided the labours of our predecessors, and before a court over which a judge presided whose learning and wisdom have known no rival in our judicial history. The very question was debated, and the very arguments laboriously presented, and deliberately considered, which have been delivered on this occasion. It was a question interwoven with the titles of the country, and therefore vitally interesting. The decision was to settle the law of conveyancing, and was therefore of the utmost importance. And it has, for thirty-three years, been the received and undisputed law of the land, and counsel have accordingly advised, and titles have been made under the sanction of its authority. Moreover, it has never been impugned by this court. In the case of *Moore v. The Auditor*, 3 Hen & Munf. 232, it was not even mentioned, and in *Rootes v. Holliday*, though the decree was affirmed, yet it by no means appears, that it was upon any principle inconsistent with *Eppes v. Randolph*. Nor, indeed, did the chancellor, in his able opinion, overruling the sophism which attempted to apply the principle of *Eppes v. Randolph* to the case of *Rootes v. Holliday*, undertake to question the decision that the deed took effect by its second delivery before witnesses, though he criticised a part of the language which had

565 been used by president *Pendleton.

The case then stands unassailed, and is moreover supported by the decision in *Colquhoun v. Atkinsons*, 6 Munf. 550, which, on one point, was exactly like it. In that case, the deed of trust to Atkinson, was dated the 9th November 1804. It was not recorded till 16th December 1805, thirteen months after; but it was reacknowledged on the 9th July 1805, about five months before the recording; and its validity was not called in question. There, however, as in *Moore v. The Auditor*, the question was not discussed; and, in this regard, they may be fairly placed in the balance against each other; except that *Colquhoun v. Atkinsons*, being last in point of date, is entitled, for that reason, to most consideration.

Taking *Eppes* and *Randolph*, then, as law, it establishes these positions: That though a deed has been sealed and delivered before witnesses, yet a subsequent sealing and delivery before new witnesses, is not void, but is effectual to the intent of making that delivery the date from whence the eight months are to be computed; or, in other words, that the second delivery, before new witnesses, is to be taken as a reexecution of that date, so as to make the recording within eight months thereafter, a recording within due time; that this acknowledgment before new witnesses, is so intirely a new execution, that the deed is to be considered, to every intent and purpose, as a deed of that date, and of course it is not to be considered or interpreted as a mere acknowledgment of the first execution and delivery.

Hence, it seems clear, that if the deed

from Roane to the trustees, had been reacknowledged before witnesses in April 1805, instead of having been acknowledged in court, such reacknowledgment would have made it a deed as of that date, and the recording would have been in due time. The question, then, is reduced to this point: Can the acknowledgment in court be considered, in this case, equivalent to the reacknowledgment before witnesses?

That the acknowledgment of a deed before witnesses, is sufficient evidence of delivery, would seem, perhaps, infer-

566 rible *from the case of *Currie v. Donald*, 2 Wash. 58. That such an acknowledgment before a court, followed by a deposit of the deed with the clerk to be recorded, is a sufficient delivery, although the deed was never actually delivered to the bargainee, provided he afterwards assented to it, is not a question now open to be examined. It was expressly decided in the case of *The Commonwealth v. Selden*, 5 Munf. 160. Indeed, no particular form or ceremony is necessary to make a good delivery. It is sufficient if the grantor testifies his intention to deliver or put the deed into the possession of the other party; *Phil. Law Ev.* [418.]* And, therefore, a delivery to a third person for the use of the grantee, and without his knowledge, becomes a valid delivery by his subsequent assent, and relates back to the original delivery. *Hatch v. Hatch*, 9 Mass. Rep. 307; *Ruggles v. Ruggles*, 13 Johns. Rep. 285. Indeed, there are many cases which shew that a deed, though never parted with, by the person who executed it, may yet operate as a deed, where it has been signed, sealed and acknowledged: as where a grantor signed a deed (which was ready sealed) in the presence of his niece, the grantee not being present, saying "I deliver this as my act and deed;" and as soon as she attested it, took it into his own possession and carried it away; it was resolved to be a good delivery: *Doe v. Knight*, 5 Barn. & Cress. 671; 12 Eng. C. L. R. 351. In that case, *Bayley, J.* cites many cases to the same point. In the same case, the principle was also settled, that the delivery to a third person for the use of the grantee, where the grantor parts with all control over the deed, makes the deed effectual from the instant of delivery. For, about a month after the execution above mentioned, the grantor delivered a bundle of papers to his niece, among which was the deed in question, saying "Here, keep this; it belongs to Mr. Garnons," the grantee. This was held good, and the opinion was sustained by many authorities, and among others by *Shepherd (Touchstone 57.)* who is

567 particularly *strict as to the requisition of delivery. *Mr. justice Bayley* cites also 2 Roll. Abr. K. 24, pl. 7; *Taw v. Bury*, *Dyer* 167; 1 *Anders.* 4; *Alford v. Lea*, 2 Leon. 111; *Cro. Eliz.* 54. *Butler* and *Baker's case*, 3 Co. 26, 27, which go indeed to shew, that a deed delivered by the grantor to a third person for the use of the grantee, is a good deed, even before it is delivered over to or accepted by the grantee.

*New York edition of 1820.

This doctrine has a very strong application to the acknowledgment of a deed in court, or before the clerk, in order to its being recorded. That acknowledgment is stated by president Pendleton, 2 Call 184, to be an acknowledgment, that the instrument is the act and deed of the party, and it is followed by a delivery to the officer of the court for the purpose of being recorded. Here, then, is a delivery to a third person. For whose use? for the use of the grantee. With what intent? with intent to perfect the instrument by recording. To whom to be afterwards delivered? to the grantee only, to whom alone the officer of the court would be justified in delivering it. It brings the case, then, completely within the principle, that where the grantor has parted with all control over the deed, the delivery is complete, though it be made to a third person.

That the acknowledgment of a deed before the court, will have the effect of a delivery, where there has been no previous delivery, would not, I think, be denied. Since the statute allowing the acknowledgment of deeds before the clerk, the sealing and delivery in presence of witnesses, has become more rare than formerly. It is more convenient for the parties to go to the clerk's office, than to take the witnesses there; and a very large proportion of the conveyances of the country are now executed without the intervention of witnesses. Titles would be shaken throughout the commonwealth, if such transactions were now to be assailed; and the case of *The Commonwealth v. Selden* has, therefore, wisely confirmed them.

Confining ourselves to the proofs in this cause, we need, perhaps, go no farther; for there is no evidence here of any
568 *delivery before witnesses, or of any other delivery than that which is evinced by the acknowledgment in court.

But I do not think it necessary to rest the case on this defect in the proofs. Admitting (what I doubt not was the fact) that there had been a delivery before witnesses at the date of the deed, the 6th April 1804, I think the acknowledgment in 1805, amounted to a new delivery, and not merely to the acknowledgment of a previous delivery.

As the act of acknowledgment may have this operation, where such is the design of the parties, it remains to inquire, what construction shall be given to the act, when it is done after the expiration of the time limited for recording. Two constructions offer themselves: one which will give some effect to the act; the other which will leave it without effect: one which will effectuate the intent of the parties; the other, which will defeat it: one which will authorize the recording of the deed; the other, which will render that recording nugatory: one which will give effect to the conveyance; the other which will avoid it. There can be no hesitation in choosing that which will sustain the transaction, and give effect to the fair and honest intentions of the parties. When a deed has run out of date, and is then reacknowledged and delivered before witnesses, or before the court, for the express purpose of curing the defect, I infer,

that it is to every intent a new execution, and not a mere acknowledgment of a former execution which is out of date. And in this inference, I think myself supported by the principles of the law, as applied to the acts of the parties.

On the second point in the case, I am of opinion, that according to Scott v. Gibbon, 5 Munf. 86, the joint interest of Roane and his wife cannot be touched by the creditors of Roane. But I do not perceive that the reversionary interest for the life of James Roane himself is protected by the conveyance. For though it is a contingent interest, and therefore not such a trust as may under our statute be taken in execution, yet, in equity, it is certainly responsible to the creditor. Upon reversing the
569 decree, therefore, I would not *be understood to direct that the injunction should be perpetuated in toto, without reserving to the creditor the right to institute any proper proceeding for the purpose of securing to himself the benefit of this interest of James Roane, whatever may be its value.

CABELL and BROOKE, J., concurred in the opinion of the president.

Decree reversed, and cause remanded to the court of chancery, with directions to reinstate the injunction, without prejudice to the right of the appellee to institute any proceedings, for the purpose of subjecting to the payment of his debt, James Roane's contingent interest for life, in remainder, after the death of his wife.

Miller v. Trueheart and Others.

November, 1833.

Nuisance—Rebuilding Mill Dam—Stagnant Water—Injunction—Case at Bar.—A mill and mill dam is erected in 1815, by leave of court, according to the statute concerning mills &c.: the stagnation of the water in the mill pond proves injurious to the health of the neighbourhood; and one of the neighbours, thereby injured, brings an action against the mill owners, and recovers damages at law: about the time of this recovery, the mill dam is carried away, and the pond drained; and the mill owners, after the recovery, are proceeding to rebuild the mill dam, proposing certain expedients to prevent the stagnation of the waters from being again injurious to the health of the neighbourhood: HELD, a court of chancery, upon a bill by the person who recovered the judgment at law against the mill owners, may and ought to interfere, and enjoin them from rebuilding the dam, unless it shall appear that the expedients proposed by the mill owners, will be effectual to prevent the mischief in future, which ought to be ascertained by a jury upon an issue directed for the purpose.

Miller exhibited a bill against Trueheart and others in the superior court of chancery of Richmond, setting forth, that Trueheart and others, in the year 1815,
570 erected a mill *and mill dam on a branch of Deep creek in the county of Powhatan, only 1925 yards, and in a south western direction, from Miller's dwelling house; that the mill pond covered ten or twelve acres of land; that Miller's dwelling place, always before the erection of the mill dam, and the stagnation of the waters thereby, had been as healthy as any in that part of the country, but immediately after-

*See monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

The principal case is cited in *Powell v. Bentley*, etc., Co., 34 W. Va. 808, 12 S. E. Rep. 1086.

wards, it became and continued to be for many years, extremely sickly, and his whole family were afflicted with severe bilious diseases every year; that Miller imputed this remarkable change, and it was imputed by intelligent physicians and others well acquainted with the localities, and was no doubt justly imputable, to the effluvia from the stagnant waters of the mill pond; that in 1823, Miller brought suit against Trueheart and others for the nuisance, in the circuit court of Powhatan, and in 1824, having, on a full and fair trial, proved the injury sustained by him to the satisfaction of a jury of the country, recovered a verdict and judgment for 400 dollars; that about the same time, the mill dam was carried away by a fresh, and the pond drained, and thenceforth, Miller's dwelling place was restored to its original salubrity; but that Trueheart and others were now about to repair and rebuild the mill dam, and if they should be permitted to do so, Miller had the strongest reason to fear, and did apprehend, that the severe visitations of disease, with which he and his family had been afflicted during the former continuance of the mill and mill pond, would be repeated, and his dwelling place rendered unsafe for habitation; and that this was an evil for which he could not be compensated by any damages which a jury could assess: therefore, he prayed an injunction to inhibit Trueheart and others from proceeding to repair and rebuild their mill dam &c.

The injunction was awarded.

Trueheart and others, in their answers, suggested, without positively asserting, that their mill and mill dam had been erected, in the first instance, by 571 leave of court; for they *said (what would have been wholly impertinent if they had not obtained such leave) that the mill dam having been carried away, as stated in the bill, they were proceeding to repair and rebuild the same, as they had lawful right to do, according to the provisions of the statute.* And they insisted, and affirmed, that it was the general opinion of persons most competent to judge on the subject, that the injurious effects upon the health of the neighbourhood, and especially on the salubrity of Miller's dwelling place, were owing solely to the number of trees standing in the pond, deadened by being overflowed with the water, and gradually decaying; and that, in order to obviate the mischievous effects complained of by Miller, they proposed, and had begun, to cut down and remove the dead trees, and to clear away and burn all the rubbish and vegetable matter, from the bed of the mill pond, and so to remove the only cause, as they said, of any injurious effects to the health of the neighbourhood.

Miller exhibited with his bill, the record of his suit against Trueheart and others, in the circuit court of Powhatan, and many depositions of witnesses, taken and read in that cause. And it was proved, by the evidence of many witnesses, that, before the erection of the mill dam, Miller's dwelling place had been uncommonly healthy,

and never subject to bilious fevers. An aged woman who had lived near by for fifty years, and reared many children, deposed, that her own dwelling place, and Miller's, had been, for all that time, and until the erection of the mill dam, uncommonly healthy, and since the dam was erected, uncommonly sickly. Five physicians were examined, who were uniform and clear in the opinion, that the sickness in Miller's family during the continuance of the mill dam and mill pond, was caused by effluvia from the pond: two of these who had practised in Miller's family, described the sickness as unprecedented; that there were not enough of the well to wait on the sick;

that, of the family consisting of 572 forty-five *persons, thirty-two were down at a time; and that between 1815 and 1823, four of Miller's family, and a son among them, died, as these physicians believed, from the pernicious effects of the mill pond. And it was proved also, that since the dam had been carried away, and the pond drained, the former salubrity of Miller's dwelling place had been restored.

The chancellor, on the motion of Trueheart and others, dissolved the injunction, but reserved liberty to the parties to apply again to the court, the plaintiff to reinstate the injunction, or the defendant to have the bill dismissed with costs: saying, that it would be his duty to require proof, if insisted on, of the matter in the answer not responsive to the bill, namely, that all the dead timber and rubbish in the bed of the mill pond, had been or would be removed or burned, before the ground should be again overflowed by the mill pond; and that he himself was inclined to think that the defendants were correct as to the effect of such precautions; but that they must proceed at their own peril, both as to cause and effect.

From this order, upon the petition of Miller to this court, an appeal was allowed him.

The attorney general, Taylor and Leigh, for the appellant.

Johnson, for the appellees.

CARR, J. If the dam in this case, be considered as a private nuisance, it is well settled, that a court of equity will, under circumstances interfere by injunction to arrest it, upon the general concurrent jurisdiction which it exercises in such cases. And if it be said, that this dam cannot be taken as a nuisance, because it was built by leave of court founded on an express statute (a point which I do not think it necessary to decide) yet, I think, the interference of the court may be justified, on the ground of preventing irreparable mischief.

Many cases might be cited to shew, 573 that the *courts of equity are in the constant practice of granting injunctions to prevent the destruction of specific chattels, not properly the subject of compensation; and the principle will surely apply, a multo fortiori, to cases in which the interference of the court is necessary to prevent the destruction of health and life. It is true, this is one of those extraordinary powers of the court, which should be exercised with great caution, and only in clear and strong cases. But this is such a case.

*The statute, namely, concerning mills and mill dams. 2 Rev. Code. ch. 235. § 1-7, pp. 225-8.—Note in Original Edition.

[Here the judge stated the evidence in the causes, and shewed that the allegations of the bill were incontestably proved.] If this be not a case, not merely justifying, but calling for the preventive justice of the court, I cannot conceive one that would.

But it was said, that whatever might be the power of the court on general principles, our statute regulating the building of mills, has taken it away in this case: that that has prescribed the course to be pursued by one wishing to establish a mill; he must have a jury of inquest; they must report, that the health of the neighbours will not be injured; all parties concerned may contest this report; the court must weigh all the circumstances; and in its sound discretion, give or withhold the leave asked. And it was strenuously insisted, that when, with all these precautions, and under the sanction of the law, a party went on to erect his mill, and invest perhaps his whole property in it, no court of equity could revoke his license, and thus destroy his property: and this was considered as more strongly proved by that clause of the statute, which authorizes the owner of a mill destroyed by any accident to rebuild it, without any order of court, provided he begins in one year and finishes in three. It must be admitted, that when a man has thus acquired a property valuable to himself, and acknowledged by the law as of public benefit, it is a high and strong handed measure to interfere with it; but that it can under no possible circumstances be touched, is a proposition to which I can by no means assent. And it seems to me, that the general

principles governing the interference
574 of courts *on the subject, so far from being abrogated, or even weakened, are strengthened and enlarged, by the cautious and benign policy of the statute. A glance at its provisions will shew how exceedingly careful it has been of the health of the citizen. The jury is directed to inquire and report, whether in its opinion, the health of the neighbours will be annoyed by the stagnation of the waters. If the jury reports that no such annoyance will take place, any person may contest the truth of the statement, and produce evidence before the court; and if upon this evidence, the court shall think that the jury is wrong, it will refuse leave to erect the mill; if on the contrary, the jury reports that the health of any part of the neighbours will in its opinion be affected, or will probably be affected (*Mayo v. Turner*, 1 *Munf.* 405,) this is conclusive: no evidence can be adduced to controvert it; for the law says, that in such case, the court shall not give leave to build the mill, and erect the dam. Again, notwithstanding all these precautions, it occurred to the law makers, that the jury might be mistaken, or some thing omitted; and they added, that no inquest taken by virtue of the statute, and no opinion or judgment of the court thereupon, shall bar any public prosecution, or private action, which could have been had or maintained if this statute had never been made, other than prosecutions, and actions for such injuries as were actually foreseen and estimated upon the inquest; that is,

in effect, that as to all injuries not actually foreseen and estimated, the subject shall remain as if the statute had never been made. Now, it must be admitted by all, that the annoyance to the health of the plaintiff's family, which has followed the building of the mill, and which all the witnesses, and a jury sworn between the parties, say, was caused, by the stagnation of the waters in the mill pond was not foreseen or estimated upon the inquest: estimated it could not be, for though the law allows other injuries to be estimated, and the party to be compensated for them, it

attempts no such vain and cruel thing
575 with respect to health. If the *jury finds, that fish of passage, or ordinary navigation &c. may be obstructed, it may inquire how these obstructions can be removed, and the court, in granting leave, will take care to lay the party applying under proper conditions for preventing such inconveniences. But not so with regard to the health of the neighbours: if, in the opinion of the jury, that will be annoyed by the stagnation of the waters, it is not at liberty to inquire into the means of removing or preventing this inconvenience; nor is the court authorized to grant leave, in such cases, laying the party under conditions to do this or that, which it may think would be effectual to prevent the annoyance. The law tolerates no such experiments, made at the risk of human life.

It was said the savings of the statute did not comprehend this equitable interference, as they extend only to public prosecutions and private actions. I consider the true meaning of the statute to be this: that as to injuries not foreseen by the jury, the party shall have every remedy, which he would have had, if the statute had never been made. It has been seen, that the statute placed health above every other thing: it is admitted, that for injury to health, the permission to build the mill does not bar an action; and this case presents the fact, that for such injury a jury has given damages. If the dam were again erected, for the sickness and deaths of every summer, an action would accrue to the plaintiff: but would these damages redress his injuries? We see, that from 1815 to 1823, he lost four of his family, a son among them, from the effects of the pond, as the physicians think and depose. How many he might lose annually, if the dam were rebuilt, we cannot say; but this we may assume, that for the loss of a child or wife, no damages could compensate him, could place him where he stood.

The case, then, in every point of view, was one, I think, strongly calling for the preventive justice of the court. The injunction was properly allowed. It is equally clear to me, that the chancellor erred in dissolving it, simply upon the answer of the defendants, saying that they meant to cut

down the trees, and clear up the rub-
576 bish in the pond. It is one *of those very experiments, involving life, which the law will not permit. And as to saying that the defendants would make this experiment at their own peril, it is not true: they would make it at the peril of the plaintiff, because they could not restore to

him any member of his family, who might fall a sacrifice to it.

I think then, that the decree should be reversed, the cause sent back, and the injunction reinstated.

TUCKER, P. However difficult it may be to ascertain the causes of those diseases which are usually attributed to malaria, and however conflicting the opinions of the learned have been upon the subject, it must be admitted, that the evidence in this case has established, as far as evidence can establish it, that the health of the plaintiff's family was grievously annoyed and impaired by the mill dam of the appellees. This fact is put beyond question by the verdict between the parties, which, as between them is intirely conclusive; so much so, indeed, that if the dam were still in exactly the same situation as before, the verdict would be conclusive, in a second action for further damages, of the fact of nuisance. Unless, therefore, the evidence should establish, satisfactorily, that the removal of decayed timber, and other precautions, will prevent the recurrence of like evils, in case the dam be rebuilt, there can be no question, that the appellant will be entitled to new actions against the appellees for the purpose of abating this formidable nuisance. For the statute, in authorizing the establishment of mills, scrupulously guards against the erection of them, when the health of the neighbourhood might be annoyed thereby. It requires the jury to respond to that inquiry, and it prohibits the leave to build a mill where the health of the surrounding population will be endangered. Nay more; lest the jury might not anticipate such a consequence, it expressly provides, that no inquest under a writ of *ad quod damnum*, and no opinion or judgment of the court thereupon, shall bar any public prosecution or private action, which could have been had or maintained, other
577 than prosecutions *and actions for such injuries as were actually foreseen and estimated upon such inquest. If, then, the rebuilding of the dam should renew the nuisance, the right of public prosecution and of private action will be in full force.

The private action which is thus reserved to the party, may be either an action on the case, or a writ *quod permittat prosternere*; the last of which does not merely give damages, as a satisfaction for a past injury, but also strikes at the root of the evil, by removing the cause of the mischief itself. 3 Blacks. Comm. 220. It is, indeed, no longer in use; because the action on the case has been made to subserve all its purposes, by the course of practice established by the courts. For, though the verdict of the jury in the first action, gives to the plaintiff only a just satisfaction for the injury he has sustained; yet every continuance of a nuisance is held to be a fresh one, "and very exemplary damages will be given," says Blackstone, "if after one verdict against him, the defendant shall have the hardihood to continue it."

Thus, it is clear, the party injured has a right to have the nuisance abated; and that

that object may be pursued by repeated actions on the case, until it is accomplished; or the party may resort at once to the disused, yet still legal remedy of the writ *quod permittat prosternere*.

I am also inclined to think, from the evidence in the case, that the mill dam, as it existed, was a public nuisance, and might have been abated by a public prosecution, although a private action might also be sustained by the individual who had suffered special injury from the erection of it. 5 Bac. Abr. Nuisances, B. p. 151; Regina v. Wigg, 2 Ld. Raym. 1163; Dimmett v. Eskridge, 6 Munf. 308.

Admitting, then, that the rebuilding of the dam will renew the nuisance, it is perfectly obvious, that the appellant, by one or other legal remedy, will have a right to have it abated. And this being so, can there be a doubt, that a court of equity possesses the power, by injunction, to prevent a party from building up a dam, which
578 his adversary would instantly *have a right to make him pull down, though irreparable injury to the health or the life of the plaintiff or the members of his family, might be done, before that object could be effected? I think not. The jurisdiction, though confessedly one of much delicacy, is nevertheless unquestionable, where the right is clear, the danger imminent, and the injury irreparable. Mayor of London v. Bolt, 5 Ves. 129; Crockford v. Alexander, 15 Id. 138; Twort v. Twort, 16 Id. 128; Attorney General v. Nichol, Id. 341; Crowder v. Tinkler, 19 Id. 617; Crenshaw v. Slate River Co., 6 Rand. 245; Gardner v. Newburgh, 2 Johns. Ch. Rep. 164; 1 Madd. Ch. Prac. 155.

From this view of this subject, I think it obvious, that the whole case turns upon the question whether the rebuilding of the dam will renew the nuisance. I am inclined to think it will, but as the appellees have expended possibly large sums in the erection of their mill, it was proper that the chancellor should have had that fact ascertained, as far at least as it is practicable to do so. On the one hand, the injunction ought not to have been perpetuated, without the institution of a previous inquiry, whether by the means already adopted by the appellees, or by some other means, the danger of injury to the health of the neighbourhood could not be obviated. On the other, the injunction ought not to have been dissolved, and the appellees permitted to proceed at their own risk, before it was ascertained that there would be no probable risk to the appellant.

Therefore, I think the decree of the chancellor is erroneous, and that it should be reversed, and the cause sent back, with instructions to direct an issue to ascertain, whether the health of the appellant or his family will be annoyed by the stagnation of the water, in the event of the dam being rebuilt.

CABELL and BROOKE, J., concurring with the president, decree reversed, and cause remanded with the directions suggested by him.

579 *Cartigne v. Raymond and Another.
November, 1833.

Chancery Practice—Joint Defendants—Defence by One—Effect.—Case at Bar.—Upon a bill in chancery by a distributee against an administrator and his surety, alleging that the administrator has not duly accounted, and praying an account, the bill is taken pro confesso as to the administrator, but the surety answers, and proves, that the plaintiff, on a full and final settlement, has released the administrator, and so is not entitled to an account; upon which the chancellor dismisses the bill with costs as to both defendants: *Held*, the bill was properly dismissed as to both defendants.

This was a bill exhibited in the superiour court of chancery, by Catharine Cartigne against John Raymond, the administrator of Eliz. Allergue (who was the mother of the plaintiff and of this defendant) and Lodowick Brown, the surety of Raymond in his administration bond; charging, that Raymond had settled his account of administration before a commissioner appointed by the hustings court of Petersburg, and by that account appeared to be indebted to his intestate's estate in a balance of 872 dollars, of which the plaintiff as his codistributee was entitled to a moiety, and that he had never paid the same to her; surcharging and falsifying that account in several important particulars specified in the bill; and praying an account, and a decree for the plaintiff's share of the just balance which should be found due thereon, against Raymond and Brown his surety. Raymond did not appear and answer, and as to him the bill was regularly taken pro confesso. But Brown put in his answer, in which he alleged, that a full and final settlement had been made between Raymond and the plaintiff his sister; that he transferred to her, and she received property to the full amount of her share of their mother's estate, and she thereupon released him, formally by deed, from all demands on this account; and that this settlement was made, in order that Raymond might fulfil the purpose he then had, of leaving the country, without exposing his surety to loss, and he had since gone away; and he insisted, therefore that the plaintiff was not entitled to the account prayed in her bill. The truth of the answer was proved. And the cause coming on

580 *for hearing as to Raymond by default, and as to Brown on the bill, answer, replication thereto, exhibits and depositions, the chancellor dismissed the bill both as to Raymond and Brown, and gave them both a decree for costs. From this decree, the plaintiff appealed to this court.

The cause was argued by Allison for the appellant, and Spooner for the appellee. There was some discussion upon the merits, whether the proofs established the defence

***Chancery Practice—Joint Defendants—Defence by One—Effect.**—Where a bill is filed against two or more defendants jointly interested, and is taken for confessed against one or more of them for want of appearance, and one or more of the other defendants appear, make defence, and disprove the complainant's case, the bill should be dismissed as to all the defendants. This is well settled. *Aiken v. Connelley*, 2 Va. Dec. 384, citing the principal case. To the same effect, the principal case is also cited in *Payne v. Graves*, 5 Leigh 562. 579, and *foot-note*: *Ashby v. Bell*, 80 Va. 819; *Terry v. Fontaine*, 83 Va. 468. 2 S. E. Rep. 748; *Harrison v. Wallton*, 96 Va. 728, 30 S. E. Rep. 372; *Echols v. Brennan*, 99 Va. 155, 37 S. E. Rep. 786.

set up in Brown's answer; but of that the court saw no reason to doubt. The only point of law was a question of practice; namely, whether, as the allegations of the bill stood confessed as to Raymond, he standing out in default, it was proper to dismiss the bill as to him as well as Brown?

TUCKER, P. Though the bill was taken for confessed as to Raymond for want of an appearance and answer, yet his codefendant and surety answered, denied (as far as he could deny) the allegations of the bill, and has disproved them. He is then entitled to a dismissal, clearly. Now, his defence did not rest on matter separate, distinct, and applying only to himself. Admitting Raymond to be indebted, the surety had no defence. He defended himself by disproving the charge against his principal, for whom he was bound. They are conjunct in interest. If Raymond had wasted or purloined the estate, the other defendant was bound as his surety, and could not be discharged. The case is therefore clearly within the principle of *Clason v. Morris*, 10 Johns. Rep. 524. Were it otherwise, it would lead to this absurdity, that after dismissing the bill as to the surety, and decreeing against Raymond, the plaintiff might immediately bring her suit on the bond against the surety, and recover at law, though he had been discharged here.

Decree affirmed.

581

*Toole v. Stephen.

November, 1833.

(Absent **TUCKER, P.**)

Usury—Case at Bar.—S. and N. being indebted to the F. and M. bank, and the bank having recovered judgments against them for the debts, and the debtors then applying to the bank for indulgence, the bank agrees to give them a long indulgence, upon their agreeing to give real security for the debt, and moreover to pay the attorney of the bank all the costs of the suits, and the commission which the bank had agreed to pay him for collecting and securing the debt; the debtors give the real security for the debt; and one of them pays the costs and part of the commission to the attorney, and his executor gives the attorney his note for the balance of the commission; the attorney having full notice of the terms of the agreement between the bank and the debtors: *Held*, the agreement between the bank and the debtors, and therefore the note for the commission to the attorney, were usurious.

Decree between Codefendants.—Decree between codefendants refused under the particular circumstances of the case.

Adam Stephen deceased, having contracted a debt of 3750 dollars to the Farmers and Mechanics bank of Georgetown, as indorser for the accommodation of others who had failed, and George Newkirk having, in like manner as indorser for others, contracted a debt of 3510 dollars to the same bank, Stephen and Newkirk being joint indorsers on some of the notes, the bank placed the notes for the debts in the hands of John Baker, their attorney at law, to collect the debts from the indorsers, respec-

***Usury.**—See monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 608.

***Decree between Codefendants.**—In discussing this subject, *ALLEN, P.*, who delivered the opinion of the court, in *Blair v. Thompson*, 11 Gratt. 449, cited the principal case. For further information on this subject see *foot-note* to *Ould v. Myers*, 28 Gratt. 384; *foot-note* to *Blair v. Thompson*, 11 Gratt. 442; monographic note on "Decrees" appended to *Evans v. Sprague*, 11 Gratt. 615.

tively, by suit; and Baker accordingly brought suits against them, and recovered judgments. Stephen and Newkirk, thereupon, applied to the bank for indulgence; and, upon their agreeing that each should become responsible for the whole amount of the debts due by both, and should each give a mortgage of certain real estate held by them, respectively, to secure the payment of the whole amount due by both, and should, moreover, bind themselves jointly to pay, or secure to be paid, to Baker, the costs of the suits, and the usual commission of five per cent. on the whole sum, which the bank was bound, by its agreement with Baker, its attorney, to pay him, for collecting or securing the debts, the bank

582 agreed, on its part, to *give them a long credit for the debt. Stephen and Newkirk executed the mortgages, in pursuance of the agreement on their part; and Stephen, in his lifetime, paid Baker all the costs of the suits, and near half of his commission, leaving a balance of 190 dollars of the commission due; and, after his death, Baker applied to Alex. Stephen, his representative, for this balance, who gave him his own note for it; Baker having, at the time, exact knowledge of the particulars of the arrangement made by Stephen and Newkirk with the bank, and being indeed the agent of the bank in taking the mortgages for the whole debt. Baker assigned this note to Toole, and then died; and Toole brought a suit on the note against Alex. Stephen, and recovered a judgment.

Whereupon, Alex. Stephen exhibited his bill against Toole and Tapscott the executor of Baker, without making the bank a party, setting forth the facts above stated; and insisting, in the first place, that the balance claimed by Baker of his testator, and for which he gave his note, was, in truth, due from Newkirk, and ought to have been demanded of him; and, in the next place, and principally, that the consideration of the note was usurious; and praying, therefore, an injunction to inhibit Toole, the assignee, from enforcing his judgment at law. The injunction was awarded. The answers of the defendants, disclaimed all personal knowledge on the subject: But the evidence in the cause, established the facts of the case as above stated.

The chancellor, upon the hearing, perpetuated the injunction, with costs; and Toole appealed from the decree to this court.

Leigh for the appellant said, 1. that the commission was undoubtedly due to Baker, from the bank; and if the debtors of the bank thought proper to make an arrangement with it, by which they assumed the payment of the debt it owed to him, and thereby to induce him to give up his just claim on the bank, he, at least, practised no usury, and they ought not to be allowed to avoid their obligation to him, on

583 *the ground that the bank had practised usury on them. He, in effect, gave a full and fair consideration for the note. The plaintiff might have a right to recover the money from the bank, who had practised the extortion, but not to avoid his obligation to Baker, who had practised

no extortion, and to whom it was perfectly immaterial, who paid him the commission acknowledgedly due to him. And as to the bank, all it stipulated for, was the reimbursement to it by its debtors, of the exact expenses it had incurred in consequence of their neglect to make punctual payment of their just debts. But 2. if it was proper to injoin Toole the assignee, from enforcing his judgment at law, the court should have given him a decree against his codefendant Tapscott, the executor of the assignor, this being a case between codefendants, made out upon pleadings and proofs as between the plaintiff and defendants. *Chamley v. Ld. Dunsany*, 1 Scho. & Lef. 689, 709, 718. Indeed, the court ought not to have proceeded to a final decree, until the bank was made a party, so that a decree might have been given against it for the money due to Baker.

Stanard, for the appellee, said it was quite indifferent to him, what recourse Toole might be entitled to against Baker's executor, or he against the bank; but he suggested, that, as their respective remedies at law were very easy and simple, there was no manner of necessity to perplex this case with an effort to administer justice between the defendants, especially between the defendants and the bank, which was out of the commonwealth. On this point he also cited *Hubbard v. Goodwin*, 3 Leigh 492, 522. As the commission due from the bank to Baker, which the bank stipulated that Stephen and Newkirk should pay him, as part of the consideration of its forbearance of the debt they owed, was so much over and above the principal and interest of the debt, the consideration of Stephen's note to Baker for a balance of the commission, was plainly usurious; and as Baker had knowledge of all the particulars of the arrangement between the bank and

584 Stephen and Newkirk, he could *not possibly avoid the charge of usury. He cited *Meagoe v. Simmons*, 1 Mood. & Malk. 121, 22 Eng. C. L. R. 266.

PER CURIAM. The decree is right, and is to be affirmed, in omnibus.

Dupuy v. Hardaway.

November, 1883.

Guardians—Appointment—Displacement—Appeal.*—Under the statutes, 1 Rev. Code, ch. 64, § 2, ch. 66, § 50, 51, no appeal lies from an order of the county court appointing or displacing a guardian, to the superior court of chancery, or from the court of chancery to the court of appeals.

Testamentary Guardian—Appointment—What Amounts to.*—Quære.—A testator having devised and bequeathed real and personal property to his daughter, direct, that she shall have a good education, and live in a respectable family, and authorizes his executor to use part of the principal of the estate given her, if the income be not sufficient to carry that his purpose into effect: the daughter being at the time under fourteen years of age: Quære, whether this amounts to the appointment of the executor testamentary guardian of the infant daughter?

James Hardaway late of Nottoway died in September 1826, having by his last will and testament, devised and bequeathed real and personal estate to his infant daughter and only child, Mariel Hardaway, and then

*See monographic note on "Guardian and Ward" appended to *Barnum v. Frost*, 17 Gratt. 398.

made the following provision in respect to her and the property he had given her—"As it is my wish that my daughter Mariel shall have a good education and live in a decent respectable family, my executors are hereby authorized to make use of a part of the principal of the estate given to her, if the income is not sufficient to carry into effect my wish respecting her." The will was proved in the county court of Nottoway, in October 1826, and William Dupuy, one of the executors named therein, qualified as such; and at the same time, he qualified, as testamentary guardian of the infant daughter of the testator, by giving bond with surety for the faithful discharge of this trust.

585 *The infant appeared in person before the county court, at January term 1829, and made choice of Archer Robertson for her guardian. It was proved to the court, that she was above fourteen and under sixteen. There was no proof or even allegation, that Dupuy had been guilty of any neglect or misconduct in his trust as guardian, or was any way unworthy of it. Dupuy appeared, and opposed the appointment of another guardian; insisting, that he was the testamentary guardian, and that it was not competent to the court to displace him without any cause proved or alleged. But the court held, that Dupuy was not a testamentary guardian, and that the infant had a right to choose a guardian; and, therefore, appointed Robertson her guardian, in compliance with her choice. From this order Dupuy appealed to the superior court of chancery of Richmond, which affirmed it; and then he appealed to this court.

The cause was argued here, by Leigh for the appellant, and Spooner for the appellee.

I. The question on the merits, was, whether the testator's will constituted Dupuy testamentary guardian of his infant daughter?

Leigh said, that the statute concerning guardians &c. 1 Rev. Code, ch. 108, § 1, p. 405, taken from the English statute of the 12 Car. 2, ch. 24, authorized a father to appoint a testamentary guardian for his infant child, during any part of the infancy of such child; but it prescribed no precise form in which such an appointment should be made. It was always a question of intention. Here, the testator gave to his executors, the management of the estate he had given to his daughter, with power even to use the principal for her benefit, and the care of her education, maintenance and residence; he gave them, in effect, the custody and care of her person and of her estate; in other words, all the powers belonging to the office of guardian. He cited the following cases, decided on the English statute in *pari materia*; *Bedell v. Constable*, 586 *Vaugh.* 177; *Reynolds v. Lady Tenham*, 9 *Mod.* 40; 2 *Eq. Ca. Abr.* 486, ca. 16, and *S. C.* reported by the name of *Lady Teynham v. Lennard*, 4 *Bro. P. C. Toml. ed.* 302. Besides, in this case, the county court had decided that Dupuy was a testamentary guardian, by exacting bond and security from him as such, according to the 2nd section of the statute concerning guardians &c. If Dupuy was testamentary

guardian, he was entitled to the wardship by his testator's will, and could not be removed without cause; *Foster v. Denny*, 2 *Ch. Ca.* 237; 1 *Eq. Ca. Abr.* 260, ca. 3.

Spooner answered, 1. that the will of this testator made no appointment of a guardian for his daughter; for it did not devise the custody of her, within the statute; which, he said, was essential to constitute a testamentary guardian. 2. That if there was here, any good appointment of a testamentary guardian, yet the infant being under fourteen years of age at the time, and no time being appointed by the will for the continuance of the guardianship, the testamentary guardianship continued only till the infant was fourteen, when by law she had a right to choose a guardian. And for both these propositions, he relied on the resolutions in the case of *Bedell v. Constable*, *Vaugh.* 184, 5.

II. But the cause went off on another point; namely, whether an appeal lay from the order of the county court appointing Robertson the guardian, and thereby taking away the wardship from Dupuy? or from the order of the court of chancery, to this court?

Leigh said, that if any appeal lay from such an order of a county court, it lay clearly to the superior court of chancery, not of law; the jurisdiction in respect of guardians, belonging to the chancery side of the county court by the express provision of the statute, 1 *Rev. Code*, ch. 108, § 4, p. 406. The appeal lay to the superior court of chancery, and thence to this court; for the statute gave such appeals, wherever the subject in controversy was lands, slaves, or other specific property, no matter what might be the value. *Id.* ch. 64, § 2, p. 190, ch. 66, § 50, 51, p. 206. Now,

587 *he said, the right of a testamentary guardian, was that of a guardian in common socage; and such wardship was a specific right of property, for which the statute gave the guardian an action of ravishment of ward, or trespass, to recover his ward, if wrongfully taken and detained from him, and damages; *Id.* ch. 108, § 1, pp. 405, 6. Wardship of every kind was always regarded as not a bare authority, but an interest, a right of property; though a guardian in socage had nothing to his own use, but only to the use of the ward. 3 *Bac. Abr. Guardian*, E. F. p. 413. If a father appoint the mother of his children their guardian, such wardship, though worth little or nothing in a pecuniary point of view, was yet of inestimable value to the mother; and it were strange, if the law had given the county court power to take it away from her, without cause or pretence of cause, and without appeal.

Spooner maintained, that wardship was not specific property, within the meaning of the statutes concerning the appellate jurisdiction of the superior courts of chancery or of this court. It had been decided, that no appeal lies from an order of the county court, rescinding indentures of apprenticeship, and taking the apprentices from their master; which was a stronger case than the present. *Cooper v. Saunders*, 1 *Hen. & Munf.* 412. He also cited *Ritchie v. Mauro*, 2 *Peters* 243.

CARR, J. The question is, whether an appeal lay from the order complained of? If not, it is unnecessary to look further.

As appeals are unknown to the common law, some statute must be shewn giving the appeal in this case, or we must decide that it does not lie. Accordingly, the counsel for the appellant relied on those sections of the chancery law, which give an appeal from the county court to the superiour court, where the debt &c. shall be of the value of 33 dollars, and from the court of chancery to this court, where the debt &c. are of the value of 100 dollars; or, in either case, "where lands, slaves, or other specific property shall be the subject of the decree;" and he contended, that the wardship which was the subject of this decree, was comprehended by the terms specific property. I cannot think that such is the meaning of the statute. The claim of wardship is certainly not, in the usual acceptation of the words, a claim of specific property. In the case cited from Peters, chief justice Marshall says, "The office of guardian is of no value, except so far as it affords a compensation for labour and services, thereafter to be earned." It will be observed, that this phrase specific property is only used, in relation to appeals to or from the court of chancery. The statute says that this court shall have jurisdiction in appeals from the courts of law, if the matter in controversy be equal in value, exclusive of costs, to 100 dollars &c. or be a freehold or franchise, or where such freehold or franchise, or the title or bounds of lands are drawn in question; or in chancery cases, where lands, slaves or other specific property, shall be the subject of the decree or order. It is one of the distinctive powers of a court of equity, to decree the thing in specie, in many cases where the courts of law give damages only. Thus, if a party claims a family painting, or any other article, to which he may attach a peculiar value, the pretium affectionis, for which no damages will compensate him, equity will give him the thing itself. It seems to me, that it is in reference to this feature of equitable jurisdiction, that the law uses the phrase specific property. The collocation too, of the sentence,—lands, slaves or other specific property,—would seem to exclude the idea, that it was meant to comprehend, a claim of guardianship. This court has decided, that from the decision of the county court, in a question of apprenticeship, there is no appeal; and if that is not embraced by the terms "specific property," much less (I think) is a claim of wardship. If the counsel who took this position, had sat down to draw a clause giving appeals, and had meant to include this matter of guardianship, he would have couched his meaning in no such vague and

589 *dubious phrase as is here used. This conclusion, which I should draw from his known precision and accuracy, is strengthened, when we turn to the 30th section of the circuit superiour court law of 1831, Supp. to Rev. Code, ch. 109, p. 145, where, speaking of appeals, we find these words: "Appeals shall be demandable as of right,—from sentences or orders of the

said inferior courts, in controversies concerning the probat of wills and letters of administration, and concerning the appointing, displacing and controlling, the guardians of infants, and committees of persons of insane mind." This court, then, has no jurisdiction of the case; and the appeal must be dismissed.

The other judges concurring, appeal dismissed.

590 *Smith & Rickard v. Triplett & Neale.

November, 1833.

Sheriff's Return—Amendment*—Case at Bar.—Upon a bond assigned for valuable consideration, the assignees bring suit against the obligor, recover judgment, and sue out a fi. fa. which is levied, and a forthcoming bond taken, and that being returned forfeited, execution is awarded thereon against principal and surety, and a fi. fa. is sued out on the forthcoming bond; and on this execution, the sheriff returns nulla bona as to the surety but not as to the principal; then the assignees bring suit against the assignors, and after trial and verdict for defendants, court allows the sheriff to amend his return, and to return nulla bona as to the principal in the forthcoming bond; and gives plaintiff leave to amend his declaration, and to count on the amended return: *HARP.* it was right to permit the sheriff so to amend his return, and to permit the plaintiffs so to amend their declaration.

Same—Conclusiveness†—Case at Bar.—In the action between the assignees and assignors the sheriff's return of nulla bona on the execution against the obligors in the forthcoming bond, though amended after the assignees' action and five years after the return, so as to shew the insolvency of both, is conclusive evidence of such insolvency.

Same—Same—Same.—In such case, the insolvency of the debtors might be proved by other evidence, but the assignees have a right to the conclusive evidence of the sheriff's return.

Forthcoming Bond—Insolvency of Obligor—Witness—Deputy Sheriff.—It seems, the deputy sheriff in whose hands the execution on the forthcoming bond was placed, is a competent witness to prove the insolvency of the obligors.

***Sheriff's Return—Amendment—Time of.**—A court from which process is issued may permit the sheriff's return thereon to be amended at any time, even though a suit or motion founded on the original return be then pending, and even though the proposed amendment be inconsistent with the original return, and take away the foundation of the suit or motion. *Stone v. Wilson*, 10 Gratt. 533, citing the principal case, and *Wardsworth v. Miller*, 4 Gratt. 99 (see also, *foot-note* to this case). To the same effect, the principal case is cited in *Stots v. Collins & Co.*, 33 Va. 429, 2 S. E. Rep. 737.

On a motion to set aside a judgment and all the proceedings subsequent to the return of the summons on account of the defective return thereof, the sheriff may amend his return, on leave obtained from the court for that purpose, and thus cure the defect. To this effect, the principal case is cited in *Goolsby v. St. John*, 25 Gratt. 160; *foot-note* to *Walker v. Com.*, 18 Gratt. 14.

See further on this subject, monographic note on "Amendments" appended to *Snead v. Coleman*, 7 Gratt. 300.

†Same—Conclusiveness.—In *McClung v. McWhorter*, 47 W. Va. 150, 34 S. E. Rep. 741, *BRANNON, J.*, speaking for the court, said: "The proposition is to deny the facts stated in the sheriff's return. In many states this can be done, but in this state a sheriff's return on process emanating from the courts (judicial process) cannot be contradicted by parties or privies in its statement of such facts as the law requires him to state make the return good. The party must, for reparation of his injury, look to an action against the sheriff on his bond for false return. This may seem hard, but public policy requires, for stability of judicial proceedings, that the return of the sworn officer stand. It is a long-established rule with us, and based on sound principles and policy. Its reason, drawn from the United States supreme court, is ably defended in *Preston v. Kindrick*, 49 Va. 700, 27 S. E. Rep. 588, refusing relief in equity against a decree by default where relief was asked on the ground of false return. I will only refer to the cases: *Goodall v. Stuart*, 2 Hen. & M. 112; *Smith v. Triplett*, 4 Leigh 590;

Judgment on Assigned Bond—Satisfaction—Forthcoming Bond.—The taking of a forthcoming bond, on a judgment and execution against the obligor of an assigned bond, is not such a satisfaction of the judgment, as will preclude the assignees from having recourse against the assignors.

Same—Execution Nulla Bona—Right of Assignee against Assignor.—When assignees have recovered judgment on the assigned bond, and sued execution against the obligor, and that execution is returned nulla bona, they are entitled to recourse against the assignors; and it is no defence for the assignors to show neglect or malfeasance in the sheriff; the assignors, as parties injured, may sue the sheriff for such misconduct; the assignees are not bound to sue him, before they have recourse against the assignors, upon the contract of assignment.

Assumpsit by Triplett & Neale against Smith & Rickard in the circuit court of Fauquier. The original declaration contained a special count stating, in substance, that the defendants assigned a bond of one Wyatt to the plaintiffs for valuable consideration; and the plaintiffs, as assignees of the defendants, promptly commenced and diligently prosecuted a suit against Wyatt on the bond, in the 591 circuit court of *Fauquier, recovered a judgment, and sued out a fieri facias thereon, which was put into the hands of the sheriff of Fauquier, and by him levied on the property of Wyatt, who thereupon gave a bond with surety, for the forthcoming of the property at the time and place appointed for the sale thereof, which was returned forfeited; and execution on the forthcoming bond being afterwards awarded, the plaintiffs thereupon sued out a fieri facias against Wyatt and Holmes his surety in the forthcoming bond, which was put into the hands of Smith, deputy of Edmunds, sheriff of Fauquier; who made the following return thereon—"This execution, together with sundry other executions, was levied on one negro man slave, the property of Holmes [the surety] and after deducting the amount of other executions entitled to priority to this, and the sheriff's commissions, there remained the sum of 45 dollars, which I have paid to J. G. the plaintiffs' attorney; and I have made the further sum of 14 dollars, which I am ready to satisfy after deducting my commission; which latter sum is the proceeds of the sale of the said Holmes's property, contained in his schedule when he took the oath of an insolvent debtor under a ca. sa. in another case, but of a date subsequent to this execution; 1st August 1822." By reason whereof the defendants became liable to pay the plaintiffs the balance of the sum mentioned in Wyatt's bond so assigned to them, and being so liable, in consideration thereof, assumed to pay the same &c. To this special count, there were added the common money counts, 1. for money had and received; 2. for money

lent and advanced; and 3. for money paid, laid out and expended. The defendants pleaded the general issue, and the statute of limitations.

At the trial of the issues, the plaintiffs having proved the case alleged in the special count of the declaration, and given in evidence the return of the deputy sheriff Smith on the execution upon the forthcoming bond (the same which was literally copied in that count) called Smith, the deputy, as a witness, to prove the insolvency of Wyatt, the principal *debtor; but the court rejected him as incompetent. There was, then, verdict for the defendants. The plaintiffs moved the court to set it aside, and direct a new trial, upon the ground that the testimony of Smith had been improperly excluded; and the court did set aside the verdict, and directed a new trial.

And on the same day, the court, on the motion of Triplett & Neale, gave leave to the deputy sheriff to amend his return on their execution against Wyatt and Holmes on the forthcoming bond (though more than five years had now elapsed since the original return was made) by adding, immediately after the date thereof [see the copy of it in the statement of the declaration] the following words—"And no property of the said Wyatt found to levy this execution on." And, at the same time, the court gave the plaintiffs leave to amend their declaration.

The amended declaration was the same as the other, except that in the recital of the sheriff's return on the execution on the forthcoming bond, the words above mentioned, just added thereto, by way of amendment, with leave of court, were recited as part of the return.

The defendants put in a general demurrer to the amended declaration, and pleaded the general issue, and the statute of limitations.

The court overruled the demurrer. And upon the trial of the issues, four bills of exceptions were filed by the defendants, to opinions of the court.

1. The first stated, that the plaintiffs to sustain the issues on their part, offered in evidence, the bond of Wyatt, on which was indorsed an assignment to them by the defendants for value received, and the record of the proceedings in their suit against Wyatt on the bond, which now corresponded exactly with the statement thereof in the first count of the amended declaration; the return of the deputy sheriff Smith, upon the execution on the forthcoming bond, as now amended by leave of the court, and as it was set forth in that count, being given in evidence as part 593 of the record. *Whereupon, the counsel

for the defendants objected to the words added by the amendment to the original return, as above mentioned, going to the jury as evidence in support of either the first or the second count in the declaration; but the court overruled the objection, admitted the evidence, and instructed the jury, that the amended return was conclusive evidence of the insolvency of Wyatt, unless they should believe from the evidence, that the said return was fraudulent

Bowyer v. Knapp, 15 W. Va. 277; Stewart v. Stewart, 27 W. Va. 168 (syll. point 10); Rader v. Adamson, 37 W. Va. 582, 16 S. E. Rep. 806; Peck v. Chambers, 44 W. Va. 270, 28 S. E. Rep. 706; Ramsburg v. Kline, 98 W. Va. 466, 31 S. E. Rep. 608. This doctrine does not apply to notices to take depositions, or other notices given by parties, nor to returns by private parties. Bowyer v. Knapp and Chambers v. Peck, *supra*. I remark, too, that where a sutor colludes with the officer to make a false return, it is not conclusive. That is the exercise of jurisdiction to annul a judgment for fraud.

Judgment on Assigned Bond—Satisfaction—Forthcoming Bond.—See principal case cited in Garland v. Lynch, 1 Rob. 566.

lent or collusive (of which the defendants offered no evidence); to which opinion the defendants excepted.

2. They then offered evidence to prove that Wyatt had, up to the return day of the plaintiffs' execution on the forthcoming bond, and for a long time afterwards continued to have, sufficient property in his possession, of which the debt, interest &c. in the execution mentioned could have been levied; but the court rejected this evidence; and the defendants excepted.

3. The plaintiffs having offered in evidence, a copy of a writ of ca. sa. sued out by one Loyd against Holmes (Wyatt's surety in the forthcoming bond) which appeared to have been served on Holmes after the plaintiffs' execution on the forthcoming bond against Wyatt and Holmes was in the sheriff's hands, and before the return day thereof, and on which ca. sa. Holmes took the oath of insolvency; and having also offered in evidence, along with this ca. sa. a copy of the schedule of Holmes's effects surrendered on his taking the oath of insolvency; the defendants, thereupon, offered evidence to prove, that Holmes had, at the time he took the oath, and long afterwards continued to have, other property, besides that mentioned in his schedule, sufficient to satisfy the plaintiffs' execution; but the court rejected this evidence. The defendants excepted.

4. They then offered evidence to prove, that the plaintiffs' execution on the forthcoming bond, against Wyatt and Holmes, had been in fact levied by the sheriff on a slave of sufficient value to satisfy the debt, which slave was afterwards
594 *discharged by the sheriff, without the plaintiffs' consent; but the court rejected this evidence also; and the defendants excepted.

There was a verdict and judgment for the plaintiffs, for 129 dollars with interest &c. to which this court, on the petition of the defendants, allowed a supersedeas.

Stanard, for the plaintiff in error, insisted, 1. That the court ought not to have set aside the verdict rendered at the first trial on the original pleadings; for, he said, the deputy sheriff Smith was an incompetent witness to prove the insolvency of Wyatt, since proof of that fact was necessary to exonerate himself from the charge of neglect of duty, or of malfeasance in office, for which he was liable to an action at the suit of the plaintiffs. 2. That, at the time the action was brought, there was no good cause of action, inasmuch as the sheriff's return on the execution on the forthcoming bond, did not shew that Wyatt was insolvent. The amendment of the return, after the action brought, could not suffice to maintain it. Indeed, the leave for the sheriff to make the amendment of his return, was asked for the sole purpose of procuring matter necessary to maintain the action already pending; and the court ought not to have permitted such an amendment to be made, to answer such a purpose. 3. That the judgment recovered against Wyatt on the assigned bond, was completely satisfied and extinguished by the forthcoming bond; and if the forthcoming bond was insufficient to secure the

debt, the sheriff was liable to Triplett & Neal for taking 'insufficient security. They, and they alone, had remedy on the forthcoming bond; they, and they alone, had remedy against the sheriff for taking an insufficient bond: the assignors, certainly, were not entitled to institute any proceedings on the forthcoming bond, or against the sheriff on account of its insufficiency. 4. That the sheriff's return, that Wyatt was insolvent, especially as the return, in that particular, was made ex post facto to fit the plaintiffs' case,

ought not to have been taken as conclusive evidence of the *fact of

Wyatt's insolvency; and the proof of his solvency offered by the defendants ought to have been admitted. 5. That, as it appeared by the plaintiffs' own shewing, that a ca. sa. sued out by another creditor, had been served on Holmes, the surety of Wyatt in the forthcoming bond, while Triplett & Neale's execution thereon was in the sheriff's hands, which, therefore, bound all his effects; and as it appeared by the return on Triplett & Neale's execution, that the effects surrendered in Holmes's schedule had been sold to satisfy the ca. sa. creditor, in the first place, and only 14 dollars, the balance of the proceeds, had been applied to the credit of Triplett & Neale's execution, whereas the whole of the proceeds ought to have been paid to them; here was clear proof, by the plaintiff's own shewing, that they had not pursued their remedy on the forthcoming bond, as efficiently as they might and ought to have done, before they had recourse to their assignors, Smith & Rickard. And 6. That as the assignors by the contract of assignment, in effect, only warranted the solvency of Wyatt the obligor, the evidence offered to prove, that Triplett & Neale's execution on the forthcoming bond, had been actually levied on a slave, and that this property was released by the sheriff, ought to have been admitted. It would have established the solvency of the debtors beyond question; and it would have shewn, that the sheriff had made himself liable to the plaintiffs, for the whole debt. They ought to have pursued the remedy which the law gave them against the sheriff, and which must have been amply sufficient.

Leigh, for the defendant in error, answered, 1. That the verdict on the first trial was properly set aside, on the ground that the testimony of Smith the deputy sheriff to prove the insolvency of Wyatt, had been excluded. Smith was a competent witness: he stood perfectly indifferent between the parties: if Wyatt was in fact insolvent, that would be a defence for him at the suit of either party; if he was solvent, either party, the defendants as well as the plaintiffs, might maintain an action against him for neglect of official

*duty. 2. He said that, though in an action by the assignee against the assignor of a bond, the insolvency of the obligor may be proved by other evidence than the return of nulla bona on an execution against him, yet the assignor has a right to demand such a return, if it be true. The fact of the obligor's insolvency, was the foundation of an assignee's right

to recourse against the assignor, and, in this case, the fact existed, if at all, before the action brought; and the amended return was only that evidence of the pre-existing fact, which the assignees had a right to require from the sheriff. 3. The forthcoming bond is nothing but part of our process of execution; neither Triplett & Neale nor the sheriff could have prevented Wyatt from giving it; nor was it true, that the sheriff was liable if he took surety in the bond who turned out afterwards to be insufficient; he was liable only in case the surety was insufficient at the time he was received as such. 4. The sheriff's return that Wyatt was insolvent was conclusive; *Stuart v. Goodall*, 2 Hen. & Munf. 105. The evidence offered of the solvency of Wyatt and of his surety Holmes, was nothing to the purpose, unless it was also proved that this was known to the plaintiffs; and if such evidence as the court excluded were admissible, an assignee, after having exerted the utmost diligence without effect, might be surprised, in his action against the assignor, at the trial, and defeated, by evidence of the solvency of the obligor. 5. As to the other matters which Smith & Rickard, in the court below, attempted to set up in their defence, he said, they amounted at the most to this, that the sheriff had been guilty of such gross neglect or malfeasance in office, as made him liable to Triplett & Neale for the debt. Now, in the first place, it was not pretended that Triplett & Neale had been apprised of this misconduct of the sheriff, though it seemed Smith & Rickard were; and, in the next place, if the sheriff had made a false return as to the insolvency of Wyatt, or been guilty of any misconduct or neglect, Smith & Rickard were parties aggrieved thereby, as well as Triplett & Neale, and had as clear a right to an

597 action against him. *1 Rev. Code, ch. 78, § 17, p. 280, ch. 134, § 48, p. 542. And then the question was, whether the assignees were bound to resort to and exhaust their remedy against the sheriff, before they could have recourse to the assignors? or had a right to recourse against the assignors immediately, leaving them to pursue their remedy against the sheriff? The assignees were not bound to exhaust every possible remedy against the obligor; much more were they not bound to prosecute their remedy against the sheriff; especially, when it did not appear that they were apprised of his having made himself liable, till their assignors alleged the fact in their defence at the trial. According to the objections of this court, the assignees had used such due diligence in their effort to recover the debt of Wyatt the obligor, as entitled them to recourse against the assignors. *Mackie v. Davis*, 2 Wash. 219; *Stuart v. Goodall*, 2 Hen. & Munf. 105; *Barksdale v. Fenwick*, Id. 113, in note; *Harrison v. Raine*, 5 Munf. 456; *Caton & Veale v. Lenox*, 5 Rand. 31.

CARR, J. The assignee of a bond or note must use due diligence to recover from the obligor or maker, before he can resort to the assignor. What is due diligence, has been left by the court to depend on the

particular circumstances of each case. Generally speaking, the assignee must sue; must pursue a judicious course of proceeding; obtain a judgment, and the return of nulla bona on a fi. fa. These seem to be the general rules established by the cases. The exceptions to them, it is unnecessary to state. It is truly said by judge Roane, in *Mackie v. Davis*, that "the assignee of a bond acquires a legal right to bring suit upon it, and to receive the money, discharged from any control of the assignor over the subject." It is this legal right, which imposes on the assignee the duty of pursuing (as the same judge styles it) a judicious course of proceeding; by which, I presume, is meant, that he shall take such steps for the collection of the debt, as a prudent obligee would generally pursue.

598 *In the case before us, there was a judgment and execution, a forthcoming bond taken, and an execution on that. The first return on this execution was certainly not such as, of itself, to establish the insolvency of the obligors in the forthcoming bond; but the court permitted the sheriff to amend his return; and this, I think, it had a right to do, though it was after the lapse of five years, and after a verdict for the defendants at a former trial, and a new trial granted in this cause. The amended return, if it be taken to relate back to the date of the first (as I suppose it does) amounts to a return of nulla bona as to Wyatt; and the case of *Stuart v. Goodall* decides, that the assignor, in a suit against him, shall not be permitted to introduce proof to contradict such a return. But what was the return as to Holmes? So far from amounting to a return of nulla bona, it shewed that there were goods of Holmes, and that this execution was levied on some, but not on all of them. This return then does not establish that sort of insolvency of Holmes, which the court will not suffer to be contradicted. The proof, indeed, that at this time Holmes had property sufficient to satisfy this execution, other than that levied on, would stand perfectly well with the sheriff's return. Such proof the defendants offered, but the court excluded it. In this, I think, the court erred; for such proof was surely relevant both to the question of insolvency and of due diligence. What bearing it might have on those questions, was for the jury, with whom it remained to decide upon all the circumstances, whether the plaintiffs had made out a case which entitled them to come upon the assignors. Farther, to prove that while this same execution was in the hands of the sheriff, there was other property of Holmes, the defendants offered evidence to prove, that this execution was levied upon a slave of value sufficient to satisfy the execution, and discharged by the sheriff without the assent of the plaintiffs: and this too was excluded by the court, though it did not contradict the sheriff's return, and bore, I think, upon both questions before the jury. It

599 went to convict *the sheriff of a gross violation of duty, such as would have made him clearly liable for the debt; and it might have fairly raised the question, whether due diligence, involving a judi-

cious course of proceeding, would not have required the assignees to take steps against the sheriff, before coming upon the assignors? I do not understand that any case in this court has gone so far as to say that the assignee, while holding the uncontrolled ownership and management of the debt, may pass by the grossest blunders and misconduct of law officers; conduct rendering them unquestionably liable; conduct which clearly prevented the making the money out of the debtor;—and come directly upon the assignor. I have seen no such case; and I think it would be bad policy, as well as hard measure; it would tempt the assignee to connive at the malpractices of sheriffs, and to hurry over in the most careless and summary way, the process which was to bring him upon the assignor. The assignor is quite as much entitled to the favor of the court as the assignee. He gives the whole control of the case out of his hands, and before he is compelled to pay the debt, is entitled to demand proof, that after an honest and diligent pursuit of his debtor, the money cannot be made. I am of opinion that the judgment should be reversed.

TUCKER, P. In the case of *Mackie v. Davis*, this court, in establishing the liability of the assignor to the assignee, who after due diligence to recover from the obligor has failed to receive the amount of an assigned bond, carefully avoided, nevertheless, to lay down any rule as to what amounts to due diligence. The court has since, with equal caution, declined the attempt to draw the precise line at which the assignor's liability commences. It is wise, I think, in their successors to follow the example. The demarcation will best be made by successive decisions, which will serve as landmarks to those who engage in the traffic for bonds. The decisions of the courts on such questions, if they do not stand upon the elevated ground of being rules of property, *are at least the law of contracts. Those who buy and those who sell, look for the obligations which are assumed by the assignor, to those decisions. Hence the principle *stare decisis*, is peculiarly applicable to cases of this description. Upon these considerations, I shall take the case of *Stuart v. Goodall*, which has never been impugned, as not now to be questioned; modified at least as it is by the opinion of judge Roane in the case of *Barksdale v. Fenwick*. And on the same ground, I shall consider the cases of *Caton & Veale v. Lenox*, and *Harrison v. Raine*, as not to be now questioned. With these preliminaries, let us proceed to the consideration of this case. It comes to us upon exceptions to the opinions of the court who tried the cause, and those opinions constitute therefore the subject of examination.

1. I do not perceive, that, there was an exception to granting the new trial, but as this matter was made a subject of discussion, I shall observe, that I think the new trial was rightly granted to the plaintiffs, because the verdict had been found under an erroneous instruction of the court. The return of the sheriff as originally made, having omitted to return *nulla bona* as to Wyatt, the plaintiffs were indeed without

the benefit of that conclusive return; but, as the action might have been sustained by proof of insolvency, without even the institution of a suit, and as such proof is also a sufficient excuse even for negligence in the prosecution of one, if it could have been sufficiently made out that no diligence would have been availing, I think it clear, that the plaintiffs should have been permitted to prove that Wyatt was in truth insolvent when their execution issued.

2. Upon the second trial, the amended return was produced in evidence, and was admitted. I think it was properly admitted. It did not give a cause of action by relation, but it was evidence of a fact which existed before the suit, and which might have been proved by other evidence. The plaintiffs, moreover, had a right to have had this return of the sheriff as to the fact, before the suit brought, and were therefore entitled to it *nunc pro tunc*: and there is less reason *for the objection to its admissibility, since it did not contradict a former return, but only supplied an omission in it.

3. This return having been admitted, the defendant then offered to prove that Wyatt at the date of that execution had other property. This evidence was rejected, and I think properly. It is not stated, that the property so supposed to exist, was known either to the sheriff or to the assignees; and the fact, therefore, did not go to fix a malfeasance on the sheriff or negligence in the plaintiffs. Nothing is more possible, than that a man may have property unknown to the sheriff and the assignee, though the sheriff may honestly and truly have returned *nulla bona* as to him. The assignor, as judge Roane tells us, may well be presumed to know more of the obligor and his property than the assignee. It was, probably, for that reason among others, that in *Stuart v. Goodall*, the court justified the peremptory refusal of the county court of Henrico, to permit the introduction of evidence to prove that Beverley, the obligor, had goods and effects sufficient to satisfy the execution at the time of the sheriff's return. Judge Tucker approved this refusal, expressly on the ground, that the admission of the evidence would have been to permit the return to be contested, whereas it was incontrovertible between the assignee and assignor. Judge Roane and judge Fleming concurred in refusing it, though upon grounds somewhat different, and perhaps yet stronger. They seem to have considered the return conclusive upon the rights of the parties, unless the assignee had been proved to have known that there was other property, or that any other execution would probably have produced the money. Many a bond has been bought and sold on the faith of that case, which may therefore be considered as entitled to peculiar respect. It has been familiarly considered as the law of the subject, for more than twenty years.

4. The plaintiffs having introduced the return upon the execution against Holmes, shewing that only a certain sum could be made out of him, and proof that between the date *of the issue of their execution and its return, he had taken the oath of insolvency, the defendant then

offered evidence to prove that Holmes had other property, without however offering to prove that the sheriff or assignee knew of it. I can see no material distinction between this and the case arising under the last mentioned bill of exceptions. In that, the return which it was proposed to controvert, was a return of nulla bona; in this, it is the return that the defendant in the execution had taken the oath of insolvency. He might, it is true, have been made to swear out again under a ca. sa. issued at the suit of Triplett & Neale; but there was no obligation to sue that ca. sa. under the circumstances, nor could the proof that he had other property be proper, unless accompanied by proof that the assignees knew of it. Without such knowledge, they could not be charged with want of due diligence.

5. As a last effort the defendants offered evidence to prove, that the execution on the delivery bond was levied on a slave who was discharged by the sheriff without the assent of the plaintiffs. The plaintiffs, then, were in no fault. The sheriff, if the fact was so, was guilty of a malfeasance, and is liable for the debt. To whom? That depends precisely upon the question, whether, in case of the sheriff's malfeasance, the assignee is or is not bound to pursue him? If he is not bound to pursue him, then the wrong done is a wrong done to the assignor, who may have his action on the case. My own opinion is, that where the debt is not made, and where the sheriff is only responsible for malfeasance, the assignee is not bound to pursue him. It would clog and embarrass assignments too much to require this; and, moreover, it is better that the party ultimately interested in establishing his defaults, should institute the proceeding for the purpose. This court seems, indeed, to have been averse to requiring of the assignee more than a diligent pursuit of the obligor, and has exonerated him from the necessity of pursuing collateral, uncertain, and merely contingent remedies. Hence the decision, that

603 though there be special bail, and though there has been a ca. sa. returned non est inventus (which prima facie makes the bail liable) yet it is not necessary to pursue him; for, peradventure, he might still relieve himself by bringing in the principal before the return of the first scire facias executed, or of the second returned nihil. Such was the decision in *Caton & Veale v. Lenox*. And if the assignee is not bound to pursue the bail, even where there is a moral certainty that he must be fixed with the debt (for, in that case, *Hartshorne* was proved to be out of the country, and resident in Baltimore), I cannot perceive the propriety of requiring him to proceed against a sheriff, in order to take the chance of fixing upon him a malfeasance, which may charge him with the debt.

Upon the whole, I am of opinion, that there is no error in the proceedings of the circuit court, and that the judgment ought to be affirmed.

CABELL and BROOKE, J., concurring with the president, judgment affirmed.

The Farmers Bank v. Clarke.

November, 1833.

Debt on Note—Statute of Limitations—Subsequent Conditional Promise.*—In debt on a promissory note negotiable at bank, by holders against indorsers, the indorser pleads the general issue, with leave to give the statute of limitations in evidence; and, at the trial, the plaintiffs prove a conditional promise made by the indorser to pay the debt, within the period of limitation: HELD, such conditional promise does not suffice to take the case out of the statute, unless performance of the condition be shewn.

Debt in the circuit court of Henrico, brought by the president, directors and company of the farmers bank of Virginia, indorsees and holders, against Frederick Clarke, the maker, and Miles Bott 604 and Colin Clarke, indorsers, of a *note negotiable and payable at the bank, for 1200 dollars. The action was founded on the statutes of Virginia, giving an action against the maker and indorsers of such notes jointly; 1 Rev. Code, ch. 126, § 2, p. 485; 2 Id. ch. 196, § 15, art. 13, p. 90. Frederick Clarke confessed judgment. The writ abated as to Bott, by the return, that he was "no inhabitant." The defendant Colin Clarke pleaded nil debet; and the plaintiffs agreed, that he might give in evidence under that plea, any matter which he might give in evidence under a plea of the statute of limitations.

At the trial the plaintiffs filed a bill of exceptions, stating, that the plaintiffs offered in evidence the note on which the action was founded, which was dated the 12th February 1819, and payable sixty days after date, with two credits indorsed thereon, one for 187 dollars received from W. Clarke trustee, dated the 11th June 1825, and the other for 564 dollars received from J. Brockenbrough and other trustees, dated the 13th March 1826; and proved the making of the note by Frederick Clarke, and the indorsements thereof by Bott and Colin Clarke; and that the note had been discounted at the bank for the accommodation of the maker, and had been protested for non-payment at maturity, and due notice of the protest given to the defendant Colin Clarke. And, then, to take the case out of the statute of limitations, on which that defendant relied, the plaintiffs introduced a witness, who testified, that some years after the protest of the note, the defendant offered a note at the same bank for discount for his own accommodation, which the bank refused to discount; and shortly after this, and within five years next before the commencement of this action, the defendant asked the witness (who was a director of the bank at the time) why his note had been rejected; to which the witness answered, that he had voted for rejecting it, because the defendant was on the protest book of the bank, alluding to the protested note of Frederick Clarke indorsed by Bott and the defendant Colin Clarke, on which this action was brought; and thereupon, the 605 defendant said, "that the bank was well secured in that case, for it had a

*Debt on Note—Statute of Limitations—Subsequent Acknowledgment.—See foot-note to *Butcher v. Hixton*. 4 Leigh 519, where the cases citing the principal case are collected.

deed of trust on Frederick Clarke's real property, as collateral security, and if the bank would sell, or when it should sell, that property, should it not sell for enough to discharge the debt, he, the defendant, would pay the balance; that the property was sufficient to pay Frederick Clarke's bank debt, and he would pay the debt for the property." Whereupon the court, upon the motion of the defendant's counsel, instructed the jury, that if they should find from the evidence, that the defendant's supposed admissions were to the effect, that, upon condition the plaintiffs would resort to the collateral security they held for Frederick Clarke's debt, he would pay any balance that might remain unsatisfied, then such conditional admission was not sufficient to take the case out of the statute of limitations, unless the plaintiffs should prove that they had performed the condition. And then the plaintiffs' counsel moved the court to instruct the jury, that if an indorser of a note acknowledges that there is a subsisting debt, but says, that before he will pay it, the holders must resort to collateral security given by the maker or any other indorser, to which, in point of law, the holders were not bound to resort before they could recover on the note, this does not prevent the acknowledgment of the debt from taking the case out of the statute of limitations; but the court refused to give this instruction to the jury, and instructed them, that if they should find from the evidence, that the defendant's acknowledgment was unconditional, such acknowledgment was sufficient to take the case out of the statute; but if they should find that the supposed acknowledgment of the defendant was dependent on any act to be performed by the plaintiffs, such conditional acknowledgment was not sufficient for that purpose, unless the plaintiffs proved performance of the condition. To these opinions of the court the plaintiffs excepted.

There was a verdict and judgment for the defendant; from which the plaintiffs appealed to this court.

606 *Daniel, for the appellants.

The attorney general, for the appellee.

CARR, J. I think the instructions given by the circuit court to the jury were correct. It is not consonant with either law or reason, that when a man makes a promise or acknowledgment, you shall take a part of it, and reject the rest; that when he says, "if you will do this or that, I will pay you," you shall discard the condition, and make his promise unconditional. I know there are many old cases, which consider the statute as founded on the presumption of payment; that whatever repels that presumption, is, in legal effect, a promise to pay the debt; and that, though such acknowledgment is accompanied with only a conditional promise, or even a refusal to pay, the law considers the condition or refusal void, and the acknowledgment itself as an unconditional answer to the statute. But the more recent, and, I think, the more rational, decisions take a different view of the case. They consider this a statute of repose, which ought to receive

from the courts a fair and just support. They consider the acknowledgment a new promise, not a continuance of the old; and that to revive the debt, it must be unqualified and unconditional. This is decided in *Clementson v. Williams*, 8 Cranch 72. And again in *Wetzell v. Bussard*, 11 Wheat. 314, chief justice Marshall, delivering the opinion of the court, and speaking of the acknowledgment, says, "If it be connected with circumstances which in any manner affect the claim, or if it be conditional, it may amount to a new assumption, for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shewn." In *Bell v. Morrison*, 1 Peters 351, 362, the court after repeating what it had decided in the cases before cited, says, "We adhere to the doctrine thus stated, and think it the only exposition of the statute which is consistent with its true object and import. If

the bar is sought to be removed
607 *by the proof of a new promise, that promise, as a new cause of action, ought to be proved, in a clear and explicit manner, and be in terms unequivocal and determinate; and if any conditions are annexed, they ought to be shewn to be performed." In *Moore v. Bank of Columbia*, 6 Peters 92, the court reassert verbatim, the doctrine of the former cases, and consider it the settled doctrine of the court. The supreme court of Massachusetts, in *Bangs v. Hall*, 2 Pick. 368, after reviewing the principal cases, held, that to take a case out of the statute, there must be an unqualified acknowledgment, not only of the debt as originally due, but that it continues so; and, if there has been a conditional promise, it must be shewn that the condition has been performed. The same doctrine has been held in New York; *Sands v. Gelston*, 15 Johns. Rep. 511; *Roosevelt v. Marks*, 6 Johns. Ch. Rep. 266, 290. And in Pennsylvania; *Brown v. Campbell*, 1 Serg. & Rawle 176; *Fries v. Boisselet*, 9 Id. 128. If I were to go into the English authorities, the field would be still wider: but I will not. These cases assuredly sustain the correctness of the instructions of the circuit court in this case, and shew that the loose conversation of Clarke with the bank director, was wholly insufficient to take the case out of the statute.

It is not necessary to examine the more general proposition discussed in the argument, whether in debt on a promissory note, any subsequent acknowledgment can be resorted to, to take the case out of the statute. However, as the case of *Butcher v. Hixton*, [ante] in which that point was decided, has excited some remark, I shall barely say, that the case was very ably argued; that for myself, I examined it very laboriously; and that on a reexamination, I continue to think the opinion there given correct, whether we take it upon the pleadings, upon the plain meaning of the statute, upon principle, or upon authority.

CABELL, J. I am of opinion that a conditional promise to pay a debt, will not take the case out of the statute of
608 *limitations, without proof of the

performance of the condition. It is competent to him who makes a promise, to annex to it what terms or conditions he pleases; and it would be unreasonable to permit him in whose favor it was made, to avail himself of the benefit of it discharged of the condition. The point has been repeatedly adjudged in the supreme court of the U. States. On this ground, I am for affirming the judgment. Whether a promise, sufficient to take a case out of the statute of limitations, operates as a revival or continuation of the old contract, or as a new, distinct and substantive contract, founded on the old consideration, or whether there is any difference between the action of debt and the action of assumpsit, as relates to this subject, I do not deem it necessary to decide at present; since, in any aspect of this case, the judgment is right.

BROOKE, J. I concurred in the opinions of the president and judge Carr in *Butcher v. Hixton*, solely on the ground, that the acknowledgment of Hart, the principal in the note in that case, could not be considered as a waiver of the statute of limitations by Butcher, the surety. I did not think it material to decide any other point made in the argument. Even in an action of assumpsit, such an acknowledgment by the principal, would not have been considered as a waiver of the statute by the surety. The vacillating decisions of the english judges on this subject are very much to be regretted; and it would be better that the legislature should interpose, and restore the statute to its original object, by an enactment that would exclude every species of acknowledgment or promise, not made in writing. If the acknowledgment stated in the demurrer to evidence in *Butcher v. Hixton* had been by Hart and Butcher, jointly, it would not have repelled the statute. It was a mere acknowledgment that the debt was justly due: but, as is said by chief justice Marshall in *Clementson v. Williams*, this would not be enough, as the statute was not enacted to protect persons from claims fictitious in their origin, but from "antient claims, whether well or ill founded. The acknowledgment in *Butcher v. Hixton*, being defective in two respects, as a waiver of the statute, it was unnecessary to decide the question, whether it was within the issue in that case. My impression is, that if the acknowledgment had been made by Hart and Butcher both, it would have been within the issue of debt or no debt, which is the issue on the plea of nil debet. The cases on this subject are collected in *Blanchard's treatise on limitations*, pp. 128-140.

As to the case now before us, the case of *Wetzell v. Bussard*, in the supreme court of the U. States, is conclusive. In that case as in this, the acknowledgment was conditional, and it was held that the plaintiff ought to prove performance or readiness to perform the condition, else it was unavailing to repel the statute. Here, no such performance of the condition has been shewn. I think the judgment must be affirmed.

TUCKER, P. Though I think it very

clear that the judgment in this case must be affirmed, without relying on the opinions expressed by a part of the court in the case of *Butcher v. Hixton*, yet I think it proper to remark as to that case, 1st, That it is not conceived to go farther than to establish the necessity of bringing assumpsit, or adding a count on indebitatus assumpsit to the declaration in debt, where reliance is to be placed upon an acknowledgment or promise to avoid the bar of the statute of limitations.—2ndly, That however technical this may seem, yet, similar technicalities are to be found in innumerable decisions of this court, and are necessary indeed to preserve distinct the line of demarcation between different actions, and to prevent the whole system of pleading from being thrown into chaos: see *Cooke v. Sims*, 2 Call 39; *Young v. Gregorie*, 3 Id. 446; *Taylor v. Rainbow*, 2 Hen. & Munf. 423; *Moore v. Dawney*, 3 Id. 127; *Smith v. Segar*, Id. 394; *Syme v. Griffin*, 4 Id. 277; *Kirtley v. Deck*, 2 Munf. 10; *Wilson v. Crowdhill*, Id. 302; *Hall v. Smith*, 610 3 Id. 550; *Sexton v. Holmes*, Id. 566; *Beverly v. Holmes*, 4 Id. 95; *Donaghe v. Rankin*, Id. 261; *Moseley v. Jones*, 5 Id. 23.—3rdly, That no serious inconvenience can be sustained, even in causes now pending, since in every case, upon motion, a second count in debt upon the new promise or acknowledgment, or a count in indebitatus assumpsit, may be added for the amendment of the declaration.—4thly, and lastly, That by considering the promise or acknowledgment as a new promise, it binds none but the promiser, and thus avoids the unreasonable principle, that after the liability of the surety in a note, is completely taken away by the statute, it shall be restored to its full force against him, by the acknowledgment or promise of the principal alone; *Whitcomb v. Whiting*, 2 Doug. 652, which though questioned in *Atkins's ex'ors v. Tredgold*, 2 Barn. & Cress. 23, 9 Eng. C. L. R. 12, seems to have been since approved by some judges; *Perham v. Raynal*, 2 Bing. 306; 9 Eng. C. L. R. 413.

With respect to this case I have no doubt. Where the plaintiff relies on a conditional promise to take the debt out of the statute, he must shew the condition performed, before he can avail himself of the promise. This position is sustained by many authorities; and though in some, the condition insisted on does not appear to me, to be, properly speaking, any condition at all, yet where, as in this case, there is a real and not a mere nominal condition, the principle seems to be unquestionable. Thus although a promise "to pay when I am able," involves no real condition, and should therefore be taken to be a promise to pay absolutely, yet a promise to pay "if a collateral security should be first resorted to and prove deficient," is, to every intent and purpose, a conditional promise, and must be performed, before the party can be charged.

But it is said that this promise having been made before the expiration of the five years, the party was then bound, and had no right to clog the promise of payment with a condition. This would have been very true, had the suit been brought within

the five years. But when after the lapse of five years, it became necessary for the plaintiff to lay hold of this promise, he must take it as he finds it: he must take it altogether; he cannot garble it. He may renounce it altogether or he may take it altogether; but it would be without example to permit him to take as much as would suit his purpose, and reject the rest.

The case of *Hyeling v. Hastings*, 1 Ld. Raym. 389, 421, justifies, I think, no such position. The remarks of lord Holt, when the case was first before the court, leaned that way: but on the final judgment, the court said, "Prove your debt and I will pay you, is as strong as an express promise, after the condition is performed; viz. the proof of the debt, which ought to be done in evidence upon the indebitatus assumpsit." As to the case of *Scales v. Jacob*, 3 Bing. 638, 13 Eng. C. L. R. 85, the court was divided on this point. It furnishes, therefore, no barrier to the free exercise of the judgment upon the question; and as I have already said, my mind is perfectly satisfied, that no conditional promise can take a debt out of the statute, unless the condition be performed; and even when performed, it must be considered as a new promise, and not as the debt, since the old debt was unclogged by the condition. The two contracts are radically and essentially different in this, that the one is conditional, the other without condition.

Judgment affirmed.

612 *Gholson v. Kendall & Co.

November, 1838.

Chancery Jurisdiction — Judgment — Injunction.* — A county court in chancery has no jurisdiction to stay proceedings at law on a judgment of a circuit court, by injunction; and if the county court issue such injunction, the circuit court ought to disregard it.

Kendall & Co. having recovered a judgment against Gholson, in the circuit court of Brunswick, and sued out a fieri facias thereon, which was levied on the property of Gholson, he gave a forthcoming bond, with sureties, for the delivery of the property at the time and place appointed for the sale thereof; and the forthcoming bond being returned forfeited, Kendall & Co. moved the court for award of execution thereon, against the principal and his sureties. The defence set up against this motion, was, that while the execution of Kendall & Co. against Gholson was in the sheriff's hands, and before the execution of the forthcoming bond, the county court of Brunswick, upon a bill in chancery there exhibited by Gholson, alleging grounds of relief in equity against the judgment, had allowed an injunction to inhibit Kendall & Co. from further proceedings on their judgment at law. This bill was still pending in the county court; and the record of the suit in the county court, was presented to the

circuit court. It appeared, that the process of injunction had been served on Kendall & Co. on the same day on which the forthcoming bond was forfeited; and it was proved, that Kendall & Co. were not inhabitants of the county of Brunswick, but residents of the town of Petersburg. Gholson and his sureties opposed the award of execution on the forthcoming bond, on the ground that the injunction from the county court inhibited such further proceeding at law, but the circuit court disregarded the injunction, and awarded execution on the forthcoming bond. To this judgment, on the petition of Gholson, a supersedeas was allowed by this court.

613 *The cause was argued here by Taylor for the plaintiff in error, and the attorney general for the defendant, on two points:

I. Whether and how far, in any case, a court of law is bound to take notice of an injunction from a court of chancery, inhibiting proceedings at law? See *Epes's adm'r v. Dudley*, ante 145.

II. Whether a county court in chancery, is competent, upon a bill alleging grounds of relief in equity, to injoin further proceedings at law upon a judgment of a circuit court? the circuit court as constituted at the time, having no equitable jurisdiction, though as courts of common law jurisdiction, the circuit, were always superiour to the county, courts, and exercised appellate jurisdiction over their judgments at law. This point depended on the construction of the statutes concerning the equitable jurisdictions of the county courts sitting in chancery, and of the then superiour courts of chancery; 1 Rev. Code, ch. 66, § 27, 38, 61, pp. 201, 203, 209, ch. 71, § 7, 62, 75, pp. 246, 257, 260. The following cases were cited in the argument; *Ambler v. Wyld*, 2 Wash. 36; *Ford v. Gardner*, 1 Hen. & Munf. 72; *Cocke v. Pollock*, Id. 499, 515, 518; *Paul v. Paul*, 2 Id. 525; *Hite v. Fitz Randolph*, 1 Virg. Ca. 269; *Wilson v. Stevenson's adm'r*, 2 Call 217.

CARR, J. The only question which it is necessary to notice in this case, is, whether a county court in chancery can injoin the judgment of a superiour court of law? In support of this power, it was said, 1. that the terms of the law giving chancery jurisdiction to the county courts, are sufficiently broad to embrace it; and 2. that, in its exercise, there is nothing incongruous, because it is not an inferior court reversing the judgment of a superiour, but a court of equity viewing the controversy upon grounds of which the circuit court, being a court of common law jurisdiction only, from the nature of its powers, could take no notice. However true this last proposition may be, we must still consider *the question of power: did the legislature intend to give, and has it by the words of the statute given, to county courts, the power contended for?

We know that these tribunals are local; bounded, in their general jurisdiction, by the limits of their county. Is this equity power an exception? When a subsequent legislature uses the precise words of enactment used by a former, we must suppose

*See generally, monographic note on "Jurisdiction" appended to *Phippen v. Durham*, 8 Gratt. 457; monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425; monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

that it uses them in the same sense. I have looked back to the revision of 1748, ch. 7, § 5, 5 Hen. Stat. at Large, p. 491, and I find the jurisdiction of the county courts thus expressed: "The justices of every county court, or any four of them as aforesaid, shall and may take cognizance of, and are hereby declared to have power, authority and jurisdiction, to hear and determine all causes whatsoever, at common law, or in chancery, within their respective counties;" and these precise words we find used in all the laws since. In some of the later revisions are added, "and all such other matters as by any particular statute is or shall be made cognizable therein." The power, however, of injoining judgments of the superiour courts of law, is not claimed under any particular statute made since; but is rested on the general words of this statute of 1748. Did the legislature of that day mean to give this power? If we look to the words themselves, they seem to me clearly to restrict the exercise of the powers given, to the county—"all causes at common law and in chancery within their respective counties." It will be observed, that the common law and chancery jurisdiction are given in the same words; and we know well, that their common law powers were so restricted, that they could issue no process of any kind beyond the county: even if a party resided in the county when the suit was brought and judgment obtained, but moved to another county before execution issued, no execution of any kind, could, under the powers here given, reach him. To effect this, a particular statute was necessary; acts of 1748, ch. 12, § 20, Id. p. 536, which provides, "that where judgment shall be obtained in any county
615 *or other inferiour court of record, for debt or damages, and the person against whom such judgment shall be obtained, shall remove himself and his effects, or shall reside, out of the limits of the jurisdiction of such court, it shall be lawful for the clerk of the court where judgment was given, at the request of the party for whom the same was rendered, to issue any writ of fi. fa. or ca. sa. &c. and to direct the same to the sheriff of any county within this dominion, where the defendant or debtor or his goods shall be found." And even this statute, because it mentioned only a fi. fa. and ca. sa. was considered to give no power to issue any other final process; and this defect was supplied by the act of 1772, ch. 5, 8 Hen. Stat. at Large, p. 516, the preamble of which runs thus: "Whereas the laws concerning executions are defective, in not authorizing the clerks of county courts, to issue all manner of legal and proper writs of execution, upon judgments, decrees in chancery and final orders, duly recovered and obtained in said courts, into other counties, as is done in writs of fi. fa. and ca. sa. &c." This law (it may also be remarked) gives the power of issuing into other counties, attachments against executors, administrators or guardians, who shall fail to account, when ordered so to do, by such court; shewing that the general words were so strictly confined to the limits of the county, as not to confer this power so necessary to that equitable

jurisdiction which every county court exercises over these fiduciaries. In Epes v. Randolph, 2 Call 186, the president, speaking of certain judgments, says, "they were entered in July 1770, when an elegit could not issue upon them into any other county than York; and, therefore, in reason and justice, could only bind the lands in that county." Thus, we see how strictly confined to the limits of their county, was the common law jurisdiction of these courts, given by the exact words which conferred on them chancery jurisdiction. By what rule of construction can we extend them in this last case? I know of none. Look to the state of the courts, when this statute of 1748 passed; and let us ask, upon
616 what *ground of reason we can suppose, that the power to injoin the judgments of superiour courts of law, was meant to be given to county courts? There were none but county courts and the general court; and this last had a jurisdiction, both legal and equitable, covering the whole state, and express power is given to it to injoin judgments of the county courts. It could not, then, be imagined, that the county courts could injoin the judgments of the general court, the only superiour court then in being. As this law, therefore, in its origin, gave no such power, it seems to follow, that the same words, the same law, continued down to us, must mean the same thing now that it did at first. This seems to me decisive of the question.

This view is certainly strengthened by the general understanding and practice of the country: for though, in a few cases, we have heard of this power being exercised, it was always looked upon as an extraordinary attempt; and the only case in which I have ever known it carried to a superiour court, was one in the superiour court of chancery of Clarkaburg, which decided against the power. But if it had been the general belief of the bar through the country, that the county courts had this power, such were the temptations, from the convenience and the facility of those tribunals, that we should have had a thousand instances of such injunctions.

Again, we know that a chancery court never grants an injunction without directing bond and security. Thus, in the chancery court law, it is said, that where an injunction shall be granted, the clerk shall indorse on the subpoena that the effect thereof shall be suspended until the party obtaining the same, shall give security in the office of the court in which the judgment, to be enjoined, shall have been obtained. This is the law of the superiour courts of chancery, who having jurisdiction to injoin the judgments of many law courts, it was necessary to designate where the bond should be given; and it is confined to the law court whose judgment was
injoined. But when the law speaks
617 of the *power of the county courts to grant injunctions, it says, before an injunction shall issue, the party shall give bond and security, in the clerk's office, viz: of the county court granting the injunction. Why is this difference? Why can it be, but that the county court having power to injoin its own judgments only,

when bond is given in its office, it must perforce be given in the office of the court, in which the judgment to be enjoined was obtained?

Other views taken from different clauses of the statutes, crowd upon me, shewing to my mind with equal clearness, that the legislature never dreamed of the county courts possessing this power; but I forbear to quote them. Though this point has never been brought directly before this court, I think it is clear from what was said in *Cocke v. Pollock*, 1 Hen. & Munf. 514, 518, that the court had no idea of such a power in the county courts. Judge Roane, in discussing the point that the location of the court whose judgment was enjoined, fixed the jurisdiction, says, "Prior to the establishment of this new system, the high court of chancery, could have granted injunctions to any judgment rendered within the limits of its jurisdiction; and this is now also the case with the several county courts in chancery, who grant injunctions to their own judgments, without inquiry, in either case, as to the residence of the defendant." And judge Fleming says, "Suppose that this suit instead of having been brought in the district court of Charlottesville, had been in the county court of Albemarle, which is held at the same place, and the defendant had shewn good equitable cause for enjoining the judgment, could not that county court with propriety, have enjoined the judgment, without regard to the residence of Pollock?" Now, why suppose the case brought in the county court, in order to predicate its power to enjoin, if it could enjoin the judgment of the district court held at the same place?

I am clear, upon the whole, that the judgment of the court below should be affirmed.

618 *CABELL, J. If it had pleased the legislature to confer power on the county courts, to enjoin the judgments of the superiour courts of law, I should see nothing in such a jurisdiction, inconsistent with the deference and submission due from an inferiour to a superiour court. For, in the exercise of this power, the county courts would act on grounds totally distinct from those which had been the foundation of the judgments of the superiour courts of law; the county courts acting solely on the equity, while superiour courts had acted only on the law of the case. But a careful examination of the various statutes has convinced me, that it was not the intention of the legislature, to give to the county courts any such power over the judgments of the superiour courts. I am for affirming the judgment.

BROOKE, J., concurred.

TUCKER, P. I do not think it necessary to say any thing on the first point argued at the bar, in addition to what I said in *Epes's adm'r v. Dudley*, in regard to the obligation of a court of law to respect the process of a court of chancery, and to refuse its assistance to a party who is in the commission of a contempt of a coordinate branch of the judiciary.

It is sufficiently obvious, however, that if a county court has no power to enjoin the judgment of a superiour court, there can

be no obligation in the latter to respect its process of injunction. The question then to be decided, is, has it such a power? I conceive it has not.

I do not mean to deny, that a county court may entertain jurisdiction of a cause on the chancery side of that court, although a judgment at law has been rendered in the superiour court between the same parties, and proceed to make a final decree perpetually enjoining the plaintiff at law from proceeding to enforce his judgment. Thus, if a party resident in Henrico, recovers a judgment on bond in the circuit court of

that county, it cannot be denied, that
619 *the obligor may institute his suit in equity on the chancery side of the county court, alleging that the bond was given for usury or gambling, and so of no validity; and if such fact be established, I cannot doubt that the county court might by its final decree, after a full hearing of the parties, perpetually enjoin the plaintiff at law from farther proceeding. For by the statute, 1 Rev. Code, ch. 71, § 7, the county court has general jurisdiction over all matters in equity within its jurisdiction; and thus has power to take cognizance of, and by consequence to pronounce the proper decree between, the parties in the cause. And in doing so, it would neither conflict with the power of the court of law, nor overrule its judgments. Its action would be in a different sphere, and its decision would be upon the equity between the parties, while the court of law had decided only upon the law of the case, as contradistinguished from its equity. These principles are too familiar to be dilated upon. Indeed, if they do not reconcile the action of the inferiour tribunal upon the matter of equity, with the action of the superiour upon the matter of law, it would be difficult to conceive, how the coequal tribunal of the superiour court of chancery can be justified in its assumption of equitable jurisdiction to arrest the judgments of the law courts, and that too after they have received the sanction of this tribunal superiour to them all.

But though a county court may, in a suit in equity, make a final decree perpetually enjoining the judgment of a circuit court of law, yet it does not follow that it has the right to issue, at the commencement of a suit in equity, its process of injunction, restraining the plaintiff at law from proceeding, until the merits of the case shall have been heard. This, though an ordinary power of a court of equity, and incidental to the equitable jurisdiction which it exercises, does not exist, I think, as between the county and the superiour courts: it does not exist so as to authorize the county courts to enjoin any other than their
620 own judgments, though *there can be no question of their power over them. I draw this inference from the following considerations.

The power to grant injunctions to judgments at law, has been regulated by the statute law of Virginia, for more than three fourths of a century (to go no farther back); acts of 1744, ch. 11, § 6, 1748, ch. 8, § 9, 5 Hen. Stat. at Large, pp. 241, 512. By these early provisions, it was generally declared, that before any injunction in chan-

cery should be granted to stay proceedings at law, in any action, suit or judgment whatsoever, bond with good security should be given for the payment of the demand in case of the dissolution of the injunction. This principle, it is believed, has been steadfastly adhered to by the legislature, although in subsequent statutes, it has changed its form, from a general provision to a specific enactment as to each particular court. Thus, by the act of October 1787, ch. 9, § 4, 12 Hen. Stat. at Large, p. 467, concerning the court of chancery, it is provided that on all subpoenas of injunction awarded by that court, the clerk shall indorse that the effect of it is suspended until bond and security be given in the office of the court where the judgment was given; thus embracing all courts of law whether superior or inferior. In the year 1792, moreover, two other provisions are found as to this matter; the one as to the district courts, and the other as to the county courts. By the district court law, (1 Old Rev. Code, ch. 66, § 11, Pleasants' ed. p. 74,) it was provided, that the district courts, and the judges in vacation, should have the powers of the chancery court and of the chancellor, in injoining their own judgments, under the same rules and regulations as were prescribed for the court of chancery; that is to say, inter alia, upon the terms of requiring bond with security before their injunctions should have effect. And in the county court law of 1792 (Id. ch. 67, § 68, p. 92,) there was a provision as to injunctions, but limited and confined to injunctions to their own judgments. Until now, the provision had been general; but the legislature having vested this jurisdiction by *way of injunction in the district courts, there would have been no longer any sort of necessity for assuming the jurisdiction by the county courts, if they had been ever supposed to have had it. The clause of the county court law of 1792, therefore, looks only to this limited power of granting injunctions. It provides that before any injunction shall be granted to stay proceedings at law in any action, suit or judgment whatsoever, in any county or corporation court, the bill shall be verified by affidavit, and injunction bond and security given in the clerk's office; that is, the office of the clerk of the court awarding the injunction. And such, to this day, is the precise extent of the provision of the law on this subject; 1 Rev. Code, ch. 71, § 75, which is an exact transcript from the statute of 1792. This is the only clause requiring or prescribing security in county court injunctions. There is no section of the law, requiring such security to be given in injunctions awarded by a county court to the judgment of the superior courts; nor is the case comprehended by any clause of this or any other statute whatsoever; a pregnant proof, I conceive, that such power to injoin the judgment of a superior court, was not only never designed to be conferred, but is to be regarded as excluded, because no provision has been made for the manner in which it shall be exercised.

The legislative understanding of this matter is further evinced by the 62nd sec-

tion of the county court law, 1 Rev. Code, ch. 71, which provides, that "Whenever an injunction shall be obtained in any county or corporation court, to stay proceedings at law upon a judgment of such court," process may issue against such defendant or defendants as do not reside within the said county; whereas no provision is made for the case of an injunction to the judgment of a circuit court.

The opinion of the judges of the general court also, in the case of *Hite v. Fitz Randolph*, although not authoritative, is certainly entitled to the highest respect. And, lastly, the very general impression of the profession against the existence of this power in the county court, if it affords no guide for our decision, furnishes at least an assurance, that the practice has been too rare and too circumscribed, to render it dangerous or inconvenient to interfere with it. The possession of chancery powers by the circuit courts, under the present system of our courts, will render the appeal to the county courts for relief against judgments of the circuit courts, less than ever necessary; and it is probable, that even if the judgment of this court did not deny the power, we should never hereafter hear of its exercise.

Judgment affirmed.

Alcock v. Hill.

December, 1833.

Forthcoming Bonds*—Suspension of Execution—Rights of Surety.—A creditor suspends execution on a forthcoming bond for several years, but he does so without consideration, and he nowise binds himself to suspend execution for any definite time; the principal and all the sureties but one become insolvent; and then the creditor sues out execution against the solvent surety: *Held*, the surety is not entitled to relief in equity.

Principal and Surety—Discharge of Surety—Indulgence.—The principles stated, on which indul-

***Forthcoming Bonds.**—See generally, monographic notes on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

Principal and Surety—Discharge of Surety—Withdrawal of Execution against Principal.—A surety is not discharged, or exonerated to any extent, by the simple withdrawal of an execution against the principal, after it has been placed in the hands of the sheriff but before actual levy, though the principal may have had personal property on which the execution might have been levied. To this effect, the principal case was cited in *Ambler v. Leach*, 15 W. Va. 697; *Armistead v. Ward*, 2 Pat. & H. 512; *Walker v. Com.*, 18 Gratt. 39; *Humphrey v. Hitt*, 6 Gratt. 510, 528, and *foot-note*.

In *Ashby v. Smith*, 9 Leigh 172, JUDGE BROCKENBROUGH expressed the view that the principal case and *McKenny v. Waller*, 1 Leigh 434, were rendered of doubtful authority by the opinions of JUDGES BROOKE and CABELL, in *Chichester v. Mason*, 7 Leigh 244. But in *Humphrey v. Hitt*, 6 Gratt. 510, JUDGE BALDWIN, in whose opinion the other judges concurred, said: "I am for adhering to the decisions of this court in *McKenny v. Waller*, 1 Leigh 434, and *Alcock v. Hill*, 4 Leigh 622, which have not been shaken by any subsequent adjudication; and which establish a principle that furnishes a safe and certain guide. To overrule them would give rise to much litigation; and the present case is a strong illustration of the evil."

See what is said by CABELL, J. in *Chichester v. Mason*, 7 Leigh 263, concerning the principal case. See also, *foot-note* to *McKenny v. Waller*, 1 Leigh 434, containing extracts in which the principal case is cited.

†**Same—Same—Extension of Time.**—Mere indulgence granted to the principal debtor will not release his surety. *Knight v. Charter*, 22 W. Va. 429, and *First National Bank v. Parsons*, 45 W. Va. 608, 32 S. E. Rep. 275, both citing the principal case as authority. But nothing is better settled than that a binding

gence given by creditor to principal, exonerates the surety.

This was a bill in the superiour court of chancery of Frederickburg, exhibited by Pitman Hill against Abner Alcock, alleging, that Alcock having recovered a judgment in the circuit court of Stafford against James Hiffin and Richard Hill, and sued a fieri facias thereon, which was levied on their property, the plaintiff Pitman Hill and one Corbin became their sureties in a forthcoming bond for the delivery of the property at the day and place of sale; and the forthcoming bond being returned forfeited, execution was awarded thereon against the principals and sureties. That execution was sued by Alcock, and delivered to the sheriff; and if Alcock had not suspended proceedings*thereon, the debt might have been levied of the property of the principals; they being solvent at the time; but Alcock, without the consent or knowledge of the plaintiff Pitman Hill, gave written directions to the sheriff, to suspend proceedings on the execution till he should give further instructions. That Richard Hill, one of the principal debtors, had delivered a slave to one Hore, to be

agreement between the creditor and the principal debtor to extend the time of payment for a definite period discharges the surety, if made without his consent. And the reason is, that such extension of time varies the contract of the surety, and therefore operated to discharge him, even though the change be for his benefit. Moreover, the surety is entitled upon paying the debt, when due, to be subrogated to the rights and remedies of the creditor; and if, by contract, the creditor has tied his hands and disabled himself from suing, so that if the surety were to pay the debt, he would not be free to sue immediately, the effect is to deprive the surety of a right to which, by virtue of the original contract he is entitled, and consequently to discharge him. To sustain this proposition, the principal case was cited in *Stuart v. Lancaster*, 84 Va. 774, 6 S. E. Rep. 139; *Coleman v. Stone*, 85 Va. 888, 7 S. E. Rep. 241; *State Savings Bank v. Baker*, 93 Va. 515, 25 S. E. Rep. 550; *Bacon v. Bacon*, 94 Va. 602, 27 S. E. Rep. 576; *Knight v. Charter*, 23 W. Va. 429; *foot-note* to *Walker v. Com.*, 18 Gratt. 13, containing extract from *Knight v. Charter*, 22 W. Va. 429; *foot-note* to *Harnsberger v. Gelger*, 3 Gratt. 144; *foot-note* to *Shannon v. McMullin*, 25 Gratt. 211. See also, *foot-note* to *Hill v. Bull*, Gilm. 149.

In order for the indulgence to the principal to release the surety, it is necessary that a new day of payment be fixed. *First National Bank v. Parsons*, 45 W. Va. 697, 32 S. E. Rep. 275, citing the principal case as authority.

Same—Rights of Surety in Securities for Debt.—In *Coffman v. Moore*, 29 Gratt. 248, it is said: "It is also held that the surety, as against his principal is entitled to all the securities which the latter has given the creditor for the purpose of reimbursing him, if he has paid the creditor, and, if he has not, for the purpose of having it paid for his own protection. The surety has a right to stand in the shoes of the creditor in the enforcement of such securities; and the creditor, as to such securities in his hands and under his power, is considered as trustee for the surety, and if he is unfaithful, he not only fails in his duty as trustee, but violates the rights of the surety as against his principal, and is liable for the loss which the surety thereby sustains. These principles are firmly established by repeated decisions of this court. I need only refer to the following cases: *Ward v. Johnson*, 6 Munf. 6; *McKenny's Ex'ors v. Waller*, 1 Leigh 484; *Alcock v. Hill*, 4 Leigh 622; *Humphrey v. Hitt*, *supra*, in which JUDGE BALDWIN, with the unanimous concurrence of the other judges sitting, gives a clear and forcible exposition of the doctrines on this subject. Then follows *Harnsberger Adm'r v. Kinney*, 13 Gratt. 511; and the recent cases of *Shannon v. McMullin*, 25 Gratt. 211; *Harrison's Ex'or & als. v. Price's Ex'or & als.*, *Ibid.* 553. The doctrines of the law, as enunciated, are so firmly settled in Virginia that we deem it unnecessary to pursue the inquiry outside of our own courts; but will proceed to inquire how far they are applicable to the case in hand."

sold, and the proceeds applied to the discharge of the debt due to Alcock, of which Alcock was informed, and afterwards offered the slave for sale himself, and might have sold him at any time, or procured the sale; and it was because Alcock had the means thus placed in his own hands or power, of obtaining satisfaction of his demand, that he directed proceedings on his execution to be suspended. That the plaintiff Pitman Hill, being also apprised of these facts, took no steps to secure indemnity against loss by reason of his suretyship. That Alcock forbore any further proceedings for many years, until all the other obligors in the forthcoming bond had become insolvent, but had lately sued out an execution, and caused it to be levied on the property of the plaintiff. Therefore, the bill prayed an injunction to inhibit Alcock from further proceedings, on his last mentioned execution, against the plaintiff.

The injunction was awarded.

Alcock, in his answer, said, that when the plaintiff Pitman Hill, became surety in the forthcoming bond, he did so, because he was told by the sheriff, and therefore expected, that indulgence could be obtained from Alcock, by the principal debtor Richard Hill, so soon as the debt should be secured by a forthcoming bond; and it was because Alcock was apprised that this assurance had been given, and was content with such security, that he directed the sheriff to suspend proceedings on the execution, which was afterwards issued by the clerk on the forthcoming bond: that his suspension of proceedings was a mere indulgence given without consideration, and he did not thereby preclude himself from proceeding whenever he should think proper, and *he would have proceeded at any time, if the sureties had required him to do so: and that, if Richard Hill did deliver a slave to Hore to be sold for the purpose of satisfying the debt, it was a transaction between Hill and Hore, to which he, Alcock, was nowise privy; he never offered the slave for sale, nor had any power to make such sale.

It appeared in proof, that when Pitman Hill joined in the forthcoming bond as surety, he was told by the sheriff, that Alcock would give Richard Hill, the principal, time to discharge the debt, provided satisfactory surety was given in the forthcoming bond; and that Alcock obtained an award of execution on the forthcoming bond; and an execution having been issued, he then directed, in general terms, that proceedings should be suspended till further instructions. It appeared also, that Richard Hill did deliver a slave to Hore, to be sold and the proceeds applied to the payment of the debt due Alcock, and that this slave died in Hore's possession. But it was doubtful upon the evidence, whether the other allegations of the bill in respect to this slave, were true; namely, that he was delivered by Richard Hill to Hore, before the forthcoming bond was executed, with power to sell him, and with authority to Alcock to direct the sale, to pay the debt due him, and that this was the considera-

tion on which Alcock gave the indulgence.

The chancellor thinking that the allegations of the bill were proved, perpetuated the injunction. And this court, upon the petition of Alcock allowed him an appeal from the decree.

The cause was argued by Stanard for the appellant, and Briggs and Leigh for the appellee. The argument turned chiefly on the controverted question of fact above stated.

CARR, J. It was admitted by the appellee's counsel, that Alcock's suspension of proceedings on his execution, would nowise impair his remedy against the surety, if that suspension was merely voluntary on his part. But they insisted, 625 *that it was in consequence of an agreement upon valuable consideration, which tied up Alcock's hands, and therefore released the surety; an agreement, namely, that one of the principal debtors should put a slave in Alcock's hands, or under his power, to be sold for the debt, and that in consideration of this the execution should be suspended; which agreement, they said, was complied with by the delivery of the slave to Hore to be sold by him for the purpose, or to be sold when Alcock should so require. If this case had been made out by the proofs, the counsel would have had pretty strong grounds to stand on. But to my mind, the evidence proves no such agreement. On the contrary, I think the evidence proves that the slave was put into Hore's hands, but never into the possession or under the power of Alcock; and that this was a transaction between Richard Hill and Hore, to which Alcock was not a party, and which, indeed, was subsequent to the indulgence given by Alcock, and was nowise the consideration on which Alcock gave the indulgence. The circumstances detailed in the evidence, instead of disproving, corroborate Alcock's answer. This case, therefore, belongs to that class of cases, in which it has been held, that a voluntary indulgence given by a creditor to the principal debtor, does not impair the creditor's remedy against the surety. The case of *M'Kenny v. Waller*, 1 Leigh 434, is in point for the appellant. The decree should be reversed, and the bill dismissed.

CABELL and BROOKE, J., concurred.

TUCKER, P. The direction given by Alcock to the sheriff, to suspend proceedings on his execution, against the principal, till further directed, was not of itself sufficient to discharge the surety. If, indeed, a creditor engages, for a good consideration, to give indulgence, so as to tie up his hands from proceeding at any moment he may be required by the surety to do so, the surety is absolved, unless such 626 *indulgence is given with his assent.

The constituents of this principle, are, 1. a consideration; for without it, a promise to indulge is not binding: 2. a promise or agreement to indulge; for without it, the hands of the creditor are not tied, whatever collateral security he may have received: 3. that the promise should not be altogether indefinite; for an indefinite promise of forbearance is void and nugatory, and is held not to be an adequate

consideration to support even a promise, since the forbearance might be but an hour, which would be a forbearance indeed, but of no advantage to the debtor: and 4. that the surety should not have assented to the indulgence given.

Trying this case upon these principles, I think it very clear, that the surety was not absolved. For, as to the transaction at the time of the execution on the forthcoming bond, I think the evidence proves, that the probable motive of the appellee for joining in it as a surety, was the expectation of getting that indulgence for his friend, which the sheriff assured him might be obtained from Alcock, upon the debt being secured by a forthcoming bond. To this indulgence then,—if, indeed, the promise of it, thus unauthorized, by the sheriff, and the indefinite character of it, could bind Alcock at all,—the surety himself assented. It was the consideration upon which he entered into the bond. Surely, he cannot complain that that has been done which was promised by the sheriff on Alcock's behalf, and was the operative motive with himself for joining in the bond.

With regard to the transaction respecting the slave put into the possession of Hore: this, it is alleged, was a consideration for the indulgence, and sufficient to bind Alcock. Admitting the facts as they are contended for, although here was a consideration, yet there was no promise, unless we resort to the original promise at the time the bond was given. Now the fact, that the principal placed collateral security in Alcock's hands, which has been lost without his default (as, in this case, by the death of the pledge), is not sufficient to discharge the surety, unless accompanied 627 by a promise of *specified forbearance.

No such promise is proved, or even charged.

We must go back then to the promise at the time the bond was given, or there is no promise in the case. And if we do, we can see in the indulgence given, until Hore could make such sale of the property as would be just to all parties concerned, nothing but a fair, bona fide, and honorable compliance with the engagement made by the sheriff and ratified by Alcock, that he would give Richard Hill time to discharge the debt, provided a forthcoming bond was given with satisfactory surety; upon the faith of which promise, as I conceive, the appellee did become a surety. He cannot complain of a compliance with it, and therefore ought not to have sought this injunction.

Decree reversed, and bill dismissed.

Foley v. McKeown.

December, 1833.

Specific Execution—Sale in Gross—Deficiency—Abatement.—A house and lot in town is advertised for sale at auction, and the lot described as containing nearly two acres: the auctioneer at the sale, states that there is nearly two acres, but points to the enclosure of the lot as containing the land he proposes to sell; and it appears to have been a sale in gross: the lot, in fact, contains only one acre and twelve poles: upon a bill for specific

*See monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 3 Gratt. 243.

execution, by vendor against vendee, **HELD**, specific execution rightly decreed; and the purchaser is not entitled to any abatement in the price for such deficiency.

Sarah M'Keown exhibited her bill against Patrick Foley, in the superior court of chancery of Richmond, alleging that in March 1828, she had advertised and offered for sale, at public auction, a house and lot in the town of Petersburg; that Foley purchased the property at the price of 1421 dollars, payable in instalments; and that a memorandum in writing of the contract and terms of sale, was prepared by 628 the "auctioneer, and signed by Foley, but that he now refused to comply with the contract; and praying a decree for specific execution.

Foley answered, that in the advertisement of the property for sale published by the plaintiff, it was described as a lot of land containing "nearly two acres;" that the property was sold by the description contained in the advertisement, no correction or alteration thereof being made by the auctioneer at the time of sale, except that he pointed out the enclosure of the lot, to the persons present; that he, Foley, believing that the lot contained "nearly two acres," as mentioned in the advertisement, and as the auctioneer stated at the sale, without adding the words "more or less," purchased it on the terms mentioned in the bill, and without suspecting any deficiency in quantity, signed the memorandum prepared by the auctioneer; but that it was shortly afterwards ascertained by survey, that the lot, instead of being nearly two acres, was only one acre and twelve poles; that the value of real property in towns, depends materially on the quantity of ground; that his chief object in making the purchase, was the ground, and he would not have given near so much, if he had not been misled as to the quantity; and that, therefore, he had declined to complete the purchase, and asked to be absolved altogether from the contract.

The advertisement described the property, as the lot lately occupied by Alex. M'Keown deceased, situated at the junction of Market street and Halifax road, "containing nearly two acres, and having on it a good dwelling house and the usual out houses." The memorandum of the contract signed by Foley, stated that he had purchased, at auction, for the sum of 1421 dollars, "the house and lot lately occupied by A. M'K. deceased," on a credit &c. without any mention of the quantity.

The auctioneer deposed, that after he had prepared the advertisement of the sale by direction of the plaintiff, he understood that part of the lot as originally held by Alex. M'Keown deceased, had been 629 sold by him in his "lifetime, and being therefore uncertain as to the true quantity, he declared, publicly, at the commencement of the sale, that the lot was to be sold as so much, more or less, and no particular quantity was to be warranted; that the boundaries of the lot, namely, the enclosure thereof, was repeatedly pointed out to the persons present as containing the ground offered for sale; that when Foley presented himself as a bidder, he had a

private conversation with him, and made the same declaration to Foley, which he had made publicly, at the commencement of the sale, pointing out to him at the same time the boundaries of the lot. And another witness, who was at the sale, deposed, that the auctioneer proclaimed, that the quantity of ground was about, or was reckoned at, two acres, but that he would not warrant that quantity, and then pointed to the enclosure as containing the ground he was selling. But eight persons present at the sale, deposed, that they heard no such public declaration as that which the auctioneer said he made at the commencement of the sale; and that all they heard him say, was, in the language of the advertisement, that the lot "contained nearly two acres;" but he pointed out the boundaries, namely, the enclosure, as including the property he was going to sell. One person who was a bidder at the sale said, that if he had purchased the lot, he would have thought himself entitled, under the description of the lot as containing "nearly two acres," to more than an acre and a half. However, there was very clear proof, that the sale was a sale in gross, of the ground contained within the enclosure, and not a sale by the quantity; and that this was intended by the vendor and the auctioneer, and understood by the persons present at the sale. It was proved that the lot contained only one acre and twelve poles.

The chancellor decreed specific execution of the contract. And upon the petition of Foley to this court, an appeal was allowed him from the decree.

630 *The cause was argued here, by Spooner for the appellant, and by Wyndham Robertson for the appellee, upon two points: 1. Whether, seeing that the lot was described in the printed advertisement, and by the auctioneer at the sale, as containing nearly two acres, and that before the sale, there had occurred reason to doubt whether the quantity was not exaggerated in the advertisement, and that the lot was in fact only one acre and twelve poles,—the court of chancery ought, under such circumstances, to have decreed specific performance of the contract? And 2. Whether the purchaser ought not, at least, to have been allowed an abatement, from the price in proportion to the deficiency?

TUCKER, P. I throw out of the case, the evidence of the auctioneer, that he proclaimed that a part of the lot had been sold by the former owner in his lifetime, and that it was sold only for so much, more or less, without warranty of quantity. Where there has been a public advertisement of the terms of a sale at auction, the bidders must be presumed to have looked to those terms, if the contrary be not proved; unless it is proved, that the buyer did know of a change or variation in the terms. Whether, in any case, this knowledge can be brought home to a party who denies it, by proof that other persons heard the announcement of the change, it is not necessary to decide in this case. It would be hard to presume, that the defendant must have heard what he disclaims having heard, when eight or nine persons attending at the same time and place, equally depose that

they did not hear it. But, independent of that fact, I take the purchase to have been a purchase in gross. It was not a purchase by the quantity of ground contained in the lot. It was a purchase of the lot of ground, such as it was, whether it was more or less than two acres. It was advertised as containing "nearly two acres;" an indefinite expression, which excludes all idea of any accurate graduation of the price to the actual quantity of ground. It is impossible to fix upon any precise point, to which the representation can

631 *be supposed to have referred. Can it be affirmed, that an acre and a half came within the description of "nearly two acres?" One bidder thought it would. The party not having warranted or stated any particular quantity,—the lot being small, the enclosure pointed out, and the whole lying under the eye of the purchaser, I cannot doubt that it was a purchase in gross, and that the purchaser should be compelled to complete the contract.

The other judges concurring, decree affirmed.

Butler v. M'Cann and Others.

December, 1833.

Marriage Settlement*—Construction—Liability for Beneficiary's Debts.—By deed of marriage settlement, slaves of the feme are conveyed to a trustee, in trust to permit the husband to take the profits during the joint lives of himself and his wife; remainder, if the husband should first die, to the wife; and if she should first die, to such persons as she should appoint; with an express declaration, that the property should not be subject to the husband's debts: **Held**, the husband's interest in the profits during the joint lives of himself and his wife, is subject to his debts; and provision should be made for satisfaction of a creditor, by hiring the slaves out, or otherwise, as most convenient.

By deed of marriage settlement between Edward Lenieve and Jane M'Cann, executed before the marriage, certain slaves, the property of the wife, were conveyed to Richard M'Cann, upon trust, from and after the intended marriage, to permit Edward, the husband, during the joint lives of himself and Jane his wife, to take and enjoy all the profits of the said slaves to his own use and benefit; and from and after the decease of the husband if he should first die, to transfer and convey the whole of the slaves to the wife; and from and after the decease of the wife, if she should first die, then to such person or persons, in such manner and proportions, as she should appoint. The wife relinquished all

632 right of dower of the real estate of the husband, *in case she should survive him, and all right to any portion of his personal estate, and to administration thereof. And it was expressly declared to be the intent of the deed, and agreed by and between the parties, that the slaves thereby settled should not be at the disposal, or subject to the control, debts, forfeitures or engagements, of the husband.

After the marriage, the appellant Butler, having recovered a judgment against Edward Lenieve, the husband, sued out a fieri facias thereon, which was levied on one of the slaves settled by the deed.

Whereupon, M'Cann, the trustee, and Lenieve and wife, exhibited a bill against him in the superiour court of chancery of Richmond, setting forth the deed of marriage settlement; insisting, that the slaves thereby settled, were nowise subject to the debts of Lenieve, the husband, and praying an injunction to inhibit the sale of the slave taken on Butler's execution. An injunction was awarded. Butler, in his answer, insisted that Lenieve, the husband, was entitled to an interest in the property, namely, to all the profits thereof during the joint lives of himself and wife, which was subject to execution for his debts. The chancellor held, that the property, under the provisions of the settlement, was not liable for the debts of the husband; and therefore, perpetuated the injunction. From this decree, Butler appealed to this court.

Spoooner, for the appellant.

No counsel for the appellees.

PER CURIAM. The appellee Edward Lenieve, the husband, had an equitable interest in the slave, on which the appellant's execution was levied, which is liable for his debts; and the decree is erroneous in perpetuating the injunction unconditionally, instead of providing for subjecting that equitable interest of Lenieve, to the charge of the debt due the appellant. Therefore, it is to be reversed, and the cause remanded to the court of chancery, with instructions *to provide for subjecting Lenieve's interest in the slave to the payment of the debt due the appellant, by hiring the slave out, or otherwise, as shall be found most convenient.

Decree reversed, and cause remanded &c.

Garnett v. Jones.

December, 1833.

Execution—Injunction by Principal—Liability of Surety for Damages Sustained Thereby.—Execution is awarded on a forthcoming bond against the principal and the surety therein bound; the principal alone obtains an injunction to stay proceedings at law, which injunction is dissolved: **Held**, the surety is not liable for the damages incurred by the principal for retarding the execution by an injunction; and if an execution issue against the surety as well as principal for such damages, it ought, on the surety's motion, to be quashed. The execution should be so moulded, as to exempt the surety from the damages, and to make the principal who incurred them alone liable therefor.

The appellee Jones, having recovered a judgment against one Thompson, in the county court of Buckingham, sued out a fieri facias thereon in August 1820, on which execution there was the following indorsement for the direction of the sheriff, viz. "Credit 58 dollars paid the 27th May 1818—Credit John Johns's half of the within, 25th May 1819." It appeared by the sheriff's return on this execution, that he gave credit for the 58 dollars, and omitting to give credit for Johns's half of the debt, levied the execution on Thompson's prop-

***Execution—Injunctions by Principal—Liability of Surety for Damages Sustained Thereby.**—Where the principal debtor alone retards an execution against him and his surety by injunction, the surety is not liable for damages incurred thereby. To this effect the principal case is cited in approval in *Mechuax v. Brown*, 10 Gratt. 623; *Clayton v. Anthony*, 15 Gratt. 531.

*See monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 159.

erty for the balance; whereupon Thompson gave a forthcoming bond for the delivery of the property at the time and place appointed for the sale thereof, in which the appellant Garnett was bound as his surety. The amount of the debt stated in the forthcoming bond, exceeded the debt really due, to the extent of the credit indorsed on the execution for John Johns's half, which the sheriff had overlooked or disregarded. The bond having been returned forfeited, the county court, at December term 1820, 634 on the *motion of Jones, and upon due notice to Thompson and Garnett (who, however, made no defence), awarded execution thereon against them both; and Jones forthwith sued out a fieri facias, on which the sheriff made return, in March 1821, that "proceedings were stopt by injunction." What were the grounds on which this injunction had been obtained, nowise appeared in this record.

But, in March 1830, Jones sued out another fieri facias on the forthcoming bond against Thompson and Garnett, returnable in June following, for the debt therein mentioned, with interest and costs, and also "for 490 dollars to which the said Jones is entitled for his damages, by reason of the said Thompson retarding the execution of the judgment by injunction;" whence it appeared, that it was Thompson alone, not Thompson and Garnett, who had obtained the injunction; and it appeared, from the time for which the damages were computed, that the injunction had been pending for more than nine years.

At April term 1830, Garnett moved the county court to quash the forthcoming bond and a fieri facias thereon of March 1830; and the court, on a hearing of the parties, quashed the forthcoming bond as well as the execution; quashing the forthcoming bond, on the ground, no doubt, that the sheriff had omitted to give credit on the original execution, "for John Johns's half of the debt," according to the direction indorsed thereon, and thus had taken the forthcoming bond for double the amount of the debt really due.

Upon a supersedeas to this order, awarded on the petition of Jones, the circuit court of Buckingham reversed the order, and adjudged that Garnett's motion to quash the forthcoming bond and the execution thereon of March 1830, should be overruled. And then Garnett appealed to this court.

Michie, for the appellant.

Claiborne, for the appellee.

635 *CABELL, J., delivered the resolution of the court. The county court unquestionably erred in quashing the forthcoming bond, after it had, at a previous term, entered a judgment awarding an execution thereon. That judgment, so far as the county court was concerned, finally settled all questions as to the regularity of the bond. If the judgment was erroneous, it could only have been corrected by an appellate court. But, though the judgment and the bond on which it was founded, must be thus regarded as correct, yet it was still competent to the county court, to quash an execution irregularly sued out thereon. And there was manifest irregularity and injustice in the execution of March 1830.

Thompson alone had retarded the execution on the bond, by the injunction; and the damages resulting from that measure, should have fallen on him only. The execution should, therefore, have been so moulded as to subject Garnett to the payment of nothing more than the debt, interest and costs, due by the forthcoming bond. This was not done; it went against him for the damages also. The judgment of the circuit court overruling the motion to quash the execution, should, therefore, be reversed. But as the county court quashed the forthcoming bond, as well as the execution, that judgment must also be reversed, and judgment should be entered quashing the execution only.

Goode v. Love's Adm'rs.

December, 1833.

New Trial—When Not Granted.*—A new trial ought never to be granted, where it appears that the party asking it, has had a fair trial on the real merits of the case, and that justice has been done.

Debt, in the circuit superior court of Mecklenburg, brought in March 1832, by Love's administrators against Goode, on a bond of Goode to Bruce & Sydnor, 636 assigned *to Love in his lifetime.

Goode pleaded, 1. payment; and 2. that, in a previous action of assumpsit, in the former circuit court of Mecklenburg, brought in January 1829, by Goode against Love's administrators, the debt due by the bond on which this action was brought, had been set off by them, and that the same was allowed and discounted from Goode's just demand in that action. And on these pleas, issues were made up.

At the trial, the jury found a verdict for the plaintiffs, and judgment was entered for them accordingly. But the next day, the counsel for Goode, he being absent, moved the court to set aside the judgment and verdict, and to direct a new trial on two grounds, 1. that he had been improperly ruled into trial, in the absence of his witnesses, and 2. that the court had misdirected the jury. The court overruled the motion; and Goode's counsel filed exceptions to the opinion.

1. It appeared from the bill of exceptions, that when the cause was called for trial the day before, Goode being absent, his counsel had asked a continuance, alleging that there were several witnesses for the defendant whom he believed to be material, who were then absent, though they had been in attendance during every former day of the term, and he imputed their absence then, to the weather which was very rainy; but the court refused the continuance, saying, that the defence of the defendant could be proved by the officers of the court, or the counsel in attendance.

2. It appeared, that the court had instructed the jury at the trial, that the only question it had to decide, was, whether the jury who tried the action of assumpsit of

*See the principal case cited in *Stephoe v. Flood*, 31 Gratt. 342: *foot-note* to *Patteson v. Flood*, 2 Gratt. 18, containing extract from *Stephoe v. Flood*, 31 Gratt. 342: *foot-note* to *Bell v. Alexander*, 21 Gratt. 1.

See generally, monographic note on "New Trials" appended to *Boswell v. Jones*, 1 Wash. 322.

Goode against Love's administrators, had allowed the bond on which this action was brought, as a set off against Goode's demand in that action. The record of Goode's action against Love's administrators, was exhibited; which shewed, that the only plea pleaded by Love's administrators in that action, was the plea of the statute of limitations; though it also appeared, that in September 1829, the bond on which this action was brought, was by leave of court, filed as a set off in that. Goode's counsel alleged, that the court had, in its direction to the jury, intirely overlooked the issue on the plea of payment, to which the testimony of the absent witnesses applied; and he offered an affidavit, that he had been misled by what had fallen from the court, in overruling the motion for a continuance, and supposed that the defendant would not be allowed to adduce evidence on the plea of payment; and that in consequence of this, he had forborne to call a witness, actually in attendance at the trial, whose evidence related to the plea of payment. But the court overruled the motion for the new trial, because there was no evidence of the materiality of the witnesses who were said to have been absent, or of the witness said to have been in attendance, and because both the counsel for the plaintiff and for the defendant, had stated, in their opening to the jury, that the defence rested on the second plea.

Upon the petition of Goode, a supersedeas to the judgment was allowed by a judge of this court.

The cause was argued here by the attorney general for the plaintiff in error, and Leigh for the defendant, upon the following objections taken by the former: 1. That the court had erred in refusing the continuance asked on the ground of the absence of witnesses, whom Goode's counsel believed to be material, Goode himself not being present to make affidavit of their materiality, and his absence being fairly imputable to the same cause, which probably prevented the witnesses from attending, namely, the inclemency of the weather. 2. That the ground on which the court refused the continuance, shewed, that it overlooked the issue on the plea of payment, and supposed the only issue to be that made up on the second plea; which was well calculated to mislead Goode's counsel, as he was ready to make affidavit that he was misled, into a belief, that no evidence was to be received on the plea of payment; and this also explained why he had rested the defence at the trial, on the second plea. 3. That the court misdirected the jury, in telling them that the only question to be decided, was that presented by the issue on the second plea. And that, upon the whole, it was apparent, that the court, the counsel, and the jury had wholly overlooked the issue on the plea of payment.

TUCKER, P. The court having overruled the motion for a continuance saying, "that the defendant's defence could be proved by the officers of the court or by the counsel in attendance," we are left to infer, from the facts stated in the exception, that both Goode and his witnesses were prevented from attending by the inclemency of the weather. And if there was nothing more in the case, I should think the continuance ought to have been granted: for, if the weather was so inclement as to excuse the absence both of party and witnesses, no affidavit of materiality from the party, could reasonably have been expected.

But it appears, that the real defence was upon the second plea. It is impossible that Goode could have designed to defend himself, both by proving that the debt had been discounted in the former suit, and that he had also paid it in some other manner. And it is expressly stated in the bill of exceptions that his counsel rested his defence upon the second plea only. Now, as to this second plea, he could not have been permitted to introduce any oral testimony, to prove that the bond had been set off by the jury in Goode's action against Love's administrators: because in the record of that case, it appears the parties went to trial upon one plea only, and that was the plea of the statute of limitations. Under the plea of the statute of limitations, the set off in question could never have been introduced; and had testimony been offered to prove that it had been, I think that testimony should have been rejected. Hence it is clear, that Goode sustained no injury in being ruled into trial upon his second plea.

639 *As to the plea of payment, the bill of exceptions shews, that Goode rested his defence upon the other plea; and, therefore, we cannot suppose that the absent witnesses were necessary to the support of this. Indeed, it is clear, that he has had a fair trial of the very matter on which he relied as protecting him from the plaintiff's claim; and as this is a motion for a new trial, it ought not to be granted since it seems that justice has been done.

If, indeed, we were permitted to draw inferences as to the fact of payment from the record, I should say it is clear Goode has not paid the debt. As late as September 1829, it was filed as a set off in his suit against Love's administrators. This suit is brought against him in March 1832. He pleads here, that the bond had been set off and discounted in the former suit. Can we believe, that, after the bond had been, as he supposed at least, discounted in the former suit, he would have paid it? I think not, and therefore I feel assured, that no injustice has been done him by the verdict. That being so, a new trial ought not to be granted.

The judgment is to be affirmed.

REPORTS OF CASES
ARGUED AND DETERMINED IN
THE GENERAL COURT OF VIRGINIA,
FROM DECEMBER TERM 1832 TO JULY TERM 1834.

643 *DECEMBER TERM 1832.

JUDGES PRESENT.

<i>Smith, Daniel, Field, R. B. Taylor,</i>	<i>Scott, Leigh, J. E. Brown, Fry.</i>
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The Commonwealth v. Sherrard.

December, 1832.

Justice of Peace*—Disqualification—Incompatible Office—Effect of Resignation Thereof.†—By the statute of 1821-2, ch. 26, if a justice of the peace is appointed to and accepts an office under the government of the U. States or any other incompatible office, he thereby vacates his office of justice of the peace; his resignation of the incompatible office will not restore him to the office of justice of peace; nor can he ever lawfully exercise this office, without a new commission.

Case adjourned from the circuit superiour court of Hampshire. At October term 1831, a rule was made upon Sherrard, to shew a cause why an information in the nature of quo warranto, should not be filed
644 against him for exercising *the office of justice of the peace of the county of Hampshire, without any legal warrant or authority. The rule was enlarged till October term 1832, when Sherrard appearing to shew cause, the following facts were agreed:

That Sherrard was duly appointed and commissioned a justice of the peace for the county of Hampshire, in October 1818, and was duly qualified, by taking the oaths required by law, in March 1819: that he had, thenceforth, continued to act as justice of the peace, till the present time: that, in October 1828, he was duly appointed by the government of the U. States, assistant post master at Sherrard's store in Hampshire, and took the oaths prescribed by the laws of the U. States for assistant post masters; and his appointment of assistant post master was placed on file at the general post office at Washington: and that he resigned his office of assistant post master, before the rule upon him to shew cause why the information should not be filed, was made: Whereupon, the circuit superiour court,

with the defendant's consent, adjourned the following questions to this court: Whether, upon the facts agreed, leave ought to be granted to file the information? and whether the defendant's acceptance of the office of assistant post master had, under the circumstances of the case, incapacitated him from holding the office of justice of the peace?

PER CURIAM. The second section of the statute of the 26th February 1822, concerning the disqualifications of justices of the peace,* seems to remove all difficulty on this subject. That statute provides, "that the acceptance of any office under the government of the U. States, or of deputy sheriff in any county within the commonwealth, or of any other office incompatible with that of justice of the peace, agreeably to the existing laws, except the office of high sheriff of any county, shall in like manner vacate the commission of the justice so accepting such office, and he

645 *shall thereafter be disqualified to act as a justice of the peace, unless under the authority of a new commission." There can be no question, that an assistant post master holds an office under the government of the U. States; and it is of no consequence, that the defendant had resigned that office, before this prosecution was commenced; for by the acceptance of it, his commission as a justice was absolutely vacated, and he became forever disqualified to act as such, unless under the authority of a new commission.

Therefore, this court is unanimously of opinion, that upon the facts agreed and stated in the record, leave should be granted to file an information in the nature of a quo warranto against the defendant, to remove him from his office of justice of the peace: and that the acceptance of the office of assistant post master by him, under the circumstances, did incapacitate him from holding the office of justice of the peace, unless under the authority of a new commission.

The Commonwealth v. Burton.

December, 1832.

[26 Am. Dec. 337.]

Grand Jury†—Constitution of—Discharge of One Juror and Substitution of Another.—On first day of term

*Sess. Acts of 1821-2, ch. 26, Supp. to Rev. Code, ch. 114, p. 175.

†**Grand Jury—Summoning.**—In *Curtis v. Com.* 87 Va. 501, 13 S. E. Rep. 73, it is said: "At common law the process for summoning a grand jury was a precept, either in the name of the king, or of two or more justices of the peace, directed to the sheriff. This was anterior to and independent of any action

*Justices of Peace.—See generally, monographic note on "Justices of the Peace" appended to Wallace v. Com., 2 Va. Cas. 130.

†**Public Officer—Disqualification—Incompatible Office—Effect of Resignation Thereof.**—Where a public officer accepts an incompatible office, he thus forfeits the first office and creates an actual vacancy in the same; and he can in no manner affect the first office by what he does in the second, and therefore a resignation of the incompatible office cannot restore him to the first office, or in any other manner affect it. *Shell v. Cousins*, 77 Va. 332, and *Bunting v. Willis*, 122 Gratt. 162, both citing the principal case as their authority.

of a circuit superior court, a grand jury is impaneled and sworn, and proceeds in discharge of its duties; but next day, it is discovered that one of the grand jurors wants legal qualification: upon which the court discharges him, and orders another to be sworn in his place: HELD, this was regular, and the grand jury duly constituted.

Case adjourned from the circuit superior court of Rockbridge. At September 1831, a grand jury of sixteen persons was impaneled and charged; and having made one presentment, were adjourned to the next day, when all the jurors appeared; but it being discovered that one of them was not a freeholder, he was discharged and another juror sworn in his place. The grand jury thus constituted, at a *subsequent day of the term, found an indictment against Burton for unlawful gaming. Burton offered a plea in abatement, setting forth in substance, the facts above stated, and alleging that the grand jury, which found that indictment, was not duly constituted according to law. The attorney for the commonwealth objected to the filing of the plea. And the court, with the assent of the defendant, adjourned to this court, the question, whether the plea ought to be received or rejected?

SCOTT, J., delivered the resolution of the court. The statute which charged the circuit superior court with the duty of arraigning and trying offenders, invested it with all the common law powers incident to a court of criminal jurisdiction, and necessary to the discharge of the duty enjoined upon it. There are many offences which can only be tried upon indictments found by a grand jury. It is, moreover, the great instrument for inquiring into infractions of the penal laws, and bringing offenders to trial. The power, then, to procure the attendance of a grand jury, results from the criminal jurisdiction of the court; and had there been no statutory provision procuring the attendance of grand juries, the courts of criminal jurisdiction in this country, would have been invested with the common law powers of the courts of oyer and terminer and jail delivery in England. We are told by lord Hale, that upon the summons of any sessions of the peace, and in cases of commissions of oyer and terminer and jail delivery, "there goes out a precept either in the name of the king, or of two or more justices of the peace di-

rected to the sheriff," commanding him to summon a grand jury. "Upon this precept the sheriff is to summon twenty-four or more out of the whole county, namely a considerable number out of every hundred, out of which the grand inquest at the sessions of the peace, oyer and terminer or jail delivery, are taken and sworn, ad inquirendum pro domino rege et corpore comitatus."—"The grand inquest returned the first day of the sessions and

647 *sworn, commonly serves the whole sessions of the peace, oyer and terminer and jail delivery; yet the court may command another grand inquest to be returned and sworn, which is done ordinarily upon two occasions. 1. If before the end of the sessions, the grand jury having brought in all their bills, are discharged by the court, and after that discharge, either some new felony or other misdemeanour is committed, and the party taken and brought into jail; or if after the discharge of the grand inquest, some offender be taken and brought in during the sessions. 2. The second ordinary instance of a new grand jury returned, is upon the statute 3 Hen. 7, ch. 1, namely a grand inquest impaneled to inquire into the concealment of another grand inquest &c." 2 Hal. P. C. 154, 156.

In the absence then of all statutory provision on the subject, the courts of criminal jurisdiction in Virginia, might have caused grand juries to be summoned and impaneled whenever and as often as the business before them required. Has that power been taken away by statute?

We have seen, that by the provisions of the common law, grand juries were summoned previous to the meeting of the court, by precept in the name of the king or two or more justices of the peace. This was anterior to and independent of any action of the court. The object was to have a grand jury in attendance at the commencement of the term, so that there should be no delay. Over and above this provision, the court had the power, from time to time, to order grand juries to be summoned, as occasion might require. Our statute, which makes it the duty of the sheriff, ex officio, to summon a grand jury to attend on the first day of the term, is a substitute for the precept above mentioned, and could not have been intended to take from the court, the highly convenient power which it otherwise would have possessed.

If, then, the court had the power to discharge an intire jury of qualified persons, and summon another, it certainly

648 *could discharge one unqualified member, and substitute another qualified juror in his place.

Again; in this case, the grand jury as first impaneled, was not legally constituted. If it had found the indictment, the want of qualification in the member subsequently withdrawn, might and no doubt would have been pleaded in abatement; so that, if the doctrine contended for by the defendant should prevail, the swearing of a single unqualified juror would put an end to the business of the grand jury for the whole term. Such a state of things would not have existed independent of the statute;

of the court, the object being to have a grand jury in attendance at the commencement of the term. The court, however, had power to have a grand jury summoned during the term, as occasion might require. *Burton's Case, 4 Leigh 645*. By statute in Virginia, until a comparatively recent period, the sheriff was required, *ex officio*, to summon a grand jury, to attend on the first day of every term prescribed by law, as a substitute for the precept above mentioned. And now the statute, Code, sec. 3976, provides that a *venire facias* to summon a regular grand jury shall be issued by the clerk prior to the commencement of each term at which such grand jury is required."

In *Eastham v. Holt*, 43 W. Va. 604, 27 S. E. Rep. 884, JUDGE BRANNON, said: "It is clear that a criminal court possesses at common law, without statute, inherent power to impanel grand juries, and I know no limit; but I know, on above authority, that it can summon new grand juries at the same term, and this inherent power carries the ability to summon new ones as often as necessity exists. Opinion in *Burton's Case, 4 Leigh 648*; *Shinn's Case, 32 Gratt. 899*."

See the principal case also cited with approval in *Eastham v. Holt*, 43 W. Va. 602, 610, 27 S. E. Rep. 884, 887.

and the legislature never could have intended, by a simple direction to the sheriff to provide a grand jury at the commencement of the term, to place such a restriction on the powers of the court.

We are all of opinion that the plea ought to be rejected.

The Commonwealth v. Fields.

December, 1832.

Rape—Attempt by Slave*—What Constitutes—Case at Bar.—Upon an indictment on statute of 1822-3, ch. 34, § 3. It is found, that a free negro, not intending to have carnal knowledge of a white woman by force, but intending to have such knowledge of her while she was asleep, got into bed with her, and pulled up her night garment, which waked her, using no other force: HELD, this was not an attempt to ravish, within the meaning of the statute.

Case adjourned from the circuit superiour court of Rockbridge. Fields, a free negro, was indicted in that court, upon the statute of 1822-3, ch. 34, § 3, for violently and feloniously making an assault upon, and attempting to ravish, a white woman. The jury found the following special verdict: "We find, from the evidence, that the prisoner did not intend to have carnal knowledge of the within named S. L. as alleged in the indictment, by force, but that he intended to have such carnal knowledge of her while she was *asleep; that he made the attempt to have such carnal knowledge of her when she was asleep, but used no force except such as was incident to getting to bed with her, and stripping up her night garment in which she was sleeping, and which caused her to awake. If the law be for the prisoner, upon this finding, then we find him not guilty; but if against him, then we find him guilty; and, in that case, if the offence be not punishable by death, but by confinement in the public jail and penitentiary house, we ascertain the term of his imprisonment therein, to be six years." Whereupon, the court, with the assent of the prisoner, adjourned to this court, the question, what judgment ought to be given on the special verdict?

PER CURIAM. This court is of opinion, that upon the special verdict found in this case, judgment of acquittal ought to be rendered in favor of the prisoner.

650 *JULY TERM 1833.

JUDGES PRESENT.

<i>Brockenbrough,</i>	<i>Lomax,</i>
<i>Parker,</i>	<i>J. E. Brown,</i>
<i>Upshur,</i>	<i>Duncan,</i>
<i>May,</i>	<i>Thompson.</i>

The Commonwealth v. Sprinkles.

July, 1833.

Assault—Joint Indictment—Costs—Attorney's Fee.*—Indictment against four persons for an assault; they plead severally; and verdict, that they are

***Rape—Attempt—Evidence of Force Necessary.**—To sustain the charge of an attempt to commit rape there must be evidence of force, or of an intention on the part of the offender to use force in the perpetration of the heinous crime. If it should become necessary to overcome the will of his victim. *Hairston's Case*, 97 Va. 757, 32 S. E. Rep. 797, citing the principal case.

*See monographic note on "Fines and Costs in Criminal Cases" appended to *Pifer v. Com.*, 14 Gratt. 710.

guilty, assessing several fines on each; an attorney's fee is not to be taxed against each, but only one attorney's fee against all the defendants.

Case adjourned from the circuit superiour court of Smyth. Upon an indictment for an assault and battery, against George, Archibald, Henry and Mahlon Sprinkle, and three other persons, the defendants pleaded, severally, not guilty. The jury found the four Sprinkles guilty, and assessed a fine, severally, on each of them; and they found the other three defendants not guilty. The court gave judgment against each of the defendants found guilty, for the fine assessed on him by the verdict, and judgment against all four of them, for the costs of the prosecution. They then moved the court to direct the clerk to tax but one fee for the attorney for the commonwealth. The court certified, that the evidence in the case, was the same against each defendant, shewing the different agency and guilt of each, in the same offence; and, with the consent of the defendants, adjourned the question of practice to this court, Whether a fee of ten dollars for the attorney for the commonwealth, ought to be *taxed against each of the four defendants found guilty, or only one fee of ten dollars against all four of them?

BROCKENBROUGH, J. This court is unanimously of opinion, that, in this case, an attorney's fee of ten dollars ought not to be taxed against each of the four defendants, and that one fee of ten dollars should be taxed against all of them. 1 Rev. Code, ch. 69, § 67, p. 241; *The Commonwealth v. Hooper*, 2 Virg. Ca. 223.

652 *The Commonwealth v. Weldon.

The Same v. Marks.

The Same v. Sunket.

Thompson v. The Commonwealth.

July, 1833.

Criminal Law—Free Negroes—By What Court and in What Manner Tried.—Upon the construction of the statute of 1831-2, ch. 22, § 11, free negroes and mulattoes are to be tried by the county courts of oyer and terminer, in the same manner in which slaves are tried, in all cases of felony, except homicide and such crimes as, if committed by free negroes or mulattoes, were, by the laws existing before this statute, punishable with death; and for homicide and such crimes as, if committed by free negroes or mulattoes, were so punishable with death, they are still to be tried by jury in the circuit superiour courts.

Same—Same—Same—Effect of Statute.—In cases of felonies committed by free negroes or mulattoes, other than homicide and capital crimes, the statute changes the manner of trial and the tribunal for the trial, but not the punishment which previous laws inflicted on free negroes or mulattoes for such crimes; and the county court of oyer and terminer convicting such a person of such a crime, may and must sentence the convict to imprisonment in the penitentiary, if that be the punishment prescribed by previous laws.

Burglary—Indictment—Allegation of Time.*—An indictment charging that goods were feloniously and burglariously taken from a dwelling house, without charging that this was done in the night time, is not a good indictment for burglary, but is only an indictment for a larceny.

These four cases depended upon the construction of the 11th section of the statute of the 15th March 1832, Sess. Acts of

*See monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

1831-2, ch. 22, § 11; Supp. to Rev. Code, ch. 187, p. 248, whereby it is provided, that "free negroes and mulattoes shall hereafter be prosecuted, tried, convicted and punished, for any felony, by justices of oyer and terminer, in the same manner as slaves are now prosecuted, tried, convicted and punished; and any court summoned or adjourned for such trial, shall have and exercise all the powers and incidents of a court summoned or adjourned for the trial of a slave, except that in cases of homicide and in cases where the punishment shall be death, the mode of trial shall remain as heretofore."

653 *I. Weldon's case was adjourned to this court, from the circuit superiour court of Shenandoah. The prisoner was indicted in that court, for horse stealing; and being tried, and found guilty by the verdict of the jury, he made a motion in arrest of judgment, 1. because, as it appeared by the indictment that he was a free negro, the circuit superiour court had no jurisdiction to try him for this crime; and 2. because, by the statute of the 15th March 1832, free negroes and mulattoes could, thenceforth, only be prosecuted, tried, convicted and punished, for any felony, by justices of oyer and terminer, in the same manner that slaves are prosecuted, tried, convicted and punished. Whereupon, the court, with the prisoner's consent, adjourned to this court, the question, What judgment should be rendered?

The question was argued by the attorney general for the commonwealth, and by Samuels for the prisoner.

BROCKENBROUGH, J., delivered the opinion of the court. We have rarely met with any law more difficult to understand, and which has given rise to a greater diversity of opinion, than the short section on which this case, and with it the life of the prisoner, depends. The counsel who have argued it, have each given a very lucid view of his own construction; and the court, on the most serious consideration, have come to a conclusion different from that of either of them.

What is the meaning of the first clause of the section in question? Free negroes and mulattoes "shall be punished in the same manner as slaves." Does it mean, that the free negro shall be punished to the same extent—to the same degree—that the slave is punished? Heretofore, by former laws, plainly written, the slave guilty of horse stealing, was punished with death without benefit of clergy: the free negro, by imprisonment in the public jail and penitentiary house. The same difference exists as to burglary, robbery, forgery, and a long list of crimes. We do not think it con-

654 sistent *with the settled rules of interpretation applicable to penal statutes, and, particularly, to statutes on the subjects of capital felonies, to construe this statute as abolishing former laws, and substituting death as the punishment instead of imprisonment, by the mere declaration, that the manner of punishment of the free negro shall be the same as the manner of punishment of the slave. Penal statutes must be construed strictly; and we should, in all such cases, bear in mind the preced-

ent set in the construction of a statute of George II. by the courts in England. By that law the stealing of sheep, or other cattle, was made felony without benefit of clergy. But the general words "or other cattle" being looked upon as much too loose to create a capital offence, the statute was held to extend to nothing but the stealing of sheep. And, in this case, we are of opinion, that to understand the word manner as meaning extent or degree, would be not to construe the statute strictly, but to give it a forced construction, by which the severity of the punishment would be much increased. If the legislature intended to declare, that, in all cases of felony, the punishment of free negroes shall be the same hereafter as has been heretofore inflicted on slaves, for the same felonies, it would probably have used words appropriate to that idea. It would not have said, that the manner of punishment, but that the punishment itself, shall be the same. It might be proper to depart from the letter of a penal statute, where such a departure would be favorable to life or liberty, but never where it takes them away.

Let us, then, endeavour to understand the provisions of this statute. Heretofore, courts of oyer and terminer consisting of justices of the county and corporation courts, have had jurisdiction in case of slaves charged with crimes. They are authorized to try slaves, without the intervention of a jury, and after having found them guilty, they are required to render judgment, and pass sentence on them. But free negroes have not been heretofore tried, and punished, in that manner. They have been tried by a jury before the

655 *circuit courts, and have been sentenced by those courts. The law annexes the penalty on conviction; that is, it declares the quantum or degree of punishment attached to each criminal act, which the court after the conviction, merely pronounces. This statute of March 1832, enacts that hereafter free negroes and mulattoes shall not be tried and punished in that manner, but they shall be tried by justices of oyer and terminer, who after convicting shall proceed to punish them; that is, they shall proceed to pronounce the penalty which the law affixes to their crime. Such is the manner in which slaves have been heretofore tried, convicted and punished, and free negroes and mulattoes shall hereafter be tried, convicted and punished in the same manner; namely, by courts of oyer and terminer. This is the rule as to felonies generally, but there is an exception in the section,—“that in cases of homicide, and in cases where the punishment shall be death,” they shall not be tried in that mode or manner, but shall be tried as heretofore: that is, in the accustomed mode, by juries, before the circuit courts. It is the manner of trial and punishment, then, which is changed by this law, and not the punishment itself affixed to the crime which is changed.

The punishment prescribed by law to the crime of horse stealing, where that crime has been committed by a free negro, is imprisonment in the penitentiary house. How shall he be hereafter tried and punished

for that offence? He shall not be tried by a jury in the circuit court, nor punished by that court, but he shall be tried and punished by the justices of oyer and terminer in the same manner as slaves are now tried and punished. The circuit court can have no jurisdiction to try and punish him for that offence, because death is not the punishment annexed by law to that crime. The justices of the county court, sitting as a court of oyer and terminer, are expressly invested by this statute, with the jurisdiction to try, convict and punish him.

The construction which we give to this provision, is strengthened by the language of the 10th section of the 656 *same statute; by which receivers from slaves &c. of stolen goods, knowing them to be stolen, shall be adjudged guilty of larceny, and punished in the same manner, and to the same extent," as if the receiver were the thief. The legislature has here drawn the distinction between the manner, and the extent, of punishment. The inference is, that in another case, where it has changed the manner of the punishment, and said nothing about the extent of it, it did not mean to change the punishment itself.

The question has been asked, whether the county courts of oyer and terminer are empowered by this statute, to send free negroes and mulattoes to the penitentiary? It is argued, that they never before had that power, in any case, since that kind of punishment has never been inflicted on slaves; and this statute only gives to the county courts summoned for the trial of free negroes, all the powers and incidents of a court summoned for the trial of a slave: and it is contended, that as they never had the power to send a slave to the penitentiary, so now they have not the power to send a free negro to the penitentiary. We do not admit the correctness of this conclusion. The powers of the county courts of oyer and terminer, are to compel the attendance of witnesses, to hear the evidence, to hear counsel, to expound the law, to decide both on the law and fact, to decide whether the person accused before them, be guilty or not of the felony charged upon him. If they find him not guilty, they are to acquit and discharge him. If they find him guilty, they are to punish him; that is, not to act the ministerial part of inflicting punishment, but to pronounce the sentence of the law: they are to pronounce and declare the punishment, whatever it may be, which the law affixes to that crime, and to make the proper orders for carrying that sentence into execution. Does the law say, that the slave shall be hanged? The justices are to pronounce that sentence, and fix the day for the execution, and that judgment and order shall be the warrant to the sheriff for his execution. Does the law declare, that the slave shall be 657 *burnt in the hand, or receive stripes?

The justices render the judgment, and give the order for carrying the judgment into effect. The present law, after giving to the county courts of oyer and terminer, the power to try and punish free negroes and mulattoes, for any felony, declares farther, that they shall have and

exercise all the powers and incidents of a court summoned for the trial of slaves. They shall have power, if they find them not guilty, to acquit; if they convict them, to pronounce the punishment, whatever it may be (except death), which the law affixes to the crime, and then to make the proper orders for carrying that sentence into execution. If the law declares, that the free negro shall be punished by stripes, or by imprisonment in the county jail, or by imprisonment in the public jail and penitentiary house, this statute authorizes them, in the one case as well as the other, to render the judgment, and make the proper order to the sheriff to inflict the stripes, to convey him to the county jail, or to convey him to the public jail and penitentiary house.

In the case before the court, the circuit superiour court of Shenandoah, had no jurisdiction to try the prisoner. We have, therefore, no hesitation in advising and directing that court to arrest the judgment, and set aside the verdict which has been rendered, and to order the prisoner to be carried before a justice of the peace for the county of Shenandoah, who may proceed with his case de novo, and deal with him according to law.

In this opinion, JUDGES PARKER, UPSHUR, MAY, LOMAX and DUNCAN concurred. JUDGES THOMPSON and BROWN dissented.

THOMPSON, J., held, that by the 11th section of the statute of March 1832, it was intended to subject free negroes, for all offences, to the same punishment as slaves, and to the same trial before county courts of oyer and terminer, in all cases, except in cases of homicide and in cases where 658 the punishment shall be death; by which he *understood, cases in which the free negro is punishable by death according to this statute of March 1832. In the excepted cases of homicide and other capital offences, the statute intended to give, and has given, the free negro, the benefit of a trial before the circuit superiour court.

The judgment of the court was entered as follows: "This court is of opinion, and doth decide, that the circuit superiour court for the county of Shenandoah had no jurisdiction to try the said Weldon for the crime of horse stealing with which he was charged; the said crime, when committed by a free negro or mulatto, not being punishable by death, but by imprisonment in the public jail and penitentiary house; and that for the said crime, he could only be tried by the justices of oyer and terminer for the said county. And the court is, therefore, of opinion, and doth decide, that the judgment in the said case shall be arrested, the verdict set aside, and the prisoner be ordered by the said court to be carried before some justice of the peace in and for the said county, to be dealt with according to law. Which is ordered to be certified &c."

II. Marks's case, adjourned from the circuit superiour court of Augusta, was twice before this court. He was a free negro, indicted and tried, in the circuit superiour court, at November term 1832. The indict-

ment, as it appeared in the transcript of the record sent to this court on the first adjournment of the case, charged, that the prisoner, on the 2nd October 1832, did feloniously and burglariously break and enter into the dwelling house of &c. and did feloniously steal, take and carry away therefrom, sundry articles of property to the value of thirty dollars: but the indictment did not charge, that the offence was committed in the night time, or that any person was in the house at the time, and put in fear. The prisoner being found guilty by the verdict of the jury, the court doubting what judgment it could or ought to give, with the consent of the prisoner, adjourned the following questions to this court:

659 *1. Does the exception as to homicide and other cases punishable with death, in the 11th section of the statute of the 15th March 1832, take homicide and other such felonies, out of the influence of the preceding part of the section, as well in relation to punishment as mode of trial?

2. If only as to the mode of trial, what felonies are meant by the words of the exception in the statute, "in case where the punishment shall be death?" Do they mean such felonies as were punishable with death in the case of a slave, or such as were punishable with death in the case of a free negro or mulatto, according to the law as it stood before the passing of this statute?

3. Can the court render any judgment upon the verdict? and if any, what judgment?

* At December term 1832, LEIGH, J., delivered the resolution of the court: The difficult questions adjourned in this case, arise out of the exception contained in the statute of March 1832. In this court, another question has presented itself, namely, whether the circuit superiour courts have jurisdiction in any case of felony committed by a free negro or mulatto? Upon all these questions, there has been a difference of opinion among the judges; and we cannot refrain from suggesting, that many difficulties might be removed by an explanatory statute, pointing out in what courts the felonies mentioned in the exception shall be tried, the mode of trial, and the punishment. But in the present case, it is not necessary to give any opinion upon some of the questions adjourned.

Whatever doubt and difficulty there may be, as to the class of felonies mentioned in the exception contained in the section in question, there can be none as to other felonies. By the letter of the first member of the section, free negroes and mulattoes are to be prosecuted, tried, convicted and punished, in the same manner as slaves. We are of opinion, that the felony charged in the present indictment does not come within the exception; that is, that it is not a homicide or other felony punishable
660 with death, whether *committed by a slave or freeman. The offence charged is not a burglary, from which the benefit of clergy is taken away, if committed by a slave. In burglary, the offence must be committed in the night time. But this is not charged in the present case.

It is, indeed, charged that the offence was burglariously committed, but this is not sufficient. In every indictment for burglary, we hold that it must distinctly and plainly appear, that the offence was committed in the night time; which certainly does not appear here. In short, the offence charged is simply the breaking a dwelling house, no person being therein at the time and put in fear, and taking goods therefrom; from which offence we have not been able to find, that the benefit of clergy has been taken away. We are, therefore, of opinion, that the offence charged in the indictment comes not within the exception, and that the circuit superiour court of Augusta had no jurisdiction thereof.

This court is of opinion, and doth certify to the circuit superiour court, that no judgment can be rendered by that court on the verdict in this present case, as the said court had no jurisdiction. And this renders it unnecessary to answer the other questions adjourned.

But on this judgment being certified to the circuit superiour court, it was found, on examination of the original indictment, that it charged, that the prisoner, did "on the 2nd October 1832, between the hours of twelve and four in the night of that day, feloniously and burglariously, break and enter the dwelling house of &c. and certain articles of property then and there found, of the value of thirty dollars, did feloniously steal, take and carry away therefrom. Thus, the indictment charged a burglary, in the most technical form; a crime for which, before the statute of the 15th March 1832, a slave was punishable with death without benefit of clergy, and a free negro or mulatto with imprisonment in the penitentiary. Whereupon, the circuit superiour court again adjourned the case
661 to this court, for its opinions *on the same questions, on which it was first adjourned, sending to this court, now, a corrected transcript of the record.

And, at this term, BROCKENBROUGH, J., delivered the resolution of the court: That the circuit superiour court for the county of Augusta had no jurisdiction to try Marks for the crime of burglary with which he was charged; that crime, when committed by a free negro or mulatto, not being punishable by death, but by imprisonment in the public jail and penitentiary house; and that for such crime he could only be tried by the justices of oyer and terminer for the said county: and, therefore, that judgment in the case should be arrested, the verdict set aside, and the prisoner ordered by the court, to be carried before some justice of the peace in and for the said county, to be dealt with according to law.

III. Sunket's case was adjourned to this court from the circuit superiour court of Accomack. He was a free negro, indicted of grand larceny, in that court, and tried at May term 1833. The indictment charged, that he had been, once before, in 1829, indicted for the like crime of grand larceny, in the then circuit court of Accomack, tried, convicted and sentenced to be punished with stripes and six months imprisonment in the common jail of the county. It ap-

peared, on the trial of this indictment, that the punishment to which he had been sentenced for the first offence, had been inflicted upon him. And upon this indictment for the second crime of grand larceny, he was found guilty by the verdict of the jury. Whereupon, the circuit superiour court adjourned to this court, the question, whether any, and if any, what judgment should be given in the case?

BROCKENBROUGH, J., delivered the resolution of the court: That the circuit superiour court for the county of Accomack had no jurisdiction to try the said Sunket for the offence of grand larceny with which he was charged; that offence, when committed by a free negro or mulatto, not being punishable by death, but by imprisonment in the public jail *and penitentiary, where the money, bank note, goods, chattels, or other thing stolen, is of greater value than twenty dollars; and that for such offence he could only be tried by the justices of oyer and terminer for the county: and, therefore, that the judgment in the case should be arrested, the verdict set aside, and the prisoner ordered by the court, to be carried before some justice of the peace in and for the said county, to be dealt with according to law.

IV. Thompson, a free negro, was indicted in the circuit superiour court of Frederick, for violently and feloniously making an assault upon, and attempting to ravish, a white woman; a crime, which when committed by a slave, free negro or mulatto, is made punishable by death, by the statute of 1822-3, ch. 34, § 3. He was found guilty by the jury, and the court passed sentence of death upon him.

And now, he presented a petition to this court, praying a writ of error to the judgment, upon the ground, that, by the 11th section of the statute of the 15th March 1832, he could only be tried for this crime, by the justices of oyer and terminer in the county court; that, according to that provision of the statute, he ought to have been tried by a jury, in the county court; and that the circuit superiour court had no jurisdiction of the case.

BROCKENBROUGH, J., delivered the resolution of the court: That, as the petitioner Thompson, a free negro, has been convicted of the felony of making an assault upon, and attempting to ravish, a white woman, and as that crime, when committed by a free negro or mulatto, is punishable with death, the circuit superiour court for the county of Frederick, had jurisdiction to try the petitioner, and that there is no error in the judgment.

Writ of error denied.

663 *The Commonwealth v. Reynolds.

July, 1833.

Criminal Law—Adjournment of Question of Law—Record.—If a question of law in a criminal prosecution be adjourned from a circuit superiour court to this court. It must appear by the record, that it was so adjourned with the consent of the accused.

Grand Jury—Qualification—Freeholder—Who Is.—It

***Criminal Law—Adjournment of Question of Law—Consent of Accused.**—See *Com. v. Garth*, 3 Leigh 761.

†**Grand Jury—Qualification—Freeholder—Who Is.**—The principal case was cited in *Com. v. Burcher*, 2

seems, that one who has contracted by articles under seal to sell his land, but has not yet conveyed it by deed, and therefore still holds the legal title, is a freeholder qualified to serve on a grand jury.

Case adjourned from the circuit superiour court of Frederick. At May term 1832, the grand jury presented Reynolds, for a misdemeanour. The usual rule to shew cause why an information should not be filed, having been made and served on Reynolds, he appeared at October term, and put in a plea in abatement, alleging, in substance, that the grand jury which found the presentment, was not duly constituted according to the statute in such case made and provided; for that M. Smith, one of the jurors, was not, at the time of the presentment, a freeholder, or the owner of any real estate or interest therein, save only the naked legal title of and in a certain parcel of land, which he had, previous to serving on the grand jury, bargained and sold to a certain J. Monroe, by written articles of agreement under the seals of the parties; which articles, set out in the plea, shewed, that Smith had covenanted to convey his land to Monroe, upon Monroe's performing certain covenants on his part; but the plea did not allege, that Smith had actually conveyed the land, or even that Monroe was, as yet, entitled by the articles to demand a conveyance thereof. To this plea the attorney for the commonwealth demurred generally. Whereupon, the court adjourned to this court, the question, whether Smith, under the circumstances stated in the plea, was a proper juror? But it did not appear from the record, that the case was so adjourned, with the assent of the defendant.

PER CURIAM. Although the court would be of opinion, that Smith, under the circumstances stated, was a proper juror, yet, as it does not appear that the question was adjourned to this court, with the consent of the accused, the case must be remanded to the circuit superiour court &c.

The Commonwealth v. Lewis.

July, 1833.

Sheriff—Criminal Liability—Malfeasance of Deputy.† —A sheriff is not liable to a criminal prosecution for a malfeasance in office committed by his deputy.

Criminal Jurisdiction;—Official Malfeasance.—The circuit court of Richmond issues a capias against a person there indicted of felony, which is directed to the sheriff of Essex, and by him served, and then, in Essex, he wilfully permits the prisoner to escape: HELD, in such case, a criminal prosecution against the sheriff, cannot be maintained in the circuit superiour court of Richmond, for this official malfeasance committed in Essex.

Rob. 829, and *foot-note*; *Com. v. Helmondollar*, 4 Gratt. 539; *State v. McAllister*, 38 W. Va. 511, 18 S. E. Rep. 779 (dissenting opinion of BRANNON, J.). See further, monographic *note* on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

†**Sheriff—Criminal Liability—Malfeasance of Deputy.**—A sheriff is not criminally liable for the negligence or malfeasance of his deputy. *Watt's Case*, 99 Va. 877, 39 S. E. Rep. 704, citing the principal case with approval.

See further, monographic *note* on "Sheriff and Constables" appended to *Goode v. Galt*, Gilman 152. ***Criminal Jurisdiction.**—See monographic *note* on "Jurisdiction" appended to *Phippen v. Durham*, 8 Gratt. 457.

Case adjourned from the circuit superiour court for the county of Richmond. That court, at October term 1831, made a rule on Warner Lewis, sheriff of Essex, to shew cause, if any he could, why he did not detain in his custody one Abram White lately confined in the jail of Essex for petty larceny, and who was lately indicted in the circuit court of Richmond for forgery, and why he did not secure the person of White, that he might be dealt with according to law, as the sheriff was, by process from the circuit court of Richmond, and by his official duty, bound to do. This rule having been served on Lewis, he appeared to shew cause; but the matters alleged by him not being considered satisfactory, another rule was made on him, to shew cause, on the first day of the ensuing term, why an information should not be filed against him, for having disobeyed the process of the court, and violated his official duty, in discharging from his custody, the said White, then in confinement in the jail of Essex, under a sentence of the circuit court of Essex, for petty larceny, and who had been lately indicted for forgery in the circuit court of Richmond. This last rule was not made absolute; nor did it appear, that

665 the *court, in any way, gave leave to file the information; but an information was filed by the attorney for the commonwealth. In some of the counts in the information, it was charged, in substance, that White having been indicted for forgery in the circuit court of Richmond, a capias was issued against him, and delivery to Lewis the sheriff of Essex, by virtue of which Lewis arrested White, and had him in his custody, and then permitted him to escape and go at large; and, in other counts, that the capias was delivered to and served by Hill, a deputy of Lewis, and that Hill permitted the prisoner to escape. Lewis demurred generally to the information, and the attorney for the commonwealth joined in the demurrer.

The court ordered the capias, which had been issued against White upon the indictment against him for the forgery, and the return of the deputy sheriff of Essex thereupon, to be made part of the record. The capias was in the usual form: the return was in the following words—"By virtue of the within, I took the body of the within named Abram White, who is now confined in close jail in the county of Essex under sentence of the circuit court of the said county, for petty larceny, as will more fully appear by the order of the said court hereto annexed, and made part of my said return. (Signed) R. Hill, D. S. for Warner Lewis, sheriff."

And then the court, with the defendant's consent, adjourned the following questions to this court:

1. What judgment ought to be given on the demurrer?

2. Taking the whole case into consideration, and having reference, particularly, to the capias which was issued against White, and the return made thereon by the defendant's deputy, and to the proceedings in this prosecution previous to the filing of the information,—ought leave to have

been given to file the information? or ought a nolle prosequi to be directed?

And 3. any other question of law arising on the proceedings.

666 *PARKER, J. In considering these questions, the court perceives, from the capias against White referred to, and the return of the deputy sheriff thereon, that this is, in fact, a criminal proceeding against a high sheriff for the negligence or misfeasance of his deputy; and that it is a prosecution in the county of Richmond for an act done in Essex. Thinking that the high sheriff is not thus liable, and that if he were, he could only be proceeded against, in the mode here adopted, in the county of Essex, where the act complained of was committed; and waiving other objections, such as the want of leave to file the information, which this demurrer might raise:

"This court is of opinion, upon the whole case, that as the offence was committed in the county of Essex, the circuit superiour court for the county of Richmond had no jurisdiction thereof in this mode of proceeding; and that, as the misconduct charged in the information, was the act of the deputy sheriff, and not of the high sheriff, the latter is not liable to be indicted therefor; and, therefore, that no information ought to have been filed against the said Lewis, and that a nolle prosequi ought to be directed to be entered by the said superiour court."

667 *The Commonwealth v. Thompson.

July, 1883.

[26 Am. Dec. 339.]

Grand Jury*—Objection—Juror Nominated Himself to Sheriff.—Upon a presentment by a grand jury for gaming, defendant tenders plea in abatement, that one of the grand jurors nominated himself to the sheriff to be put on the panel of the grand jury, and thereupon the sheriff put his name on the panel, and summoned him to serve, without alleging that this nomination of himself by the grand juror was corrupt, or that there was a false conspiracy between him and the sheriff for returning him on the panel: HELD, the plea is naught, and the court ought not to permit it to be filed.

Case adjourned from the circuit superiour court of Ohio. The defendant having been presented by the grand jury for unlawful gaming, offered a plea in abatement, stating, that H. Moore, one of the grand jury, nominated himself to the deputy sheriff, to be put on the panel of the grand jurors, and the deputy sheriff did thereupon place Moore's name on the panel, and summoned him to serve on the grand jury; and that Moore having so nominated himself, and being so summoned, was sworn, and was one of the grand jury, when the presentment was made. The attorney for the commonwealth insisted, that he ought not to be put to demur or reply to the plea, and objected to the filing of it. And, thereupon, the court, with the consent of the defendant, adjourned to this court, the follow-

*Grand Jury.—See monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com. 14 Gratt. 674.

Abatement—Pleas in.—Pleas in abatement, being dilatory, are not favored. U. S. v. Reeves, 27 Fed. Cas. 751, citing principal case.

See further, monographic note on "Abatement, Pleas in" appended to Warren v. Saunders, 27 Gratt. 250.

ing questions: 1. Whether the matters set forth in the plea could be pleaded in abatement of the presentment? and if so, 2. Whether the same were well pleaded?

BROCKENBROUGH, J. The duty of the sheriff is plainly pointed out by the statute. He is directed to summon, before the meeting of the court, twenty-four of the most discrete freeholders of the county, being citizens of the commonwealth and not having certain specified disqualifications. It is necessary for the upright administration of justice, that the whole jury system should be preserved free and uncontaminated. The law demands, that each grand juror shall make no presentment through malice, hatred or ill will; and 668 *that he should not be prevented from making presentments, by motives equally vicious. It also requires, that the sheriff whose duty it is to summon the grand jury, should discharge that duty with the sole view to the public good. It does not seem to be compatible with either of these requisitions of the law, that a corrupt nomination of himself to the sheriff, by a citizen of the commonwealth, to serve on the grand jury, should be permitted; or that a false conspiracy or corrupt agreement between the sheriff and himself for that purpose, should be tolerated. In *Scarlet's* case, 3 Inst. 33; 12 Rep. 98, it was charged, that he well knowing that he was not returned of the grand inquest, procured himself by false conspiracy to be sworn on the same, and it was decided that such procurement was an indictable offence, as well at common law, as under the statute; 11 Hen. 4, ch. 9. And whensoever such corrupt nomination shall be procured, we have the authority of this court, in *Cherry's* case, 2 Virg. Ca. 20, for saying, that an indictment or presentment, found by a grand jury so constituted, may be avoided by plea.

But, in the case now before the court, the plea which was tendered does not charge any corrupt nomination of himself by the grand juror, or any false conspiracy between himself and the sheriff, to be returned on the panel. The nomination of himself which is charged, may have been perfectly innocent, and the court is not authorized to presume the contrary. We have, therefore, no hesitation in deciding, that, in this case, the plea should be rejected.

"This court is of opinion, that it is not proper, in this case, to require the attorney for the commonwealth to demur or reply to the plea in abatement which was tendered by the defendant, and that the plea should be rejected."

669 **Brooks v. The Commonwealth.*

July, 1833.

Criminal Law—Change of Venue—Directing Cause to Be Tried at Particular Term—Surplusage.—Indictment for felony in the circuit court of Warwick: the court for good cause sends the case to the circuit court of York, to be tried at the term of that court to be held on the 8th June 1831; the circuit court of York, doubting its competency to try the case at that term, which was a special one, continues it till the next regular term of the circuit superior court of York; and the prisoner is afterwards tried there, and convicted: *Held*, the circuit court of Warwick had no power to direct the case to be tried at any particular term of the circuit court of York; but the direction that

the case should be tried at the June term 1831, is to be rejected as surplusage: the substance of the order is a change of the venue from Warwick to York.

Appellate Practice—Excessive Judgment—Solitary Confinement.—A circuit superior court, not advertising to the statute of 1832-3, ch. 19, § 2, sentences a convict to solitary confinement in the penitentiary for one sixth of the term of imprisonment fixed by the verdict: judgment reversed for this cause; but the general court proceeds to enter judgment, that the solitary confinement shall be one twelfth of the term, according to that statute.

Error to a judgment of the circuit superior court of York. Brooks was indicted for the murder of a slave, in the circuit superior court of Warwick, at a special term held on the 1st June 1831; and the court being satisfied, from the number of challenges to jurors, that an impartial and legally qualified jury to try the cause, could not be had in that county, ordered that it should be sent to the circuit court of York, to be held on the 8th day of the same month, where, in the opinion of the court, a fair and impartial trial could be had. The prisoner was admitted to bail. It appeared, that the term of the circuit court of York held on the 8th June, was a special term, held under the provisions of the act of the 15th March 1831, providing for the holding of the then remaining spring sessions of the circuit courts; Sess. Acts of 1830-31, ch. 10, p. 41. And the circuit court of York, doubting its competency to proceed with the trial of the prisoner at that special term, continued the cause to the regular term of the circuit superior court of law and chancery for the county, to be held in

September 1831: bailing the prisoner 670 in the meantime. At that *term, the prisoner was put upon his trial, but the jury not agreeing in a verdict, were discharged; and there was another trial at April term 1832, which ended in the same way. At April term 1833, the prisoner was tried by a third jury, which found him guilty of manslaughter, and ascertained the term of his imprisonment in the penitentiary to be two years. Whereupon, the prisoner made a motion in arrest of judgment, because he had been sent to the former circuit court of York, to be tried at the special term thereof held on the 8th June 1831, but the circuit court of York, at that special term, had no jurisdiction to try the cause, and the circuit superior court of York had no jurisdiction now to try the same; and that three terms of the circuit superior court of Warwick, having passed without any trial there had, he was entitled to demand his discharge from the prosecution. The court overruled the motion in arrest of judgment, and sentenced the prisoner to imprisonment in the penitentiary for two years, and to be kept in a solitary cell there, on low and coarse diet, for one sixth of the term of imprisonment.

And, now, he presented a petition to this court for a writ of error, assigning for error, the same matters which he had moved as reasons in arrest of judgment.

***Appellate Practice—Excessive Judgment—Solitary Confinement.**—On this subject, see *foot-note* to *Murry v. Com.*, 5 Leigh 721, where the cases citing the principal case are collected.

Excessive Judgment—Effect.—See principal case cited in *foot-note* to *Murry's* Case, 5 Leigh 720: *Ex parte* Mooney, 26 W. Va. 41.

Southall for the prisoner.

The attorney general for the commonwealth.

MAY, J. By the provisions of the statute, 1 Rev. Code ch. 169, § 9, p. 601, the circuit court of Warwick had the power and was bound, under the circumstances, to change the venue in this case; and it appears by the record, that York was the most convenient county in which a fair trial could be had. The venue was, therefore, properly changed to that county. But the circuit court of Warwick had not the power to require that the trial should take place at any particular term of the circuit court of York; and although that would seem from the phraseology of the order, to have

671 *been contemplated to be done, the circuit court of York, doubting its power, properly refused to try the case at the special term of the 8th June 1831. Whether it was proper to bail the prisoner at that term, and how far the recognizance was binding, it is not material here to inquire. The prisoner appeared at the fall term of the circuit superiour court of York; and as the venue had been changed to that county, the court took cognizance of the case, and proceeded to the trial.

We are of opinion, that so much of the order changing the venue as seemed to require the trial to be had at the term of the circuit court of York, to be held on the 8th June 1831, should be considered as surplusage; and it having been substantially disregarded, then and subsequently, there is no error in the proceedings in this particular.

But the judgment is erroneous in this, that the court sentenced the prisoner to be kept in a solitary cell &c. in the penitentiary for one sixth, instead of one twelfth, part of the term of imprisonment of two years ascertained by the verdict of the jury. Sess. Acts of 1832-3, ch. 19, § 2, p. 18. The judgment is, therefore, to be reversed, and judgment to be entered, that the prisoner be confined in the penitentiary for the term of two years, and kept in a solitary cell &c. for one twelfth part of the term.

672 *DECEMBER TERM 1833.

JUDGES PRESENT.

<i>Smith,</i>	<i>R. B. Taylor,</i>
<i>Daniel,</i>	<i>Leigh,</i>
<i>A. Taylor,</i>	<i>Estill,</i>
<i>Field,</i>	<i>Fry,</i>
<i>Scott,</i>	<i>Semple.</i>

The Commonwealth v. Watts.

December, 1833.

Arrest of Judgment.—Judgment cannot be arrested for any matter of fact not appearing in the record.

Rape—Attempt by Slave—Statute—Construction—“White Woman.”—A white girl under twelve years of age, and not having attained to puberty, is a white woman, within the meaning of the statute making it felony punishable with death, for a slave, free negro or mulatto, to attempt to ravish a white woman.

***Arrest of Judgment.**—A motion in arrest of judgment lies only to correct an error that is apparent on the face of the record. *Gray's Case*, 92 Va. 776, 22 S. E. Rep. 868, citing principal case as its authority. See further, monographic *note on “Judgments”* appended to *Smith v. Charlton*, 7 Gratt. 425.

Case adjourned from the circuit superiour court of Westmoreland. At October term 1833, Watts, a free negro, was indicted (upon the statute of 1822-3, ch. 34, § 3), and tried, for violently and feloniously making an assault upon, and attempting to ravish, one J. B. described in one count of the indictment, “a white woman unmarried,” and in another, “a white maid.” The jury found him guilty. Whereupon, he made a motion in arrest of judgment, because J. B. the female upon whom the attempt to commit the rape was charged in the indictment, was, at the time of the offence, under the age of twelve and above the age of ten years, and so was not a white woman, within the meaning of the statute on which the prosecution was founded. The court certified that it was proved at the trial, that J. B. was, at the

673 time of the offence committed by the prisoner, and *yet was, a white girl, of the age of eleven going on to twelve years, and had not attained to puberty; and then, with the prisoner's consent, adjourned to this court, the question presented by the prisoner's motion in arrest of judgment, and all other questions arising on the record of the proceedings, and, generally, what judgment ought to be given?

PER CURIAM. As to the motion in arrest of judgment, the fact on which it was founded, not appearing on the record, this court is of opinion, that it should be overruled.

The circuit superiour court having certified to this court the facts proved at the trial, it might, perhaps, be in the power of this court to direct a new trial, if the circumstances of the case should seem to this court to warrant it. But the court does not think there is any distinction between a violence of this kind, practised upon a female between the age of ten and twelve years, and a similar violence practised upon one above the age of twelve. Both are equally rapes. If this was not so, the chastity of women between the age of ten and twelve years would be very inadequately protected. It is most manifest, that the statute 1 Rev. Code, ch. 158, § 3, p. 585, punishing the deflowering of children under the age of ten years, does not apply to the case of an attempt to ravish a female of the age of J. B., that is, between eleven and twelve, at the time the offence was committed of which the prisoner has been convicted. And the statute of 1822-3, ch. 34, § 3, enacts, that “if any slave, free negro or mulatto, shall attempt to ravish a white woman, married, maid, or other,” such offender shall be adjudged guilty of felony, and suffer death &c.

This court is of opinion, that sentence of death ought to be passed upon the prisoner.

674 *Hord v. The Commonwealth.

December, 1833.

[26 Am. Dec. 340.]

Grand Jury—Oath Administered by Clerk De Facto—Effect.—Upon a presentment for gaming, defendant pleads in abatement, that the clerk de facto, who administered the oath to the grand jury

that made the presentment, was not clerk de jure, at the time: **HELD**, the plea is naught.

Gaming—Presentment—Allegations—Public Place.—Presentment for gaming charges defendant with playing at unlawful game "at the house of R. L. in B. in the county of P. William:" **HELD**, the presentment is fatally defective in not charging that the house where &c. was an ordinary or a public place.

Error to a judgment of the circuit superior court of Prince William. At May term 1833, the grand jury made a presentment against Hord, "for playing at an unlawful game called faro at the house of R. Lipscomb in the town of Brentsville" in that county. The defendant pleaded two pleas in abatement: 1. that the grand jury which made the presentment, was not duly sworn, because J. Williams, who administered the oaths to the grand jurors, was not the clerk of the court, or the clerk pro tempore, he not having been duly appointed and commissioned as such, at the time of administering the oaths to the grand jurors, nor taken the oaths of office as clerk, or clerk pro tempore, then or at any other time: and 2. that M. Sinclair, was the clerk of the court at the commencement of the term at which the presentment was made, and resigned his office of clerk, during the term and before the presentment made, and the office of clerk was vacant at the time of the presentment, and so the grand jury was not legally impaneled and sworn. The attorney for the commonwealth put in a general demurrer to the pleas, in which the defendant joined. The court sustained the demurrer: and then, the defendant pleaded not guilty. The jury found him guilty; and thereupon, the court gave judgment against him for a fine of twenty dollars and the costs of the prosecution.

And now he presented a petition to this court for a writ of error, assigning as errors, 1. that no offence against the penal laws was charged in the presentment; and 2. that the "demurrer to the defendant's pleas was improperly sustained. The writ of error was allowed.

P. Harrison, for the plaintiff in error.

The attorney general, for the commonwealth.

PER CURIAM. The pleas filed on this case are insufficient; and consequently there was no error in sustaining the demurrer thereto. But the presentment is radically defective in this, that it is not charged that the playing was at an ordinary

or other public place; and therefore, the judgment is erroneous, and must be reversed.

The Commonwealth v. Israel.

December, 1833.

Criminal Law—Willful Trespasses—Statute—Construction.—Quære, whether the taking of any property other than such as is ejusdem generis with that specially mentioned in the statute of 1822-3, ch. 34, § 1, for punishing willful trespasses, be within the meaning of the statute?

Same—Same—Indictment—Allegations.—An indictment on that statute, must allege that the property taken away by the defendant, belonged to another person; and that the taking was "knowingly and wilfully without lawful authority," in the terms of the statute.

Same—Forcible Taking—Indictment—Sufficiency.—Indictment at common law, for taking a horse, "unlawfully and injuriously," the usual form with force and arms being also used: **HELD**, this does not describe the act as one that constitutes a breach of the peace.

Same—Rescuing Property from Sheriff's Baillee—Indictment—Allegation—Scienter.—Indictment at common law, charging defendant with rescuing property that had been distrained by a sheriff for public dues, from baillee to whose safe keeping the sheriff had committed it, without charging that the defendant knew in what right the baillee held it: **HELD**, indictment defective for not averring that the defendant had such knowledge.

Same—Same—Same—Same—Jeofails.—And this defect is not cured by verdict, by the statute of jeofails in criminal cases, 1 Rev. Code, ch. 169, § 44.

Case adjourned from the circuit superior court of Harrison. Israel was indicted in that court, at May term 1833, for a misdemeanor. There were three counts in the indictment. 1. The first charged 676 that, Israel being indebted *for public dues (tax, county levy and poor rate) to the amount of eighty-one cents, and the same being in the hands of K. Marsh deputy of S. Hall sheriff of Harrison, for collection, he distrained a horse, the property of Israel, for the amount so due from him, and took the horse and put it into the possession of J. Flowers for safe keeping; and that Israel, with force and arms, against the will of Flowers, unlawfully and injuriously, rescued the property, the said tax, county levy and poor rate, remaining still due and unpaid, to the damage of Flowers and Marsh, to the evil example &c. and against the peace and dignity of the commonwealth. 2. The second count charged, that Israel, with force and arms, knowingly and wilfully and without lawful authority, did take and drive away, one horse "then and there being in the possession of J. Flowers," against the will and consent of Flowers, contrary to the form of the statute in such case made and provided,|| and against the peace and

***Gaming—Presentment—Allegations—Public Place.**—A presentment for playing at cards must charge that the place at which it occurred was a public place at the time of such playing; the name of the place not of itself importing that it was at all times a public place. *Bishop v. Com.*, 13 Gratt. 785, 787, citing the principal case, and *Roberts' Case*, 10 Leigh 686.

For further cases in point, see *foot-note* to *Bishop v. Com.*, 13 Gratt. 785; *monographic note* on "Gaming" appended to *Neal v. Com.*, 22 Gratt. 917; *monographic note* on "Indictments. Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

Criminal Law—Information—Necessary Allegations.—An Information is fatally defective which fails to allege all the facts and circumstances necessary to constitute the offence with which it is sought to charge the defendant. *Com. v. Guilgon*, 1 Va. Dec. 599, citing the principal case, *Com. v. Israel*, 4 Leigh 675; *Robert's Case*, 10 Leigh 686; *Clark's Case*, 6 Gratt. 677; and *Bishop's Case*, 13 Gratt. 785.

See further, *monographic note* on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

***Criminal Law—Trespass—Construction of Statute.**—The statute of Feb. 14, 1823, has been uniformly construed to be a statute against willful trespass. *State v. Porter*, 25 W. Va. 689, 690, citing principal case, *Campbell's Case*, 2 Rob. 791, and *Dye's Case*, 7 Gratt. 662.

§**Same—Information—Necessary Allegations.**—See principal case cited in *foot-note* to *Hord v. Com.*, 4 Leigh 674; *Com. v. Guilgon*, 1 Va. Dec. 599.

§**Same—Impeding Officer in Discharge of Duty—Allegation—Scienter.**—The principal case was cited with approval in *Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. Rep. 546.

§**Same—Statute of Jeofails.**—See principal case cited in *Old v. Com.*, 18 Gratt. 930; *State v. Cain*, 8 W. Va. 736.

The statute of 1822-3, ch. 34, Supp. to Rev. Code ch. 226, § 1, p. 280, by which it is enacted, "that any person, who shall knowingly and wilfully, without lawful authority, cut down any tree growing on the

dignity &c. 3. The third count was like the second in all respects, except that it charged, that the horse taken and driven away by Israel, was at the time "in the possession of E. Marsh, deputy of S. Hall, sheriff of Harrison." The defendant pleaded not guilty. The jury found him guilty, and assessed a fine of ten dollars upon him. Whereupon, he made a motion in arrest of judgment, because neither count of the indictment alleged any indictable offence. And the court, with the defendant's consent, adjourned to this court, the questions arising on the reasons assigned in arrest of judgment, and the question, what judgment should be given on the verdict, if any one count were good, and the others defective?

677 *W. A. Harrison, for the defendant.

The attorney general, for the commonwealth.

FRY, J. Waiving the question, whether by the statute of 1822-3, ch. 34, § 1, the legislature designed to punish by indictment as for a misdemeanour, the wilful taking and carrying away personal property of any kind whatever, or only property ejusdem generis with that specially there enumerated, this court is of opinion, that the second and third counts of the indictment, which are founded on that statute, are fatally defective, in not averring that the property taken by the defendant belonged to Flowers and to Marsh, respectively. Non constat but that it belonged to the defendant himself. The offence mentioned in the statute, consists in unlawfully taking away the property of another; and it ought to appear by the indictment, that it is the property of another; for every indictment ought to shew, with certainty, that the accused is guilty of the offence punished by the law.

Upon the first count, there is more difficulty. But the court is of opinion, that the taking of the horse there charged, is not so described as to constitute a breach of the peace. It is charged, that the taking was "unlawful and injurious;" and though the usual phrase "with force and arms" is previously inserted, these words alone do not imply such a force as will sustain an indictment. If connected with the description of an ordinary trespass only, they do not shew such a violence as is indictable. *Rex v. Storr*, 3 Burr. 1698; *Rex v. Bake & al.* Id. 1731. Rescue seems applicable only to the forcible delivery of a person from arrest or imprisonment, or to the recaption of goods distrained for rent or damage feasant. 6 Bac. Abr. Rescue, A. p. 87. But, without deciding, whether if the property had been taken from the sheriff himself, in the manner stated in this count, it would have been an indictable offence, it seems to the court, that to make it such

when the taking is from his private bailee, the defendant should know in what right the bailee held the possession.

The property was his own: if found in the possession of the sheriff, the defendant might be held to know his office, and to be informed of the authority for his acts; and if he took the property from him, he would do it with knowledge and at his peril; but not so in the case of the private bailee. The taking from the private bailee, without knowledge that the property had been distrained by the sheriff, and committed by him to the keeping of the bailee, would be no offence; the defendant could not be presumed or held to know, by what authority he possessed it. 6 Bac. Abr. Rescue, C. p. 89. Now here, it is not averred, that the defendant knew that the property had been distrained by the sheriff, and left by him with Flowers. For aught that appears, he might have been wholly ignorant of it. And the court thinks, that the omission is not cured by the statute of jeofails, 1 Rev. Code, ch. 169, § 44, p. 611. For the indictment might have been found true, without any proof of such knowledge in the defendant as was a necessary ingredient to constitute a misdemeanour; and, as it is not necessary to prove what is not averred, we are not to presume that such proof was adduced at the trial. This first count though, at common law, might, indeed, be sustained, if the offence were so described in it, as to bring the case within the influence of the statute of 1822-3, ch. 34, § 1, on which the other two counts are founded. But, without deciding whether the statute would apply to the taking of such property in the manner alleged, it is sufficient to say, that the offence is not charged in this first count, substantially, in the terms of the statute: it is not there charged, that the taking was "knowingly and wilfully, without lawful authority."

ESTILL, J., dissented from the opinion of the court in regard to the first count.

The judgment entered was: "This court is of opinion, that the reasons assigned are sufficient to arrest the judgment."

679 *The Commonwealth v. Stephen.

December, 1833.

Capital Felony—Record—Petty Jurors—Freeholders.*—

In the trial for a capital felony, it is not necessary that it should be expressly stated in the record that the petty jurors were freeholders.

Arrest of Judgment.†—Motion in arrest of judgment because several of the petty jury were not freeholders; this being matter of fact not appearing in the record, is not a good reason for arresting judgment.

Case adjourned from the circuit superiour court of Accomack. Stephen, a free negro, was indicted for murder, in that court, at

*Petty Jurors—Oath—Record.—See principal case cited in *Crumph's Case*, 98 Va. 834, 23 S. E. Rep. 780.

See further, monographic note on "Juries" appended to *Chahoon v. Com.* 20 Gratt. 738.

†Arrest of Judgment.—A motion in arrest of judgment lies only to correct an error that is apparent on the face of the record. *Gray's Case*, 92 Va. 776, 22 S. E. Rep. 858, citing principal case and *Watts v. Com.* 4 Leigh 672.

See further, monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

For the proposition laid down in the headnotes, the principal case was cited in *Lawrence v. Com.* 30 Gratt. 848.

land of another, or destroy or injure any such tree, or any building, fence or other improvement, or the soil or growing crop on the land of another—or shall knowingly and wilfully, without lawful authority, but not feloniously, take and carry away, or destroy or injure, any tree already cut, or any other timber or property, real or personal, belonging to another," "shall be deemed guilty of a misdemeanour, and may be prosecuted and punished as in other cases of misdemeanour at common law."

—Note in Original Edition.

November term 1833. He pleaded not guilty. "Whereupon," the record proceeded, "came a jury, to wit, [here naming them] who being elected, tried and sworn the truth of and upon the premises to speak," found the prisoner guilty of murder in the first degree. Then, he made a motion in arrest of judgment, 1. because several of the jurors in the panel of the petty jury, which tried him, were not good and lawful freeholders of Accomack or of any other county of the commonwealth; and 2. because it was not expressly stated in the record, that any of the petty jury were good and lawful freeholders of that or any other county. And the court, with the consent of the prisoner, adjourned to this court, the question, whether the judgment ought to be arrested for the reasons assigned?

SMITH, J. The assignment of error, that several of the jurors were not freeholders, is matter of fact, not appearing by the record; which, therefore, could not be pleaded in arrest of judgment. As to the other objection, there was no necessity to state in the record, that the jurors were good and lawful men. The record, in this case, is in the usual and correct form. It is, therefore, the unanimous opinion of this court, that the errors assigned are not sufficient to arrest the judgment.

680 *Windsor v. The Commonwealth.

December, 1833.

Gaming*—Case at Bar.—Indictment for gaming, charges defendant with unlawful playing with cards, to wit, at the game of all fours, of loo, and of whist, at a public place, to wit, at the store house of G. H. & Co.: **HELD.**

1. **Same—Same—What Necessary for Conviction.**—That to convict the defendant, it is incumbent on the prosecutor to prove, that he played at some one of the games specified in the indictment: and

2. **Same—Store House—When a Public Place.**—That, if the playing was at the store house of G. H. & Co. in the night time, after the business of the day was at an end, and the doors closed, the store house in that state of things, *prima facie*, was not a public place, though it was so when it was open to the public in the day time.

Error to a judgment of the circuit superior court of Fayette. Windsor was indicted in that court, upon the 5th section of the statute against unlawful gaming, 1 Rev. Code, ch. 147, p. 563. The indictment charged, "that he did unlawfully play at certain games at cards, to wit, the game of all fours, the game of loo, and the game of whist, at a public place, to wit, at the store house of G. Huddleston & Co." The defendant pleaded not guilty. At the trial, his counsel moved the court to instruct the jury, 1. that it was necessary to convict the defendant, that the jury should be satisfied that he played at some one of the games specified in the indictment; and 2. that if the jury should find from the evidence that the playing was at the store house of Huddleston & Co. in the night time, after the business of the day at the store was ended and the doors of the house closed, it ought not to be considered by the jury that the playing was at a public place within the meaning of the statute, no one

having a right to enter the house at that time, without the consent of the owner. But the court refused to give such instructions, and the defendant filed exceptions.

Verdict, guilty; and judgment for the fine of twenty dollars imposed by the statute, and the costs of the prosecution.

And now, the defendant presented a petition to this court for a writ of error to the judgment, assigning as errors, the refusal of the court to give the instructions set forth in the bill of exceptions. The writ of error was allowed.

681 *Leigh, for plaintiff in error.

The attorney general, for the commonwealth.

SEMPLE, J. As to the first point: if it be admitted, that the commonwealth might have convicted the accused, on proof of his playing at any one unlawful game, had the indictment charged him with playing at a game at a public place, and that the game was neither bowles, backgammon, chess nor drafts (which are excepted by the statute), it does not follow, that he can be convicted upon this indictment, charging that he played at the game of all fours &c. upon proof of his playing at any unlawful game other than one of the games specified. The attorney chose to frame his indictment differently. That alleges, that the defendant played unlawfully at the game of all fours &c. with cards. The offence here consists in the playing at the game of all fours &c. which are unlawful games, not being either of the games excepted in the statute. The games charged to have been played, became essential ingredients in the offence itself, and could not be rejected as unnecessary or as surplusage. The proof must agree with the allegation, and this would have been required even in a civil case. It was more necessary to prove that the defendant had played at one of the specified games, than it was in Butt's case, 2 Virg. Ca. 18, to prove, that the play took place at the booth of Skinner, as charged in the presentment, and not at the booth of Clark; for, whether the play was at one or other of the booths, it was equally an offence against the statute; but as it was laid to have taken place at the booth of Skinner, proof that it took place at the booth of Clark, was held not to be competent. A majority of the court, therefore, is of opinion, that the court below erred in refusing the first instruction asked for.

Then, as to the second point—To convict the defendant, it was incumbent on the commonwealth to prove, that the play occurred at the store of Huddleston & Co. and that it was a public place at the time

682 of the playing: it was so alleged *in the indictment. Proof that Huddleston & Co.'s house was a store house, at which goods were vended, would establish that it was a public place so long as it was kept open for that purpose. But when the business of the day was ended, the store house was bona fide shut up, the doors closed, it ceased *prima facie* to be a public place; and in the absence of other proof, it would not be regarded as a public but a private place. When reopened, it again became a public place, in point of fact and legal contemplation. Even when the doors

*See monographic note on "Gaming" appended to Neal v. Com., 22 Gratt. 917. The principal case was cited in State v. Brast, 31 W. Va. 382, 7 S. E. Rep. 12.

were closed and all sales ceased, the business of the day having ended, it might be shewn by testimony to have been in fact a public place, so as to subject persons engaged at play in the house to the penalties of the statute. The second instruction asked for is not at all inconsistent with this latter proposition. The court understands that instruction as going no farther than to insist, that it was not an offence against the statute, to play at the store house, in the night, after the business of the store was ended, and the doors shut, in the absence of other proof as to the character of the house; that the house did not continue, in that state of things, to be a public place, because it was a store house open to the public in the day time. And this by no means excludes the idea, that it was competent to establish by other proof, that, though shut up at night, as to the ordinary business, it was still, in truth, a public place. The court, therefore, is of opinion, that the circuit superior court erred in refusing to give the second instruction asked for.

Judgment reversed, and case sent back to the circuit court for a new trial &c.

683

*JULY TERM 1834.

JUDGES PRESENT.

<i>Saunders,</i>	<i>Lomax,</i>
<i>Summers,</i>	<i>Estill,</i>
<i>Upshur,</i>	<i>Duncan,</i>
<i>May,</i>	<i>Clopton,</i>
	<i>Field.</i>

Stevens v. The Commonwealth.

July, 1834.

Arson—County Jail—Indictment—Description of Building—Surplusage.—Indictment for arson describes the house burned as "the county jail and prison of the county of H. being the house of L. J. sheriff and jailor of the said county." HELD, the burning of such jail is felony by the statute, 1 Rev. Code, ch. 160, § 4, and whether the jail may be properly laid to be the house of the sheriff and jailor or not, that part of the description is unnecessary and may be rejected as surplusage.

Petition for a writ of error to a judgment of the circuit superior court of Hanover. Stevens was indicted in that court, tried and convicted of burning the common jail and county prison of Hanover, and sentenced to imprisonment in the penitentiary for the term of five years according to the verdict. There were several counts in the indictment; in the fourth of which it was charged, that the prisoner feloniously set fire to and burned "the common jail and county prison in the county of Hanover, being the house of Laney Jones, sheriff and jailor of said county." At the trial, the prisoner moved the court to instruct the jury, that Laney Jones, as sheriff and jailor of Hanover, could not legally have any such right of property in the county jail, charged to have been burned, as

684 would sustain the fourth *count in the indictment; but the court refused to give the instruction, and the prisoner excepted to the opinion. And now he pre-

sented a petition to this court, for a writ of error, assigning for error, the refusal of the court to give the instruction.

Briggs, for the petitioner.

MAY, J. The first three sections of the statute concerning arson, 1 Rev. Code, ch. 160, p. 587, prohibits the burning of certain houses therein described; jails not being within those provisions. The fourth section prohibits the burning, "either in the day or the night, of any house or houses whatsoever, other than those enumerated in the three first sections." And under this provision, we are of opinion, that the petitioner was indictable for burning the jail and prison of Hanover; and that the indictment properly and sufficiently described the house as the common jail and county prison of that county. Waving the objection, which is felt by some of us, to the form in which this question was presented to the circuit superior court; and not deciding, as two of us are inclined to do, that the jail may properly be termed the house of the sheriff and jailor who keeps the keys and has the control thereof; we are all of opinion, that this portion of the description was intirely unnecessary, and should be regarded as surplusage.

Writ of error denied.

685 *The Commonwealth v. Deskins and Another.

July, 1834.

Contempts*—What Constitutes—Statute—Construction.—A circuit superior court orders a subpoena, witnesses to attend the grand jury then in session and they intentionally conceal themselves from the sheriff to prevent the process from being served, and so prevent it from being served, till the grand jury is discharged: HELD, upon the construction of the statute of 1830-31, ch. 11, § 25, that this is not a contempt punishable by the court in a summary manner.

Case adjourned from the circuit superior court of Tazewell. That court, at April term 1834, made a rule upon Deskins and Lockhart returnable instant, to shew cause why they should not be fined and imprisoned for a contempt of the administration of justice, in intentionally concealing themselves (in Jeffersonville, where the court was sitting) from the sheriff, and thereby intentionally preventing him from serving a subpoena upon them, issued by order of the court, ordering them to appear as witnesses before the grand jury then in session, and so concealing themselves there, till the grand jury was discharged. The rule being served upon them, they appeared, and moved the court to discharge it, upon the ground, that by the statute of 1830-31, ch. 11, § 25; (Supp. to Rev. Code, ch. 109, pp. 143, 4,) whereby contempts are defined, the acts in the rule mentioned, do not constitute a contempt punishable in any manner by the court. Whereupon, the court, with the assent of the accused, adjourned the following questions to this court: 1. Whether the acts mentioned in

*Contempts. — See monographic note on "Contempts" appended to Wells v. Com., 21 Gratt. 500.

On this subject the principal case was cited in State v. Frew, 24 W. Va. 438, 460, 477; State v. McClaurberry, 33 W. Va. 256, 10 S. E. Rep. 406; State v. Hansford, 43 W. Va. 777, 28 S. E. Rep. 793. See Va. Code, 1887, §§ 3768, 3772.

*See monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

the rule, amounted to a contempt of law and the due administration of justice, punishable by the court? 2. What judgment ought to be given on the motion to discharge the rule? 3. And what disposition ought the court to make of the case?

PER CURIAM. Without intending to intimate an opinion, that Deakins and Lockhart might not be proceeded against by indictment or information, for corruptly endeavouring to obstruct or impede the due administration of justice, this court is unanimously of opinion, that since the 686 statute of 1830-31, defining contempts, and limiting the powers of the courts to inflict punishment for them, the acts imputed in the rule to the defendants, do not amount to a contempt punishable in the summary manner contemplated by the rule; and therefore the motion to discharge the rule ought to be sustained.

The Commonwealth v. Percavil.

July, 1834.

Indictment under Statute—Willful Trespass—Special Verdict—Sufficiency.—Upon an indictment on the statute of 1822-3, ch. 34, § 1, the jury find, in a special verdict, that defendant shot and killed hogs the property of another, the hogs being on defendant's own land at the time of his shooting and killing them: HELD, the verdict is defective and insufficient. In not finding the essential ingredients required by the statute to constitute the misdemeanor, viz. that defendant killed the hogs "knowingly and wilfully without lawful authority."

Same—Same—Construction of Statute.—The provisions of that statute are not confined to property ejusdem generis with that specially there enumerated; and the circumstance of the property destroyed being at the time on defendant's own land does not take the case out of the statute.

Case adjourned from the circuit superiour court of Lancaster. Percavil was indicted in that court, at March term 1834, upon the statute of 1822-3, ch. 34, § 1,† for knowingly and wilfully, without lawful authority, but not feloniously, wounding and killing thirty hogs, the property of E. Brent. Plea, not guilty. The jury found the following verdict: "We of the jury find the defendant guilty, and assess his fine at twenty-one dollars, in case the court shall be of opinion, that the defendant is liable under the presentment made in this case to the penalties of the act to provide for the more effectual punishment of certain offences," [namely the statute above referred to] "for having shot and killed seven hogs

*Indictment under Statute—Willful Trespass—Indictment—Sufficiency.—The principal case is cited with approval in *Com. v. Howard*, 11 Leigh 632.

Criminal Law—Verdict for Term of Imprisonment Shorter Than Law Allows—Variance between Verdict and Judgment—Appellate Practice.—In *Nemo's Case*, 2 Gratt. 558, the verdict of the jury found the accused guilty of voluntary manslaughter, and fixed his term of imprisonment at three years; and upon this verdict the circuit court sentenced him to imprisonment for five years, that being the shortest term prescribed by law for the offence. The judgment, thus varying from the verdict, the general court reversed it for this reason, and the verdict being illegal in ascertaining a term of imprisonment shorter than that prescribed by law, the court set aside the verdict and awarded a *venire de novo*. In *Jones v. Com.*, 20 Gratt. 855, it is said that this decision is sustained by *Gibson v. Com.*, 2 Va. Cas. 111; *Com. v. Smith*, 2 Va. Cas. 327; *Com. v. Percavil*, 4 Leigh 686; *Mills v. Com.*, 7 Leigh 751; *Com. v. Hatton*, 3 Gratt. 623; *Marshall v. Com.*, 5 Gratt. 663; *S. C.*, 5 Gratt. 693; *Com. v. Scott*, 5 Gratt. 697.

†Supp. to Rev. Code, ch. 228, p. 280. See the words of the statute in a note on *Israel's case*, ante.

687 the property of E. Brent, which "hogs were on the land of the defendant at the time of the shooting and killing thereof." Whereupon, the circuit court adjourned to this court, the following questions: 1. Whether the wounding and killing of hogs, not being upon the land of the owner thereof when they were wounded and killed, nor being at the time in his immediate personal possession, but being on the land of the defendant, is a destruction of personal property, within the meaning of the statute on which the prosecution is founded? 2. What judgment ought to be given upon the proceedings in this cause? And all questions arising upon the record.

PER CURIAM. As to the first question, the court is of opinion, that the legislature did not intend to limit the operation of the statute referred to, to cases of trespass upon property of the same kind as that specially enumerated in the statute; but that by the words "property real or personal" therein contained, it intended to embrace living domestic animals; the usual and ordinary effect of these general words, not being confined by the special enumeration in the preceding part of the statute. And the court is of opinion, that the fact of the property being at the time of the trespass, on the land of the defendant, will not prevent the operation of the statute, if the other constituents required thereby, namely, that the injury or trespass be done knowingly and wilfully, without lawful authority, be found by the jury to exist in the case. Upon the first question, therefore, the court answers in the affirmative.

Upon the second question—Though the jury in the first part of their verdict (in the usual form of general verdicts) find the defendant guilty and assess his fine, they evidently intended by the other part of their verdict, to ask the opinion of the court as to the law upon a particular state of facts. The verdict, therefore, is to be regarded as a special one. Considering it in that light, the state of facts which it contains, and to which the jury asked the court to apply the law, must be taken as presenting all the facts which the

688 jury found to exist in the case; and as the verdict does not contain the essential attributes required by the statute to constitute the misdemeanour, viz. that the defendant shot and killed the hogs "knowingly and wilfully, without lawful authority," it is defective and insufficient. Upon the second question, therefore, the court is of opinion, that no judgment should be rendered, but the verdict should be set aside, and a *venire de novo* awarded.

Gilliam v. The Commonwealth.

July, 1834.

Criminal Law—Assault and Battery—Witness—Prosecutor.—On an indictment for an assault and battery on the voluntary information of the person assaulted, the informer and prosecutor, being the only witness for the prosecution, is a competent witness, though liable for costs in case defendant is acquitted.

*Criminal Law—Assault and Battery—Witness—Prosecutor.—The principal case was cited in *Com. v. Hart*, 2 Rob. 822; *foot-note* to *Baker v. Com.*, 2 Va. Cas. 353. See also *monographic note* on "Witnesses" appended to *Clafborne v. Parrish*, 2 Wash. 146.

Petition for a writ of error to a judgment of the circuit superior court of Prince George. The grand jury made a presentment against Gilliam, for an assault on a deputy sheriff, and resisting him by force in the lawful discharge of his official duty, upon the information of the deputy sheriff, who was a voluntary informer; upon which an information was filed against Gilliam for the offence. At the trial, the deputy sheriff was the only witness for the prosecution; and the defendant objected to his competency, because, as he was the informer and prosecutor, and so stated to be in the presentment of the grand jury, he was liable for costs in case the defendant was acquitted, by the provision of the statute, 1 Rev. Code, ch. 169, § 46, p. 611. But the court overruled the objection, and admitted the testimony of the witness; to which the defendant filed exceptions. The jury found him guilty, and assessed a fine of fifty dollars upon him. The court gave judgment for the fine. And now he presented a petition to this court

689 for a writ of error, *assigning for error, the admission of the testimony of the informer and prosecutor to sustain the prosecution.

Allison, for the petitioner.

MAY, J. The question presented in this case, was decided by this court in Baker's case, 2 Virg. Ca. 353, and it is believed, that the practice of all the courts of criminal jurisdiction in the state, has been, from the earliest times, in conformity with that decision. From necessity, or on a principle of public policy, evidence is received from persons who are entitled to rewards on conviction; 1 Phil. Law Ev. 91, [96.]* The reason here is of the same character. The prosecutor was, in this particular case, and in many others, he probably will be, the only witness, by whose testimony the indictment could be sustained. The statute has made him liable for costs, in case the prosecution fails; but it could not have been intended, in such cases, to make the failure of the prosecutions inevitable.

Writ of error denied.

Blunt v. The Commonwealth.

July, 1834

[28 Am Dec. 341.]

Larceny+—What Constitutes—Felonious Intent—Case at Bar.—If a person obtain possession of a watch from the owner, by a false and fraudulent pretence of buying it for cash, and then carry it away without the consent or knowledge of the owner, he is yet not guilty of larceny, unless it was with a felonious intent that he so obtained possession of the watch and carried it away.

Criminal Law—Instruction—Request for.—The court,

*New York edition of 1820.

+Larceny.—See monographic note on "Larceny" appended to Johnson v. Com., 24 Gratt. 555.

Instructions—Request for.—In State v. Cobbs, 40 W. Va. 718, 22 S. E. Rep. 311, JUDGE BRANNON speaking for the court, said: "In this state, no duty rests on the judge to instruct on the general features of the case, law, or fact. I have said that the matter of instructing as to punishment falls under the law of instructions. Under that, it was not the duty of the judge, unasked, to give the instruction. We are not discussing the question whether it is error for a judge, without request by either side, to give instructions, as in Gwatkin's Case, 9 Leigh 678. I do not doubt that, as held in *Blunt's Case*, 4 Leigh 689, the court may properly instruct the jury on a question of law when, in its opinion, justice requires such in-

in the trial of a criminal cause, may properly instruct the jury on any question of law, when in its opinion justice requires such interposition, though it be not asked by either party.

Error to a judgment of the circuit superior court of Henrico. At the last term of that court, Blunt was indicted, 690 *tried, and convicted by the verdict of the jury, and sentenced by the court, to imprisonment in the penitentiary for two years, according to the verdict, for grand larceny; namely, the stealing of a gold watch, seal and chain, the property of J. Johnson. At the trial, the counsel for the prisoner moved the court to instruct the jury, that if they should find from the evidence, that the prisoner had bargained for the watch with Johnson's clerk, who delivered the same to him on a promise that he would pay the price for it immediately, and that the prisoner carried it away with him, and failed and neglected to return and pay the price, in such case he was not guilty of the larceny charged in the indictment. The court refused to give such instruction; and instructed the jury, that if they should find from the evidence, that the prisoner made a bargain with Johnson's clerk for the watch, in pursuance of which the watch was delivered to him, upon his promise to pay the price immediately, intending that the prisoner might take the watch away, and return immediately and pay for it, then he was not guilty of the larceny. But if the jury should find, from the evidence, that the prisoner obtained possession of the watch by a false and fraudulent pretence of buying it for cash, and then carried it away without the consent or knowledge of the owner's clerk, then he was guilty of the larceny. To these opinions of the court, the prisoner filed exceptions.

And now he presented his petition to this court for a writ of error to the judgment; assigning as errors, 1. that the court erred in refusing to give the instruction to the jury asked by the prisoner's counsel; 2. that the court erred in proceeding, after refusing the instruction asked by the prisoner's counsel, to give any instruction to the jury, not asked by the attorney for the commonwealth or by the counsel for the prisoner; and 3. that the instruction, which the court did give to the jury, was erroneous. The writ of error was allowed.

Briggs, for the plaintiff in error.

691 *MAY, J., delivered the resolutions of the court: 1. That the instruction asked by the prisoner's counsel, was properly refused; because, if the prisoner acquired possession of the watch in the manner therein stated, with a felonious in-

terposition, though it be not asked by either party. But the question in point now is whether a court is bound, without request of specific instructions, to give them. It is clearly not so under our practice. *Dejarnette's Case*, 75 Va. 877; *Rosenbaums v. Weeden*, 18 Gratt. 785; 4 Minor 747; *State v. Caddle*, 35 W. Va. 73, 12 S. E. 1068. The cases of *Kitty v. Fitzhugh*, 4 Rand. (Va.) 600, *Brooke v. Young*, 3 Rand. (Va.) 106, and *Womack v. Circle*, 29 Gratt. 192, holding that a party must ask instructions on specific points, and that even when asked the court is not bound to instruct generally on the law of the case, logically negative the claim that it is error for a court not to instruct when not asked. The party must ask specific instructions."

See further, monographic note on "Instructions" appended to *Womack v. Circle*, 29 Gratt. 192.

tent at the time to carry it away, and appropriate it to his own use, without paying for it, he may have been guilty of larceny in so doing. 2. That the prisoner's counsel having applied to the court for an instruction on the law, and the court having refused to give it in the precise form in which it was asked, it was correct that the court should give one with such modification as, in its opinion, was legal and proper. For the court may, at all times, instruct the jury on any question of law arising in a cause, if, in its opinion, justice shall require such interposition. 3. That the instruction, however, which was given, was erroneous in this, that although the prisoner may have obtained possession of the watch in the fraudulent manner indicated in the latter part of the instruction; yet, unless he so obtained it, and carried it away, with a felonious intent at the time, he was not guilty of larceny.

The judgment is, therefore, reversed, and the cause sent back to the circuit superiour court of Henrico, for a new trial to be had: in which trial, if any instruction shall be moved for on the same subject, or the evidence shall require it, the court is directed to instruct the jury, that if they shall find from the evidence, that the prisoner with a felonious intent obtained possession of the watch by false and fraudulent pretenses, and afterwards carried away the same, without the consent of the owner or his clerk, then the prisoner is guilty of larceny.

692 *The Commonwealth v. Peas.

July, 1834.

Indictment under Statute—Removing Slaves from County—Fatal Defects.—Indictment on the statute 1 Rev. Code, ch. 111, § 30, for feloniously and fraudulently taking and removing a slave from one county to another, with intent to defraud the owner and deprive him of the property: **HELD**, fatally defective, after verdict, for want of an averment, that the slave was so taken and removed without the consent of the owner.

Case adjourned from the circuit superiour court of Henrico. Peas was tried in that court, upon an indictment on the statute 1 Rev. Code, ch. 111, § 30, p. 428.† The indictment charged, that the prisoner in the county of Henrico, "feloniously and fraudulently, did take possession of a negro boy named John, a slave, the property of W. Richardson, and did, then and there, feloniously and fraudulently, remove the said slave beyond the limits of the said county of Henrico into the county of Prince George, with intent to defraud the said Richardson, the owner of the said slave, and to deprive him of the said slave, contrary to the form of the statute &c." without ex-

pressly charging, that the prisoner so took and removed the slave, without the consent of the owner. The jury found him guilty. Whereupon, he made a motion in arrest of judgment, because it was not averred in the indictment, that the slave was taken and carried from Henrico to Prince George, without the consent of Richardson, the owner; and so no criminal offence was charged in the indictment, and the same was not sufficient in law to warrant any judgment against him upon the verdict. And the court, with the consent of the prisoner adjourned to this court, the question, what judgment ought to be given upon the plea in arrest of judgment?

693 *LOMAX, J., delivered the resolution of the court: That the omission of an averment in the indictment, that it was without the consent of the owner that the slave was removed or carried away, is a fatal defect, not cured by the verdict; and, therefore, that it be certified to the circuit superiour court, that the judgment ought to be arrested.

Anderson v. The Commonwealth.

July, 1834.

Criminal Law—Court of Oyer and Terminer—Writ of Error.—A writ of error does not lie from the general court to a judgment of a county or corporation court, sitting as a court of oyer and terminer, in a criminal prosecution under the statute of 1831-2, ch. 22, § 11.

Same—Same—Same.—Quære, whether a writ of error lies to such judgment from the circuit superiour court?

Petition for a writ of error to a judgment of the corporation court of Petersburg. Anderson, a free negro, was tried for larceny in that court, sitting as a court of oyer and terminer, convicted, and sentenced to imprisonment in the penitentiary for five years. He was prosecuted and tried in the same manner as slaves are prosecuted and tried for the like offences, according to the provisions of the statute of 1831-2, ch. 22, § 11. (See the cases of Weldon and others, ante.) And now he presented a petition to this court, complaining of irregularities in the trial, and praying a writ of error.

Allison, for the petitioner.

MAY, J. The court cannot look into the alleged errors. There are two preliminary inquiries: Whether a writ of error lies to the proceedings of the county or corporation courts sitting as courts of oyer and terminer? And if so, whether it may be allowed by this court, or must be by the circuit superiour court of Petersburg?

694 *The court, without deciding any other question, is of opinion, that a writ of error does not lie from this court to the county or corporation courts. 1 Rev. Code, ch. 67, § 26, p. 224.

Writ of error denied.

Pendleton v. The Commonwealth.

July, 1834.

[26 Am. Dec. 342.]

Forgery—Secondary Evidence—When Admissible.—On the trial of an indictment for forgery of a

*To the point that the general court has no jurisdiction to award a writ of error to a judgment of the hustings court, the principal case was cited in *Abrahams v. Com.*, 11 Leigh 676.

†**Forgery—Secondary Evidence—When Admissible.**—*Kirk v. Com.*, 9 Leigh 690, was a prosecution for

*The opinion in this case, delivered by JUDGE LOMAX, is reported in the Appendix to 2 Gratt. 629. Here also are collected all the cases citing the principal case, save *Glass v. Com.*, 33 Gratt. 832.

†The statute enacts, that "whosoever shall carry, or cause to be carried, any slave or slaves out of this commonwealth, or shall carry, or cause to be carried, any slave or slaves out of any county or corporation within this commonwealth, into any other county or corporation within the same, without the consent of the owner or owners of such slave or slaves, or of the guardian of such owner or owners, if he, she or they be a minor or minors, and with intention to deprive such owner or owners of such slave or slaves, shall be adjudged guilty of felony &c."

check on a bank, if there be proof rendering it highly probable that the original paper has been lost or destroyed, though this was not done by the accused or by his procurement, secondary evidence of the contents, character and description, of the paper, is admissible to sustain the prosecution.

Petition for a writ of error to a judgment of the circuit superiour court of Henrico. Pendleton was indicted and tried there, for forging and counterfeiting a check in the name of Bagwell, Smith & Williams on the bank of Virginia, payable to Pendleton or bearer, for 200 dollars; and for passing and uttering the check as genuine, knowing it to be a forgery.

At the trial, the attorney for the commonwealth called a witness, Dudley, who testified, that he received a check from the prisoner, of which he retained a copy and delivered the original to D. Miller; he produced the copy which corresponded exactly with the check described in the indictment. Miller testified, that he delivered the original check to D. Wilson. Wilson testified, that he delivered it, with sundry other checks, to J. Talley; that Talley, in his presence, burned all the checks so delivered to him except one which he kept; but whether the one so kept by Talley, was the same that was delivered by Dudley to Miller and by Miller to this witness, he did not know. Talley testified, that he received several checks from Wilson, and
695 *burned all but one, which he retained and put in his pocket book; that he had since seen it among his papers; that two or three weeks before the trial, he had looked among his papers for the check, and for other purposes, and could not find it; that not having been apprised that he was to be examined as a witness till he was called, he had made no thorough search among his papers for the single purpose of finding the check; he did not know that it had been destroyed; it was possible that it was still among his papers; but he believed it was not among them, and that it was lost. The attorney for the commonwealth then shewed a written notice, which had been served on the prisoner some time before the trial, that he would be required to produce the check (describing it) at the

passing a counterfeit coin. On his trial, the prisoner objected to the admission of any testimony to prove the passing of the coin, or that the same was forged or counterfeit, without the production of the piece of money alleged to be forged and passed. In answering this objection, ALLEN, J. who delivered the opinion of the court, said: "The absence of the forged pieces may increase the difficulty of proving the prisoner's guilt: but there seems to be no good reason for rejecting evidence tending to satisfy the jury of the fact of the felonious passing, and that the pieces passed were counterfeit. If the rule were as contended for, then secondary evidence could never be received in a prosecution for forgery; for the objection covers the whole ground, that the production of the forged piece was essential, and that all testimony to prove its counterfeit character and the felonious passing was inadmissible unless the coin was produced. The contrary has been repeatedly established by the courts in this country and in England. *Pendleton's Case*, 4 Leigh 694; 2 Russell 674."

To the point that, on a trial for forgery, the instrument alleged to be forged is the best evidence of itself and its contents, and therefore its production can never be dispensed with unless unavoidable, the principal case was cited in *State v. Lowry*, 42 W. Va. 208, 24 S. E. Rep. 562.

See further, monographic note on "Forgery and Counterfeiting" appended to *Coleman v. Com.*, 25 Gratt. 885.

trial, and that if it should not be produced, other evidence of its contents, character and description, would be offered to sustain the prosecution. And, accordingly, the original not being produced, he offered secondary evidence of the contents, character and description, of the check; namely, the copy of it produced by Dudley. The prisoner's counsel objected, that such secondary evidence, if competent in any case, was not competent under the circumstances proved in this case. But the court being satisfied that it was impracticable to produce the original check, and that reasonable diligence had been used to procure it without effect, overruled the objection, and admitted the secondary evidence; to which opinion the counsel for the prisoner filed exceptions.

The jury found the prisoner guilty, and the court sentenced him to imprisonment in the penitentiary for two years, according to the verdict.

And now he presented a petition to this court for a writ of error, assigning for error, the admission of the secondary evidence of the contents, character and description of the check.

Scott, for the petitioner. To permit the prosecutor to resort to evidence of the contents of a paper alleged to be
696 *forged, without producing the original, except in cases where the paper is withheld by the accused, or has been destroyed by him, or by his procurement, would be to deprive him, in many cases, of the highest evidence of his innocence. It would render him unable to prove the paper genuine. If, indeed, the original be traced to the possession of the prisoner, and he will not produce it, or if it be shewn that he has destroyed it, or procured it to be destroyed; in any such case, it is admitted, secondary evidence of its contents would be proper. But, in a case like this, in which the paper, if destroyed or lost at all, has been destroyed or lost by another person, without the procurement, connivance or knowledge of the prisoner; as the absence of the primary evidence may deprive the prisoner of the means of making a just defence, without any fault of his own, the secondary evidence ought not to be admitted. Accordingly, it will be found on examination, that in all the cases in which secondary evidence of the contents of a paper charged to be forged, has been admitted, a foundation has been laid for the admission of the secondary evidence, by proof that the original was in the possession of the accused himself, or had been destroyed by him. 1 Chitt. Crim. Law 566, 7, and the cases there cited. It is obvious, that a notice to the party, to produce an original paper, shewn by the prosecutor not to be in his possession, or within his reach or control, is nugatory; and the requisition of such notice, therefore, shews the necessity of tracing the paper to his possession. But, in the present case, was there any foundation laid for the admission of the secondary evidence? The original was traced to the witness Talley. He testified, that he kept one check and burned others; that two or three weeks before, he had looked over his papers to find the check

he did retain, and for other purposes, and could not find it; but he had not made a thorough search among his papers with the single purpose of finding this paper; nor could he have done so, being called as a witness suddenly and unexpectedly: he believed it was lost. Surely, for aught that appears, *the paper may be still in existence among Talley's papers; and time should (as it certainly might) have been given him, to make a thorough search for it.

SUMMERS, J. The question is, whether the circumstances proved formed a sufficient ground for the admission of the secondary evidence of the contents, character and description, of the check? The general rule, which runs alike through civil and criminal proceedings, that the best evidence which the nature of the case admits of must be produced, is intended to preclude all testimony, which from its very nature supposes that the party offering it has it in his power to produce better evidence. But wherever an original paper is shewn to have been lost or destroyed, or is in the hands of the party himself, the prosecutor may give a copy in evidence, or if not, parol evidence of its contents; because, in each of those cases, the presumption of the prosecutor having it in his power to produce better evidence is repelled. In this case, the inquiry seems to be narrowed down to the sufficiency of the search made

by the witness Talley, for the original paper. His testimony is not so perfectly simple, direct and positive, as it might have been; but the bare possibility that the paper might have been found on a more diligent search, was no good reason for excluding the evidence. The burning of the checks handed to Talley by Wilson, made it extremely doubtful, whether the check on which the prosecution was founded, was not one of those committed to the flames, probably for the protection of the prisoner. If the retained check may have been the one in question, the failure to produce it was not owing to any fault of the prosecutor; nor can any presumption possibly arise of an unjust suppression by him of the primary evidence. The mind of the witness Talley himself was satisfied, that the paper was lost; and the judge, to whom this preliminary inquiry belonged, was satisfied by the examination, of the correctness of the conclusion of the witness. This court ought not to interfere, unless error is made apparent. We are *unanimously of opinion, that there is no error. If authorities be necessary to sustain this opinion, they may be found in 2 Russel on Crimes, book 6, ch. 3, § 2, p. 674, and the cases there referred to, and the case of *The Commonwealth v. Snell*, 3 Mass. Rep. 82.

Writ of error denied.

INDEX.

ACCOUNT.

A private unchartered company, associated for the purpose of carrying on business as a bank, though such associations are contrary to law, shall be entertained in a court of chancery, in a suit against its cashier, for an account of his agency.

Berkshire v. Evans and others, 223

ACKNOWLEDGMENT IN FIVE YEARS.

1. See Debt No. 4, 5, and Butcher v. Hixton, 519
2. See Debt No. 6, and Farmers Bank v. Clarke, 608

ACTION.

1. See Assignment No. 5, 6, and Colner v. Hansbarger, 452
2. See Contract No. 6, and Gore v. Buzzard's adm'r's, 231
3. See Covenant No. 3, and Bream v. Marsh, 31
4. See Covenant No. 1, and Tabb's adm'r v. Binford, 132
5. See Freedom No. 3, and Nicholas v. Burruss, 289
6. See Judgment No. 1, and Newcomb v. Drummond, 57
7. See Sheriffs and sergeants No. 1, and Reynolds v. Gore, 276

ACTS OF ASSEMBLY.

See Statutes cited and construed.

ADMINISTRATION.

1. Right to administration. See Executors and administrators No. 1, 2, 4, and Thornton v. Winston, 153
2. What may be recovered by administrator de bonis non. See Executors and administrators No. 11, and Waddy's ex'or v. Hawkins's adm'r, 458

ADVERSARY POSSESSION.

C. being seized of land in fee, agrees to sell and convey the same to J. and receives the purchase money, and puts him in possession, but does not make a conveyance to him; J. agrees to sell and convey the same land to W. and puts him in possession, but W. not paying the purchase money, this contract is rescinded, and W. agrees to give up to J. all his claim to the land; W. nevertheless, remains in possession, without paying any rent, and without pretence of title; and while W. is thus in possession, C. conveys the title to J. by deed of bargain and sale: HELD, W.'s possession was not an adversary one, and, therefore, C.'s deed to J. passed the legal title to him, so that C. cannot maintain a writ of right against W. for the land.

Williams v. Sndow, 14

AGREEMENT.

See Contract.

AMENDMENTS.

1. See Assignments No. 8, and Smith & Rickard v. Triplett & Neale, 590
2. See Clerical errors, and Eubank et al. v. Ralls's ex'or, 308
3. See Judgment No. 6, and S. C., 308

ANNUITY.

- See Interest No. 2, and Thorntons v. Fitzhugh, 209

APPEARANCE BAIL.

See Bail.

APPELLATE JURISDICTION.

1. Effect of appeal. See Judgment No. 1, and Newcomb v. Drummond, 57
2. Effect of affirming dissolution of injunction. See Injunction No. 5, and Epes's adm'r's v. Dudley, 145
3. What decrees will be deemed final. See Decrees in chancery No. 1, 2, and Faup's adm'r et al. v. Mingo et al., 168
4. What will be regarded by appellate court. See Thornton v. Fitzhugh, 209
- Bill of exceptions No. 2, and Barrett v. Wills, 114

700 *5. See Guardian No. 1, and Dupuy v. Hardaway, 584

6. See Restitution, and

Eubank et al. v. Ralls's ex'or, 308

APPORTIONMENT.

Concerning apportionment of rent, see Landlord and tenant, and Briggs v. Hall, 484

APPRENTICE.

A father cannot bind his infant child apprentice by indentures to which the child is not a party; and indentures of apprenticeship executed by the father, without the child's concurrence, are not voidable only, but void.

Pierce v. Massenburg, 493

ARBITRATION AND AWARD.

Misconduct of arbitrators.

1. Award of arbitrators sought to be set aside, on the ground that the conduct of the arbitrators had the effect of a surprise on one of the parties, and so was misconduct, though no partiality or corruption was imputed to them; and HELD, upon all the circumstances of the case, that there was nothing in the proceedings of the arbitrators to invalidate the award.

May v. Yancey, 362

2. Award of arbitrators set aside, on the ground of circumstances in their conduct, amounting to misbehaviour, though not to corruption, and resulting in injustice to one of the parties.

Lee v. Patillo, 486

ARREST OF JUDGMENT.

- See Judgment No. 10, 11, and Commonwealth v. Watts, 672
- Commonwealth v. Stephen, 679

ARSON.

Indictment for arson describes the house burned as "the county jail and prison of the county of H. being the house of L. J. sheriff and jailor of the said county;" HELD, the burning of such jail is felony by the statute, 1 Rev. Code, ch. 160, § 4, and whether the jail may be properly laid to be the house of the sheriff and jailor or not, that part of the description is unnecessary and may be rejected as surplusage.

Stevens v. Commonwealth, 683

ASSENT TO BEQUEST.

Concerning executor's assent to bequest of freedom, see Freedom No. 2, 3, and Nicholas v. Burruss, 289

ASSETS.

1. What will be deemed unadministered. See Executors and administrators No. 11, and Waddy's ex'or v. Hawkins's adm'r, 458
2. Concerning course of administration, see Recognition No. 1, and Moon v. Pasteur's adm'r, 35

ASSIGNMENT.

1. If buildings insured in the Mut. Ass. Society against fire &c. be mortgaged, the policy of assurance is ipso facto assigned to the mortgagee.

Farmers Bank v. Mutual Assurance Society &c. and others, 69

2. What is a valid gift of a bond. See Gift, and Elam v. Keen, 333

3. What is performance of contract to assign and deliver a bond. See Contract No. 7, and Daniels v. Conrad, 401

Liability of assignee of lease.

4. In general, the assignee of a term of years is not liable for breaches of the covenants in the lease before the assignment—but, if the assignee, by express covenant with his assignor, bind himself to pay the rents, and perform all the covenants in the lease contained, and required to be done and performed on the part of the lessee,—such a covenant not only binds the assignee to fulfil the covenants during his own time, but makes him liable for breaches before his time.

Farmers Bank v. Mutual Assurance Society &c. and others, 69

Assignor's liability on contract of assignment.

5. C. assigns to H. a bond of W. payable on demand; if the obligor is insolvent at the time of the assignment, it is not necessary that the assignee should bring suit on the bond against him, in order to entitle himself to recourse against the assignor. *Cotner v. Hausbarger*, 452

6. In such case the assignor is immediately liable to the assignee upon the contract of assignment. *S. C.*, 452

7. A bond payable on demand is assigned by the holder to a third person; the obligor is insolvent at the time of the assignment, and so continues; the assignee forbears to bring suit against the obligor, and makes an arrangement with him, whereby he agrees to receive payment at a future day; the assignor being informed of the fact, though ignorant of the legal effect thereof to discharge him from liability, sanctions the arrangement, and promises payment of the debt to the assignee: *HELD*, the assignor is bound by such his promise to pay. *S. C.*, 452

8. Upon a bond assigned for valuable consideration, the assignees bring suit against the obligor-recover judgment, and sue out a *f. fa.* which is levied, and a forthcoming bond taken, and that being returned forfeited, execution is awarded thereon against principal and surety, and a *f. fa.* is sued out on the forthcoming bond; and on this execution, the sheriff returns nulla bona as to the surety, but not as to the principal; then, the assignees bring suit against the assignors, and after trial and verdict for defendants, court allows the sheriff to amend his return, and to return nulla bona as to the principal in the forthcoming bond; and gives plaintiff leave to amend his declaration, and to count on the amended return: *HELD*, it was right to permit the sheriff so to amend his return, and to permit the plaintiffs so to amend their declaration. *Smith & Rickard v. Triplett & Neale*, 500

9. In the action between the assignees and assignors the sheriff's return of nulla bona on the execution against the obligors in the forthcoming bond, though amended after the assignees' action and five years after the return, so as to shew the insolvency of both, is conclusive evidence of such insolvency. *S. C.*, 500

10. In such case, the insolvency of the debtors might be proved by other evidence, but the assignees have a right to the conclusive evidence of the sheriff's return. *S. C.*, 500

11. It seems, the deputy sheriff in whose hands the execution on the forthcoming bond was placed, is a competent witness to prove the insolvency of the obligors. *S. C.*, 500

12. The taking of a forthcoming bond, on a judgment and execution against the obligor of an assigned bond, is not such a satisfaction of the judgment, as will preclude the assignees from having recourse against the assignors. *S. C.*, 500

13. When assignees have recovered judgment on the assigned bond, and sued execution against the obligor, and that execution is returned nulla bona, they are entitled to recourse against the assignors; and it is no defence for the assignors to shew neglect or malfeasance in the sheriff; the assignors, as parties injured, may sue the sheriff for such misconduct; the assignees are not bound to sue him, before they have recourse against the assignors, upon the contract of assignment. *S. C.*, 500

ASSUMPSIT.

See Debt No. 5, and
Butcher v. Hixton, 519

ATTORNEY FOR COMMONWEALTH.

Fees in criminal cases.

Indictment against four persons for an assault; they plead severally; and verdict, that they are guilty, assessing several fines on each; an attorney's fee is not to be taxed against each, but only one attorney's fee against all the defendants. *Commonwealth v. Sprinkles*, 650

AVOWRY.

See Replevin, No. 2, 3, and
Bargamin v. Pottiaux ex'or &c., 412

AWARD.

See Arbitration and award.

BAIL.

1. Dignity of debt by recognizance of bail. See Recognizance No. 1, and
Moon v. Pasteur's adm'r, 35

2. Action against sheriff for taking insufficient bail. See Sheriffs and sergeants No. 1, and
Raynolds v. Gore, 276

3. Liability of special bail in detinue. See Detinue No. 1, 2, 3, and
Cloud v. Catlett's ex'or, 462

BANKING COMPANY—Illegal.

See Unchartered banking company.

BASTARDS.

See Wills No. 3, and

Thomason v. Andersons, 118

BEQUEST.

See Legacy and Wills.

BILL OF EXCEPTIONS.

1. Whenever a bill of exceptions to an instruction of the court to a jury, on the trial of an issue, is so vague and imperfect, that the appellate court cannot ascertain the exact state of the case, nor consequently the import and effect of the instruction, it is the settled practice, to reverse the judgment, set aside the verdict, and remand the cause for a new trial.

Bowyer v. Chesnut, 1

2. In a case brought before an appellate court, on complaint of error in a particular point stated in a bill of exceptions, the appellate court will regard only that point, and will not look into objections that might have been, but were not, made in the court below. *Barrett v. Wills*, 114

BILL OF EXCHANGE.

Suit by indorsee against drawer.

1. In an action by indorsee against drawer of a bill of exchange, it is found by special verdict, that the bill was drawn in Maryland on a person in Virginia, and no law of Maryland found, declaring such a bill an inland bill: *HELD*, the court cannot take judicial notice of any law of Maryland to that effect, unless it be expressly found; and such bill being a foreign bill of exchange, according to the general law merchant, it must be so regarded. *Brown & Sons v. Ferguson*, 37

2. Every party upon a bill of exchange, even (it seems) a party who is a mere agent for collection, indorsing the bill, though only for the purpose of collection, is entitled to one full day, to give notice to the party next before him, in succession. *S. C.*, 37

3. But the over diligence of one party to a bill, shall not supply the under diligence of others; and though the drawer or indorser sought to be charged, in fact receive notice as early as he would have been regularly entitled to it, yet the holder, in order to charge him, is bound to shew due diligence in each and every party through whose hands the bill has passed, the onus probandi, in such case, lying on the plaintiff, to prove due diligence, not on the defendant, to prove negligence. *S. C.*, 37

4. A bill of exchange is drawn by a creditor on his debtor, payable sixty days after date; the drawee being advised thereof, before acceptance, writes to the drawer, that he will be unable to pay the bill at its maturity; whereupon the drawer, by letter to the drawee, authorizes him, when the bill approaches maturity, to redraw on himself, in order to raise funds to honour the bill; the drawee redraws accordingly, and then the drawer refuses to accept his bill; but no credit is given, by the holder or any other person, to the drawee, on the faith of the drawer's authority to him so to redraw: *HELD*, the drawer has not, by this authority to the drawee to redraw, waived notice of dishonor of his own bill, nor do the facts constitute any excuse for neglect to give such notice; nor is there any assumption to the holder, but only a promise to the drawee, which being without consideration, is not binding. *S. C.*, 37

BOND.

I. Validity of bond.

1. A bail bond is executed by the principal and the bail, though the name of the bail is not inserted in the body of the bond (there being a blank left for his name) which, in other respects, is a regular bail bond: *HELD*, this is the bond of the bail, though his name is not inserted in the body of it. *Raynolds v. Gore*, 276

II. Forthcoming bond.

2. See title Forthcoming bond.

III. Transfer of bond.

3. What is a valid gift of a bond. See Gift, and
Elam v. Keen, 333

4. What is performance of a contract to assign and deliver a bond. See Contract No. 7, and
Daniels v. Conrad, 401

BURGLARY.

What the indictment must charge.

An indictment charging that goods were feloniously and burglariously taken from a dwelling house, without charging that this was done in the

night time, is not a good indictment for burglary, but is only an indictment for a larceny.
Commonwealth v. Weldon. 652

CAPIAS AD RESPONDENDUM.

Return day.

A capias ad respondendum is made returnable to the next term generally, instead of the first day of the term as the statute requires; the writ is executed before the term and returned to the first day; an office judgment is entered at rules; at the ensuing term, defendant moves to quash the writ and all the proceedings on it at rules, on the ground that the writ being returnable to term generally, was naught; and the court overrules the motion: **HELD**, the motion was rightly overruled.

Hare v. Niblo, 359

703 *CAPIAS AD SATISFACIENDUM.

Lien of ca. sa. executed.

A. recovers a judgment against B. at August term, and sues out a ca. sa. thereon in October, under which B. is taken in execution, and in November takes the oath of insolvency, and is discharged, under the statute for the relief of insolvent debtors; in the interval between the date of A.'s judgment and the service of his ca. sa. on B. sundry mortgages are executed by B. and duly recorded, to secure sundry debts to other creditors: **HELD**, that by the actual service of A.'s ca. sa. on B. the lien of A.'s judgment was destroyed, and A. could then stand only on the lien given to the ca. sa. executed by the statute of executions, 1 Rev. Code, ch. 134, § 10, and that, therefore, the mortgages are entitled to the benefit of their mortgages.

Rogers & brothers v. Marshall and others, 425

CAVEATS.

Upon the construction of the 38th section of the general land law, 1 Rev. Code, ch. 86, **HELD**, that a person holding a perfect legal title to lands by grant from the commonwealth, may maintain a caveat to prevent the issuing of a junior grant to another person.

Hardman v. Boardman, 377

CHARITIES.

Testator bequeaths "to the school commissioners and their successors of South Farnham district, Essex county, for the schooling of the poor children of that district, 1000 dollars, to be put out at interest, and the interest only to be applied for the schooling of said poor children;" there are school commissioners of the county of Essex, and testator was one of them at his death, but they are not a corporate body; there are no school commissioners of South Farnham district, nor any such district, that being only the name of an ancient parish: **HELD**, the bequest is void.

Janey's ex'or v. Latane and others, 327

CHATTEL.

1. What delivery will make a valid gift. See Gift, and

Elam v. Keen, 333

2. Concerning performance of contract to deliver, see Contract No. 7, and

Daniels v. Conrad, 401

3. Concerning measure of damages for deceit in sale of chattel, see Deceit No. 3, and

Rice v. White, 474

4. What is a fair sale as against creditors of vendor. See Fraudulent alienations No. 2, 3, 4, and

Sydnor v. Gee, sheriff &c., 535

CHOSE IN ACTION.

What is a valid gift of a chose in action. See Gift, and

Elam v. Keen, 333

CIRCUIT SUPERIOUR COURTS.

Jurisdiction.

1. The present circuit superiour courts of law and chancery have jurisdiction to correct mistakes in judgments of the former circuit courts of law—**HELD**, in Garland v. Marx reported in a note.

Eubank and others v. Ralls's ex'or, 308

2. Quære, whether a writ of error lies from a circuit superiour court to a judgment of a county or corporation court, sitting as a court of oyer and terminer, in a criminal prosecution under the statute of 1831-2, ch. 22, § 11?

Anderson v. Commonwealth, 663

3. See Guardian No. 1, and

Dupuy v. Hardaway, 584

CLERICAL ERRORS.

1. Judgment upon nil dic't in county court, entered on the minute book, "for specialty and costs," and then entered at large, by the clerk, in the order book for debt with interest from 1st March 1817, the date of the specialty, though the day of payment appointed in the condition was the 1st March 1818; the clerk, in his entry in the order book, following, not the condition of the bond, but a memorandum thereon indorsed, that the debt if not punctually paid should bear interest from the date of the bond: **HELD**, 1. it was error to give interest from the date of bond, instead of the day of payment; and 2. this error was a clerical mistake, amendable by the court, at a subsequent term.

Eubank and others v. Ralls's ex'or, 308

2. A like error in entering an office judgment in the county court, in debt on a like bond; and **HELD**, a clerical mistake amendable in like manner. S. C., 308

3. A like error in entering an office judgment in circuit court, in debt on a like bond; and **HELD**, a clerical mistake, amendable in like manner. S. C., 308

704 *CODEFENDANTS.

Decree between codefendants refused under the particular circumstances of the case.

Toole v. Stephen, 581

COMPETENCY OF EVIDENCE.

1. See Assignment No. 11, and

Smith & Rickard v. Triplett & Neale, 540

2. See Prosecutor, and

Gilliam v. Commonwealth, 688

CONDITIONAL PROMISE.

Is no answer to statute of limitations, unless condition be performed. See Debt No. 6, and

Farmers Bank v. Clarke, 608

CONTEMPTS.

A circuit superiour court orders a subpoena for witnesses to attend the grand jury then in session, and they intentionally conceal themselves from the sheriff to prevent the process from being served, and so prevent it from being served, till the grand jury is discharged: **HELD**, upon the construction of the statute of 1830-31, ch. 11, § 26, that this is not a contempt punishable by the court in a summary manner.

Commonwealth v. Deskins and another, 685

CONTINGENT REMAINDER.

See Wills No. 1, 3, and

Bramble v. Billups, 90

Thomason v. Andersons, 118

CONTRACT.

I. Construction of contract.

1. Where reciprocal covenants have been contracted, and one party has partially performed the covenants on his part, and has no other remedy for compensation therefor but by action on the covenant, there, whatever be the form of the contract, and even though the covenants are expressly dependent covenants in form, and though they are pleaded as dependent covenants, yet they shall be held independent covenants, and the plaintiff shall recover compensation for his part performance.

Bream v. Marsh, 31

2. See Covenant No. 1, and

Tabb's adm'r v. Blinford, 182

II. Consideration.

3. See Assignment No. 7, and

Coiner v. Hansbarger, 452

4. See Usury, and

Toole v. Stephen, 581

5. Nudum pactum. See Bill of exchange No. 4, and

Brown & Sons v. Ferguson, 37

III. Validity of contract.

6. A person sends raw hides to a tanner, and receives tanned leather in return, by his slave: **HELD**, he is responsible to the tanner for the difference between the value of the raw material and the manufactured article, notwithstanding the dealings were conducted on his part wholly through the agency of the slave, it appearing that the slave acted by verbal directions of his master.

Gore v. Buzzard's adm'rs, 231

IV. Performance.

7. Defendant agrees to assign, transfer and deliver a title bond to plaintiff; defendant gives an order on third persons requiring them to deliver the bond to plaintiff, and containing an assignment thereof to him; and this order is given by

defendant, and accepted by plaintiff, in lieu of an actual delivery of the bond: **Held**, the delivery of the order was tantamount to a delivery of the bond, and a full performance of the contract on defendant's part, whether plaintiff obtained the bond or not.

Daniels v. Conrad, 401

CONVEYANCE.

1. See Adversary possession, and Williams v. Snidow, 14
2. Conveyance by husband and wife. See Feme covert No. 1, 2, 3, and Langhorne v. Hobson, 234
3. Registry. See Registry of deeds, 498
4. See Mortgages and trusts.

COUNTY AND CORPORATION COURTS.

I. Jurisdiction.

1. A county court in chancery has no jurisdiction to stay proceedings at law on a judgment of a circuit court, by injunction; and if the county court issue such injunction, the circuit court ought to disregard it.

Gholson v. Kendall & Co., 612

2. Criminal jurisdiction. See Slaves, free negroes and mulattoes No. 2, 3, and Commonwealth v. Weldon, 652

II. Writ of error.

3. A writ of error does not lie from the general court to a judgment of a county or corporation court, sitting as a court of *oyer and terminer, in a criminal prosecution under the statute of 1831-2, ch. 22, § 11.

Quære, whether a writ of error lies to such judgment from the circuit superior court? Anderson v. Commonwealth, 693

COURT OF APPEALS.

Concerning its jurisdiction, see Guardian No. 1, and Dupuy v. Hardaway, 564

COVENANT.

1. In a deed of bargain and sale of lands, the bargainor covenants as follows—"And the said T. doth hereby covenant, for himself and his heirs, to and with the said B. that he the said T. will warrant and forever defend to the said B. his heirs and assigns, the title to the said parcels of land against all persons whatever"—**Held**, this covenant was not a mere warranty real, but was a personal covenant, upon which an action of covenant lay for the bargainee, on being evicted, against the administrator of the bargainor.

Tabb's adm'r v. Blinford, 132

2. Concerning liability of assignee or mortgagee of lease, see Assignment No. 4, Mortgages and trusts No. 6, and Farmers Bank v. Mut. Ass. Society &c. et al., 69

3. Concerning compensation for part performance of dependent covenant, see Contract No. 1, and Bream v. Marsh, 21

CREDIT OF WITNESS.

How impeachable, see Witness No. 3, and Rixey v. Bayse, 330

CRIMINAL JURISDICTION.

1. The circuit court of Richmond issues a *capias* against a person there indicted of felony, which is directed to the sheriff of Essex, and by him served, and then, in Essex, he wilfully permits the prisoner to escape: **Held**, in such case, a criminal prosecution against the sheriff cannot be maintained in the circuit superior court of Richmond, for this official malfeasance committed in Essex.

Commonwealth v. Lewis, 664

2. See General court No. 1, and Commonwealth v. Reynolds, 663

3. See Slaves, free negroes and mulattoes No. 2, 3, and Commonwealth v. Weldon, 652

CRIMINAL PROCEEDINGS.

See Indictments, informations and presentments.

DAMAGES.

1. In suits for freedom. See Freedom No. 1, and Paup's adm'r et al. v. Mingo et al., 163

2. In action for deceit in sale of chattel. See Deceit No. 3, and Rice v. White, 474

DEBT.

1. Upon judgment of which the record is destroyed. See Judgment No. 1, and Newcomb v. Drummond, 57

Limitation of action.

2. Limitation of debt against representative on judgment against decedent. See Judgment No. 2, and

Mercer's adm'r v. Beale and others, 189

3. Limitation of debt on judgment where execution issued, and no return made. See Judgment No. 4, and

Fleming's ex'or v. Dunlop &c., 336

4. In debt upon a promissory note against H. and B.—H. being the principal debtor and B. the surety, and the declaration counting on the note alone.—B. pleads, severally, the statute of limitations, the plaintiff replies generally, and issues: **Held**, that proof of an acknowledgment of the debt by H. the principal, within five years next before the action brought, does not sustain this issue on the plaintiff's part.

Butcher v. Hixton, 519

5. If in any case of an action of debt on simple contract, the plaintiff would rely on a subsequent acknowledgment, to take the case out of the statute of limitations, it seems, he must count on such subsequent acknowledgment in his declaration; otherwise, in an action of assumpsit. S. C., 519

6. In debt on a promissory note negotiable at bank, by holders against indorser, the indorser pleads the general issue, with leave to give the statute of limitations in evidence; and, at the trial, the plaintiffs prove a conditional promise made by the indorser to pay the debt, within the period of limitation: **Held**, such conditional promise does not suffice to take the case out of the statute, unless performance of the condition be shewn.

Farmers Bank v. Clarke, 608

DEBTS.

Dignity of debts. See Recognizance No. 1, and Moon v. Pasteur's adm'r, 85

706

*DECEIT.

In sale of a chattel.

1. In an action for deceit in a sale of a chattel, there is a plea of the statute of limitations, a general replication thereto, and issue thereon joined: **Held**, the cause of action accrued at the time of the deceit practised, and the limitation begins to run immediately.

Rice v. White, 474

2. It seems, that if the fraud was not discovered till some time after it was practised and within the time of limitation, this would suffice to take the case out of the statute; but to enable the plaintiff to avail himself of such matter, he must plead specially in his replication. S. C., 474

3. Quære, in an action for deceit in the sale of a slave, by vendee against vendor, what is the proper measure of damages? the purchase money with interest, or the value at the time the property was recovered from the vendee for defect in the vendor's title? S. C., 474

DECLARATION.

1. Immaterial averment. See Negotiable note No. 1, 2, and

Barrett v. Wills, 114

2. On simple contract acknowledgment in 5 years. See Debt No. 5, and

Butcher v. Hixton, 519

DECREES IN CHANCERY.

I. What is a final decree.

1. Testator by his will desires, that, when his affairs are settled and all his debts paid, his slaves be emancipated according to law, and those under age and over forty to be equally in the care of his wife, son and daughter, and that the above may be done by his executors; upon bill in chancery by slaves (suing in forma pauperis) against the executor, charging that ample fund has been raised out of their profits to pay debts, and praying an account of administration, and of their profits, and decree for their manumission and for excess of profits above the debts, the chancellor, in 1809, finding that ample fund to pay the debts has been raised out of the profits, though debts not yet finally liquidated and paid, decrees, that the executor shall manumit them, reserving liberty to them to resort to the court for a distribution of any surplus of profits which might remain after liquidation and payment of debts, or for other arrangement in respect to such surplus: **Held**, the decree is a final decree as to the manumission, but makes no disposition of the surplus of profits.

Paup's adm'r and others v. Mingo &c., 163

2. Testator bequeaths, that his executor shall pay his daughter \$25. per annum so long as she shall remain single; and devises and bequeaths to his son, all his estate, real and personal, which shall remain after payment of debts and legacies; the son is the executor; he takes under the will large real and

personal estate, either of which is amply sufficient to satisfy all legacies: he sells the real, wastes the personal, and dies insolvent. Upon a bill by the daughter against the purchaser of the real estate, and two sons of a deceased surety of the executor in his executorial bond, holding estate of the surety, the chancellor decrees, that the sons should each pay one half of the annuities in arrear, and the costs of suit, reserving liberty to the plaintiff, if the decree should prove unavailing against either, to resort to the court for a further decree against the other, and ordering the cause to be retained in court for the purpose of taking further accounts as to the annuities to accrue in future: **HOLD**, notwithstanding the reservation, this is a final decree, from which no appeal can be taken after the lapse of three years from its date.

Thorntons v. Fitzhugh, 209

II. Decree between codefendants.

3. See Codefendants, and
Toole v. Stephen, 581

DEED.

See Conveyance.

DELIVERY.

1. What delivery will make a valid gift of bond.
See Gift, and
Elam v. Keen, 333
2. Concerning performance of contract to assign and deliver a bond, see Contract No. 7, and
Daniels v. Conrad, 401

DEMURRER TO EVIDENCE.

1. On the trial of an action of trespass *quare clausum fregit*, brought by the heirs of R. A., the defendant demurs to the plaintiffs' evidence: and by the evidence stated in the demurrer, it appears, that R. A. died seized; there is no positive proof that the plaintiffs, his heirs, ever entered after his death; but there is proof that the defendant's possession did not commence till a year after R. A.'s death: **HOLD**, that, on this evidence in a demurrer to evidence, it may fairly be inferred, that R. A.'s heirs entered into possession immediately upon their ancestor's death; and that, therefore, they are entitled to recover.

- Marsteller and wife &c. v. Coryell, 325
2. See Evidence No. 7, and
Gore v. Buzzard's adm'rs, 281
3. See Freedom No. 2, and
Nicholas v. Burruss, 289
4. See Variance No. 1, and
M'Alexander v. Montgomery, 61

DEPENDENT COVENANTS.

Concerning compensation for part performance of a dependent covenant, see Contract No. 1, and
Bream v. Marsh, 21

DESTRUCTION OF RECORDS.

Debt on burnt judgment. See Judgment No. 1, and
Newcomb v. Drummond, 57

DETINUE.

Liability of special bail in detinue.

1. By recognizance of special bail in detinue, taken by a justice in the country, the bail is made to undertake, that in case the principal shall be cast, he shall restore the chattels sued for, or the alternative value thereof (without adding "as the court shall adjudge"), or pay and satisfy the condemnation of the court, or render his body in execution &c. or that the bail will do it for him: **HOLD**, this is a good recognizance of special bail, according to the statute 1 Rev. Code, ch. 128, § 53.

Cloud v. Catlett's ex'or, 462
2. In scire facias upon a recognizance of special bail in detinue, it is not necessary that the scire facias should shew, that the execution against the principal had been superseded for the specific thing and given for the alternative value, according to the statute 1 Rev. Code, ch. 134, § 43, and a scire facias omitting to state such matter, is good on general demurrer. S. C., 462

3. It is necessary to charge the special bail in detinue, that the execution against the principal should be superseded as to the specific thing and given for the alternative value, and that a ca. sa. should be sued out against the principal, without effect; but if these proceedings be omitted, it is matter of defence for the bail, of which he can avail himself only by plea; dissentiente **TUCKER**, P. S. C., 462

DEVISE.

See Wills.

DIGNITY OF DEBTS.

See Recognizance No. 1, and
Moon v. Pasteur's adm'r, 35

DISMISSION OF BILL.

Upon a bill in chancery by a distributee against an administrator and his surety, alleging that the administrator has not duly accounted, and praying an account, the bill is taken pro confesso as to the administrator, but the surety answers, and proves, that the plaintiff, on a full and final settlement, has released the administrator, and so is not entitled to an account; upon which the chancellor dismisses the bill with costs as to both defendants: **HOLD**, the bill was properly dismissed as to both defendants.

Cartigne v. Raymond and another, 579

DOWER.

I. Where husband's seisin was transitory.

1. G. by deed of bargain and sale, sells and conveys a parcel of land to M. and M. by deed of the same date, conveys the same land to trustees, upon trust to secure the purchase money thereof to G.: **HOLD**, the two conveyances shall be intended parts of the same transaction, and the seisin of M. was instantaneous and transitory, so that M.'s widow is not entitled to dower of the land.

Gilliam v. Moore, 30

II. Where husband aliened.

2. Upon a bill in equity by a widow against the alienee of her husband, for dower of lands aliened by the husband in his lifetime, the widow is dowerable of the lands, as of the value thereof at the time of alienation, not at the time of assignment of dower; she is entitled to no advantage from enhancement of the value, either by improvements made by the alienee, or from general rise in value, or from any cause whatever.

Tod v. Baylor, 498

3. Upon a bill in equity by a widow against an alienee of the husband for dower of lands sold, she is not entitled to an account of profits from the death of the husband, but only from the date of the subpoena in the cause; otherwise, upon a bill against the heir. S. C., 498

III. Relinquishment of dower.

4. See Feme covert No. 1, 2, 3, and
Langhorne v. Hobson, 224
708 5. See Feme covert No. 4. and
Tod v. Baylor, 498

DUE DILIGENCE.

1. In giving notice of dishonour. See Bill of exchange No. 3, and
Brown & Sons v. Ferguson, 37
2. In assignee's proceeding against obligor. See Assignment No. 5, 6, 11, 12, and
Colner v. Hansbarger, 452
Smith & Rickard v. Triplett & Neale, 590

ELECTION.

See Emancipation No. 3, and
Elder v. Elder's ex'or, 253

EMANCIPATION.

I. Construction of instrument.

1. Testator bequeathed, that his negro woman C. and her child A. and C.'s increase be given to G. D. in trust to be sent to the colony of Liberia, provided the expense of sending them would be defrayed by the colonization society; and that the rest of his negroes who might be willing to go, should also be left in trust to said G. D. to be sent to Liberia in same manner; but that those who should prefer to stay here, should be given, within twelve months, to his brother. Testator's estate being involved in debts, which the other personal assets did not suffice to pay, the executor hired out the slaves for several years, to raise a fund out of the profits to pay debts: **HOLD**, 1. This was an effectual emancipation of such of the slaves as preferred to go to Liberia; and it was not necessary to perfect their title to freedom, that they should elect to go within the year, provided they made such election when it was offered to them,—or that the colonization society should agree to defray the expense of sending them, provided any person would agree to do so.

Elder v. Elder's ex'or, 253

2. The slaves born after the testator's death and while the executor held their mothers in slavery, were also emancipated. S. C., 253

3. As to the infant slaves incapable to make election for themselves, it was right to take the election of their mothers for them. S. C., 253

II. Executor's duty where estate is indebted.

4. The executor did right in hiring the slaves out, in order to raise a fund out of their profits to pay testator's debts, and consequently in forbearing to offer the slaves their election to go to Liberia within the year; for,

5. When slaves emancipated by will, are set free by the executor, he is not entitled to a refunding bond to indemnify him against the claims of the testator's creditors, though the manumitted slaves are, notwithstanding manumission, subject to debts; and.

6. The burden of debts ought to be distributed among such freedmen as equally as practicable. S. C., 252

III. Right to profits of emancipated slaves.

7. See Freedom No. 1. and
Paup's adm'r and others v. Mingo and others, 168

EQUITABLE JURISDICTION.

1. Account. See Unchartered banking company, and
Berkshire v. Evans &c., 223
2. Infants. See Infants No. 2, Guardian No. 1, and
Markham v. Guerrant &c., 279
Dupuy v. Hardaway, 584
3. Injunction. See Nuisance; Slaves No. 2; and
Miller v. Trueheart and others, 599
Sims v. Harrison &c., 846
4. Where the matter is already in litigation. See
Multiplicity of suits, and
Heywood v. Covington's heirs, 373
5. Jurisdiction of county court. See County court
No. 1. and
Gholson v. Kendall & Co., 612

ERROR.

See Writ of error.

* ESCHEATS.

1. Upon a petition under the statute 1 Rev. Code, ch. 82, § 14, by the creditor of a person whose lands have been escheated, the creditor is required to make affidavit that the amount of his demand is bona fide due, but this requisition of the statute does not dispense with the necessity of other evidence; the court can only render judgment for such sum as is proved to be due.

Watson v. Lyle's adm'r, 236

2. If judgment has been rendered for the whole amount of the demand, when the whole is not proved to be due, and it is uncertain to what part the proof extends, an appellate court will reverse the judgment and dismiss the petition. S. C., 236

700 *3. The escheator who is defendant to the petition, has the same right to plead the statute of limitations in bar of the petition, that a representative of the debtor would have to plead the statute in bar of an action. S. C., 236

ESTATES TAIL.

1. Quære, how far, in determining what is an estate tail on which the statute for abolishing entails shall operate, the statute which dispenses with the necessity of words of inheritance, in deeds or wills, to give an estate of inheritance, may affect the construction of the grant or devise?

Bramble v. Billups, 90

2. See Wills No. 1. and S. C., 90

3. See Wills No. 4. and

Thomason v. Andersons, 118

EVICITION.

Effect of eviction by landlord. See Landlord and tenant, and

Briggs v. Hall, 484

EVIDENCE.

I. Competency.

1. See Assignment No. 11. and
Smith & Rickard v. Triplett & Neale, 590

2. See Prosecutor, and

Gilliam v. Commonwealth, 688

3. When secondary evidence is admissible. See

Forgery, and

Pendleton v. Commonwealth, 694

II. Credibility.

4. See Witness No. 3. and

Rixey v. Bayse, 330

III. Relevancy.

5. Defendant agrees to assign, transfer and deliver a title bond to plaintiff; the agreement is part of the consideration given by defendant for land bought of plaintiff; HELD, the value of this land is a proper subject of inquiry at the trial of an action of assumpsit for breach of the agreement; and a witness, who had owned the land, having been examined by both parties as to its value, evidence offered to prove the price at which the witness had himself offered it for sale, is proper and competent. Daniels v. Conrad, 401

IV. Variance.

6. See Variance No. 1. 2. and

M'Alexander v. Montgomery, 61

Arthur v. Crenshaw's adm'r, 394

V. Sufficiency.

7. In assumpsit, there are two counts; one for the agreed price of goods sold; the other, quantum valebant for the same; on the general issue, the proof is, that plaintiff, being a tanner, received raw hides from defendant, and credited him for the value, and sent him in return tanned leather, and debited him with the value thereof, and the debt claimed is the balance appearing due the tanner on these dealings; HELD, the proof is properly applicable to, and sustains the declaration.

Gore v. Buzzard's adm'r, 231

8. Replication to the plea of the statute of limitations, that the accounts concerned the trade of merchandize between merchant and merchant; no evidence is adduced to prove that either party was a merchant during the time of the dealings between them, nor any evidence of the character of those dealings but that furnished by the account of the petitioner; in which account, the debits to the alleged debtor consisted of two items for cash paid him on account of bills of exchange, one item for goods sold him, and the other items for cash advanced to or for him, and there was a single credit for the proceeds of a bill of exchange bought of him; HELD, that the replication was not supported by the evidence, and the demand therefore was barred by the statute.

Watson v. Lyle's adm'r, 236

9. Defendant agrees to assign, transfer and deliver a title bond to plaintiff; defendant gives an order on third persons requiring them to deliver the bond to plaintiff, and containing an assignment thereof to him; and this order is given by defendant, and accepted by plaintiff, in lieu of an actual delivery of the bond; HELD, the delivery of the order was tantamount to a delivery of the bond, and a full performance of the contract on defendant's part, whether plaintiff obtained the bond or not.

Daniels v. Conrad, 401

10. See Debt No. 4, 6, and

Butcher v. Hixton, 519

Farmers Bank v. Clarke, 608

11. See Demurrer to evidence No. 1, and

Marstell and wife &c. v. Coryell, 325

12. See Escheats No. 1, 2, and

Watson v. Lyle's adm'r, 236

13. See Freedom No. 2, and

Nicholas v. Burruss, 280

14. See Gaming No. 2, 3, and

Windsor v. Commonwealth, 680

See Larceny, and

Blunt v. Commonwealth, 680

15. See Rape No. 1, and

Commonwealth v. Fields, 648

710 *16. See Use and occupation, and

Briggs v. Hall, 484

17. See (as to proof of obligor's insolvency, in suit by assignee against assignor) Assignment No. 9, 10, 11, 13, and

Smith & Rickard v. Triplett & Neale, 590

EXCEPTIONS.

See Bill of exceptions.

EXECUTION.

1. After dissolution of injunction affirmed by appellate court. See Injunction No. 5, and

Epes's adm'r's v. Dudley, 145

2. After dissolution of injunction obtained by principal alone. See Principal and surety No. 5, and

Garnett v. Jones, 633

EXECUTORS AND ADMINISTRATORS.

I. Right to administration.

1. The person entitled to the estate of a decedent, is entitled to the administration.

Thornton v. Winston, 152

2. A testator by his will gives personal property to his wife, and she takes the provision made for her by the will; HELD, she is entitled to no part of an undisposed of residuum, as distributee of her husband, being excluded from distribution by the statute, 1 Rev. Code, ch. 104, § 26, and in a contest between the widow and a distributee, for administration with the will annexed, the distributee is entitled to it. S. C., 153

II. Renunciation of executorship.

3. There may be a valid renunciation of the executorship of a will, by matter in pais. S. C., 152

4. An executrix declines to qualify as such, and agrees that administration with the will annexed shall be granted to her daughter, reserving her right to qualify after her daughter's death; HELD, this renunciation of the executorship is absolute and perpetual, and cannot be retracted after the death of the administratrix, nor does the nomination of the executrix in the will, give her any preferable right to the administration de bonis non with the will annexed. S. C., 152

III. Duties of executor.

5. Payment of debts according to dignity. See Recognition No. 1, and Moon v. Pasteur's adm'r. 35
6. Executor's duty in regard to slaves emancipated by will, where estate is indebted. See Emancipation No. 4, 5, 6, and Elder's v. Elder's ex'or. 253

IV. Rights of executor.

7. That executor has no right to profits of slaves emancipated by will, see Freedom No. 1, and Paup's adm'r &c. v. Mingo &c.. 163
8. It seems, that since the statute of distributions of 1785, the executor is not, in any case, entitled to the residuum of his testator's personal estate not actually bequeathed away by the will. S. C., 163
9. See Refunding bond, and Elder v. Elder's ex'or. 252
10. Executor's allowance for trouble. See Wills No. 5, and Waddy's ex'or v. Hawkins's adm'r. 458

V. Suit by administrator de bonis non.

11. The sureties of an executrix require counter security from her under the statute of wills of 1792, ch. 92, § 25, and she failing to give counter security, the court orders her to deliver the testator's estate then in her hands, consisting of slaves, to her sureties; she delivers the estate to them, and they receive the profits for several years; then the executrix dies, and there is an administrator de bonis non with the will annexed of the testator; the sureties having never settled any account of their transactions while the estate was in their hands, a suit in chancery is brought by the administrator de bonis non against the sureties, for an account of the profits, to which the legatees of the testator are not parties: HELD, the suit well brought, the administrator, nor the legatees, being entitled to demand the account of profits and the balance due thereon. S. C., 458

VI. Suits against executor or administrator.

12. Limitation of debt or scire facias on judgment against decedent. See Judgment No. 2, and Mercer's adm'r v. Beale &c.. 189
13. Liability of personal before real estate. See Legacy, and Thorntons v. Fitzhugh. 200

VII. Liability of sureties.

14. A house is insured against fire, as being leasehold property, held for a term of 99 years renewable forever; it was, in fact, held by the assured in fee simple; after the death of the assured, it was destroyed by fire: HELD, the money due for the loss belonged to the heirs of the assured, and his administrator having received it, the sureties of the administrator are not responsible for it. Harrison v. Harrison's adm'r &c.. 371

*VIII. Assent to bequest.

15. See Freedom No. 2, 3, and Nicholas v. Burruss. 289

EXECUTORY LIMITATION.

- See Wills No. 1, 3, 4, and Bramble v. Billups. 90
- Thomason v. Andersons. 118
- Melson v. Cooper. 406

FEME COVERT.

Relinquishment of dower.

1. In the commission for the examination of a feme covert touching a deed executed by husband and wife, and in the certificate of the privy examination and acknowledgment of the wife, under the statute of 1792, 1 Old Rev. Code, ch. 90, § 6, it is not necessary, that the requisitions of the statute be literally followed, to make the deed binding on the wife; it is enough, if they be substantially complied with. Langhorne v. Hobson. 224
2. What shall be regarded as a substantial and sufficient compliance with the requisitions of the statute, to make the deed binding on the wife. S. C., 224
3. Deed of husband and wife is first recorded as to the husband; then a commission for the privy examination of the wife is issued, and executed; and then the commission and privy examination of the wife are recorded: the deed is hereby perfected as to the wife, though it does not appear that she had signed and sealed it at the time when it was recorded as to the husband. S. C., 224
4. A certificate of a privy examination of a feme covert to a conveyance of real estate by husband and wife, before commissioners in the country, under the statute of conveyances of 1792, states, that the feme made her acknowledgment of the conveyance of the land contained in the conveyance thereto annexed, freely and voluntarily, and that

she was willing the same should be recorded, without stating that the feme declared that she had willingly signed and sealed the deed, and without stating that it was shewn and explained to her by the commissioners: HELD, if the feme had in fact signed the deed, such certificate of privy examination is substantially a compliance with the requisitions of the statute, and good, and the feme is bound by the deed; but if the feme had not signed the deed, such acknowledgment, so certified, is not sufficient to make the deed binding on her, within the requisitions of the statute.

Tod v. Baylor. 498

FOREIGN BILL OF EXCHANGE.

- What is to be deemed. See Bill of exchange No. 1, and Brown & Sons v. Ferguson. 37

FORGERY.

Secondary evidence.

On the trial of an indictment for forgery of a check on a bank, if there be proof rendering it highly probable that the original paper has been lost or destroyed, though this was not done by the accused or by his procurement, secondary evidence of the contents, character and description, of the paper, is admissible to sustain the prosecution. Pendleton v. Commonwealth. 604

FORTHCOMING BOND.

I. Limitation of motion on bond.

1. The statute of limitations, 1 Rev. Code, ch. 128, § 5, whereby the remedy on a judgment by debtor scire facias is limited to ten years, is no bar to a motion on a forthcoming bond of more than ten years standing. Lipscomb's adm'r v. Davis's adm'r. 303

II. Effect of forfeiture.

2. It seems, that a forthcoming bond has not the force of a judgment, till it is returned forfeited and filed in the clerk's office; and even after it is filed, it is only in a partial sense, that it has the force of a judgment before execution upon it is awarded. S. C., 303

III. How far a satisfaction of judgment.

3. See Assignment No. 12, and Smith & Rickard v. Triplett & Neale. 590

IV. Surety's liability.

4. See Principal and surety No. 5, and Garnett v. Jones. 633

FRAUD.

- See Decelt No. 1, 2, 3, and Rice v. White. 474

FRAUDULENT ALIENATIONS.

I. As against subsequent purchaser.

1. See Mortgages and trusts No. 2, and Bird v. Wilkinson. 266

*II. As between vendee and creditors of vendor.

2. An absolute bill of sale of slaves is executed by B. to C. for valuable consideration, and the slaves are delivered by vendor to vendee; and then vendee hires the slaves to vendor, for their victuals and clothes, taxes and levies, till the end of the ensuing year; the sale and the hiring are both bona fide transactions; at the end of the year, vendee takes possession of the slaves, holds them for several years, and then dies; a creditor of vendor recovers judgment against him, after vendee has taken possession of the slaves, and levies his execution on the slaves in the hands of vendee's executor: HELD, in a controversy between such creditor of the vendor and the executor of the vendee, that the slaves are the property of the vendee's estate, and not subject to execution at the suit of such creditor of the vendor. Sydnor v. Gee &c.. 536

3. It seems, that, in the case of an absolute sale and delivery of chattels, and an immediate redelivery thereof by vendee to vendor, upon bailment, for a limited time, on valuable consideration, both transactions being in fact fair, such bailment of vendee to vendor is not inconsistent with the sale, so as to make the sale fraudulent per se, within the rule of Edwards v. Harben, 2 T. R. 567. Sydnor v. Gee &c.. 535

4. If an absolute sale of chattels, fair in itself, be not accompanied and followed by immediate possession, but possession is taken by the vendee before the rights of any creditor of the vendor attach, the sale is good against the vendor's creditors. S. C., 535

FREEDOM—Suits for.

I. Right to profits of emancipated slaves.

1. Testator by his will desires, that, when his af-

fairs are settled and all his debts paid, his slaves be emancipated according to law, and those under age and over forty to be equally in the care of his wife, son and daughter, and that the above may be done by his executors: upon bill in chancery by slaves (suing in forma pauperis) against the executor, charging that ample fund has been raised out of their profits to pay debts, and praying an account of administration, and of their profits, and decree for their manumission and for excess of profits above the debts, the chancellor, in 1809, finding that ample fund to pay the debts has been raised out of the profits, though debts not yet finally liquidated and paid, decrees, that the executor shall manumit them, reserving liberty to them to resort to the court, for a distribution of any surplus of profits which might remain after liquidation and payment of debts, or for other arrangement in respect to such surplus: the debts are not finally liquidated and paid till 1827, when there appears a surplus of profits: and now, the freedmen claim this surplus, the testator's next of kin claim it, and the executor claims it: **Held**, 1. the freedmen are not entitled to the surplus of profits accruing while they were actually held in bondage: negroes recovering freedom by suit in forma pauperis, cannot, in any case, recover profits or damages. 2. The executor is not entitled to the surplus of profits, but the same is part of his testator's estate undisposed of by his will, which belongs to his next of kin.

Paup's adm'r &c. v. Mingo &c., 163

II. Proof of executor's assent to emancipation.

2. Testator bequeaths, that all his slaves who at the time of his death should be 40 years of age, should serve one year and no longer, and then be emancipated; all who should then be 30 and under 40, should serve till they should be 40, and then be emancipated; all who should be 20 and under 30, should serve till they should be 35, and then be emancipated; and all under 20 should serve till they should be 31, and then be emancipated:

In an action at law, brought by one of the slaves, who was under 20 at testator's death and now 31, to recover his freedom, the defendant demurs to the evidence, which consists, 1. of the testator's will; 2. proof that the executor, not long after testator's death, assented to liberation of four slaves who were then by the will entitled to freedom; 3. proof, that, in the opinion of witnesses, and as the executor himself had said, in open court, the testator's estate, other than his slaves, was amply sufficient for payment of his debts, though executor's accounts of administration had never been settled; and 4. proof, that the pauper plaintiff was, in the executor's presence, sold under execution on a judgment against the executor for a debt of the testator, under which sale defendant claims: **Held**, from such evidence, stated in demurrer to evidence, the assent of the executor to the emancipation of the plaintiff under his testator's will, 713 may fairly be inferred; and, therefore, *the plaintiff is entitled to judgment of freedom.

Nicholas v. Burruss, 289

III. Whether executor's assent to emancipation is necessary.

3. Quære, whether, upon a will emancipating slaves, the executor's assent to the bequest is necessary to perfect the right to freedom; and per **TUCKER, P.**, it is so; and without such assent, no action at law can be maintained by the freedmen to recover freedom. S. C., 289

GAMING.

I. What the presentment must charge.

1. Presentment for gaming charges defendant with playing at unlawful game "at the house of R. L. in B. in the county of P. William:" **Held**, the presentment is fatally defective in not charging that the house where &c. was an ordinary or public place.

Hord v. Commonwealth, 674

II. Evidence.

2. Indictment for gaming charges defendant with unlawful playing with cards, to wit, at the game of all fours, of loo, and of whist, at a public place, to wit, at the store house of G. H. & Co: **Held**, that to convict the defendant, it is incumbent on the prosecutor to prove, that he played at some one of the games specified in the indictment, and that

3. If the playing was at the store house of G. H. & Co. in the night time, after the business of the day was at an end, and the doors closed, the store house in that state of things, prima facie, was not a public place, though it was so when it was open to the public in the day time.

Windsor v. Commonwealth, 680

GENERAL COURT.

Criminal jurisdiction.

1. If a question of law in a criminal prosecution

be adjourned from a circuit superior court to this court, it must appear by the record, that it was so adjourned with the consent of the accused.

Commonwealth v. Reynolds, 663

2. A circuit superior court, not adverting to the statute of 1832-3, ch. 19, § 2, sentences a convict to solitary confinement in the penitentiary for one sixth of the term of imprisonment fixed by the verdict; judgment reversed for this cause; but the general court proceeds to enter judgment, that the solitary confinement shall be one twelfth of the term, according to that statute.

Brooks v. Commonwealth, 669

3. A writ of error does not lie from the general court to a judgment of a county or corporation court, sitting as a court of oyer and terminer, in a criminal prosecution under the statute of 1831-2, ch. 22, § 11.

Anderson v. Commonwealth, 693

GIFT.

The owner of a bond which was in suit, and for which the owner held an attorney's receipt, told the plaintiff that he might have the bond, and delivered him the attorney's receipt for it, instead of delivering the bond itself, which was then filed in the suit in court; no consideration was given by the plaintiff for the bond: **Held**, this was a valid gift of the bond to the plaintiff, and he is entitled to recover the money collected upon it.

Elam v. Keen, 333

GRAND JURY.

1. See Jurors No. 1, 2, and

Commonwealth v. Burton, 645

Commonwealth v. Reynolds, 663

2. See Pleading No. 5, 6, and

Commonwealth v. Thompson, 667

Hord v. Commonwealth, 674

GUARDIAN.

1. Under the statutes, 1 Rev. Code, ch. 64, § 2, ch. 66, § 50, 51, no appeal lies from an order of the county court appointing or displacing a guardian, to the superior court of chancery, or from the court of chancery to the court of appeals.

Dupuy v. Hardaway, 584

2. What amounts to appointment of testamentary guardian. See Wills No. 6, and S. C., 584

HUSBAND AND WIFE.

1. Conveyance by husband and wife. See Feme covert, and

Langhorne v. Hobson, 324

Tod v. Baylor, 498

2. Real and personal estate settled by deed, to the use and benefit of R. and E. his wife, during their joint lives, and if R. should survive E. his wife, then to his use during his life, and after his death to the children of R. by E. his wife: **Held**, the joint interest of husband and wife during their joint lives, 714 is not subject to the husband's debts; but his contingent interest, in case he should survive his wife, is subject to his debts.

Roanes v. Archer, 550

3. See Trusts and trustees No. 2, 3, 4, and

Markham v. Guerrant &c., 279

4. See Marriage settlement No. 1, and

Buller v. McCann &c., 631

ILLEGAL BANKING COMPANY.

See Unchartered banking company.

ILLEGITIMATE CHILDREN.

See Wills No. 3, and

Thomason v. Andersons, 118

INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

I. What must be charged in indictment or presentment.

1. Indictment for arson. See Arson, and

Stevens v. Commonwealth, 663

2. Indictment for Burglary. See Burglary, and

Commonwealth v. Marks, 668

3. Presentment for gaming. See Gaming No. 1, and

Hord v. Commonwealth, 674

4. Indictment for rescue. See Rescue, and

Commonwealth v. Israel, 675

5. Indictment for feloniously carrying away slave. See Slaves No. 4, and

Commonwealth v. Peas, 692

6. Indictment for criminal trespass. See Trespass

No. 5, 6, and

Commonwealth v. Israel, 675

II. Jurisdiction.

7. See Criminal jurisdiction No. 1, and

Commonwealth v. Lewis, 664

III. Pleas in abatement.

8. See Pleading No. 5, 6, and Commonwealth v. Thompson, Hord v. Commonwealth.

IV. Changing venue.

9. See Venue, and Brooks v. Commonwealth, V. Proof.

10. See Larceny, and Blunt v. Commonwealth. See Rape No. 1, and Commonwealth v. Fields, See Forgery, and Pendleton v. Commonwealth.

VI. Trial of free persons of colour.

11. See Slaves, free negroes and mulattoes No. 2, 3, and Commonwealth v. Weldon &c.,

VII. Attorney's fee.

12. See Attorney for commonwealth, and Commonwealth v. Sprinkles.

INFANTS.

1. A father cannot bind his infant child apprentice by indentures to which the child is not a party; and indentures of apprenticeship executed by the father, without the child's concurrence, are not voidable only, but void.

Pierce v. Massenburg, 493
2. It seems, a court of chancery may authorize the sale of the personal property of infant cestuis que trust, in cases where such sale is absolutely necessary for their support.

- Markham v. Guerrant & Watkins, 279
3. Election for infants. See Emancipation No. 3, and Elder v. Elder's ex'or, 252

INFORMATION.

See Indictments, Informations and presentments.

INJUNCTION.

1. See Nuisance, and Miller v. Trueheart &c., 509
2. To wrongful sale of slave under execution. See Slaves No. 2, and Sims v. Harrison &c., 346
3. See Principal and surety No. 3, 4, and Alcock v. Hill, 622
4. Jurisdiction of county court. See County court No. 1, and Gholson v. Kendall & Co., 612
5. If proceedings on a judgment at law be enjoined by a court of chancery, and the injunction be afterwards dissolved; and on appeal taken to the court of appeals, the order of dissolution is affirmed in omnibus; an execution may be sued out on the judgment at law, before the decree of affirmance is entered up in the court of chancery.
Epes's adm'r's v. Dudley, 145
6. Damages on dissolution. See Principal and surety No. 5, and Garnett v. Jones, 633

INSOLVENCY.

Proof of obligor's insolvency, in action by assignee against assignor. See Assignment No. 9, 10, 11, 13, and

- Smith & Rickard v. Triplett & Neale, 590

INSTANTANEOUS AND TRANSITORY SEISIN.

- See Dower No. 1, and Gilliam v. Moore, 30

*INSTRUCTION TO JURY.

The court, in the trial of a criminal cause, may properly instruct the jury on any question of law, when in its opinion justice requires such interposition, though it be not asked by either party.

- Blunt v. Commonwealth, 689

INSUFFICIENT BAIL.

Concerning action against sheriff for taking insufficient bail, see Sheriffs and sergeants No. 1, and Reynolds v. Gore, 276

INTEREST.

1. In covenant by M. against B. judgment is recovered by M. in 1792, for £2500. damages; *fi. fa.* is sued out by M. and returned nulla bona; then both parties die; and afterwards, the executor of B. makes sundry payments, at sundry times, to M.'s administrator: HELD, all such payments shall be applied to the principal of the debt due on the judgment; and M. is only entitled to the balance of principal with interest from the date of the judgment, and shall not be allowed to compute interest on the whole debt from date of the judgment, and apply

the partial payments, first to the satisfaction of interest so computed, and then to the principal.

- Mercer's adm'r v. Beale &c., 189
Rate of interest.

2. It seems, that on the bequest of an annuity by will in 1791, while the legal rate of interest was only five per cent., though the annuity fall in arrear after interest was raised to six per cent., yet only five per cent. ought to be allowed on such arrears.

- Thornions v. Fitzhugh, 209

Back interest.

3. See Clerical errors No. 1, and Eubank &c. v. Ralls's ex'or, 308

JEOFAILS.

I. Application of statute in civil cases.

1. In general, the statute of jefails is not applicable in case of a judgment by default for want of appearance; but if the party has once appeared, though he makes default afterwards, and then there is judgment against him by such default, the statute of jefails is applicable.

- Bargamin v. Poitiaux ex'or &c., 412

2. See Roe v. Baker, in note, 416

3. See Replevin No. 3, and Bargamin v. Poitiaux ex'or &c., 412

II. Application of statute in criminal cases.

4. Indictment at common law, charging defendant with rescuing property that had been distrained by a sheriff for public dues, from a bailee to whose safe keeping the sheriff had committed it, without charging that the defendant knew in what right the bailee held it: HELD, indictment defective for not averring that the defendant had such knowledge. And this defect is not cured by verdict, by the statute of jefails in criminal cases. 1 Rev. Code, ch. 160, § 44.

- Commonwealth v. Israel, 675

5. Indictment on the statute 1 Rev. Code, ch. 111, § 30, for feloniously and fraudulently taking and removing a slave from one county to another, with intent to defraud the owner and deprive him of the property: HELD, fatally defective, after verdict, for want of an averment, that the slave was so taken and removed without the consent of the owner.

- Commonwealth v. Peas, 692

JUDGMENT.

I. Debt on judgment where record is destroyed.

1. D. recovered judgment against N. from which N. complained of error, regularly took an appeal; but before this appeal was or could be prosecuted, the office of the clerk of the court, and with it the record of the judgment, were destroyed by fire, and therefore the appeal was never prosecuted; then D. brought debt on the judgment whereof the record was so destroyed: HELD, he was entitled to recover, notwithstanding the appeal taken from the judgment, and the circumstances which prevented the prosecution thereof.

- Newcomb v. Drummond, 57

II. Limitation of remedy on judgment.

2. Quære, whether the provisions of the statute of 1792, 1 Rev. Code, ch. 138, § 17, apply to any case of a judgment recovered before the date of the enactment thereof? or whether it does not apply to every case of a judgment recovered against a decedent, whether before or after the enactment, in which his executor or administrator has qualified after the enactment? And per TUCKER, P., it applies to every case in which the qualification of the representative of the deceased debtor has been subsequent to the enactment, though the judgment *against the decedent may have been recovered before.

- Mercer's adm'r v. Beale &c., 189

3. Judgment recovered by D. P. & Co. against F. in September 1810, and execution sued out in the same month, and another in October 1815, but neither returned; to a scire facias to revive the judgment against F.'s ex'or, sued out in July 1826, defendant pleads in bar, the statute of limitations, 1 Rev. Code, ch. 128, § 5.—plaintiffs reply the two executions sued out in September 1810, and October 1815; on demurrer to this replication, HELD, the statute is a bar to the scire facias.

- Fleming's ex'or v. Dunlop & Buchanan &c., 338

4. But it seems, by the opinion of TUCKER, P., that debt would lie on the judgment, and the statute would not be a bar to that action. S. C., 338

III. Interest on judgment.

5. See Interest No. 1, and Mercer's adm'r v. Beale &c., 189

IV. Uncertainty and mistake in judgment.

6. Quære, whether a mere mistake, technically in the judgment of the court itself, be not amendable,

in like manner as clerical mistakes, under the provisions of the statute. 1 Rev. Code, ch. 128, § 108, 110?
Eubank and others v. Ralls's ex'or, 308

7. See Verdict No. 1, and
Barrett v. Willis, 114
V. Jeofalls—When statute applies to judgment by default.

8. See Jeofalls No. 1, and
Bargamin v. Poltiaux ex'or &c., 412
9. See
Roe v. Baker, in note, 416

VI. Arrest of judgment.

10. Judgment cannot be arrested for any matter of fact not appearing in the record.
Commonwealth v. Watts, 672
11. Motion in arrest of judgment because several of the petty jury were not freeholders; this being matter of fact not appearing in the record, is not a good reason for arresting judgment.
Commonwealth v. Stephen, 679

JURISDICTION.

1. See Appellate jurisdiction.
2. See Criminal jurisdiction.
3. See Equitable jurisdiction.
4. See Circuit superior courts.
5. See County and corporation courts.
6. See Court of appeals.
7. See General court.

JURORS.

I. Constitution of grand jury.

1. On first day of term of a circuit superior court, a grand jury is impaneled and sworn, and proceeds in discharge of its duties; but next day, it is discovered that one of the grand jurors wants legal qualification; upon which the court discharges him, and orders another to be sworn in his place. HELD, this was regular, and the grand jury duly constituted.
Commonwealth v. Burton, 645

2. It seems, that one who has contracted by articles under seal to sell his land, but has not yet conveyed it by deed, and therefore still holds the legal title, is a freeholder qualified to serve on a grand jury.
Commonwealth v. Reynolds, 668

3. See Pleading No. 5, 6, and
Commonwealth v. Thompson, 667
Hord v. Commonwealth, 674

II. Constitution of petty jury.

4. In the trial for a capital felony, it is not necessary that it should be expressly stated in the record that the petty jurors were freeholders.
Commonwealth v. Stephen, 679

JURY.

1. See Instruction to jury, and
Blunt v. Commonwealth, 669
2. See Jurors.

JUSTICES OF PEACE.

Disqualification.

By the statute of 1821-2, ch. 26, if a justice of the peace is appointed to and accepts an office under the government of the U. States or any other incompatible office, he thereby vacates his office of justice of the peace; his resignation of the incompatible office will not restore him to the office of justice of the peace; nor can he ever lawfully exercise this office, without a new commission.
Commonwealth v. Sherrard, 643

LANDLORD AND TENANT.

In assumpsit for the use and occupation of a farm for a year, it appears, that the landlord entered on a meadow, parcel of the premises, within the year, and mowed and carried away the hay, without the consent and against the will of the tenant; who, nevertheless, continued to occupy the farm during the residue of the year: HELD, the landlord, by 717 such disturbance of the tenant, lost "the benefit of the intire contract, and is not entitled to recover any part of the rent."
Briggs v. Hall, 484

LARCENY.

What amounts to larceny.

If a person obtain possession of a watch from the owner, by a false and fraudulent pretense of buying it for cash, and then carry it away without the consent or knowledge of the owner, he is yet not guilty of larceny, unless it was with a felonious intent that he so obtained possession of the watch and carried it away.
Blunt v. Commonwealth, 669

LEASE.

Concerning liability of mortgagee or assignee for covenants in lease, see Mortgages and trusts No. 6, Assignment No. 4, and
Farmers Bank v. Mut. Ass. Society et al., 69

LEGACY.

It seems, though a legacy be charged both on real and personal estate, in the hands of a devisee and legatee of the residue, yet the personality is primarily applicable to the legacy, and a decree subjecting a surety of the executor, before a purchaser of the real estate, is right.
Thorntons v. Fitzhugh, 209

LEGAL TITLE.

Concerning right to call for legal title, see Mortgages and trusts No. 3, and
Beck's adm'r v. De Baptists and others, 349

LIEN.

Priority of lien.

1. See Mortgages and trusts No. 4, and
Farmers Bank v. Mut. Ass. Society et al., 69
2. See Capias ad satisfaciendum, and
Rogers and brothers v. Marshall and others, 245

LIMITATION OF ACTIONS.

1. Contracts to locate a treasury warrant on lands in Kentucky, is made in August 1782; and it appeared, the breach, if any, must have occurred before the erection of Kentucky into a separate state: HELD, the act of limitations of Virginia began to run from the time of the breach, and was, therefore, a bar to an action on the contract brought in 1816.
M'Alexander v. Montgomery, 61

2. Limitation of debt on simple contract. See Debt No. 4, 5, 6, and
Butcher v. Hixton, 519
Farmers Bank v. Clarke, 603

3. Limitation of action for deceit in sale of chattel. See Deceit No. 1, 2, and
Rice v. White, 474

4. Limitation of creditor's petition for proceeds of escheated land. See Escheats No. 3, and
Watson v. Lyle's adm'r, 236

5. Limitation of motion on forthcoming bond. See Forthcoming bond No. 1, and
Lipscomb's adm'r v. Davis's adm'r, 303

6. Limitation of debt or scire facias on judgment against decedent. See Judgment No. 2, and
Mercer's adm'r v. Beale &c., 189

7. Limitation of debt or scire facias on judgment where execution issued and no return made. See Judgment No. 3, 4, and
Fleming ex'or v. Dunlop & Buchanan &c., 338

8. Concerning exception of merchants' accounts, see Merchants' accounts No. 1, and
Watson v. Lyle's adm'r, 236

9. Limitation of writ of error coram nobis. See Writ of error No. 1, 2, and
Eubank and others v. Ralls's ex'or, 308

MARRIAGE SETTLEMENT.

What interest is subject to husband's debts.

1. By deed of marriage settlement, slaves of the feme are conveyed to a trustee, in trust to permit the husband to take the profits during the joint lives of himself and his wife; remainder, if the husband should first die, to the wife; and if she should first die, to such persons as she should appoint; with an express declaration, that the property should not be subject to the husband's debts: HELD, the husband's interest in the profits during the joint lives of himself and his wife, is subject to his debts; and provision should be made for satisfaction of a creditor, by hiring the slaves out, or otherwise, as most convenient.
Butler v. M'Cann and others, 631

2. See Husband and wife No. 2, and
Roanes v. Archer, 550

MERCHANTS' ACCOUNTS.

1. Quære, whether the exception in the statute of limitations, of accounts which concern the trade of merchandise between merchant and merchant, will apply to accounts, no item of which has arisen within five years?
Watson v. Lyle's adm'r, 236

2. See Evidence No. 8, and S. C., 236

*MILLS.

See Nuisance, and
Miller v. Trueheart &c., 569

MISCONDUCT OF ARBITRATORS.

See Arbitration and award, and
May v. Yancey, 362
Lee v. Patillo, 436

MISTAKE.

1. See Clerical errors, and
Eubank et al. v. Ralls's ex'or, 306
2. See Judgment No. 6, and S. C., 306

MORTGAGES AND TRUSTS.

- I. When mortgagor's wife need not join in deed.
1. When mortgage by vendee will be deemed part of same transaction with conveyance by vendor. See Dower No. 1, and Gilliam v. Mobre, 30

II. What instruments must be recorded.

2. L. executes a bill of sale of a slave to B. which bill of sale, though absolute on its face, was in fact intended as a mortgage; the bill of sale, though intended as a mortgage, was never recorded; and possession of the slave was never delivered to or acquired by the vendee, and could not be at the time the deed was executed, the slave being then a runaway; but the vendor afterwards got possession of him, without the knowledge or consent of the vendee; and then sold him to C. a fair purchaser, for valuable consideration, without notice of the previous bill of sale to B. HELD, that the bill of sale from L. to B. must be taken for what it was intended to be, a mortgage, which was void as against the subsequent fair purchaser, because it was not recorded according to the statute of conveyances, 1 Rev. Code, ch. 99, § 4. Bird v. Wilkinson, 266

III. When mortgagee may call for legal title, as against a purchaser.

3. By written articles, Head contracts to sell to Benjamin De Baptist, a lot of land, for bricks to be furnished and laid by vendee in walls of a house to be built for vendor; vendee, unable to perform the contract, transfers it, before work begun, to John and William De Baptist, with Head's consent; John and William borrow \$500 of Beck, and give him a deed of trust of the lot to secure the payment; then, John and William furnish the bricks and do the work for Head, according to the contract; but afterwards Benjamin sells the same lot to Edward De Baptist, and he sells it to Long, and Benjamin, Edward, John and William all join in conveyance to Long, all the parties having actual notice of Beck's deed of trust; and then Long sells it to Adams who has no notice of the deed of trust;—the legal title having been retained by Head, as security for performance of the contract on part of vendee, and still remaining in him: HELD, that Beck has the best right to call for the legal title, and to subject the property to the payment of the \$500 secured to him by the deed of trust, if that deed was duly recorded before Adams's purchase, otherwise not. Beck's adm'r v. De Baptists and others, 349

IV. Priority of lien.

4. Mortgage of leasehold property, to secure to Bank of Virginia the contents of a note discounted for mortgagor's accommodation, with stipulation that the note shall be renewed only till a certain time; and then same subject is mortgaged to Farmers Bank, to secure a debt to it; the Bank of Virginia renews the note for three years after time stipulated; HELD, such prolonged renewals of the note were only an extension of credit for the same debt, which no wise impaired the lien of the first mortgage, and the Bank of Virginia has priority over the Farmers Bank. Farmers Bank v. Mut. Ass. Society &c., 69

5. See Capias ad satisfaciendum, and Rogers and brothers v. Marshall &c., 425

V. Mortgagee's liability to covenants in lease.

6. A mortgagee of a term of years, though he never in fact enters into possession, is, like any other purchaser, bound to perform the covenants in the lease, after the date of the mortgage. Farmers Bank v. Mut. Ass. Society &c., 69

VI. Family settlements.

7. See Husband and wife No. 2, and Roanes v. Archer, 560
8. See Marriage settlement No. 1, and Butler v. McCann et al., 631
9. See Trusts and trustees No. 2, 3, 4, and Markham v. Guerrant & Watkins, 279

VII. When the mortgage property is insured.

10. See Mutual assurance society, and Farmers Bank v. Mut. Ass. Society et al., 69

*MOTIONS.

- On forthcoming bonds. See Forthcoming bonds No. 1, 2, and Lipscomb's adm'r v. Davis's adm'r, 308

MULTIPLICITY OF SUITS.

- In a suit in the county court in chancery between

the heirs of a decedent, the court decrees, that a mill, whereof partition can no otherwise be made, shall be sold by commissioners on a credit of twelve months; the commissioners make the sale and report it; the court, after the twelve months elapsed, confirm the report, and order the commissioners to convey to the purchaser; then, a conveyance is tendered to the purchaser, who refuses to complete the purchase, the mill having been carried away by a fresh within the twelve months; and while the cause is yet pending in the county court, the heirs exhibit a bill in the superior court of chancery against the purchaser for specific execution: HELD, that as the cause in the county court was still pending, this bill in the superior court could not be entertained.

Heywood v. Covington's heirs, 373

MUTUAL ASSURANCE SOCIETY.

If buildings insured in the Mut. Ass. Society against fire &c. be mortgaged, the policy of assurance is ipso facto assigned to the mortgagee.

Farmers Bank v. Mut. Ass. Society et al., 69

NEGOTIABLE NOTE.

1. In debt on promissory note, by indorsee against maker, the declaration states the note as one made negotiable at the bank of V. and avers, that the note at maturity was duly presented at the bank, and protested for non-payment; the note offered in evidence, was made negotiable at bank; and there was no proof that it was presented at bank for payment: HELD, a note made negotiable at bank, is not therefore payable there also, and so the averment of presentation at bank was wholly immaterial, and need not be proved. Barrett v. Wills, 114

2. Quære, whether, in the case of a note made payable at a particular bank, it is necessary, in an action on it against the maker, to aver and prove due presentation of the note for payment, at the bank? S. C., 114

3. Concerning limitation of action on note, see Debt No. 4, 6, and

Butcher v. Hixton, 519
Farmers Bank v. Clarke, 608

NEW PROMISE.

Concerning effect of new promise within five years, to pay a simple contract debt, see Debt No. 4, 5, 6, and

Butcher v. Hixton, 519
Farmers Bank v. Clarke, 608

NEW TRIAL.

1. Whenever a bill of exceptions to an instruction of the court to a jury, on the trial of an issue, is so vague and imperfect, that the appellate court cannot ascertain the exact state of the case, nor consequently the import and effect of the instruction, it is the settled practice, to reverse the judgment, set aside the verdict, and remand the cause for a new trial. Bowyer v. Chestnut, 1

2. If a special verdict be uncertain, so that the court cannot say for which party judgment ought to be given, there ought to be a venire de novo; but if the verdict be not uncertain, but the plaintiff's case thereby shewn to be a defective case, or a defective title, there should be no venire de novo, and judgment must be given for the defendant. Brown & Sons v. Ferguson, 37

3. A new trial ought never to be granted, where it appears that the party asking it has had a fair trial on the real merits of the case, and that justice has been done. Goode v. Love's adm'rs, 635

NOTE.

See Negotiable note.

NOTICE.

Of dishonor of bill of exchange. See Bill of exchange No. 2, 3, 4, and Brown & Sons v. Ferguson, 37

NUDUM PACTUM.

See Bill of exchange No. 4, and Brown & Sons v. Ferguson, 37

NUISANCE.

When equity will injoin.

A mill and mill dam are erected in 1815, by leave of court, according to the statute concerning mills &c.; the stagnation of the water in the mill pond proves injurious to the health of the neighbourhood; and one of the neighbours, thereby injured, brings an action against the mill owners, and recovers damages at law; about the time of this recovery, the mill dam is carried away, and the pond drained; and the mill owners,

after the recovery, are proceeding to rebuild the mill dam, proposing certain expedients to prevent the stagnation of the waters from being again injurious to the health of the neighborhood: HELD, a court of chancery, upon a bill by the person who recovered the judgment at law against the mill owners, may and ought to interfere, and join them from rebuilding the dam, unless it shall appear that the expedients proposed by the mill owners will be effectual to prevent the mischief in future, which ought to be ascertained by a jury upon an issue directed for the purpose.

Miller v. Trueheart &c., 569

OFFICE JUDGMENT.

1. See Clerical errors No. 2, 3, and Eubank et al. v. Ralls's ex'or, 308
2. See Jeofails No. 1, and Bargamin v. Poltiaux ex'or &c., 412

ONUS PROBANDI.

- See Bill of exchange No. 3, and Brown & Sons v. Ferguson, 37

OYER AND TERMINER.

1. Who may be tried by a county or corporation court of oyer and terminer, and for what offences. See Slaves, free negroes and mulattoes No. 2, 3, and Commonwealth v. Weldon, 652
2. Concerning writ of error to judgment of such court, see Writ of error No. 3, 4, and Anderson v. Commonwealth, 693

PARTIES IN CHANCERY.

1. D. & A. partners, assign effects to B. upon trust to pay all debts due from a former partnership of D. & C. and all debts of D. & A. for which B. the trustee, was responsible as their surety, and to pay the surplus to the order of D. & A. Afterwards, D. & A. draw an order on B. the trustee, in favor of P. for a sum of money they owed him, to be paid out of the surplus of the trust fund; and B. accepts the order, payable out of the surplus: Upon a bill in chancery by P. against B. the trustee alone, praying that he might render an account of the fund, that the surplus might be ascertained, and applied to discharge of the order, HELD, that neither D. & A. nor D. & C. nor any other of the cestuis que trust, are necessary parties, since the trustee represents the interests of all the cestuis que trust. Buck v. Pennybacker's ex'ors, 5
2. See Executors and administrators No. 11, and Waddy's ex'or v. Hawkins's adm'r, 458

PAUPER SUITS.

See Freedom.

PENAL STATUTES.

Construction.

1. See Arson, and Stevens v. Commonwealth, 683
2. See Contempts, and Commonwealth v. Deskins and another, 685
3. See Gaming No. 3, and Windsor v. Commonwealth, 680
4. See Rape No. 1, 2, and Commonwealth v. Fields, 648
- Commonwealth v. Watts, 672
5. See Slaves, free negroes and mulattoes No. 2, 3, and Commonwealth v. Weldon, 652
6. See Trespass No. 2, 3, 4, 5, and Commonwealth v. Israel, 675
- Commonwealth v. Percavil, 686

PENALTY.

- Concerning back interest by way of penalty, see Clerical errors No. 1, and Eubank et al. v. Ralls's ex'or, 308

PERFORMANCE.

1. What amounts to performance of contract. See Contract No. 7, and Daniels v. Conrad, 401
2. Concerning compensation for part performance of dependent covenant, see Contract No. 1, and Bream v. Marsh, 21

PETITION.

- See Escheats, and Watson v. Lyle's adm'r, 236

PLEADING.

I. Declaration.

1. Declaration on negotiable note. See Negotiable note No. 1, 2, and Barrett v. Wills, 114
2. Declaration in debt on simple contract, where acknowledgment within five years is relied on. See Debt No. 5, and Butcher v. Hixton, 519

721

*II. Pleas.

3. The statute of limitations of writs of error, if it apply to writs of error coram nobis, cannot be relied on without being pleaded.

Eubank et al. v. Ralls's ex'or, 308

4. What may be pleaded by escheator in bar of creditor's petition. See Escheats No. 3, and Watson v. Lyle's adm'r, 236

5. Upon a presentment by a grand jury for gaming, defendant tenders plea in abatement, that one of the grand jurors nominated himself to the sheriff to be put on the panel of the grand jury, and thereupon the sheriff put his name on the panel, and summoned him to serve, without alleging that this nomination of himself by the grand juror was corrupt, or that there was a false conspiracy between him and the sheriff for returning him on the panel: HELD, the plea is naught, and the court ought not to permit it to be filed.

Commonwealth v. Thompson, 687

6. Upon a presentment for gaming, defendant pleads in abatement, that the clerk de facto, who administered the oath to the grand jury that made the presentment, was not clerk de jure, at the time: HELD, the plea is naught.

Hord v. Commonwealth, 674

III. Replication.

7. Concerning replication of deceit, to plea of the statute of limitations, see Deceit No. 2, and Rice v. White, 474

IV. Scire facias against bail in detinue.

8. See Detinue No. 2, 3, and Cloud v. Catlett's ex'or, 462

V. Indictments &c.

9. See Indictments, informations and presentments.

POLICY OF ASSURANCE.

- See Mutual assurance society, and Farmers Bank v. Mutual Assurance Society et al., 69

PRACTICE IN ACTIONS AT LAW.

1. Amendments. See Assignment No. 8, and Smith & Rickard v. Triplett & Neale, 590
- See Clerical errors, and Eubank et al. v. Ralls's ex'or, 308
- See Judgment No. 6, and S. C., 308
2. Bail—exception to sufficiency. See Sheriffs and sergeants No. 1, and Reynolds v. Gore, 276
3. Bill of exceptions. See that title.
4. Capias ad respondendum. See that title, and Hare v. Niblo, 359
5. Declaration. See Debt No. 5, Negotiable note No. 1, 2, and Butcher v. Hixton, 519
- Barrett v. Wills, 114
6. Detinue—scire facias against bail. See Detinue No. 2, 3, and Cloud v. Catlett's ex'or, 462
7. Executions. See Injunction No. 5, and Epes's adm'r's v. Dudley, 145
- See Principal and surety No. 5, and Garnett v. Jones, 633
- See Restitution, and Eubank et al. v. Ralls's ex'or, 308
8. New trial. See that title.
9. Pleading. See Escheats No. 3, and Watson v. Lyle's adm'r, 236
- See Pleading No. 3, and Eubank et al. v. Ralls's ex'or, 308
10. Replevin—where tenant plaintiff is nonsuited. See Replevin, and Bargamin v. Poltiaux ex'or &c., 412

PRACTICE IN CRIMINAL CASES.

1. Attorney's fee. See Attorney for commonwealth, and Commonwealth v. Sprinkles, 650
2. Right of court to instruct jury. See Instruction to jury, and Blunt v. Commonwealth, 669
3. Where judgment is reversed by general court. See General court No. 2, and Brooks v. Commonwealth, 669

PRACTICE IN SUITS IN EQUITY.

1. See Codefendants, and Toole v. Stephen, 581
2. See Decrees in chancery No. 1, 2, and Paup's adm'r et al. v. Mingo et al., 163
- Thorntons v. Fitzbugh, 209
3. See Dismission of bill, and Cartlign v. Raymond and another, 579
4. See Injunction No. 5, and Epes's adm'r's v. Dudley, 145
5. See Parties in chancery No. 1, and Buck v. Pennybacker's ex'ors, 5

6. See Slaves No. 2. and
Sims v. Harrison et al., 346
7. See Specific execution No. 1. and
Foley v. M'Keown, 627

PRESENTMENTS.

See Indictments, Informations and presentments.

722 *PRINCIPAL AND SURETY.

1. Concerning liability of administrator's surety, see Executors and administrators No. 14, and
Harrisons v. Harrison's adm'r et al., 371
2. Concerning effect of acknowledgment by principal, see Debt No. 4, and
Butcher v. Hixton, 519

Indulgence by creditor to principal.

3. A creditor suspends execution on a forthcoming bond for several years, but he does so without consideration, and he nowise binds himself to suspend execution for any definite time: the principal and all the sureties but one become insolvent; and then the creditor sues out execution against the solvent surety: HELD, the surety is not entitled to relief in equity.

- Aicock v. Hill, 622
4. The principles stated, on which indulgence given by creditor to principal, exonerates the surety, S. C., 622

Execution after injunction by principal alone.

5. Execution is awarded on a forthcoming bond against the principal and the surety therein bound: the principal alone obtains an injunction to stay proceedings at law, which injunction is dissolved: HELD, the surety is not liable for the damages incurred by the principal for retarding the execution by an injunction; and if an execution issue against the surety as well as principal for such damages, it ought, on the surety's motion, to be quashed. The execution should be so moulded, as to exempt the surety from the damages, and to make the principal who incurred them alone liable therefor.

- Garnett v. Jones, 633

PRIORITY OF LIEN.

See Lien.

PRIVY EXAMINATION.

- See Feme covert, and
Langhorne v. Hobson, 224
Tod v. Baylor, 498

PROCESS.

1. Return day of capias. See Capias ad respondendum, and
Hare v. Niblo, 359
2. Amendment of sheriff's return. See Assignment No. 8, and
Smith & Rickard v. Triplett & Neale, 590

PROFITS.

1. Concerning right to profits of slaves emancipated by will, see Freedom No. 1, and
Paup's adm'r et al. v. Mingo et al., 163
2. Concerning recovery of profits in dower, see
Dower No. 3, and
Tod v. Baylor, 498

PROMISSORY NOTE.

See Negotiable note.

PROSECUTOR.

On an indictment for an assault and battery on the voluntary information of the person assaulted, the informer and prosecutor, being the only witness for the prosecution, is a competent witness, though liable for costs in case defendant is acquitted.

- Gilliam v. Commonwealth, 688

PURCHASER WITHOUT NOTICE.

- See Mortgage No. 2, 3, and
Bird v. Wilkinson, 266
Beck's adm'r v. De Baptists et al., 349

RAPE.

Attempt by coloured man on white female.

1. Upon an indictment on statute of 1822-3, ch. 34, § 3. It is found, that a free negro, not intending to have carnal knowledge of a white woman by force, but intending to have such knowledge of her while she was asleep, got into bed with her, and pulled up her night garment, which waked her, using no other force: HELD, this was not an attempt to ravish, within the meaning of the statute.

- Commonwealth v. Fields, 648
2. A white girl under twelve years of age, and not having attained to puberty, is a white woman, within the meaning of the statute making it felony punishable with death, for a slave, free negro or mulatto, to attempt to ravish a white woman.
Commonwealth v. Watts, 672

RECOGNIZANCE.

1. A debt due by recognizance of special bail, is of higher dignity than a debt due by specialty, and shall have preference accordingly, in the administration of the assets of a decedent.
Moon v. Pasteur's adm'r, 25
2. Concerning recognizance of bail in detainue, see
Detinue No. 1, and
Cloud v. Catlett's ex'or, 462

723 *RECORD.

- Concerning debt on burnt judgment, see
Judgment No. 1, and
Newcomb v. Drummond, 57

REFUNDING BOND.

When slaves emancipated by will are set free by the executor, he is not entitled to a refunding bond to indemnify him against the claims of the testator's creditors, though the manumitted slaves are, notwithstanding manumission, subject to debts.

- Elder v. Elder's ex'or, 252

REGISTRY OF DEEDS.

1. A deed dated in April 1804, and the execution thereof attested by witnesses, is not recorded within eight months from its date: but, in April 1805, the grantor acknowledges the deed in open court, and upon such acknowledgment it is ordered to be recorded: HELD, upon the construction of the statute of conveyances of 1792, 1 Old Rev. Code, ch. 90, § 1, 4, such acknowledgment of the deed in court, is to be taken as a redelivery and reexecution of the deed, so as to make it a deed as of the date of such acknowledgment, and so the deed is well recorded within eight months from the time of the execution, and is valid as against the grantor's creditors.

- Roanes v. Archer, 550
2. See Mortgages and trusts No. 2, 3, and
Bird v. Wilkinson, 266
Beck's adm'r v. De Baptists et al., 349

RELIEF IN EQUITY.

See Equitable jurisdiction and Injunction.

RELINQUISHMENT OF DOWER.

- See Feme covert, and
Langhorne v. Hobson, 224
Tod v. Baylor, 498

RENT.

- See Use and occupation, and
Briggs v. Hall, 484

RENTS AND PROFITS.

See Profits.

REPLEVIN.

Nonsuit of tenant plaintiff.

1. In replevin, defendant makes avowry for rent due him from plaintiff, and then plaintiff, failing to appear and plead, is nonsuit: HELD, if it is proper, in such case, to award a writ of inquiry to ascertain avowant's damages, under the 23rd section of the general statute of rents, 1 Rev. Code, ch. 113.

- Bargamin v. Poltiaux ex'or &c., 412
2. In such case, too, the avowry is to be considered as only a suggestion, and though it be faulty as an avowry, in not shewing the landlord's title, yet as a suggestion, it is good and sufficient. S. C., 412

3. In such case, moreover, the statute of jeofails would be applicable to cure all defects in the avowry. S. C., 412

RESCUE.

1. Indictment at common law, charging defendant with rescuing property that had been distrained by a sheriff for public dues, from a bailee to whose safe keeping the sheriff had committed it, without charging that the defendant knew in what right the bailee held it: HELD, indictment defective for not averring that the defendant had such knowledge.

- Commonwealth v. Israel, 67
2. And this defect is not cured by verdict, by the statute of jeofails in criminal cases, 1 Rev. Code, ch. 169, § 44. S. C., 675

RESTITUTION.

Where execution has been levied and returned satisfied, on judgment which is erroneous and afterwards reversed or corrected, restitution cannot be awarded, unless it appear that the money has been paid to plaintiff.

- Eubank et al. v. Ralls's ex'or, 806

RETURN OF PROCESS.

1. Concerning return day of capias, see Capias ad respondendum, and
Hare v. Niblo, 359
2. Concerning amendment of sheriff's return, see Assignment No. 8. and
Smith & Rickard v. Triplett & Neale, 590

SCIRE FACIAS.

1. Concerning limitation of scire facias on judgment against a decedent, see Judgment No. 2. and
Mercer's adm'r v. Beale et al., 189
2. Concerning limitation on judgment
724 where execution issued and no return *made, see Judgment No. 3. and
Fleming's ex'or v. Dunlop & Buchanan & Co., 388
3. Scire facias against special bail in detinue. See Detinue No. 2. 3. and
Cloud v. Catlett's ex'or, 462

SEISIN.

1. Adversary. See Adversary possession, and
Williams v. Snldow, 14
2. Instantaneous and transitory. See Dower No. 1. and
Gilliam v. Moore, 80

SETTLEMENT.

1. See Marriage settlement.
2. See Trusts and trustees No. 2. 3. 4. and
Markham v. Guerrant and Watkins, 279
3. See Husband and wife No. 2. and
Roanes v. Archer, 560

SHERIFFS AND SERGEANTS.

- I. Action against sheriff for taking insufficient bail, or defective bail bond.
1. On a capias ad respondendum, on which appearance bail is required, the sheriff takes insufficient bail, but the plaintiff proceeds against the bail, and recovers judgment against him as well as the principal, without objecting to the sufficiency of the bail, at the rules or in court, at or before the first term after the return day of the writ, or at any time pending the suit: HELD, the plaintiff cannot afterwards maintain an action against the sheriff for taking insufficient bail.
A bail bond is executed by the principal and the bail, though the name of the bail is not inserted in the body of the bond (there being a blank left for his name) which, in other respects, is a regular bail bond, and the plaintiff proceeds on the bond and recovers judgment against the bail as well as principal, and this judgment stands unreversed: HELD, 1. this is the bond of the bail, though his name is not inserted in the body of it; and 2. if it were a defective bond, the plaintiff having a judgment on the bond against the bail, could not maintain an action against the sheriff for returning a defective bail bond.
Raynolds v. Gore, 276
- II. Amendment of return.
2. When return of process may be amended. See Assignment No. 8. and
Smith & Rickard v. Triplett & Neale, 590
- III. How liable for conduct of deputy.
3. A sheriff is not liable to a criminal prosecution for a malfeasance in office committed by his deputy.
Commonwealth v. Lewis, 664

SIMPLE CONTRACT.

- Concerning limitation of debt on simple contract, see Debt No. 4. 5. and
Butcher v. Hixton, 519

SLAVES.

1. Concerning the validity of a contract made by the agency of a slave, see Contract No. 6. and
Gore v. Buzzard's adm'rs, 231
2. In every case in which the owner of slaves wrongfully taken in execution for the debt of another, applies to a court of equity to inhibit the sale of them, the court ought to award an injunction, and if the case be made out, to give relief, though it be neither alleged in the bill, nor proved, that the slaves have any peculiar value.
Slms v. Harrison and another, 346
3. Concerning widow's interest in proceeds of slaves sold by administrator, see Widow No. 3. and
Godwin's adm'r v. Godwin's adm'x & Co., 410
4. Indictment on the statute, 1 Rev. Code, ch. 11, § 30, for feloniously and fraudulently taking and removing a slave from one county to another, with intent to defraud the owner and deprive him of the property: HELD, fatally defective, after verdict, for want of an averment that the slave was so taken and removed without the consent of the owner.
Commonwealth v. Peas, 692
5. See Emancipation and Freedom.

SLAVES. FREE NEGROES AND MULATTOES.

Criminal proceedings against them.

1. See Rape, and
Commonwealth v. Fields, 648
Commonwealth v. Watts, 672
2. Upon the construction of the statute of 1831-2, ch. 22, § 11, free negroes and mulattoes are to be tried by the county courts of oyer and terminer, in the same manner in which slaves are tried. In all cases of felony, except homicide and such crimes as, if committed by free negroes or mulattoes, where, by the laws existing before this statute, punishable with death; and for homicide and such crimes as, if committed by free negroes or mulattoes, where so punishable with death, they are still to be tried by jury in the circuit superiour courts.
Commonwealth v. Weldon, 653
- 725 *3. In cases of felonies committed by free negroes or mulattoes, other than homicide and capital crimes, the statute changes the manner of trial and the tribunal for the trial, but not the punishment which previous laws inflicted on free negroes or mulattoes for such crimes; and the county court of oyer and terminer convicting such a person of such a crime, may and must sentence the convict to imprisonment in the penitentiary, if that be the punishment prescribed by previous laws.
S. C., 652

SPECIAL BAIL.

See Bail.

SPECIAL VERDICT.

1. If a special verdict be uncertain, so that the court cannot say for which party judgment ought to be given, there ought to be a venire de novo; but if the verdict be not uncertain, but the plaintiff's case thereby shewn be a defective case, or a defective title, there should be no venire de novo, and judgment must be given for the defendant.
Brown & Sons v. Ferguson, 37
2. See Trespass No. 3. and
Commonwealth v. Percavil, 686

SPECIFIC EXECUTION.

1. A house and lot in town is advertised for sale at auction, and the lot described as containing nearly two acres; the auctioneer at the sale states that there is nearly two acres, but points to the enclosure of the lot as containing the land he proposes to sell; and it appears to have been a sale in gross; the lot, in fact, contains only one acre and twelve poles; upon a bill for specific execution, by vendor against vendee, HELD, specific execution rightly decreed; and the purchaser is not entitled to any abatement in the price for such deficiency.
Foley v. McKeown, 627
2. See Vendor and vendee No. 4. and
Heywood v. Covington's heirs, 373

STATUTE OF LIMITATIONS.

See Limitation of actions.

STATUTES OF VIRGINIA, OF A GENERAL NATURE, CITED AND CONSTRUED.

I. School commissioners.

1. Ch. 33, § 13-19, pp. 87, 8, 9 of 1 R. C. concerning school commissioners, cited.
Janey's ex'or v. Latane et al., 329
2. Ch. 28, § 1, p. 40 of Supp. to R. C. authorizing school commissioners to divide county, cited.
S. C., 328

II. Jurisdiction and practice of courts.

3. Ch. 64, § 2, p. 190 of 1 R. C. concerning chancery jurisdiction of court of appeals, construed.
Dupuy v. Hardaway, 584
4. Ch. 66, § 51, p. 206 of 1 R. C. on same subject, construed.
S. C., 584
5. Ch. 64, § 21, p. 195 of 1 R. C. directing judgments of court of appeals to be certified to inferior court, construed.
Epes's adm'rs v. Dudley, 145
6. Ch. 66, § 27, p. 201 of 1 R. C. concerning jurisdiction of superiour courts of chancery, cited.
Gholson v. Kendall & Co., 613
7. Same chapter, § 50, p. 206, on same subject, construed.
Dupuy v. Hardaway, 584
8. Same chapter, § 38, 61, pp. 203, 9, concerning injunctions in superiour courts of chancery, cited.
Gholson v. Kendall & Co., 613
9. Ch. 67, § 26, p. 224 of 1 R. C. concerning writs of error from general court in criminal cases, construed.
Anderson v. Commonwealth, 693
10. Ch. 69, § 8, p. 230 of 1 R. C. concerning continuances where a term of circuit court is not held, cited.
Hare v. Niblo, 361

11. Same chapter, § 67, p. 241, concerning fees of commonwealth's attorney in circuit court, construed. 650
12. *Commonwealth v. Sprinkles*, 12 Sess. acts of 1830-31, ch. 11, p. 42, concerning circuit superior courts, cited. 322
13. Same chapter, § 28, p. 48, concerning jurisdiction of circuit superior courts, construed. S. C., 322
14. Same chapter, § 55, p. 60, providing for execution of judgments of former circuit courts, construed. S. C., 322
15. Ch. 71, § 7, p. 246 of 1 R. C. concerning chancery jurisdiction of county courts, construed. *Gholson v. Kendall & Co.*, 612
16. Former statutes concerning jurisdiction of county courts, cited. S. C., 614, 15
17. Ch. 71, § 62, 75, pp. 257, 260 of 1 R. C. concerning injunctions in county courts, construed. S. C., 612
18. Ch. 108, § 4, p. 406, of 1 R. C. concerning jurisdiction of chancery over guardians, cited. *Dupuy v. Hardaway*, 586
19. Ch. 108, § 80, p. 145 of Supp. to R. C. concerning appeals demandable as of right, cited. S. C., 589
- 726 *III. Justices of peace.
 20. Ch. 114, p. 175 of Supp. to R. C. concerning disqualifications of justices of peace, construed. *Commonwealth v. Sherrard*, 643
 - IV. Sheriffs.
 21. Ch. 78, § 17, p. 280, ch. 134, § 48, p. 542 of 1 R. C. concerning sheriff's liability for default in execution or return of process, cited. *Smith & Rickard v. Triplett & Neale*, 597
 - V. Rights.
 22. Ch. 82, § 14, p. 297 of 1 R. C. concerning creditor's petition for proceeds of escheated land, construed. *Watson v. Lyle's adm'r*, 236
 23. Same chapter, § 19, p. 298, concerning suit for proceeds of escheated land by claimant of freehold, cited. S. C., 244
 24. Ch. 86, § 38, p. 329 of 1 R. C. defining grounds of caveat, construed. *Hardman v. Boardman*, 377
 25. Same chapter, § 42, 47, pp. 331, 2, concerning effect of judgment for caveat, cited. S. C., 378
 26. Same chapter, § 43, p. 331, requiring affidavit on entering caveat, construed. S. C., 382, 3
 27. Former statute concerning caveats, cited. S. C., 388
 28. *Append. II*, § 8, p. 340 of 2 R. C. reciting former statute concerning caveats, cited. S. C., 388
 29. *Append. II*, ch. 29, § 4, p. 402 of 2 R. C. concerning friendly caveats, cited. S. C., 388
 30. Ch. 96, § 18, p. 357 of 1 R. C. concerning capacity of bastards to inherit or transmit inheritance from mother—Quære as to construction? *Thomason v. Andersons*, 118
 31. Ch. 99, § 4, p. 362 of 1 R. C. concerning registry of deeds of trust and mortgages, construed. *Bird v. Wilkinson*, 266
 - Beck's adm'r v. De Baptists et al.*, 349
 32. Statute of 1792, ch. 90, § 1, 4, concerning registry of deeds, construed. *Roanes v. Archer*, 550
 33. Former statutes on same subject, cited. S. C., 555, 6
 34. Ch. 99, § 27, p. 369 of 1 R. C. dispensing with words of inheritance in passing estates in fee—Quære as to construction? *Bramble v. Billups*, 90
 35. Same section, cited. *Thomason v. Andersons*, 126
 36. Ch. 104, § 20, 32, pp. 379, 382 of 1 R. C. concerning right to administration, construed. *Thornton v. Winston*, 152
 37. Same chapter, § 26, p. 381, concerning widow's renunciation of provision in husband's will, construed. S. C., 152
 38. Same chapter, § 29, p. 382, concerning distribution of intestate's estates, construed. *Paup's adm'r et al. v. Mingo et al.*, 163
 39. Statute of 1792, ch. 92, § 25, concerning relief of sureties of executors or administrators, cited. *Waddy's ex'or v. Hawkins's adm'r*, 458
 40. Ch. 107, § 2, p. 403 of 1 R. C. concerning widow's quarantine, cited. *Gilliam v. Moore*, 31
 41. Same chapter, § 4, p. 403, concerning damages for forfeiture of dower, construed. *Tod v. Baylor*, 498
 42. Statute of 1792 (1 Old Rev. Code, ch. 90, § 6, Pleasants's edn. p. 157, 8,) concerning relinquishment of dower, construed. *Langhorne v. Hobson*, 224
 - Tod v. Baylor*, 498
 43. Statute of 1748, ch. 1, § 6, on same subject, cited. *Langhorne v. Hobson*, 229
 44. Ch. 108, § 1, p. 406 of 1 R. C. authorizing appointment of testamentary guardian, cited. *Dupuy v. Hardaway*, 586
 45. Same chapter, § 27, p. 411, concerning extension of time of apprenticeship, construed. *Pierce v. Massenburg*, 495
 46. Ch. 111, § 53, 56, pp. 433, 4 of 1 R. C. concerning emancipation of slaves, cited. *Nicholas v. Burruss*, 292
 47. Same chapter, § 53, concerning mode of emancipation, cited. *Paup's adm'r et al. v. Mingo et al.*, 169
 48. Ch. 113, § 23, p. 451 of 1 R. C. concerning damages of avowant in replevin, construed. *Bargamin v. Poitiaux ex'or &c.*, 412
 - VI. Remedies.
 49. Ch. 193, § 4, 5, pp. 254, 5 of Supp. to R. C. concerning proceedings in replevin by other than the tenant, cited. *Bargamin v. Poitiaux ex'or &c.*, 414
 50. Ch. 118, pp. 463, 4 of 1 R. C. concerning method of proceeding in writs of right, cited. *Williams v. Snidow*, 14
 51. Ch. 124, pp. 481, 2 of 1 R. C. concerning pauper suits, cited. *Paup's adm'r et al. v. Mingo et al.*, 164
 - Nicholas v. Burruss*, 292
 52. Same chapter, § 4, p. 481, concerning suits for freedom, cited. *Paup's adm'r et al. v. Mingo et al.*, 170
 53. Ch. 125, § 1, p. 483 of 1 R. C. concerning inland bills of exchange, cited. *Brown & Sons v. Ferguson*, 42
 54. Ch. 126, § 2, p. 485 of 1 R. C. concerning foreign bills of exchange, cited. *Garland v. Marx*, 331
 - Farmers Bank v. Clarke*, 604
 - 727 *55. Ch. 194, § 10, p. 78 of 2 R. C. placing notes negotiable at Virginia bank on footing of foreign bills, cited. *Barrett v. Wills*, 114
 56. Ch. 196, § 15, clause 13, p. 90 of 2 R. C. placing notes negotiable at Farmers bank on footing of foreign bills, cited. *Garland v. Marx*, 321
 - Farmers Bank v. Clarke*, 604
 57. Ch. 207, p. 111 of 2 R. C. to prevent circulation of private bank notes, cited. *Berkshire v. Evans et al.*, 224
 58. Ch. 208, p. 111 of 2 R. C. suppressing unchartered banking companies, cited. S. C., 224
 59. Ch. 128, § 4, p. 488, of 1 R. C. excepting merchants' accounts from limitation of actions of account and on the case—Quære as to construction? *Watson v. Lyle's adm'r*, 236
 60. Same chapter, § 5, 6, 17, pp. 489, 492, concerning limitation of scire facias or debt on judgment, cited. *Mercer's adm'r v. Beale et al.*, 198
 61. Same chapter, § 5, concerning limitation where execution issued and no return made, construed. *Fleming's ex'or v. Dunlop & Buchanan &c.*, 338
 62. Same section, concerning limitation of scire facias or debt on judgment, construed. *Lipscomb's adm'r v. Davis's adm'r*, 303
 63. Same chapter, § 17, p. 492, concerning limitation of scire facias or debt on judgment against decedent—Quære as to construction? *Mercer's adm'r v. Beale et al.*, 189
 64. Same chapter, § 19, p. 492, concerning limitation of writ of error or supersedeas, cited. *Eubank et al. v. Ralls's ex'or*, 308
 65. Same chapter, § 34, p. 496, abolishing voucher in real actions, cited. *Tabb's adm'r v. Binford*, 136
 66. Same chapter, § 45, 46, p. 500, concerning manner and time of objecting to sufficiency of appearance bill, construed. *Reynolds v. Gore*, 276
 67. Same chapter, § 53, p. 501, concerning recognition of bail in detinue, construed. *Cloud v. Catlett's ex'or*, 462
 68. Same chapter, § 70, p. 507, concerning return day of capias ad respondendum, construed. *Hare v. Niblo*, 359
 69. Former statute on same subject, cited. S. C., 360
 70. Ch. 128, § 77, p. 508 of 1 R. C. concerning court's control over proceedings at rules, construed. *Eubank et al. v. Ralls's ex'or*, 317
 71. Same section, cited. *Hare v. Niblo*, 360
 72. Same chapter, § 79, p. 508, concerning office judgments made final, cited. *Eubank et al. v. Ralls's ex'or*, 318
 73. Former statute on same subject, cited. S. C., 318

74. Ch. 128, § 80, p. 508 of 1 R. C. concerning interest in actions on contract, cited.	
Mercer's adm'r v. Beale et al.,	189
75. Same chapter, § 103, p. 512, concerning stay or reversal of judgment after verdict, cited.	
Tabb's adm'r v. Binford,	136
76. Same section, construed.	
Bargamin v. Poitiaux ex'or &c.,	412
77. Same chapter, § 105, p. 512, concerning writ of enquiry where verdict in detinue omits value, cited.	
Cloud v. Catlett's ex'or,	464
78. Same chapter, § 108, pp. 109, 110, pp. 512, 13, concerning amendments, and releases of excess in judgments—Quære as to construction?	
Eubank et al. v. Ralls's ex'or,	308
79. Ch. 180, pp. 515, 16 of 1 R. C. concerning destruction of records, cited.	
Newcomb v. Drummond,	60
80. Ch. 134, § 10, p. 528 of 1 R. C. concerning lien of ca. sa. executed, construed.	
Rogers & brothers v. Marshall et al.,	425
81. Same chapter, § 16, p. 530, authorizing the taking of forthcoming bonds, cited.	
Lipscomb's adm'r v. Davis's adm'r,	304
82. Same chapter, § 25, 26, 27, pp. 533, 34, concerning indemnifying bonds taken by officer serving execution, cited.	
Sydnor v. Gee &c.,	585
83. Same chapter, § 46, p. 541, empowering court to supersede distringas in detinue as to specific thing, cited.	
Cloud v. Catlett's ex'or,	462
VII. Crimes, prosecutions and punishments.	
84. Ch. 111, § 19, p. 426 of 1 R. C. prohibiting dealing with slave without the owner's leave, cited.	
Gore v. Buzzard's adm'rs,	233
85. Same chapter, § 30, p. 428, concerning felonious carrying away of slaves, construed.	
Commonwealth v. Peas,	602
86. Ch. 147, § 5, p. 503 of 1 R. C. punishing gaming at public places, construed.	
Windsor v. Commonwealth,	680
87. Ch. 158, § 3, p. 585 of 1 R. C. punishing rape on children under 10 years, cited.	
Commonwealth v. Watts,	673
88. Sess. acts of 1822-3, ch. 34, § 3, declaring punishment of slave, free negro or mulatto, for attempt to ravish a white woman, construed.	
Commonwealth v. Fields,	648
Commonwealth v. Watts,	672
728 *89. Same section, cited.	
Commonwealth v. Thompson,	662
90. Ch. 160, § 4, p. 587 of 1 R. C. punishing house-burning, construed.	
Stevens v. Commonwealth,	683
91. Ch. 169, § 9, p. 601 of 1 R. C. concerning change of venue in prosecutions for felony, construed.	
Brooks v. Commonwealth,	669
92. Same chapter, § 44, p. 611, concerning defects cured by verdict in criminal cases, construed.	
Commonwealth v. Israel,	675
93. Ch. 109, pp. 143, 44 of Supp. to R. C. Sess. acts of 1830-31, ch. 11, § 25, defining contempts of court, construed.	
Commonwealth v. Deskins et al.,	685
94. Ch. 187, p. 248 of Supp. to R. C. Sess. acts of 1831-2, ch. 22, § 11, concerning trial and punishment of free negroes and mulattoes for certain felonies, construed.	
Commonwealth v. Weldon et al.,	652
95. Same section, cited.	
Anderson v. Commonwealth,	603
96. Same chapter, § 10, making receivers from slaves &c. of stolen goods, guilty of larceny, cited.	
Commonwealth v. Weldon,	655
97. Ch. 226, § 1, p. 280 of Supp. to R. C. Sess. acts of 1822-3, ch. 34, § 1, punishing wilful trespasses, cited, and quære as to construction?	
Commonwealth v. Israel,	675
98. Same section, construed.	
Commonwealth v. Percavil,	686
99. Sess. acts of 1832-3, ch. 19, § 2, p. 18, concerning solitary confinement in penitentiary, cited.	
Brooks v. Commonwealth,	671
VIII. Mills.	
100. Ch. 225, § 1-7, pp. 225, 28, of 2 R. C. concerning mills and milldams, cited	
Miller v. Trueheart et al.,	571
SUBSEQUENT PURCHASER.	
See Purchaser without notice.	
SUGGESTION in nature of avowry.	
See Replevin No. 2, 3, and	
Bargamin v. Poitiaux ex'or &c.,	412
SURETY.	
See Principal and surety.	

TRANSITORY SEISIN.

See Dower No. 1, and

Glilliam v. Moore.

30

TRESPASS.

1. Trespass quare clausum fregit. See Demurrer to evidence No. 1, and

Marsteller and wife et al. v. Coryell,

325

Construction of statute punishing wilful trespass.

2. Quære, whether the taking of any property other than such as is ejusdem generis with that specially mentioned in the statute of 1822-3, ch. 34, § 1, for punishing wilful trespasses, be within the meaning of the statute?

Commonwealth v. Israel,

675

3. Upon an indictment on the statute of 1822-3, ch. 34, § 1, the jury find, in a special verdict, that defendant shot and killed hogs the property of another, the hogs being on defendant's own land at the time of his shooting and killing them: HELD, the verdict is defective and insufficient, in not finding the essential ingredients required by the statute to constitute the misdemeanour, viz. that defendant killed the hogs "knowingly and wilfully without lawful authority."

Commonwealth v. Percavil,

686

4. The provisions of that statute are not confined to property ejusdem generis with that specially there enumerated; and the circumstance of the property destroyed being at the time on defendant's own land, does not take the case out of the statute.

S. C.,

686

5. An indictment on that statute, for taking away property, must allege that the property taken away by the defendant belonged to another person; and that the taking was "knowingly and wilfully without lawful authority." In the terms of the statute.

Commonwealth v. Israel,

675

Indictment at common law for forcible taking.

6. Indictment at common law, for taking a horse, "unlawfully and injuriously," the usual form with force and arms being also used: HELD, this does not describe the act as one that constitutes a breach of the peace.

S. C.,

675

TRUSTS AND TRUSTEES.

1. Concerning trustee's representation of the interest of cestui que trust, see Parties in chancery No. 1, and

Buck v. Pennyback's ex'ors,

5

Power of trustee.

2. J. M. by deed conveys land and slaves and personally to W. F. in trust, *for the support and maintenance of J. M. and L. his wife, and their children and family during the joint lives of J. M. and his wife, and the life of the longest liver of them, remainder to their children, with full power to the trustee to manage the estate, and to sell any part of the trust subject to pay the debts of J. M. then due; J. M. in the space of seven months contracts a debt to merchants for goods furnished to an amount equal to whole yearly profits of trust estate: HELD, that the trustee could not pledge the prospective profits of the trust estate necessary for the current support of the cestui que trust, to such a debt, if contracted even by the trustee himself, for their past support; much more the debts contracted by one of the cestui que trust without the trustee's consent or knowledge.

Markham v. Guerrant & Watkins,

279

Power of chancery.

3. Such debt contracted by J. M. cannot be properly charged by a court of chancery on the prospective profits of the estate, so as to bereave J. M.'s wife and children of support.

S. C.,

279

4. But, it seems, a court of chancery may authorize the sale of the personal property of infant cestui que trust, in cases where such sale is absolutely necessary for their support.

S. C.,

279

What is subject to husband's debts.

5. That the joint life interest of husband and wife in a trust estate is not liable for husband's debts, see Husband and wife No. 2, and

Roanes v. Archer,

550

6. See Marriage settlement No. 1, and

Butler v. McCann et al.,

631

UNCHARTERED BANKING COMPANY.

A private unchartered company, associated for the purpose of carrying on business as a bank, though such associations are contrary to law, shall be entertained in a court of chancery, in a suit against its cashier, for an account of his agency.

Berkshire v. Evans et al.,

223

USE AND OCCUPATION.

In assumpsit for the use and occupation of a farm for a year, it appears, that the landlord entered on

a meadow, parcel of the premises, within the year, and mowed and carried away the hay, without the consent and against the will of the tenant, who, nevertheless, continued to occupy the farm during the residue of the year. **Held**, the landlord, by such disturbance of the tenant, lost the benefit of the entire contract, and is not entitled to recover any part of the rent.

Briggs v. Hall, 484

USURY.

S. and N. being indebted to the F. and M. bank, and the bank having recovered judgments against them for the debts, and the debtors then applying to the bank for indulgence, the bank agrees to give them a long indulgence, upon their agreeing to give real security for the debt, and moreover to pay the attorney of the bank all the costs of the suits, and the commission which the bank had agreed to pay him for collecting and securing the debt; the debtors give the real security for the debt; and one of them pays the costs and part of the commission to the attorney, and his executor gives the attorney his note for the balance of the commission; the attorney having full notice of the terms of the agreement between the bank and the debtors: **Held**, the agreement between the bank and the debtors, and therefore the note for the commission to the attorney, were usurious.

Toole v. Stephen, 581

VARIANCE.

Between declaration and proof.

1. In assumpsit, plaintiff declares that defendant contracted to locate a treasury warrant for plaintiff on waste and unappropriated lands, and to cause the same to be surveyed and patented, and alleges a breach, that defendant did not cause lands by him located on the warrant to be surveyed and patented; but at the trial, plaintiff proves a contract whereby defendant did not undertake to cause the land to be patented as well as located and surveyed; on demurrer to evidence, **Held**, the evidence does not prove the contract laid in the declaration, and plaintiff is not entitled to recover.

M'Alexander v. Montgomery, 61

2. In debt on an injunction bond, the declaration, in assigning breach, alleges that the injunction was dissolved by the superiour court of chancery; plea, conditions performed: at trial, plaintiff offers the record of the injunction cause in evidence, 780 whereby it appears the injunction was awarded by the county court in August 1814, dissolved in July 1820, and bill dismissed in September 1820; and in November 1820 leave was given to the plaintiff in equity to reinstate the injunction, and amend the bill, and the amended bill was filed and answered; afterwards, the cause is removed by certiorari to the superiour court of chancery, which dissolved the injunction awarded by the county court in August 1814, not that awarded in November 1820—and an objection being taken to the record as evidence, on the ground that the injunction awarded in August 1814, has been finally and conclusively dissolved by the county court, and so was not and could not be dissolved by the superiour court, and, therefore, that there was a variance between the record offered in evidence, and the allegation of the breach in the declaration, the objection was overruled, and the record admitted in evidence. **Held**, the record was properly admitted in evidence.

Arthur v. Crenshaw's adm'r, 304

VENDOR AND VENDEE.

1. When mortgage by vendee will be deemed part of same transaction with conveyance by vendor. See *Dower No. 1*, and

Gilliam v. Moore, 30

2. Covenant of warranty. See *Covenant No. 1*, and

Tabb's adm'r v. Binford, 132

3. See *Specific execution No. 1*, and

Foley v. M'Keown, 627

4. In a suit in chancery between the heirs of a decedent, the court decrees that a mill, whereof partition can no otherwise be made, shall be sold by commissioners on a credit of twelve months; the commissioners make the sale and report it; the court, after the twelve months elapsed, confirm the report, and order the commissioner to convey to the purchaser; then, a conveyance is tendered to the purchaser, who refuses to complete the purchase, the mill having been carried away by a fresh within the twelve months: on bill by the heirs against the purchaser for specific execution,—**Quære**, whether the purchaser is bound to bear the loss arising to the property from the fresh, within the twelve months, and before the report of sale was confirmed?

Heywood v. Covington's heirs, 373

5. Concerning measure of damages for deceit in sale of a chattel, see *Deceit No. 3*, and

Rice v. White, 474

6. What will be deemed a fair sale of chattel, as against creditors of vendor. See *Fraudulent alienations No. 2, 3, 4*, and

Sydnor v. Gee &c., 585

VENIRE DE NOVO.

See *New trial*.

VENUE.

Change of venue in criminal case.

Indictment for felony in the circuit court of Warwick: the court for good cause sends the case to the circuit court of York, to be tried at the term of that court to be held on the 8th June 1831; the circuit court of York, doubting its competency to try the case at that term, which was a special one, continued it till the next regular term of the circuit superiour court of York; and the prisoner is afterwards tried there, and convicted: **Held**, the circuit court of Warwick had no power to direct the case to be tried at any particular term of the circuit court of York; but the direction that the case should be tried at the June term 1831, is to be rejected as surplusage: the substance of the order is a change of the venue from Warwick to York.

Brooks v. Commonwealth, 669

VERDICT.

I. Certainty in verdict.

1. Verdict and judgment for debt claimed in the declaration, with interest &c. subject to a credit for a specified sum, paid at a specified date: this is certain enough.

Barrett v. Wills, 114

2. See *Special verdict No. 1*, and

Brown & Sons v. Ferguson, 37

3. See *Trespass No. 3*, and

Commonwealth v. Percavil, 686

II. Effect of verdict in curing errors.

4. See *Jeofalls*.

WAIVER.

Concerning waiver of notice of dishonor, see *Bill of exchange No. 4*, and

Brown & Sons v. Ferguson, 37

WARRANTY.

Concerning warranty real, see *Covenant No. 1*, and

Tabb's adm'r v. Binford, 132

WIDOW.

I. Dower.

1. See *Dower*.

781

II. Interest in personality.

2. A testator by his will gives personal property to his wife, and she takes the provision made for her by the will: **Held**, she is entitled to no part of an undisposed of residuum, as distributee of her husband, being excluded from distribution by the statute, 1 Rev. Code, ch. 104, § 20.

Thornton v. Winston, 152

3. An administrator makes sales of slaves of his intestate, to raise funds for payment of debts, but it turns out that the funds are not wanted to pay debts; and upon a question, what interest the intestate's widow is entitled to in the proceeds of the slaves so sold: **Held**, that, as the widow was entitled to only a life interest in one-third of the slaves, the best general practical rule is, to give her one-third of the proceeds of sale thereof for her life, requiring bond with surety of her, that the principal, at her death, shall be paid to the persons, entitled in remainder.

Godwin's adm'r v. Godwin's adm'r &c., 410

WILFUL TRESPASS.

See *Trespass No. 2, 3, 4, 5*, and

Commonwealth v. Israel, 675

Commonwealth v. Percavil, 686

WILLS.

Construction of will.

1. Testator devises the residue of his real estate to his daughter L. B. and her husband J. B. during the life of the longest liver of them, and then to their offspring if any by his daughter L. B. as they shall think best to give it; and, in default of such offspring, to M. B.'s and N. A.'s offspring, if they have any, and as they think best to dispose to their offspring; and if they have none, then to the poor of E. R. parish—at the date of the will, the testator's daughter L. B. had offspring by her husband J. B.—the daughter died before the testator; her offspring survived him, and died in infancy, living their

father J. B.—HELD, J. B. the husband took by the will an estate tail, which the statute for abolishing entails, converted into a fee simple, and barred the contingent remainder limited on the estate tail; dissentiente TUCKER, P.

Bramble v. Billups, 90

2. Quære, how far, in determining what is an estate tail on which the statute for abolishing entails shall operate, the statute which dispenses with the necessity of words, of inheritance in deeds or wills, to give an estate of inheritance, may affect the construction of the grant or devise?

S. C., 90

3. Testator devises real and personal estate to his natural daughter P. A. to her and her heirs forever; and if she should die leaving no child, the estate before given should return into his estate, and be divided among his legitimate children; but should she leave a living child or children, then the estate should be held by him, her or them, as the case might be: HELD, P. A. took by the will an estate tail in the lands devised to her, which the statute for abolishing entails converted into a fee simple, and barred the contingent remainder limited on the estate tail.

The devisee P. A. having left illegitimate children living at her death, capable of inheriting and of transmitting inheritance on the part of their mother, in like manner as if they had been her lawful children, by the provision of the statute of descents, 1 Rev. Code, ch. 96, § 18. Quære, whether effect of the devise, in this case, was not the same as if she had left legitimate children?

Thomason v. Andersons, 118

4. Testator devises land to his son William and his heirs, and if he should die without a son and not sell the land, then to testator's son George: HELD, the devise gave William absolute power to sell the fee simple; and therefore, whether he sold it or not, he took a fee simple, and the devise over to George was void.

Melson v. Cooper, 408

5. Testator directs, that his executors shall be handsomely paid out of his estate for the trouble they shall be at in the charging that trust; it appears, that there is no extraordinary trouble in the administration: HELD, nothing shall be allowed beyond the usual commission of five per cent.

Waddy's ex'or v. Hawkins's adm'r, 458

6. A testator having devised and bequeathed real and personal property to his daughter, directs, that she shall have a good education, and live in a respectable family, and authorizes his executor to use part of the principal of the estate given her, if

the income be not sufficient to carry that his purpose into effect; the daughter being at the time under fourteen years of age: Quære, whether this amounts to the appointment of the executor testamentary guardian of the infant daughter?

Dupuy v. Hardaway, 564

7. See Emancipation No. 1, 2, 3, and

Elder v. Elder's ex'or, 52

*8. See Charities, and

Janey's ex'or v. Latane et al., 57

WITNESS.

I. Competency.

1. See Assignment No. 11, and

Smith & Rickard v. Triplett & Neale, 500

2. See Prosecutor, and

Gilliam v. Commonwealth, 68

II. Impeachment of credit.

3. In trial of action of slander, defendant, to discredit testimony of two witnesses of plaintiff, offered evidence of particular acts of hostility of those witnesses towards him: HELD, such hostility could only be proved by proving acts of hostility, and therefore the evidence was proper.

But when the general reputation of a witness for veracity is in question, the party impeaching his veracity cannot go into evidence of particular instances of falsehood.

Rixey v. Bayse, 330

WRIT OF ERROR.

I. Limitation of error coram nobis.

1. The statute of limitations of writs of error, if it apply to writs of error coram nobis, cannot be relied on without being pleaded; and

2. Quære, whether it does apply to writs of error coram nobis?

Eubank et al. v. Ralls's ex'or, 38

II. Error to court of oyer and terminer.

3. A writ of error does not lie from the general court to a judgment of a county or corporation court, sitting as a court of oyer and terminer, in a criminal prosecution under the statute of 1831-2, ch. 22, § 11.

4. Quære, whether a writ of error lies to such judgment from the circuit superiour court?

Anderson v. Commonwealth, 63

WRIT OF RIGHT.

See Adversary possession, and

Williams v. Snidow, H

father J. B.—HELD, J. B. the husband took by the will an estate tail, which the statute for abolishing entails, converted into a fee simple, and barred the contingent remainder limited on the estate tail; *dissentiente TUCKER, P.*

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Dupuy v. Hardaway, 584
7. See Emancipation No. 1, 2, 3, and
Elder v. Elder's ex'or, 252
732 *3. See Charities, and
Janey's ex'or v. Latane et al., 327

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II. Error to court of oyer and terminer.

3. A writ of error does not lie from the general court to a judgment of a county or corporation court, sitting as a court of oyer and terminer, in a criminal prosecution under the statute of 1831-2, ch. 22, § 11.

4. Quære, whether a writ of error lies to such judgment from the circuit superiour court?

Anderson v. Commonwealth, 693

WRIT OF RIGHT.

See Adversary possession, and
Williams v. Snidow, 14





